RGSL
RIGA GRADUATE SCHOOL OF LAW

# TRANSBORDER LITIGATION

## MATERIALS

## RIGA 2005

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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 l 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 Æéêïíïißao);

- >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>öïíìiåe¡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 |
| **DESCRIPT** | civil law ; commercial law ; Community national ; EU country ; jurisdiction of the courts ; mutual recognition principle |
| **PUB** | 2001/01/16 |
| **DOC** | 2000/12/22 |
| **INFORCE** | 2002/03/01=EV |
| **ENDVAL** | 9999/99/99 |
| **LEGBASE** | 11997E061-PTC.....<br>11997E067-P1..... |
| **LEGCIT** | 41968A0927(01).....<br>41971A0603(02).....<br>31973L0239.....<br>41978A1009(01).....<br>41978A1009(01).....<br>41982A1025(01).....<br>41982A1025(01).....<br>31988L0357.....<br>41989A0535.....<br>41989A0535.....<br>31990L0618.....<br>11997E005.....<br>11997E065.....<br>11997E293.....<br>11997E299.....<br>41997A0115(01).....<br>41997A0115(01).....<br>41998A0126(01).....<br>41998Y0126(01).....<br>31999D0468.....<br>32000R1348..... |
| **MODIFIES** | 41968A0927(01)..... Relation.....<br>41998A0126..... Relation..... |
| **MODIFIED** | Corrected by.. 32001R0044R(01)..... (DA, DE, EL, EN, ES, FI, FR, IT, NL, PT, SV)<br>Corrected by.. 32001R0044R(02)..... (ES)<br>Amended by.... 32002R1496..... Amendment ANN 1 from 29/08/2002<br>Amended by.... 32002R1496..... Amendment ANN 2 from 29/08/2002<br>Amended by.... 12003TN02/18A..... Replacement ART 65 from 01/05/2004 |

Amended by.... 12003TN02/18A..... Completion ANN 1 from 01/05/2004
Amended by.... 12003TN02/18A..... Completion ANN 3 from 01/05/2004
Amended by.... 12003TN02/18A..... Completion ANN 4 from 01/05/2004
Amended by.... 12003TN02/18A..... Completion ANN 2 from 01/05/2004
Amended by.... 12003TN02/18A..... Completion ART 69 from 01/05/2004

**SUBSPREP** Amendment proposed by 52002IG1214(01).....

**SUB** Approximation of laws ; Justice and home affairs

**REGISTER** 19200000

**PREPWORK** Proposal Commission;Com 1999/0348 Final ; OJ C 376/1999 P 1
Opinion European Parliament;given on 21/09/2000
Opinion Economic and Social Committee;OJ C 117/2000 P 6

**MISCINF** CNS 99/0154

**DATES** of document: 22/12/2000
of effect: 01/03/2002; Entry into force See Art 76
end of validity: 99/99/9999

22 October 2005

**List of selected judgments on Jurisdiction, Recognition and Enforcement**

1. Scope of Application
   - 1.1. LTU, 1976 (civil and commercial matters)
   - 1.2. Rüffer, 1980 (civil and commercial matters)
   - 1.3. Gourdain, 1979 (bankruptcy)
   - 1.4. Rich, 1991 (arbitration)
   - 1.5. Steenbergen, 2002 (social security)
   - 1.6. Tiard, 2003 (customs matters)

2. General Jurisdiction - Defendant's Forum
   - 2.1. Josi, 2000 (defendant's domicile)

3. General Contract Jurisdiction
   - 3.1. Peters, 1983 (matters relating to a contract)
   - 3.2. Effer, 1982 (matters relating to a contract)
   - 3.3. Bloos, 1976 (obligation in question)
   - 3.4. Shenavai, 1987 (obligation in question)
   - 3.5. Tessili, 1976 (place of performance)
   - 3.6. Zelger, 1980 (place of performance)
   - 3.7. Custom Made Commercial, 1994 (place of performance)
   - 3.8. Groupe Concorde, 1999 (place of performance)
   - 3.9. Leathertex, 1999 (place of performance)
   - 3.10. Besix, 2002 (place of performance)
   - 3.11. Wagner, 2002 (pre-contractual liability)
   - 3.12. Frahuil, 2004 (gurantee)

4. Employment Contract Jurisdiction
   - 4.1. Ivenel, 1982 (policy)
   - 4.2. Shenavai, 1987 (employment contract)
   - 4.3. Weber, 2002 (place of performance)

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4.4. Pugliese, 2003 (place of performance)

5. Maintenance

5.1. Blijdenstein, 2004 (recovery)

6. Tort Jurisdiction

6.1. Bier, 1976 (place of tort)

6.2. Kalfelis, 1988 (tort)

6.3. Reichert, 1992 (tort)

6.4. Réunion européenne, 1998 (tort)

6.5. Fiona Shevill, 1995 (defamation)

6.6. Marinari, 1995 (damage)

6.7. Dumez, 1990 (place of tort)

6.8. Handte, 1992 (tort)

6.9. Henkel, 2002 (preventive action)

6.10. Torline, 2004 (place of tort)

6.11. Kronhofer, 2004 (financial loss)

6.12. Danmarks Rederiforening, 2004 (place of tort)

6.13. Owusu, 2005 (non-contracting state)

7. Branch Jurisdiction

7.1. Blankert, 1981 (branch definition)

7.2. Bloos, 1976 (branch definition)

7.3. Somafer, 1978 (branch definition)

7.4. Schotte, 1987 (branch definition)

7.5. Lloyd's, 1995 (operation of branch)

8. Insurance Jurisdiction

8.1. Peloux, 2005 (jurisdiction agreement)

8.2. GIE, 2005 (third party proceedings)

9. Consumer Jurisdiction

9.1. Mietz, 1999 (provisional measure)

9.2. Gabriel, 2002 (classification)

9.3. Gruber, 2005 (consumer contract)



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9.4. Engler, 2005 (consumer contract)

10. Exclusive Jurisdiction

10.1. Rösler, 1985 (immovable property)

10.2. Gaillard, 2001 (immovable property)

10.3. Dansommer, 2000 (summer house)

11. Express Submission Agreement

11.1. Powell Duffryn, 1992 (particular legal relationship)

11.2. Salotti 1976 (formal requirements 1968-version)

11.3. Tilly Russ, 1984 (formal requirements 1968-version)

11.4. Berghofer 1985 (formal requirements 1968-version)

11.5. MSG, 1997 (formal requirements 1978-version)

11.6. Castelletti, 1999 (formal requirements 1978-version)

11.7. Meeth, 1978 (prorogation)

11.8. Anterist, 1986 (standard form contract)

11.9. Gerling, 1983 (third party)

11.10. Iveco, 1986 (implied prolongation)

11.11. Coreck, 2000 (interpretation of jurisdiction clause)

11.12. Gasser, 2003 (obligation to stay proceedings)

12. Tacit Submission Agreement

12.1. Spitzley, 1985 (effect)

12.2. Elefanten Schuh, 1981 (conditions)

13. Lis Pendens

13.1. Gubisch, 1987 (same cause of action)

13.2. Zelger II, 1984 (seizure)

13.3. Overseas Union, 1991 (examination of jurisdiction)

13.4. Gantner, 2003 (setoff)

14. Interim measures

14.1. Turner, 2004 (injunctions)



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15. Grounds for Refusal

15.1. Krombach, 2000 (public policy)

15.2. Renault, 2000 (public policy)

15.3. Hoffmann, 1988 (due process)

15.4. Van Uden, 1998 (provisional measure)

15.5. Lancray, 1990 (default judgment)

15.6. Hengst 1995 (default judgment)

15.7. Denilauer, 1980 (default judgment)

15.8. Klomps, 1981 (default judgment)

15.9. Pendy, 1982 (default judgment)

15.10. Mærsk, 2004 (default judgment)

15.11. Unibank, 1999 (enforceable documents)

15.12. Italian Leather, 2002 (irreconcilability)

16. Other conventions

16.1. Nürnberger, 2004 (carriage of goods)

17. Interpretation

17.1. Reichling, 2002 (competent court)

17.2. Warbecq, 2004 (competent court)



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**Judgment of the Court (Sixth Chamber)**
**of 13 July 2000**
**Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC).**
**Reference for a preliminary ruling: Cour d'appel de Versailles - France.**
**Brussels Convention - Personal scope - Plaintiff domiciled in a non-Contracting State - Material scope - Rules of jurisdiction in matters relating to insurance - Dispute concerning a reinsurance contract.**
**Case C-412/98.**

1. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction - Conditions for the application of Title II - Domicile of the defendant in a Contracting State - Domicile of the plaintiff in third country - Lack of bearing subject to an express provision of the Convention

(Convention of 27 September 1968, Title II)

2. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to insurance - Objective - Protection of the weaker party - Scope - Disputes between professionals in connection with a reinsurance contract - Exclusion

(Convention of 27 September 1968, Arts 7 to 12a)

3. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to insurance - Objective - Protection of the weaker party - Scope - Disputes between a private individual and a reinsurer - Inclusion

(Convention of 27 September 1968, Arts 7 to 12a)

1. Title II of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State. Such is the case where the plaintiff exercises the option open to him under Article 5(2), point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention, and also in matters relating to prorogation of jurisdiction under Article 17 of the Convention, solely where the defendant's domicile is not situated in a Contracting State.

(see paras 47, 61, and operative part 1 )

2. The rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12a of the Convention of 27 September 1968, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, do not refer to disputes between a reinsurer and a reinsured in connection with a reinsurance contract. In affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, those rules reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically. No particular protection is justified as regards the relationship between a reinsured and his reinsurer. Since both parties to the reinsurance contract are professionals, neither of whom can be presumed

to be in a weak position compared with the other party to the contract.

(see paras 64, 66, 76, and operative part 2 )

3. Although the rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12 of the Convention of 27 September 1968 do not refer to disputes between a reinsured and his reinsurer in connection with a reinsurance contract, they are, on the other hand, fully applicable where, under the law of a Contracting State, the policy-holder, the insured or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer in order to assert his rights under that contract as against that reinsurer. In such a situation, the plaintiff is in a weak position compared with the professional reinsurer, so that the objective of special protection inherent in Article 7 et seq. of the Convention justifies the application of the special rules which it lays down.

(see para. 75 )

In Case C-412/98,

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Cour d'Appel, Versailles, France, for a preliminary ruling in the proceedings pending before that court between

Group Josi Reinsurance Company SA

and

Universal General Insurance Company (UGIC),

on the interpretation of the provisions of Title II of the Convention of 27 September 1968, cited above (OJ 1972 L 299, p. 32), 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 (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Schintgen (Rapporteur), J.-P. Puissochet, G. Hirsch and F. Macken, Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Group Josi Reinsurance Company SA, by C. Bouckaert, of the Paris Bar,

- Universal General Insurance Company (UGIC), by B. Mettetal, of the Paris Bar,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in the same directorate, acting as Agents,

- the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Lloyd Jones, Barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and A.X. Lewis, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government and the Commission at the hearing on 10 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 9 March 2000,

gives the following

Judgment

Costs

77 The costs incurred by the French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Cour d'Appel, Versailles, by judgment of 5 November 1998, hereby rules:

1. Title II of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of that convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.

2. The rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12a of that convention do not cover disputes between a reinsurer and a reinsured in connection with a reinsurance contract.

1 By judgment of 5 November 1998, received at the Court on 19 November 1998, the Cour d'Appel (Court of Appeal), Versailles, referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 two questions on the interpretation of the provisions of Title II of that convention (OJ 1972 L 299, p. 32), 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 (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter the Convention).

2 Those questions were raised in proceedings between Universal General Insurance Company (UGIC), in liquidation, an insurance company incorporated under Canadian law, having its registered office in Vancouver, Canada, and Group Josi Reinsurance Company SA (Group Josi), a reinsurance company

incorporated under Belgian law, having its registered office in Brussels, concerning a sum of money claimed by UGIC from Group Josi in its capacity as party to a reinsurance contract.

The Convention

3 The rules of jurisdiction laid down by the Convention are to be found in Title II thereof, which contains Articles 2 to 24.

4 Article 2 of the Convention, which forms part of Section 1, entitled General provisions, of Title II, states:

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.

5 The first paragraph of Article 3 of the Convention, which is part of the same section, provides:

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.

6 The second paragraph of Article 3 of the Convention prohibits a plaintiff from relying on special rules of jurisdiction in force in the Contracting States which are based, in particular, on the nationality of the parties and on the plaintiff's domicile or residence.

7 Article 4, which also forms part of Section 1 of Title II of the Convention, states:

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.

8 In Sections 2 to 6 of Title II, the Convention lays down rules of special or exclusive jurisdiction.

9 Thus, under Article 5, which is part of Section 2, entitled Special jurisdiction, of Title II of the Convention:

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;...

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident...

...

10 Articles 7 to 12a constitute Section 3, entitled Jurisdiction in matters relating to insurance, of Title II of the Convention.

11 Article 7 of the Convention states:

In matters relating to insurance, jurisdiction shall be determined by this section...

12 Article 8 of the Convention provides:

An insurer domiciled in a Contracting State may be sued:

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

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

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

An insurer who is not domiciled in a 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.

13 Section 4 of Title II of the Convention contains rules of jurisdiction over consumer contracts.

14 The first paragraph of Article 14, which is part of that section, states:

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.

15 Article 16, which constitutes Section 5 of Title II of the Convention, lays down certain rules of exclusive jurisdiction and states that they are to apply regardless of domicile.

16 Under the first paragraph of Article 17, which is part of Section 6, entitled Prorogation of jurisdiction, of Title II of the Convention:

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....

17 Article 18, which also forms part of Section 6, states:

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.

The main proceedings

18 It is apparent from the documents in the case in the main proceedings that UGIC instructed its broker, Euromepa, a company incorporated under French law, having its registered office in France, to procure a reinsurance contract with effect from 1 April 1990 in relation to a portfolio of comprehensive home-occupiers' insurance polices based in Canada.

19 By fax dated 27 March 1990, Euromepa offered Group Josi a share in that reinsurance contract, stating that the main reinsurers are Union Ruck with 24% and Agrippina Ruck with 20%.

20 By fax of 6 April 1990, Group Josi agreed to acquire a 7.5% share.

21 On 28 March 1990, Union Ruck had told Euromepa that it did not intend to retain its share after 31 May 1990 and, by letter of 30 March 1990, Agrippina Ruck had informed the same broker that it would reduce its share to 10% with effect from 1 June 1990, the reason for those withdrawals being changes in economic policy imposed by the American-based parent companies of those insurance undertakings.

22 On 25 February 1991, Euromepa sent Group Josi first a statement of account showing a debit balance and then a final calculation showing that Group Josi owed CAD 54 679.34 in respect of its share in the reinsurance transaction.

23 By letter of 5 March 1991, Group Josi refused to pay that amount, essentially on the ground that it had been induced to enter into the reinsurance contract by the provision of information which subsequently turned out to be false.

24 In those circumstances, on 6 July 1994, UGIC brought proceedings against Group Josi before the Tribunal de Commerce (Commercial Court), Nanterre, France.

25 Group Josi argued that that court lacked jurisdiction since the Tribunal de Commerce, Brussels, within whose territorial jurisdiction it has its registered office, had jurisdiction, and it relied, first, on the Convention and, second, in the event of the general law being found to apply, on Article 1247 of the French Code Civil (Civil Code).

26 By judgment of 27 July 1995, the Tribunal de Commerce, Nanterre, held that it had jurisdiction on the ground that UGIC is a company incorporated under Canadian law without a place of business in the Community and that the objection of lack of jurisdiction raised on the basis of the Convention cannot be applied to it. On the substance, the court ordered Group Josi to pay the sum claimed by UGIC, plus statutory interest as from 6 July 1994.

27 Group Josi subsequently appealed against that judgment before the Cour d'Appel, Versailles.

28 In support of its appeal, Group Josi submitted that the Convention applies to any dispute in which a connecting factor with the Convention is apparent. In the present case, the Convention should apply. The main connecting factor is that specified in the first paragraph of Article 2 of the Convention, namely the defendant's domicile. Since Group Josi has its registered office in Brussels and no subsidiary place of business in France, it can, in accordance with that provision, be sued only in a Belgian court. In addition, Group Josi relied on Article 5(1) of the Convention, arguing in this respect that the obligation in question, being payment of a contractual debt, was, in the absence of any stipulation to the contrary in the reinsurance contract, to be performed in the debtor's place of domicile, namely Brussels.

29 UGIC, on the other hand, contended that the rules of jurisdiction established by the Convention can apply only if the plaintiff is also domiciled in a Contracting State. Since UGIC is a company incorporated under Canadian law with no subsidiary place of business in a Contracting State, the Convention is not applicable in the present case.

30 The Cour d'Appel observed, first, that, although a dispute may be regarded as sufficiently integrated into the European Community to justify jurisdiction being vested in the courts of a Contracting State where, as in the present case, the defendant is domiciled in a Contracting State, it is a different question whether the specific rules of that convention can be used against a plaintiff domiciled in a non-Contracting State, which would necessarily entail extending Community law to non-member countries.

31 Second, the Cour d'Appel noted that Article 7 of the Convention simply refers to matters relating to insurance without specifying further, so that the question arises whether reinsurance falls within the scope of the autonomous system of jurisdiction established by Articles 7 to 12a of the Convention. In this respect, it might be considered that the purpose of those articles is to protect the insured as the weak party to the insurance contract and that there is no such characteristic in matters of reinsurance, but, on the other hand, the text of the Convention does not contain any exclusion on that point.

The questions referred for preliminary ruling

32 Taking the view that, in those circumstances, the resolution of the dispute required an interpretation of the Convention, the Cour d'Appel, Versailles, decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

1. Does the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters apply not only to "intra-Community" disputes but also to disputes which are "integrated into the Community"? More particularly, can a defendant established in a Contracting State rely on the specific rules on jurisdiction set out in that convention against a plaintiff domiciled in Canada?

2. Do the rules on jurisdiction specific to matters relating to insurance set out in Article 7 et seq. of the Brussels Convention apply to matters relating to reinsurance?

The first question

33 By its first question, the national court essentially seeks to ascertain whether the rules of jurisdiction laid down by the Convention apply where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country.

34 In order to answer that question, it is important to state at the outset that the system of common rules on conferment of jurisdiction established in Title II of the Convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective of the nationality of the parties.

35 That jurisdictional rule is a general principle, which expresses the maxim actor sequitur forum rei, because it makes it easier, in principle, for a defendant to defend himself (see, to that effect, Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967, paragraph 14; see also the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, 18)).

36 It is only by way of derogation from that fundamental principle, that the courts of the Contracting State in which the defendant has its domicile or seat are to have jurisdiction, that the Convention provides, under the first paragraph of Article 3 thereof, for the cases, exhaustively listed in Sections 2 to 6 of Title II, in which a defendant domiciled or established in a Contracting State may, where the situation is covered by a rule of special jurisdiction, or must, where it is covered by a rule of exclusive jurisdiction or a prorogation of jurisdiction, be excluded from the jurisdiction of the courts of the State in which it is domiciled and sued in a court of another Contracting State.

37 In that context, Sections 2 to 6 of Title II of the Convention include certain specific provisions which, for the purpose of determining which court has jurisdiction, depart from the general criterion of the domicile of the defendant by according, exceptionally, a certain influence to the domicile of the plaintiff.

38 Thus, first, in order to facilitate the proceedings brought by a maintenance creditor, Article 5(2) of the Convention gives that person the option to sue the defendant, in a Contracting State other than that of the defendant's domicile, in the courts for the place where the plaintiff is domiciled or habitually resident.

39 Similarly, also with the aim of protecting the party deemed to be weaker than the other party to the contract, point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention provide, respectively, that a holder of an insurance policy and a consumer have the right to bring proceedings against the other party to their contract in the courts of the Contracting State in which they are domiciled.

40 Although those rules of special jurisdiction give importance, exceptionally, to the plaintiff's domicile being in a Contracting State, they none the less constitute only an additional option for the plaintiff, alongside the forum of the courts of the Contracting State where the defendant is domiciled, which constitutes the general rule underlying the Convention.

41 Second, Article 17 of the Convention provides for the exclusive jurisdiction of a court or

the courts of a Contracting State chosen by the parties, so long as one of the parties is domiciled in a Contracting State.

42 That condition does not necessarily refer to the defendant's domicile, so that the place of the plaintiff's domicile may, where appropriate, be decisive. However, it also follows from that provision that the rule of jurisdiction set out therein is applicable if the defendant is domiciled in a Contracting State, even if the plaintiff is domiciled in a non-member country (see, to that effect, the Jenard Report, cited above, p. 38).

43 On the other hand, the other provisions in Sections 2 to 6 of Title II of the Convention do not attach any importance to the plaintiff's domicile.

44 Admittedly, under Article 18 of the Convention, the voluntary appearance of the defendant establishes the jurisdiction of a court of a Contracting State before which the plaintiff has brought proceedings, without the place of the defendant's domicile being relevant.

45 However, although the court seised must be that of a Contracting State, that provision does not further require that the plaintiff be domiciled in such a State.

46 The same conclusion can be drawn from Article 16 of the Convention, which states that the rules of exclusive jurisdiction which it lays down are to apply without the domicile of the parties being taken into consideration. The fundamental reason for those rules of exclusive jurisdiction is the existence of a particularly close connection between the dispute and a Contracting State, irrespective of the domicile both of the defendant and of the plaintiff (as regards, more specifically, in proceedings having as their object tenancies of immovable property, the exclusive jurisdiction of the courts of the Contracting State in which the property is situated, see, in particular, Case C-8/98 Dansommer v Götz [2000] ECR I-393, paragraph 27).

47 In the light of the foregoing, the Court finds that it is only in quite exceptional cases that Title II of the Convention accords decisive importance, for the purpose of conferring jurisdiction, to the plaintiff's domicile being in a Contracting State. That is the case only if the plaintiff exercises the option open to him under Article 5(2), point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention, and also in matters relating to prorogation of jurisdiction under Article 17 of the Convention, solely where the defendant's domicile is not situated in a Contracting State.

48 None of those specific cases is applicable in the case in the main proceedings.

49 Furthermore, it is settled case-law that the rules of jurisdiction which derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction, cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention (see, in particular, Handte, paragraph 14; Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, paragraphs 15 and 16; Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 13; and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 16).

50 In addition, as is already clear from the second paragraph of Article 3 of the Convention, which prohibits a plaintiff from invoking against a defendant domiciled in a Contracting State national rules of jurisdiction based, in particular, on the plaintiff's domicile or residence, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile (see Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraph 16; and Shearson Lehman Hutton, paragraph 17). It follows that the Convention must not be interpreted as meaning that, otherwise than in the cases expressly provided for, it recognises the jurisdiction of the courts of the plaintiff's domicile and therefore enables a plaintiff to determine the court

with jurisdiction by his choice of domicile (see, to that effect, Dumez France and Tracoba, paragraph 19).

51 Article 4 of the Convention provides, admittedly, for a derogation from the rule laid down in the second paragraph of Article 3. Article 4 states that, if the defendant is not domiciled in a Contracting State, jurisdiction is to be determined by the law in force in each Contracting State, subject only to Article 16, which applies regardless of domicile, and that, as against such a defendant, a plaintiff domiciled in a Contracting State has the right to avail himself in that State of the special rules of jurisdiction there in force of which an illustrative list appears in the second paragraph of Article 3 of the Convention.

52 However, in so far as Article 4 of the Convention provides that the rules of jurisdiction laid down by the Convention are not applicable where the defendant is not domiciled in a Contracting State, it constitutes a confirmation of the fundamental principle set out in the first paragraph of Article 2 of the Convention.

53 In the light of all the foregoing, it must be concluded that the system of rules on conferment of jurisdiction established by the Convention is not usually based on the criterion of the plaintiff's domicile or seat.

54 Moreover, as is clear from the wording of the second paragraph of Article 2 and the second paragraph of Article 4 of the Convention, nor is that system based on the criterion of the nationality of the parties.

55 The Convention enshrines, on the other hand, the fundamental principle that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction.

56 As is clear from paragraph 47 above, it is only by way of exception to that general rule that the Convention includes certain specific provisions which, in clearly defined cases, accord an influence to the plaintiff's domicile.

57 It follows that, as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the Convention, since that application is, in principle, dependent solely on the criterion of the defendant's domicile being in a Contracting State.

58 It would be otherwise only in exceptional cases where the Convention makes that application of the rules of jurisdiction expressly dependent on the plaintiff being domiciled in a Contracting State.

59 Consequently, the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country.

60 As the Advocate General observed in paragraph 21 of his Opinion, it is thus fully in accordance with that finding that the Court has interpreted the rules of jurisdiction laid down by the Convention in cases where the plaintiff had his domicile or seat in a non-member country, although the provisions of the Convention in question did not establish any exception to the general principle that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction (see Case C-190/89 Rich [1991] ECR I-3855; and Case C-406/92 The Tatry [1994] ECR I-5439).

61 In those circumstances, the answer to the first question must be that Title II of the Convention is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting

State.

The second question

62 In this respect, it must be observed, first, that the rules of jurisdiction in matters relating to insurance, laid down in Section 3 of Title II of the Convention, apply expressly to certain specific types of insurance contracts, such as compulsory insurance, liability insurance, insurance of immovable property and marine and aviation insurance. Furthermore, point 3 of the first paragraph of Article 8 of the Convention expressly refers to co-insurance.

63 On the other hand, reinsurance is not mentioned in any of the provisions of that section.

64 First, according to settled case-law, it is apparent from a consideration of the provisions of Section 3 of Title II of the Convention in the light of the documents leading to their enactment that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically (Case 201/82 Gerling and Others v Amministrazione del Tesoro dello Stato [1983] ECR 2503, paragraph 17).

65 The role of protecting the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract which is fulfilled by those provisions implies, however, that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified (see, by analogy, in respect of Article 13 et seq. of the Convention in relation to jurisdiction over consumer contracts, Shearson Lehmann Hutton, paragraph 19).

66 No particular protection is justified as regards the relationship between a reinsured and his reinsurer. Both parties to the reinsurance contract are professionals in the insurance sector, neither of whom can be presumed to be in a weak position compared with the other party to the contract.

67 It is thus in accordance with both the letter and the spirit and purpose of the provisions in question to conclude that they do not apply to the relationship between a reinsured and his reinsurer in connection with a reinsurance contract.

68 That interpretation is confirmed by the system of rules of jurisdiction established by the Convention.

69 Thus Section 3 of Title II of the Convention includes rules which confer jurisdiction on courts other than those of the Contracting State in which the defendant is domiciled. In particular, point 2 of the first paragraph of Article 8 of the Convention provides that the courts for the place where the policy-holder is domiciled are to have jurisdiction.

70 As has already been noted in paragraph 49 above, it is settled case-law that the rules of jurisdiction which derogate from the general principle, laid down in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction, cannot give rise to an interpretation going beyond the cases envisaged by the Convention.

71 That interpretation is all the more valid in the case of a rule of jurisdiction such as that laid down in point 2 of the first paragraph of Article 8 of the Convention, which enables the policy-holder to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled.

72 For the reasons more fully set out in paragraph 50 above, the framers of the Convention demonstrated their hostility towards the attribution of jurisdiction to the courts of the plaintiff's domicile otherwise than in the cases for which it expressly provides.

73 It follows that Section 3 of Title II of the Convention may not be regarded as applying to the relationship between a reinsured and his reinsurer in connection with a reinsurance contract.

74 That interpretation is also supported by the Schlosser Report on the Convention of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, 117), according to which [r]einsurance contracts cannot be equated with insurance contracts. Accordingly, Articles 7 to 12 do not apply to reinsurance contracts.

75 However, as the Commission rightly pointed out, although the rules of special jurisdiction in matters relating to insurance do not refer to disputes between a reinsured and his reinsurer in connection with a reinsurance contract, such as that at issue in the main proceedings, they are, on the other hand, fully applicable where, under the law of a Contracting State, the policy-holder, the insured or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer in order to assert his rights under that contract as against that reinsurer, for example in the case of the bankruptcy or liquidation of the insurer. In such a situation, the plaintiff is in a weak position compared with the professional reinsurer, so that the objective of special protection inherent in Article 7 et seq. of the Convention justifies the application of the special rules which it lays down.

76 In the light of all the foregoing, the answer to the second question must be that the rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12a of the Convention do not cover disputes between a reinsurer and a reinsured in connection with a reinsurance contract.


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**NATCOUR** *A8* Cour d'appel de Versailles, 12e chambre, 2e section, arrêt du 15/01/1998 (9795/95)
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**ADVGEN** Fennelly

**JUDGRAP** Schintgen

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**Judgment of the Court (Fifth Chamber)**
**of 15 May 2003**
**Préservatrice foncière TIARD SA v Staat der Nederlanden.**
**Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands.**
**Brussels Convention - Article 1 - Scope - Concept of civil and commercial matters - Concept of customs matters - Action based on a guarantee contract between the State and an insurance company - Contract entered into in order to satisfy a condition imposed by the State on associations of carriers, principal debtors, under Article 6 of the TIR Convention.**
**Case C-266/01.**

In Case C-266/01,

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Préservatrice foncière TIARD SA

and

Staat der Nederlanden,

on the interpretation of Article 1 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT

(Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Netherlands Government, by H.G. Sevenster, acting as Agent,

- the Commission of the European Communities, by A.-M. Rouchaud and H. van Vliet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Préservatrice foncière TIARD SA, represented by R.S. Meijer, advocaat, of the Netherlands Government, represented by N.A.J. Bel, acting as Agent, and of the Commission, represented by A.-M. Rouchaud and H. van Vliet, at the hearing on 17 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

Costs

45 The costs incurred by the Netherlands Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 18 May 2001, hereby rules:

The first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

- `civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals;

- `customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

1 By judgment of 18 May 2001, received at the Court on 5 July 2001, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 two questions on the interpretation of Article 1 of that convention (OJ 1972 L 299, p. 32), 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (`the Brussels Convention').

2 Those questions were raised in the context of proceedings between the Netherlands State and Préservatrice foncière TIARD SA (`PFA'), an insurance company governed by French law, concerning the enforcement of a guarantee contract (borgtochtovereenkomst) under which PFA agreed to pay the customs duties owed by the Netherlands associations of carriers authorised by the Netherlands State to issue TIR carnets.

Legal context

The Brussels Convention

3 The first paragraph of Article 1 of the Brussels Convention provides:

`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 TIR Convention

4 The Customs Convention on the international transport of goods under cover of TIR carnets (`the TIR Convention') was signed at Geneva on 14 November 1975. The Kingdom of the Netherlands is a party to that convention. It was also approved on behalf of the European Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1).

5 The TIR Convention provides, in particular, that goods carried under the TIR procedure, which it lays down, are not to be subject to the payment or deposit of import or export duties and taxes at customs offices en route.

6 For those facilities to be applied, the TIR Convention requires that the goods be accompanied, throughout the transport operations, by a standard document, the TIR carnet, which serves to check the regularity of the operation. It also requires that the transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the Convention.

7 Article 6(1) of the TIR Convention, which forms part of Chapter II, entitled `Issue of TIR carnets - Liability of guaranteeing associations', states in the version applicable at the material time:

`Subject to such conditions and guarantees as it shall determine, each Contracting Party may authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.'

8 Where there is an irregularity in the conduct of the TIR operation, in particular where the TIR carnet has not been discharged, import or export duties and taxes become payable. They are due directly from the holder of the TIR carnet - generally the carrier. Where he does not pay the sums owed, the national guaranteeing association is `jointly and severally' liable for payment, under Article 8(1) of the TIR Convention.

The main proceedings

9 By order of 5 March 1991, in accordance with Article 6 of the TIR Convention, the Netherlands State Secretary for Finance authorised three Netherlands associations of carriers to issue TIR carnets (`the authorised Netherlands associations'). Under Article 1 of that order, those associations undertake unconditionally to pay the duties and taxes due from the holders of the TIR carnets issued, for which they become jointly and severally liable. Article 5 states that the authorised Netherlands associations must provide a guarantee covering fulfilment of their obligations. That article states that the person who provides the guarantee must undertake to pay all the sums claimed by the Netherlands Minister for Finance from the authorised Netherlands associations. Article 19 states that the order will enter into force only when the Netherlands Minister for Finance has accepted the guarantee referred to in Article 5.

10 That guarantee was provided by PFA. By various documents, PFA bound itself vis-à-vis the Netherlands State, as guarantor and joint debtor, to pay as its own debt the import or export duties and taxes imposed under customs and excise legislation on the holders of TIR carnets issued by the national associations of carriers.

11 On 20 November 1996, the Netherlands State brought proceedings against PFA before the Rechtbank te Rotterdam (District Court, Rotterdam) (Netherlands), claiming that PFA should be ordered to pay it the sum of NLG 41 917 063 together with statutory interest. That action was based on the guarantee commitments undertaken by PFA vis-à-vis the Netherlands State and sought payment of the import or export duties and taxes owed by the authorised Netherlands associations.

12 PFA pleaded the lack of jurisdiction of the Rechtbank te Rotterdam on the ground that the dispute fell within the scope of the Brussels Convention and that the court with jurisdiction was to be determined in accordance with the provisions thereof.

13 The Rechtbank te Rotterdam and, on appeal, the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands) rejected the plea of lack of jurisdiction. The appellate court held that, in authorising associations of carriers to issue TIR carnets subject to the acceptance of the guarantee furnished by them, the Netherlands State had exercised a public-law power and that the conclusion by that State of the guarantee contract with PFA also formed part of the exercise of that power. It also found that the debts payable by PFA were customs debts.

14 Since it doubted the validity of that analysis, the Hoge Raad der Nederlanden, to which PFA had appealed, decided to stay proceedings and to refer the following questions to the Court:

`(1) Is a claim lodged by the State under a private-law guarantee contract (borgtochtovereenkomst) which it has concluded in fulfilment of a condition determined by it pursuant to Article 6(1) of the 1975 TIR Convention, and therefore in exercise of its public powers, to be regarded as a civil or commercial matter within the meaning of Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters?

(2) Must proceedings which are brought by the State and which have as their subject-matter a private-law guarantee contract be regarded as a customs matter within the meaning of Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, on the ground that pleas may be put forward by the defendant which necessitate an investigation into, and a ruling on, the existence and content of the customs debts to which that contract relates?'

The first question referred for a preliminary ruling

15 By this question, the national court seeks essentially to ascertain whether the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State.

Observations submitted to the Court

16 PFA, the Netherlands Government and the Commission all acknowledge that `civil and commercial matters' within the meaning of Article 1 of the Brussels Convention must be defined independently. Similarly, they all point out that proceedings between public administrative authorities and an individual may come within the scope of the Brussels Convention, in so far as those authorities have not acted in the exercise of their public powers.

17 However, their observations differ in respect of the application of those principles to the main proceedings.

18 The Netherlands Government adopts the analysis of the Gerechtshof te 's-Gravenhage. In its submission, there is a link between the act of guarantee and the system of taxes and duties whose payment it seeks to ensure, which is shown by the fact that the guarantee was a condition without

whose fulfilment the public-law relationship between the State and the authorised Netherlands associations would not have arisen. The content of the act of guarantee flows directly from rules of public law, as is demonstrated by the fact that its clauses reproduce almost literally the provisions of the order of 5 March 1991 approving national associations of carriers. In concluding that act, PFA undertook to take part in the public-law system for collecting duties and taxes which was put in place by the TIR Convention. In the light of those factors, the fact that the act took the form of a private-law guarantee contract is immaterial.

19 By contrast, according to PFA and the Commission, the Netherlands State has not, in its relationship with PFA, acted in the exercise of its public powers. The Netherlands State has not imposed any obligation on PFA, which concluded the guarantee contract of its own free will and is at liberty to terminate it subject to a period of notice. The Netherlands State's claim against PFA is founded solely in the guarantee contract, which is governed by private law.

The reply of the Court

20 It is settled case-law that, since Article 1 of the Brussels Convention serves to indicate the area of application of the Convention, it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. `Civil and commercial matters' must therefore be regarded as an independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the national legal systems as a whole (Case 29/76 LTU [1976] ECR 1541, paragraph 3; Case 133/78 Gourdain [1979] ECR 733, paragraph 3; Case 814/79 Rüffer [1980] ECR 3807, paragraph 7; Case C-172/91 Sonntag [1993] ECR I-1963, paragraph 18, and Case C-271/00 Baten [2002] ECR I-0000, paragraph 28).

21 The Court has made it clear that that interpretation results in the exclusion of certain judicial decisions from the scope of the Brussels Convention, owing either to the legal relationships between the parties to the action or to its subject-matter (LTU, paragraph 4, and Baten, paragraph 29).

22 Thus the Court has held that, although certain judgments in actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (LTU, paragraph 4; Rüffer, paragraph 8, and Baten, paragraph 30).

23 In order to apply those principles in a case such as that in the main proceedings, it is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action (see, to that effect, Baten, paragraph 31).

24 As a preliminary point, it should be observed that, as the Netherlands Government submits, PFA has not bound itself solely as guarantor, but also as joint debtor liable to pay as its own debt the duties and taxes owed.

25 The question whether a stipulation of joint and several liability alters the nature of a guarantee undertaking, or modifies only some of its effects, is a question governed by national law.

26 In any event, in the present case the national court, which is responsible for analysing the nature of the relationship between PFA and the Netherlands State, has referred in the questions which it has submitted to the Court for a preliminary ruling only to a `guarantee' contract. Accordingly, in order to answer those questions, the Court must proceed on the basis of the hypothesis that proceedings have been brought against PFA only in its capacity as guarantor, and not as joint

debtor.

27 According to the general principles which stem from the legal systems of the contracting States, a guarantee contract represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the principal debtor if the debtor fails to fulfil them himself.

28 Such a contract creates a new obligation, assumed by the guarantor, to guarantee the performance of the principal obligation imposed on the debtor. The guarantor does not take the place of the debtor, but guarantees only to pay his debt, according to the conditions specified in the guarantee contract or laid down by legislation.

29 The obligation thus created is accessory, in the sense that, first, the creditor cannot bring proceedings against the guarantor unless the debt covered by the guarantor is payable and, second, the obligation assumed by the guarantor cannot be more extensive than that of the principal debtor. The accessory nature of the obligation does not however mean that the legal rules applicable to the obligation assumed by the guarantor must be in every particular identical to the legal rules applicable to the principal obligation (see, to that effect, Case C-208/98 Berliner Kindl Brauerei [2000] ECR I-1741).

30 In order to answer the first question, it is therefore necessary to examine whether the legal relationship between the Netherlands State and PFA, under the guarantee contract, is characterised by an exercise of public powers on the part of the State to which the debt is owed, in that it entails the exercise of powers going beyond those existing under the rules applicable to relations between private individuals (on that criterion, see Sonntag, paragraph 22).

31 Although it is for the national court to make that assessment, it seems none the less helpful for the Court to provide, in the light of the observations lodged before it, some guidelines as to the factors to be taken into consideration.

32 In the first place, the legal relationship between the Netherlands State and PFA is not governed by the TIR Convention. Although Chapter II of that convention defines the obligations of a national guaranteeing association authorised by a contracting State under Article 6 thereof, in the version applicable at the material time the TIR Convention does not contain any provisions defining the extent of the possible undertakings imposed on a guarantor by a State as a condition for a decision authorising national guaranteeing associations.

33 In the second place, account must be taken of the circumstances surrounding the conclusion of the contract. In the main proceedings, the case file shows that PFA's undertaking vis-à-vis the Netherlands State was freely given. According to the information relied on by the Commission, without being contradicted by the Netherlands Government, PFA freely determined with the principal debtors, that is, the authorised Netherlands associations, the amount of its remuneration for providing the guarantee. PFA and the Commission also stated, at the hearing, that PFA is free to terminate the guarantee contract at any moment, subject to 30 days' notice.

34 In the third place, it is necessary to take into consideration the terms of the contract defining the extent of the guarantor's undertaking. In that respect, the identity, noted in the main proceedings by the Netherlands Government, between the provisions of the order of 5 March 1991 approving national associations of carriers, on the one hand, and the clauses of the contract defining the guarantee obligation assumed by PFA, on the other, cannot be regarded as proof that the Netherlands State exercised its public powers in respect of the guarantor. The fact that the principal obligation and the guarantor's undertaking are the same in fact results from the accessory nature of the guarantee contract. In the main proceedings, it is hardly material that the extent of PFA's undertaking is determined by reference to the obligations of the authorised Netherlands associations, since

it is common ground that that undertaking was not imposed on PFA, but is the result of an expression of its free will.

35 As regards the fact, asserted by the Netherlands Government, that PFA waived the right to rely on certain provisions of the Netherlands Civil Code, such as those providing for the defence of set-off and the `benefits of discussion and division' (permitting the claim of a preliminary distraint on the principal debtor's assets and the guarantor's right to limit its liability in the event of a plurality of guarantors), it should be noted that such stipulations are common practice in commercial relationships. They could constitute an exercise of its public powers by the Netherlands State vis-à-vis the guarantor only if they exceeded the limits of the freedom conferred on the parties by the legislation applicable to the contract, which is for the national court to determine.

36 In the light of all these considerations, the answer to the first question must be that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals.

The second question referred for a preliminary ruling

37 By this question, the national court seeks essentially to ascertain whether the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `customs matters', within the meaning of the second sentence of that provision, covers a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

38 In that regard, it should be recalled that the second sentence of the first paragraph of Article 1 of the Brussels Convention was added 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 to the Brussels Convention in order to clarify, by means of examples, which matters do not fall within the scope of the Brussels Convention (see report on that convention submitted by Mr Schlosser, OJ 1979 C 59, p. 71, point 23). That sentence seeks only to draw attention to the fact that `customs matters' are not covered by the concept of `civil and commercial matters'. That clarification did not however have the effect of either limiting or modifying the scope of the latter concept.

39 It follows that the criterion for fixing the limits of the concept of `customs matters' must be analogous to that applied to the concept of `civil and commercial matters'.

40 As indicated in paragraph 36 above, `civil and commercial matters' must therefore cover a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to guarantee the payment of a customs debt owed by a third person to that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise of powers going beyond those existing under the rules applicable to relations between private individuals.

41 This analysis applies even if the guarantor may raise pleas in defence which necessitate an investigation into whether the customs debt, whose payment the guarantee contract guarantees, is owed.

42 In order to determine whether an action falls within the scope of the Brussels Convention,

only the subject-matter of that action must be taken into account. It would be contrary to the principle of legal certainty, which is one of the objectives pursued by that convention, for its applicability to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties (see, to that effect, Case C-190/89 Rich [1991] ECR I-3855, paragraphs 26 and 27, and Case C-129/92 Owens Bank [1994] ECR I-117, paragraph 34).

43 Where the subject-matter of an action is the enforcement of a guarantee obligation owed by a guarantor in circumstances which permit the inference that that obligation falls within the scope of the Brussels Convention, the fact that the guarantor may raise pleas in defence relating to whether the guaranteed debt is owed, based on matters excluded from the scope of the Brussels Convention, has no bearing on whether the action itself is included in the scope of that convention.

44 It follows from all the foregoing considerations that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

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| **SUB** | Brussels Convention of 27 September 1968 ; Jurisdiction |
| **AUTLANG** | Dutch |
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| **NATIONA** | Netherlands |
| **NATCOUR** | *A9* Hoge Raad, arrest van 18/05/2001 (C99/286 HR)<br>- Nederlands internationaal privaatrecht 2001 nAo 203<br>- Nederlands juristenblad 2001 p.1129-1130<br>- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2001 p.2573 (rA¬sumA¬)<br>- Rechtspraak van de week 2001 nAo 106<br>- Rechtspraak van de week 2001 p.910 (rA¬sumA¬)<br>- Schip en schade 2003 nAo 38 |
| **NOTES** | Van Haersolte-Van Hof, J.J.: Nederlands tijdschrift voor Europees recht 2003 p.243-245<br>Polak, M.V.: Ars aequi 2003 p.681-684<br>Geimer, Reinhold: Praxis des internationalen Privat- und Verfahrensrechts 2003 p.512-515<br>GarcA¡a LA3pez, Julio A.: Diario la ley 2003 nAo 5883 p.1-8<br>X: Il Corriere giuridico 2003 p.1362-1364<br>Wittwer, Alexander: European Law Reporter 2003 p.450-451<br>Schiavolin, Roberto: Il Corriere giuridico 2004 p.11-16<br>Verlinden, Johan: The Columbia Journal of European Law 2004 p.385-392<br>Bischoff, Jean-Marc: Journal du droit international 2004 p.646-650<br>Briggs, Alan: Lloyd's Maritime and Commercial Law Quarterly 2004 p.313-319 |
| **PROCEDU** | Reference for a preliminary ruling |
| **ADVGEN** | LA¬ger |
| **JUDGRAP** | Jann |
| **DATES** | of document: 15/05/2003<br>of application: 05/07/2001 |

**Judgment of the Court (Fifth Chamber)**
**of 8 May 2003**
**Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV.**
**Reference for a preliminary ruling: Oberster Gerichtshof - Austria.**
**Brussels Convention - Article 21 - Lis pendens - Setoff.**
**Case C-111/01.**

In Case C-111/01,

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Gantner Electronic GmbH

and

Basch Exploitatie Maatschappij BV,

on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) 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 (OJ 1997 C 15, p. 1),

THE COURT

(Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gantner Electronic GmbH, by A. Concin and H. Concin, Rechtsanwälte,

- Basch Exploitatie Maatschappij BV, by T. Frad, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Italian Government, by U. Leanza, acting as Agent, and O. Fiumara, avvocato dello Stato,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and D. Lloyd Jones QC,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Gantner Electronic GmbH, Basch Exploitatie Maatschappij BV, the United Kingdom Government and the Commission, at the hearing on 10 July 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

Costs

42 The costs incurred by the Austrian, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 22 February 2001, hereby rules:

Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, 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, must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

1 By order of 22 February 2001, received at the Court on 12 March 2001, the Oberster Gerichtshof (Austrian Supreme Court) referred for a preliminary ruling under the Protocol of 3 June 1971 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 (`the Protocol'), three questions on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) 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 (OJ 1997 C 15, p. 1) (`the Convention').

2 Those questions have been raised in proceedings between Gantner Electronic GmbH (`Gantner'), a company incorporated under Austrian law, and Basch Exploitatie Maatschappij BV (`Basch'), a company incorporated under Netherlands law, following the termination of their commercial relations.

Legal framework

The Convention

3 According to its preamble, the aim of the Convention is to facilitate the reciprocal recognition and enforcement of judgments in accordance with Article 293 EC, and to strengthen the legal protection of persons established in the Community. The preamble also states that it is necessary for that

purpose to determine the international jurisdiction of the courts of the Contracting States.

4 The rules on jurisdiction are laid down in Title II of the Convention. Section 8 of Title II entitled `Lis pendens - related actions' is intended to prevent conflicting judgments and thus to ensure the proper administration of justice in the Community.

5 Article 21 of the Convention, dealing with lis pendens, provides as follows:

`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.'

6 Article 22 of the Convention, which deals with related actions, provides as follows:

`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.'

National laws

7 Under Netherlands and Austrian law set-off always requires a unilateral declaration by one party to the other. Statutory set-off, characterised by the extinction of mutual claims by operation of law, which is well known in other European national laws, does not exist in Netherlands and Austrian law. The declaration may be made either extra-judicially or in the course of proceedings. It has retroactive effect: the two claims are considered to be extinguished on the day on which the conditions for set-off are met and not on the day on which set-off is declared, and the court confines itself to making a declaration that set-off has been effected.

The dispute in the main proceedings and the questions referred for preliminary ruling

8 Gantner manufactures and markets carrier pigeon clocks. In the course of its commercial relations with Basch, it supplied Basch with its goods for resale in the Netherlands.

9 Taking the view that Basch had not paid the price of the goods delivered and invoiced up to June 1999, Gantner terminated their commercial relations.

10 By document of 7 September 1999, notified to Gantner on 2 December 1999, Basch brought an action before the Arrondissementsrechtbank (District Court) Dordrecht (Netherlands) in which it sought an order requiring Gantner to pay to it NLG 5 555 143.60 (EUR 2 520 814.26), primarily in respect of damages. Basch argued that, as Gantner had terminated a contractual relationship which had lasted more than 40 years, the period of notice ought to have been longer.

11 According to the order for reference, Basch considered that it was owed NLG 5 950 962 (EUR 2 700 428.82). However, it deducted from that sum NLG 376 509 (EUR 170 852.34), corresponding to the claims by Gantner that it considered to be justified, and accordingly limited its claim to NLG 5 555 143.60 (EUR 2 520 814.26). Basch accordingly effected a set-off by way of a declaration of intent.

12 In the proceedings before the Arrondissementsrechtbank Dordrecht, Gantner did not plead a counterclaim in its defence against Basch.

13 By document of 22 September 1999, notified to Basch on 21 December 1999, Gantner brought an action before the Landesgericht (Regional Court) Feldkirch (Austria) for an order requiring Basch to pay to it ATS 11 523 703.30 (EUR 837 460.18), corresponding to the sales price of the goods delivered to Basch up to 1999 which remained unpaid.

14 Basch argued that the claim should be dismissed. It contended that the portion of Gantner's claim that it considered to be justified, that is to say, EUR 170 852.34, was extinguished by the extra-judicial set-off that it had effected in the Netherlands. In regard to the balance of Gantner's claim (EUR 666 607.84), Basch argued that if, contrary to all probability, that claim was upheld, it would in any event be set off by the balance of its own claim for damages, which was the subject-matter of the dispute pending before the Arrondissementsrechtbank Dordrecht. Furthermore, Basch asked the Landesgericht to stay proceedings on the ground of lis pendens under Article 21, or on the ground that the proceedings constituted related actions within the meaning of Article 22 of the Convention.

15 The Landesgericht refused to suspend in their entirety the proceedings pending before it. It did, however, decide to stay its decision on the defence plea raised by Basch alleging set-off against the debt that it sought to recover before the Arrondissementsrechtbank Dordrecht.

16 Basch appealed to the Oberlandesgericht (Higher Regional Court) Innsbruck (Austria) against the Landesgericht's decision not to stay the proceedings in their entirety.

17 Taking the view that the defence plea alleging extra-judicial set-off effected by Basch in the Netherlands was capable of giving rise to lis pendens in regard to the two actions, the Oberlandesgericht set aside the first-instance decision in so far as it dismissed Basch's application for a stay on the basis of Article 21 of the Convention. On the other hand, the Oberlandesgericht upheld the dismissal of Basch's application for a stay of proceedings on the basis of Article 22 of the Convention, which thus became final.

18 Gantner appealed against that decision to the Oberster Gerichtshof.

19 The Oberster Gerichtshof takes the view, in the first place, that the respective claims of Basch and Gantner are not based on identical or similar facts. Before the Netherlands court, Basch seeks compensation for loss resulting from Gantner's wrongful termination of an alleged concession contract. In the proceedings which it subsequently brought before the Austrian courts, Gantner seeks payment of the sales price of goods delivered during the period prior to the termination of commercial relations. Conceptually, those claims are not based on conflicting assessments of the same facts and actions, but have different factual bases giving rise to different rights.

20 The Oberster Gerichtshof is, however, unsure whether, taking account of the relevant case-law of the Court (see Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861, paragraphs 16 to 18, and Case C-406/92 The Tatry [1994] ECR I-5439, paragraphs 30 to 34), there any grounds for holding that the requirements for lis pendens have been met in this case.

21 Second, the Oberster Gerichtshof points out that Basch relies on a contract for an indefinite period, whereas Gantner argues that there was a succession of sales contracts.

22 In that regard, the application brought by Basch before the Netherlands court raises the question of the existence of a contract for an indefinite period only as a preliminary issue. It is thus necessary to determine whether the decision which will be given by the Netherlands court, on an issue which legal theory in Austria still predominantly regards as being merely a preliminary issue, will have binding force for the subsequent proceedings in Austria. The Oberster Gerichtshof states

that this question is highly controversial in Austrian law.

23 The Oberster Gerichtshof accordingly decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

`1 Does the concept of "the same cause of action" in Article 21 of the Brussels Convention extend also to the defence of the defendant that he has extinguished a part of the claim sued for by extra-judicial set-off, where the part of this counterclaim that is allegedly not extinguished is the subject-matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another Contracting State?

2 In the examination of the question whether "the same cause of action" has been brought, are exclusively the pleadings of the plaintiff in the proceedings initiated by a later action decisive and the defence and submissions of the defendant therefore irrelevant, in particular also the defence of the procedural objection of set-off concerning a claim that is the subject-matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another Contracting State?

3. Where, on the basis of an action to enforce a contract seeking damages for unlawful termination of a long-term obligation, the question as to whether such a long-term obligation existed at all is decided, is that decision also binding in subsequent proceedings between the same parties?'

The first two questions

24 By its first two questions, which it is appropriate to examine together, the national court seeks to ascertain, essentially, whether Article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account must be taken not only of the claims of the respective applicants but also of the grounds of defence raised by a defendant.

25 In that regard it must be observed, first of all, that according to its wording Article 21 of the Convention applies where two actions are between the same parties and involve the same subject-matter (see Gubisch Maschinenfabrik, cited above, paragraph 14). Furthermore, the subject-matter of the dispute for the purpose of that provision means the end the action has in view (The Tatry, cited above, paragraph 41).

26 It thus appears from the wording of Article 21 of the Convention that it refers only to the applicants' respective claims in each of the sets of proceedings, and not to the defence which may be raised by a defendant.

27 Next, it follows from Case 129/83 Zelger v Salinitri [1984] ECR 2397, paragraphs 10 to 15, that, in so far as the substantive conditions laid down in paragraph 25 of the present judgment are met, lis pendens exists from the moment when two courts of different Contracting States are definitively seised of an action, that is to say, before the defendants have been able to put forward their arguments.

28 Although it is not applicable ratione temporis to the case in the main proceedings, 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 2001 L 12, p. 1) confirms that interpretation.

29 That regulation specifies, in particular for the purpose of the application of the rules on lis pendens, when a court is deemed to be seised. Under Article 30, a court is deemed to be seised either 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, 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.

30 Finally, the objective and automatic character of the lis pendens mechanism should be stressed. As the United Kingdom Government correctly points out, Article 21 of the Convention adopts a simple method to determine, at the outset of proceedings, which of the courts seised will ultimately hear and determine the dispute. The court second seised is required, of its own motion, to stay its proceedings until the jurisdiction of the court first seised is established. Once that has been established, it must decline jurisdiction in favour of the court first seised. The purpose of Article 21 of the Convention would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later date by the defendant. Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case.

31 It follows that, in order to determine whether there is lis pendens in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set-off, on which a defendant might subsequently rely when the court is definitively seised in accordance with its national law.

32 In the light of the foregoing, the answer to the first two questions is that Article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

The third question

33 By its third question, the national court seeks to ascertain whether the decision of a court of a Contracting State, which, in order to settle a claim, has had to determine the legal nature of the relations between the parties, is binding on the court of another Contracting State subsequently seised of a dispute between the same parties, in which the precise legal nature of the contractual relations between the parties is a matter of dispute.

34 As a preliminary point, it must be recalled that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18).

35 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which a case has been referred to it by the national court, in order to assess whether it has jurisdiction (PreussenElektra, cited above, paragraph 39, and Canal Satélite Digital, cited above, paragraph 19). The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see Bosman, cited above, paragraph 60, and Case C-451/99 Cura Anlagen [2002] ECR I-3193, paragraph 26).

36 It is therefore possible that there will be a refusal to rule on a question referred by a national

court for a preliminary ruling where, inter alia, the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, for example, PreussenElektra, paragraph 39, and Canal Satélite Digital, paragraph 19).

37 In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case and settle the questions of purely national law (see Joined Cases 36/80 and 71/80 Irish Creamery Milk Suppliers Association [1981] ECR 735, paragraph 6). By the same token, it is essential for the national court to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see Joined Cases 98/85, 162/85 and 258/85 Bertini and Others [1986] ECR 1885, paragraph 6, and Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 19).

38 That case-law may be transposed to orders for preliminary reference provided for by the Protocol (see, to that effect, Case C-220/95 Van den Boogaard [1997] ECR I-1147, paragraph 16; Case C-295/95 Farrell [1997] ECR I-1683, paragraph 11; and Case C-159/97 Castelletti [1999] ECR I-1597, paragraph 14).

39 In that connection it must be observed that in the case in the main proceedings the Austrian courts are seised of a claim for payment of the price of goods supplied. It is not clear from the order for reference how the exact legal nature of the contract on which Gantner bases its claim would be relevant for the purpose of giving judgment.

40 In those circumstances, the Court does not have sufficient information to indicate how an answer to the third question is necessary.

41 That question is therefore inadmissible.

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| **DOCNUM** | 62001J0111 |
| **AUTHOR** | Court of Justice of the European Communities |
| **FORM** | Judgment |
| **TREATY** | European Economic Community |
| **TYPDOC** | 6 ; CJUS ; cases ; 2001 ; J ; judgment |
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| **DOC** | 2003/05/08 |
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61990J0343 : N 37
61992J0092 : N 20 25
61993J0415 : N 34 35
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11997E234 : N 33 - 41
11997E293 : N 3
61997J0159 : N 38
61998J0098 : N 37
61998J0379 : N 34 36
61999J0390 : N 34
61999J0451 : N 35

**CONCERNS** Interprets 41968A0927(01)-A21

**SUB** Brussels Convention of 27 September 1968 ; Jurisdiction

**AUTLANG** German

**OBSERV** Austria ; Italy ; United Kingdom ; Member States ; Commission ; Institutions

**NATIONA** Austria

**NATCOUR** *A9* Oberster Gerichtshof, BeschluAƒ vom 22/02/2001
- Juristische BlAñtter 2001 p.796-800
- Zeitschrift fAîr Rechtsvergleichung, internationales Privatrecht und Europarecht 2001 p.192 (rA¬sumA¬)
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**PROCEDU** Reference for a preliminary ruling

**ADVGEN** LA¬ger

**JUDGRAP** Wathelet

**DATES** of document: 08/05/2003
of application: 12/03/2001

**Judgment of the Court (Third Chamber)**
**of 28 October 2004**
**Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV.**
**Reference for a preliminary ruling: Oberlandesgericht München - Germany.**
**Brussels Convention - Articles 20 and 57(2) - Failure by the defendant to enter an appearance - Defendant domiciled in another Contracting State - Geneva Convention on the Contract for the International Carriage of Goods by Road - Conflict between conventions.**
**Case C-148/03.**

In Case C-148/03,

REFERENCE for a preliminary ruling pursuant to the Protocol of 3 June 1971 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 from the Oberlandesgericht München (Germany), made by decision of 27 March 2003, registered at the Court on 31 March 2003, in the proceedings

Nürnberger Allgemeine Versicherungs AG

v

Portbridge Transport International BV,

THE COURT (Third Chamber),

composed of: A. Rosas, President of the Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Nürnberger Allgemeine Versicherungs AG, by K. Demuth, Rechtsanwalt,

- Portbridge Transport International BV, by J. Kienzle, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent,

- the United Kingdom Government, by K. Manji, acting as Agent, and by D. Beard, Barrister,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without a hearing or an Opinion,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Articles 20 and 57(2)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36, the Brussels Convention'), 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 (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) 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 (OJ 1997 C 15, p. 1).

2. The reference was made in the course of a dispute between Nürnberger Allgemeine Versicherungs AG (Nürnberger') and Portbridge Transport International BV (Portbridge') concerning a claim for compensation for the harm sustained by Nürnberger as a result of the loss of goods which were to have been transported by Portbridge to the United Kingdom.

Legal background

3. Under Article 57(1) and (2)(a) of the Brussels Convention:

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.'

4. The first paragraph of Article 20 of the Brussels Convention provides:

Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.'

5. The Convention on the Contract for the International Carriage of Goods by Road (CMR'), signed in Geneva on 19 May 1956, applies, in accordance with Article 1 to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country,... irrespective of the place of residence and the nationality of the parties'.

6. Under Article 31(1) of the CMR:

In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) the place where the goods were taken over by the carrier or the place designated for delivery is situated.'

7. Both the Federal Republic of Germany and the Kingdom of the Netherlands are parties to the CMR.

The dispute in the main proceedings and the question referred for a preliminary ruling

8. Nürnberger is a transportinsurance company incorporated under German law. It is claiming from Portbridge, a company incorporated under Netherlands law, compensation for the loss, in June 2000, of goods taken over by the latter in Vöhringen (Germany) which were to have been transported to the United Kingdom.

9. The carriage of goods at issue in the main proceedings is subject to the provisions of the CMR. In accordance with Article 31(1)(b) of that convention, the court seised, namely the Landgericht

Memmingen (Germany), has jurisdiction since the place where the goods to be transported were taken over is situated within its jurisdiction. Portbridge nevertheless contested the jurisdiction of that court and did not submit any pleas on the merits.

10. In an interlocutory judgment, the Landgericht Memmingen declined jurisdiction and dismissed Nürnberger's action on the ground that it was inadmissible. It considered that, notwithstanding the rules on jurisdiction laid down in Article 31 of the CMR, pursuant to the second sentence of Article 57(2)(a) of the Brussels Convention Article 20 of that convention must be applied where a defendant does not enter an appearance or refuses to submit any pleas on the merits of the case. In such circumstances that provision requires the court seised to declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.

11. Nürnberger appealed against that judgment to the Oberlandesgericht München, arguing that the provisions on jurisdiction laid down in Article 31(1) of the CMR override the general provisions on jurisdiction of the Brussels Convention even where the defendant has submitted no pleas on the merits, but has merely contested the jurisdiction of the court seised.

12. It was in those circumstances that the national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

Do the provisions on jurisdiction contained in other conventions take precedence over the general provisions on jurisdiction in the Brussels Convention even where a defendant domiciled in the territory of a State which is a party to the Brussels Convention and against whom an action has been brought before a court of another State which is a party to that Convention fails to submit pleas as to the merits of the case in the proceedings before that court?'

The question referred for a preliminary ruling

13. By that question the national court asks, essentially, whether Article 57(2)(a) of the Brussels Convention must be interpreted as meaning that a court of a Contracting State in which a defendant domiciled in another Contracting State is sued may base its jurisdiction on a specialised convention, to which the first State is also a party and which contains specific rules on jurisdiction excluding the application of the Brussels Convention, even where, in the course of the proceedings in question, the defendant does not submit pleas on the merits.

14. In that regard it must be noted that Article 57 introduces an exception to the general rule that the Brussels Convention takes precedence over other conventions signed by the Contracting States on jurisdiction and the recognition and enforcement of judgments. The purpose of that exception is to ensure compliance with the rules of jurisdiction laid down by specialised conventions, since when those rules were enacted account was taken of the specific features of the matters to which they relate (see Case C-406/92 Tatry [1994] ECR I-5439, paragraph 24).

15. Portbridge maintains, nevertheless, that the rules of jurisdiction set out in Article 31(1) of the CMR should be disregarded and must make way for the application of the Brussels Convention under the second sentence of Article 57(2)(a), according to which the court hearing the action shall, in any event, apply Article 20 of this convention'.

16. Article 20, it will be recalled, provides that, where a defendant is sued in a court of another Contracting State and does not enter an appearance, the court is to declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Brussels Convention.

17. In this case, the jurisdiction of the court must be regarded as derived from the Brussels Convention, because Article 57 specifically states that the rules of jurisdiction laid down by specialised conventions are not affected by the Brussels Convention.

18. In those circumstances, when verifying of its own motion whether it has jurisdiction with respect

to that convention, the court of a Contracting State in which a defendant domiciled in another Contracting State is sued and fails to enter an appearance must take account of the rules of jurisdiction laid down by specialised conventions to which the first Contracting State is also a party.

19. The same is true where, as in this case, the defendant, while submitting no pleas on the merits, formally contests the jurisdiction of the national court seised of the case.

20. Having regard to the foregoing, the answer to the question must be that Article 57(2)(a) of the Brussels Convention should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question submits no pleas on the merits.

Costs

21. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) rules as follows:

Article 57(2)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question, submits no pleas on the merits.


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| **DOCNUM** | 62003J0148 |
| **AUTHOR** | Court of Justice of the European Communities |
| **FORM** | Judgment |
| **TREATY** | European Economic Community |
| **TYPDOC** | 6 ; CJUS ; cases ; 2003 ; J ; judgment |
| **PUBREF** | European Court reports 2004 Page 00000 |
| **DOC** | 2004/10/28 |
| **LODGED** | 2003/03/31 |

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| **JURCIT** | 41968A0927(01)-A20<br>41968A0927(01)-A57P1<br>41968A0927(01)-A57P2LA |
| **CONCERNS** | Interprets 41968A0927(01)-A57P2LA |
| **SUB** | Brussels Convention of 27 September 1968 ; Jurisdiction |
| **AUTLANG** | German |
| **OBSERV** | Federal Republic of Germany ; United Kingdom ; Member States ; Commission ; Institutions |
| **NATIONA** | Federal Republic of Germany |
| **PROCEDU** | Reference for a preliminary ruling |
| **ADVGEN** | Tizzano |
| **JUDGRAP** | Schintgen |
| **DATES** | of document: 28/10/2004<br>of application: 31/03/2003 |

**Order of the Court (Fourth Chamber)**
**of 10 June 2004**
**Magali Warbecq v Ryanair Ltd.**
**Reference for a preliminary ruling: Tribunal du travail de Charleroi - Belgium.**
**Regulation (EC) No 44/2001 - Jurisdiction in civil and commercial matters - Court or tribunal having the power under Article 68 EC to request the Court to give a preliminary ruling - Court lacking jurisdiction to give a preliminary ruling.**
**Case C-555/03.**

In Case C-555/03,

REFERENCE to the Court under Article 68 EC by the Tribunal du travail de Chareleroi (Belgium) for a preliminary ruling in the proceedings pending before that court between

Magali Warbecq

and

Ryanair Ltd ,

on the interpretation 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 (OJ 2001 L 12, p. 1),

THE COURT (Fourth Chamber),

composed of: J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, K. Schiemann and E. Juhasz,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1. By judgment of 15 December 2003, received at the Court on 24 December 2003, the Tribunal du travail de Charleroi (Chareleroi Labour Court) referred to the Court for a preliminary ruling under Article 68 EC two questions on the interpretation 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 (OJ 2001 L 12, p. 1).

2. Those questions were raised in proceedings between Ms Warbecq, a Belgian national, and the Irish company Ryanair Ltd (hereinafter Ryanair'), established in Dublin (Ireland).

Legal framework

3. Article 61 EC states:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

...

(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;

...'

4. Article 19 of Regulation No 44/2001 provides:

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, ...

...'

Main proceedings and questions referred to the Court

5. By contract of employment signed in Dublin on 19 April 2001, Ms Warbecq was engaged by Ryanair as a customer services agent-inflight'.

6. Ryanair terminated the contract on 10 April 2002 and paid Ms Warbecq a severance allowance equivalent to seven days' remuneration.

7. On a date not specified in the judgment making the reference, Ms Warbecq brought proceedings against Ryanair before the Tribunal du travail de Charleroi. The application seeks an order for payment by the defendant in the main proceedings of certain sums by way of end-of-contract holiday allowance, additional severance pay and damages.

8. The claimant in the main proceedings maintains that under Article 19 of Regulation No 44/2201 she had the choice of bringing proceedings against her employer in the courts of the place where the latter was domiciled and in the courts for the place where she habitually carried out her work, in this case Charleroi Airport.

9. Ryanair contends that the Belgian courts have no jurisdiction to hear the action brought by Ms Warbecq.

10. Taking the view that the resolution of the dispute before it required an interpretation of Article 19 of Regulation No 44/2001, the Tribunal du travail decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

1. For the purposes of Article 19(2) of Council Regulation No 44/2001 ..., what are the relevant criteria for determining the Contracting State on the territory of which an employee habitually carries out his work, when that employee is employed as a member of the air crew of an undertaking engaged in international air passenger transport?

2. Which place should be regarded as the place where or from which such an employee in fact performs most of his duties for his employer when the duties under the contract of employment are to be performed partly on the ground (airport) of a Contracting State and partly on an aircraft which has the nationality of another Contracting State which also recruited the employee?'

Jurisdiction of the Court

11. Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.

12. Article 68(1) EC provides that Article 234 shall apply to this Title [IV concerning Visas, asylum, immigration and other policies related to free movement of persons] under the following circumstances and conditions: where a question on the interpretation... of acts of the institutions of the Community based on this Title is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court

or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon'.

13. Regulation No 44/2001 was adopted on the basis of Article 61(c) EC, which appears in Part Three, Title IV of the EC Treaty. In those circumstances, only a national court or tribunal against whose decisions there is no judicial remedy under national law may request the Court to give a preliminary ruling on the interpretation of that regulation.

14. It is not disputed in the present case that decisions taken by the Tribunal du travail de Charleroi in proceedings such as the main proceedings are amenable to appeal under national law.

15. Therefore, as the reference to the Court has not been made by a court or tribunal as referred to in Article 68 EC, the Court has no jurisdiction to give a preliminary ruling on the interpretation of Regulation No 44/2001.

16. Consequently, Article 92(1) of the Rules of Procedure must be applied and it must be held that the Court clearly has no jurisdiction to rule on the questions referred by the Tribunal du travail de Charleroi.

Costs

17. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

The Court of Justice of the European Communities clearly has no jurisdiction to answer the questions referred by the Tribunal du travail de Charleroi (Belgium) by judgment of 15 December 2003.

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|---|---|
| **DOCNUM** | 62003O0555 |
| **AUTHOR** | Court of Justice of the European Communities |
| **FORM** | Order |
| **TREATY** | European Economic Community |
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11997E068 : N 15
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32001R0044 : N 13 15

| | |
|---|---|
| **SUB** | Brussels Convention of 27 September 1968 ; Jurisdiction |
| **AUTLANG** | French |
| **NATIONA** | Belgium |
| **PROCEDU** | Reference for a preliminary ruling - inadmissible |
| **ADVGEN** | Tizzano |
| **JUDGRAP** | Cunha Rodrigues |
| **DATES** | of document: 10/06/2004<br>of application: 24/12/2003 |

# 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 |
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| **LEGBASE** | 12002E061<br>12002E067 |
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| **MODIFIES** | 32000R1347 Repeal<br>52002PC0222 Adoption |
| **MODIFIED** | Amended by 32004R2116 Completion Article 63.3 from 01/03/2005<br>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<br>PCONS;;<br>AV;PE;RENDU 20/09/2002<br>AV;CES;JO C 61/2003 P 76 |
| **MISCINF** | N/APPL DK<br>CNS 2002/0110 |
| **DATES** | of document: 27/11/2003<br>of effect: 01/08/2004; Entry into force See Art 72<br>of effect: 01/08/2004; Partial implementation See Art 72<br>of effect: 01/03/2005; Implementation See Art 72<br>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 |
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| | |
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| **ENDVAL** | 9999/99/99 |
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| **SUB** | Justice and home affairs ; Approximation of laws |
| **REGISTER** | 19200000 |
| **PREPWORK** | PR;COMM;CO 2004/0616 FIN |
| **DATES** | of document: 02/12/2004<br>of effect: 03/01/2005; Entry into force Date pub. + 20 See Art 2<br>of effect: 01/03/2005; Implementation See Art 2<br>end of validity: 99/99/9999 |

# 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

>ISO_7>ÅEEAú

- áôo ooç
- Ç åéäéê« åêêaèÜñéoç
- Ç =ñïoùñéí« äéa ßñéoç åôaéñßao. Ç äéïßêçoç êaé ç äéa ßñéoç ôùí =éoôùôoí
- Ç o=aaùa« å=é ßñçoço o=ü å=ßôñï=ï iå oêï=ü ôç ouíaøç ooiâéâaoiïu iå ôïoo =éoôùô¡o

>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

>ISO_7>ÅEEAú

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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

>ISO_7>ÅEEAú

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- I åéäéêüo åêêaèañéoô«o
- I å=ßôñï=ïo

>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

| | |
|---|---|
| **DOCNUM** | 32000R1346 |
| **AUTHOR** | Council |
| **FORM** | Regulation |
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| **TYPDOC** | 3 ; secondary legislation ; 2000 ; R |
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| **EARLACTS** | 31999Y0803(02).....Relation..... |
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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*

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>PIC FILE= "L_2000160EN.005201.EPS">

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| **LEGBASE** | 11997E061-PTC.....<br>11997E067-P1..... |
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| **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<br>Consultation procedure ;Opinion European Parliament;given on 17/11/99<br>Opinion Economic and Social Committee;OJ C 368/99 P 47 |
| **MISCINF** | CNS 92012 |
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**Judgment of the Court**
**of 4 February 1988**
**Horst Ludwig Martin Hoffmann v Adelheid Krieg.**
**Reference for a preliminary ruling: Hoge Raad - Netherlands.**
**Brussels Convention - Articles 26, 27, 31 and 36.**
**Case 145/86.**

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1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION OF JUDGMENTS - SCOPE - EFFECTS OF A JUDGMENT IN THE STATE IN WHICH IT WAS GIVEN - SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT

(CONVENTION OF 27 SEPTEMBER 1968, ART. 26 )

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - JUDGMENT ORDERING MAINTENANCE PAYMENTS - OBSTACLES TO PROCEEDING WITH ENFORCEMENT - CIRCUMSTANCE FALLING OUTSIDE THE SCOPE OF THE CONVENTION - DIVORCE DECREED IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT .

(CONVENTION OF 27 SEPTEMBER 1968, SECOND PARAGRAPH OF ART. 1 AND ART . 31 )

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT - GROUNDS FOR REFUSING ENFORCEMENT - IRRECONCILABLE JUDGMENTS - FOREIGN JUDGMENT MAKING A MATRIMONIAL MAINTENANCE ORDER - DECREE OF DIVORCE GRANTED IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT

(CONVENTION OF 27 SEPTEMBER 1968, ARTICLE 27 (3 ) )

4 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - FAILURE TO APPEAL AGAINST THE JUDGMENT GRANTING LEAVE TO ENFORCE - PLEADING, AT THE EXECUTION STAGE, OF GROUNDS FOR REFUSAL - NOT PERMITTED - OBLIGATIONS ON THE PART OF THE COURT SEISED - LIMITS

(CONVENTION OF 27 SEPTEMBER 1968, ART. 36 )

1 . A FOREIGN JUDGMENT WHICH HAS BEEN RECOGNIZED BY VIRTUE OF ARTICLE 26 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH JUDGMENT WAS GIVEN.

2 . A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION AND WHICH REMAINS ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN MUST NOT CONTINUE TO BE ENFORCED IN THE STATE WHERE ENFORCEMENT IS SOUGHT WHEN, UNDER THE LAW OF THE LATTER STATE, IT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION.

THE CONVENTION DOES NOT PRECLUDE THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT FROM DRAWING THE NECESSARY INFERENCES FROM A NATIONAL DECREE OF DIVORCE WHEN CONSIDERING THE ENFORCEMENT OF THE FOREIGN ORDER MADE IN REGARD TO MAINTENANCE OBLIGATIONS BETWEEN SPOUSES .

3 . A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS

IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3 ) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES .

4 . ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER REFERRED TO IN THAT PROVISION IS THEREAFTER PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID GROUND WHICH HE COULD HAVE PLEADED IN SUCH AN APPEAL, AND THAT THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. HOWEVER, THAT RULE DOES NOT APPLY WHEN IT HAS THE RESULT OF OBLIGING THE NATIONAL COURT TO MAKE THE EFFECTS OF A NATIONAL JUDGMENT WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION CONDITIONAL ON ITS RECOGNITION IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN.

IN CASE 145/86

REFERENCE TO THE COURT UNDER THE PROTOCOL OF 3 JUNE 1971 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, BY THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS ), FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

HORST LUDWIG MARTIN HOFFMAN, RESIDING AT ENSCHEDE (NETHERLANDS ),

AND

ADELHEID KRIEG, RESIDING AT NECKARGEMOEND (FEDERAL REPUBLIC OF GERMANY ),

ON THE INTERPRETATION OF ARTICLES 26, 27, 31 AND 36 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, G. BOSCO AND G. C . RODRIGUEZ IGLESIAS (PRESIDENTS OF CHAMBERS ), T. KOOPMANS, K. BAHLMANN, R . JOLIET AND T. F. O' HIGGINS, JUDGES,

ADVOCATE GENERAL : M. DARMON

REGISTRAR : D. LOUTERMAN, ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

HORST HOFFMAN, THE APPELLANT IN THE MAIN PROCEEDINGS, IN THE WRITTEN PROCEDURE BY E. KORTHALS ALTES, OF THE HAGUE BAR, AND IN THE ORAL PROCEDURE BY H. AE. UNIKEN VENEMA, ALSO OF THE HAGUE BAR,

ADELHEID KRIEG, THE RESPONDENT IN THE MAIN PROCEEDINGS, IN THE WRITTEN PROCEDURE BY H. J. BRONKHORST, OF THE HAGUE BAR, AND IN THE ORAL PROCEDURE BY B. J. DRIJBER, ALSO OF THE HAGUE BAR,

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY BY C. BOEHMER, ACTING AS AGENT,

THE UNITED KINGDOM BY S. J. HAY, ACTING AS AGENT,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, IN THE WRITTEN PROCEDURE BY L . GYSELEN, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, ASSISTED BY S. PIERI, AN ITALIAN CIVIL SERVANT ON SECONDMENT TO THE COMMISSION, AND IN THE WRITTEN PROCEDURE BY H. VAN LIER, A MEMBER OF ITS LEGAL DEPARTMENT,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 20 MAY 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 9 JULY 1987, GIVES THE FOLLOWING

JUDGMENT

COSTS

35 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED, IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT, THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS,

THE COURT,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD BY A JUDGMENT OF 6 JUNE 1986, HEREBY RULES :

(1 ) A FOREIGN JUDGMENT WHICH HAS BEEN RECOGNIZED BY VIRTUE OF ARTICLE 26 OF THE CONVENTION 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;

(2 ) A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION AND WHICH REMAINS ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN MUST NOT CONTINUE TO BE ENFORCED IN THE STATE WHERE ENFORCEMENT IS SOUGHT WHEN, UNDER THE LAW OF THE LATTER STATE, IT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION;

3 A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3 ) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES;

4 ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER REFERRED TO IN THAT PROVISION IS THEREAFTER PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID GROUND WHICH HE COULD HAVE PLEADED IN SUCH AN APPEAL AGAINST THE ENFORCEMENT ORDER, AND THAT THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. HOWEVER, THAT RULE DOES NOT APPLY WHEN IT HAS THE RESULT OF OBLIGING THE NATIONAL COURT TO MAKE THE EFFECTS OF A NATIONAL JUDGMENT WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION CONDITIONAL ON ITS RECOGNITION

IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN.

1 BY A JUDGMENT OF 6 JUNE 1986, WHICH WAS RECEIVED AT THE COURT ON 13 JUNE 1986, THE HOGE RAAD DER NEDERLANDEN REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER THE PROTOCOL OF 3 JUNE 1971 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 (HEREINAFTER REFERRED TO AS "THE CONVENTION ") FIVE QUESTIONS ON THE INTERPRETATION OF A NUMBER OF ARTICLES CONTAINED IN THAT CONVENTION.

2 THE QUESTIONS AROSE IN THE COURSE OF PROCEEDINGS BETWEEN H. L. M . HOFFMAN (HEREINAFTER REFERRED TO AS "THE HUSBAND ") AND A. KRIEG (HEREINAFTER "THE WIFE "), CONCERNING THE ENFORCEMENT IN THE NETHERLANDS OF A JUDGMENT OF THE AMTSGERICHT (LOCAL COURT ) HEIDELBERG, ORDERING THE HUSBAND TO MAKE MONTHLY MAINTENANCE PAYMENTS TO THE WIFE .

3 IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT THE PARTIES TO THE MAIN PROCEEDINGS ARE GERMAN NATIONALS WHO WERE MARRIED IN 1950 AND THAT, IN 1978, THE HUSBAND LEFT THE MATRIMONIAL HOME IN THE FEDERAL REPUBLIC OF GERMANY AND SETTLED IN THE NETHERLANDS. ON APPLICATION BY THE WIFE, THE HUSBAND WAS ORDERED BY A DECISION OF THE AMTSGERICHT, HEIDELBERG OF 21 AUGUST 1979 TO MAKE MAINTENANCE PAYMENTS TO HER AS A SEPARATED SPOUSE.

4 ON THE APPLICATION OF THE HUSBAND, THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT ), MAASTRICHT, GRANTED A DECREE OF DIVORCE BY A JUDGMENT OF 1 MAY 1980 GIVEN IN DEFAULT, APPLYING GERMAN LAW IN ACCORDANCE WITH NETHERLANDS RULES ON THE CONFLICT OF LAWS. ON 19 AUGUST THE DIVORCE WAS ENTERED IN THE CIVIL REGISTER AT THE HAGUE WHEREUPON IN THE NETHERLANDS THE MARRIAGE WAS DISSOLVED. THE DECREE OF DIVORCE, WHICH FALLS OUTSIDE THE SCOPE OF THE CONVENTION, HAD NOT BEEN RECOGNIZED IN THE FEDERAL REPUBLIC OF GERMANY AT THE TIME WHICH THE NATIONAL COURT CONSIDERS MATERIAL FOR THE PURPOSES OF THE CASE.

5 ON THE APPLICATION OF THE WIFE, THE PRESIDENT OF THE ARRONDISSMENTSRECHTBANK, ALMELO, MADE AN ORDER ON 29 JULY 1981 FOR THE ENFORCEMENT OF THE JUDGMENT OF THE AMTSGERICHT, HEIDELBERG, IN ACCORDANCE WITH ARTICLE 31 OF THE CONVENTION. IN APRIL 1982 NOTICE OF THAT ENFORCEMENT ORDER WAS SERVED ON THE HUSBAND WHO DID NOT APPEAL AGAINST THE ORDER.

6 ON 28 FEBRUARY 1983 THE WIFE OBTAINED AN ATTACHMENT OF THE HUSBAND' S EARNINGS PAID BY HIS EMPLOYER. THE HUSBAND BROUGHT INTERLOCUTORY PROCEEDINGS BEFORE THE ARRONDISSEMENTSRECHTBANK, ALMELO, IN ORDER TO HAVE THE ATTACHMENT ORDER DISCHARGED, OR AT LEAST SUSPENDED . HE WAS SUCCESSFUL AT FIRST INSTANCE BUT ON APPEAL THE GERECHTSHOF (REGIONAL COURT OF APPEAL ), ARNHEM, DISMISSED HIS APPLICATION . HE APPEALED IN CASSATION AGAINST THAT JUDGMENT TO THE HOGE RAAD .

7 THE HOGE RAAD TOOK THE VIEW THAT THE RESOLUTION OF THE DISPUTE DEPENDED ON THE INTERPRETATION OF A NUMBER OF ARTICLES IN THE CONVENTION AND REFERRED THE FOLLOWING QUESTIONS TO THE COURT FOR A PRELIMINARY RULING :

"1 . DOES THE OBLIGATION IMPOSED ON THE CONTRACTING STATES TO RECOGNIZE

A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE (ARTICLE 26 OF THE BRUSSELS CONVENTION ) MEAN THAT SUCH A JUDGMENT MUST BE GIVEN THE SAME EFFECT IN THE OTHER CONTRACTING STATES AS IT HAS UNDER THE LAW OF THE STATE IN WHICH IT WAS GIVEN AND DOES THIS MEAN THAT IT IS THEREFORE ENFORCEABLE IN THE SAME CASES AS IN THAT STATE?

2 . IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE :

MUST ARTICLES 26 AND 31 OF THE BRUSSELS CONVENTION, READ TOGETHER, BE INTERPRETED AS MEANING THAT THE OBLIGATION TO RECOGNIZE A JUDGMENT GIVEN IN A CONTRACTING STATE REQUIRES THAT, BECAUSE THE JUDGMENT REMAINS ENFORCEABLE UNDER THE LAW OF THE STATE IN WHICH IT WAS GIVEN, IT IS ALSO ENFORCEABLE IN THE SAME CASES IN THE OTHER CONTRACTING STATE?

3 . IF QUESTION 2 IS ANSWERED IN THE AFFIRMATIVE :

IN A CASE SUCH AS THIS, IS IT POSSIBLE TO PLEAD THAT THE GERMAN MAINTENANCE ORDER IS IRRECONCILABLE WITH THE SUBSEQUENT NETHERLANDS DECREE OF DIVORCE OR TO PLEAD PUBLIC POLICY (ARTICLE 27 (1 ) AND (3 ) OF THE BRUSSELS CONVENTION )?

4 . DOES (THE SCHEME OF ) THE BRUSSELS CONVENTION REQUIRE ACCEPTANCE OF THE RULE THAT, IF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT OF A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE FAILS TO PLEAD, IN THE APPEAL AGAINST THE ORDER FOR ENFORCEMENT OF THE JUDGMENT, MATTERS OF WHICH HE WAS AWARE BEFORE THE END OF THE PERIOD REFERRED TO IN THE FIRST PARAGRAPH OF ARTICLE 36 OF THE BRUSSELS CONVENTION AND WHICH PRECLUDE (FURTHER ) ENFORCEMENT OF THAT JUDGMENT, HE MAY NO LONGER PLEAD THOSE MATTERS IN SUBSEQUENT EXECUTION PROCEEDINGS IN WHICH HE IS APPEALING AGAINST (CONTINUED ) ENFORCEMENT?

5 . IF QUESTION 4 IS ANSWERED IN THE AFFIRMATIVE :

DOES (THE SCHEME OF ) THE BRUSSELS CONVENTION REQUIRE IT TO BE ASSUMED THAT THE COURT OF THE STATE IN WHICH AN ENFORCEMENT ORDER IS ISSUED MUST APPLY OF ITS OWN MOTION THE RULE REFERRED TO IN THE FOURTH QUESTION IN SUBSEQUENT EXECUTION PROCEEDINGS, EVEN IF ITS OWN LAW MAKES NO PROVISION FOR THE APPLICATION OF SUCH A RULE?

8 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS, THE COURSE OF THE PROCEDURE AND THE WRITTEN OBSERVATIONS SUBMITTED TO THE COURT, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

9 THE NATIONAL COURT' S FIRST QUESTION SEEKS, IN ESSENCE, TO ESTABLISH WHETHER A FOREIGN JUDGMENT, WHICH HAS BEEN RECOGNIZED PURSUANT TO ARTICLE 26 OF THE CONVENTION, MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH JUDGMENT WAS GIVEN.

10 IN THAT REGARD IT SHOULD BE RECALLED THAT THE CONVENTION "SEEKS TO FACILITATE AS FAR AS POSSIBLE THE FREE MOVEMENT OF JUDGMENTS, AND SHOULD BE INTERPRETED IN THIS SPIRIT ". RECOGNITION MUST THEREFORE "HAVE THE RESULT OF CONFERRING ON JUDGMENTS THE AUTHORITY AND EFFECTIVENESS ACCORDED TO THEM IN THE STATE IN WHICH THEY WERE GIVEN" (JENARD REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, OFFICIAL

JOURNAL 1979, C 59, PP . 42 AND 43 ).

11 IT FOLLOWS THAT THE ANSWER TO BE GIVEN TO THE NATIONAL COURT' S FIRST QUESTION IS THAT A FOREIGN JUDGMENT WHICH HAS BEEN RECOGNIZED BY VIRTUE OF ARTICLE 26 OF THE CONVENTION MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH JUDGMENT WAS GIVEN.

12 IN THE CIRCUMSTANCES OF THE MAIN PROCEEDINGS, AS DISCLOSED BY THE DOCUMENTS BEFORE THE COURT, THE NATIONAL COURT' S SECOND QUESTION SEEKS, IN ESSENCE, TO ESTABLISH WHETHER A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION MUST CONTINUE TO BE ENFORCED IN ALL CASES IN WHICH IT WOULD STILL BE ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN EVEN WHEN, UNDER THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT, THE JUDGMENT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION.

13 IN THIS INSTANCE, THE JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE IS ONE WHICH ORDERS A HUSBAND TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS OBLIGATIONS, ARISING OUT OF THE MARRIAGE, TO SUPPORT HER . SUCH A JUDGMENT NECESSARILY PRESUPPOSES THE EXISTENCE OF THE MATRIMONIAL RELATIONSHIP.

14 CONSIDERATION SHOULD THEREFORE BE GIVEN TO WHETHER THE DISSOLUTION OF THAT MATRIMONIAL RELATIONSHIP BY A DECREE OF DIVORCE GRANTED BY A COURT OF THE STATE IN WHICH THE ENFORCEMENT IS SOUGHT CAN TERMINATE THE ENFORCEMENT OF THE FOREIGN JUDGMENT EVEN WHEN THAT JUDGMENT REMAINS ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN, THE DECREE OF DIVORCE NOT HAVING BEEN RECOGNIZED THERE.

15 IN THAT CONNECTION IT MUST BE OBSERVED THAT INDENT (1 ) OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION PROVIDES THAT THE CONVENTION DOES NOT APPLY INTER ALIA TO THE STATUS OR LEGAL CAPACITY OF NATURAL PERSONS. MOREOVER, IT CONTAINS NO RULE REQUIRING THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT TO MAKE THE EFFECTS OF A NATIONAL DECREE OF DIVORCE CONDITIONAL ON RECOGNITION OF THAT DECREE IN THE STATE IN WHICH THE FOREIGN MAINTENANCE ORDER IS MADE.

16 THAT IS CONFIRMED BY ARTICLE 27 (4 ) OF THE CONVENTION, WHICH EXCLUDES IN PRINCIPLE THE RECOGNITION OF ANY FOREIGN JUDGMENT INVOLVING A CONFLICT WITH A RULE - CONCERNING INTER ALIA THE STATUS OF NATURAL PERSONS - OF THE PRIVATE INTERNATIONAL LAW OF THE STATE IN WHICH THE RECOGNITION IS SOUGHT. THAT PROVISION DEMONSTRATES THAT, AS FAR AS THE STATUS OF NATURAL PERSONS IS CONCERNED, IT IS NOT THE AIM OF THE CONVENTION TO DEROGATE FROM THE RULES WHICH APPLY UNDER THE DOMESTIC LAW OF THE COURT BEFORE WHICH THE ACTION HAS BEEN BROUGHT.

17 IT FOLLOWS THAT THE CONVENTION DOES NOT PRECLUDE THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT FROM DRAWING THE NECESSARY INFERENCES FROM A NATIONAL DECREE OF DIVORCE WHEN CONSIDERING THE ENFORCEMENT OF THE FOREIGN MAINTENANCE ORDER.

18 THUS THE ANSWER TO BE GIVEN TO THE NATIONAL COURT IS THAT A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION AND WHICH REMAINS ENFORCEABLE IN THE STATE

IN WHICH IT WAS GIVEN MUST NOT CONTINUE TO BE ENFORCED IN THE STATE WHERE ENFORCEMENT IS SOUGHT WHEN, UNDER THE LAW OF THE LATTER STATE, IT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION.

19 THE NATIONAL COURT' S THIRD QUESTION SEEKS, IN ESSENCE, TO ESTABLISH WHETHER A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3 ) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES OR, ALTERNATIVELY, WHETHER SUCH A FOREIGN JUDGMENT IS CONTRARY TO PUBLIC POLICY IN THE STATE IN WHICH RECOGNITION IS SOUGHT WITHIN THE MEANING OF ARTICLE 27 (1 ).

20 THE PROVISIONS TO BE INTERPRETED SET OUT THE GROUNDS FOR NOT RECOGNIZING FOREIGN JUDGMENTS. UNDER THE SECOND PARAGRAPH OF ARTICLE 34, AN ENFORCEMENT ORDER MAY BE REFUSED FOR THOSE SAME REASONS.

21 AS FAR AS THE SECOND PART OF THE THIRD QUESTION IS CONCERNED, IT SHOULD BE NOTED THAT, ACCORDING TO THE SCHEME OF THE CONVENTION, USE OF THE PUBLIC-POLICY CLAUSE, WHICH "OUGHT TO OPERATE ONLY IN EXCEPTIONAL CASES" (JENARD REPORT, CITED ABOVE, AT P. 44 ) IS IN ANY EVENT PRECLUDED WHEN, AS HERE, THE ISSUE IS WHETHER A FOREIGN JUDGMENT IS COMPATIBLE WITH A NATIONAL JUDGMENT; THE ISSUE MUST BE RESOLVED ON THE BASIS OF THE SPECIFIC PROVISION UNDER ARTICLE 27 (3 ), WHICH ENVISAGES CASES IN WHICH THE FOREIGN JUDGMENT IS IRRECONCILABLE WITH A JUDGMENT GIVEN IN A DISPUTE BETWEEN THE SAME PARTIES IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

22 IN ORDER TO ASCERTAIN WHETHER THE TWO JUDGMENTS ARE IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3 ), IT SHOULD BE EXAMINED WHETHER THEY ENTAIL LEGAL CONSEQUENCES THAT ARE MUTUALLY EXCLUSIVE .

23 IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT, IN THE PRESENT CASE, THE ORDER FOR ENFORCEMENT OF THE FOREIGN MAINTENANCE ORDER WAS ISSUED AT A TIME WHEN THE NATIONAL DECREE OF DIVORCE HAD ALREADY BEEN GRANTED AND HAD ACQUIRED THE FORCE OF RES JUDICATA, AND THAT THE MAIN PROCEEDINGS ARE CONCERNED WITH THE PERIOD FOLLOWING THE DIVORCE .

24 THAT BEING SO, THE JUDGMENTS AT ISSUE HAVE LEGAL CONSEQUENCES WHICH ARE MUTUALLY EXCLUSIVE. THE FOREIGN JUDGMENT, WHICH NECESSARILY PRESUPPOSES THE EXISTENCE OF THE MATRIMONIAL RELATIONSHIP, WOULD HAVE TO BE ENFORCED ALTHOUGH THAT RELATIONSHIP HAS BEEN DISSOLVED BY A JUDGMENT GIVEN IN A DISPUTE BETWEEN THE SAME PARTIES IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

25 THE ANSWER TO BE GIVEN TO THE THIRD QUESTION SUBMITTED BY THE NATIONAL COURT IS THEREFORE THAT A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3 ) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES.

26 THE NATIONAL COURT' S FOURTH AND FIFTH QUESTIONS ASK WHETHER ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER IN ACCORDANCE WITH THAT PROVISION IS PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID ARGUMENT WHICH HE COULD HAVE RAISED IN AN APPEAL AGAINST THE

ENFORCEMENT ORDER, AND WHETHER THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

27 IN ANSWERING THOSE QUESTIONS IT SHOULD FIRST BE POINTED OUT THAT, IN ORDER TO LIMIT THE REQUIREMENTS TO WHICH THE ENFORCEMENT OF A JUDGMENT DELIVERED IN ONE CONTRACTING STATE MAY BE SUBJECTED IN ANOTHER CONTRACTING STATE, THE CONVENTION LAYS DOWN A VERY SIMPLE PROCEDURE FOR THE ISSUE OF THE ENFORCEMENT ORDER, WHICH MAY BE WITHHELD ONLY ON THE GROUNDS EXHAUSTIVELY SET OUT IN ARTICLES 27 AND 28 . HOWEVER, 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 (JUDGMENT OF 2 JULY 1985 IN CASE 148/84 DEUTSCHE GENOSSENSCHAFTSBANK V BRASSERIE DU PECHEUR (( 1985 )) ECR 1981 ).

28 CONSEQUENTLY, A FOREIGN JUDGMENT FOR WHICH AN ENFORCEMENT ORDER HAS BEEN ISSUED IS EXECUTED IN ACCORDANCE WITH THE PROCEDURAL RULES OF THE DOMESTIC LAW OF THE COURT IN WHICH EXECUTION IS SOUGHT, INCLUDING THOSE ON LEGAL REMEDIES.

29 HOWEVER, THE APPLICATION, FOR THE PURPOSES OF THE EXECUTION OF A JUDGMENT, OF THE PROCEDURAL RULES OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY NOT IMPAIR THE EFFECTIVENESS OF THE SCHEME OF THE CONVENTION AS REGARDS ENFORCEMENT ORDERS.

30 IT FOLLOWS THAT THE LEGAL REMEDIES AVAILABLE UNDER NATIONAL LAW MUST BE PRECLUDED WHEN AN APPEAL AGAINST THE EXECUTION OF A FOREIGN JUDGMENT FOR WHICH AN ENFORCEMENT ORDER HAS BEEN ISSUED IS LODGED BY THE SAME PERSON WHO COULD HAVE APPEALED AGAINST THE ENFORCEMENT ORDER AND IS BASED ON AN ARGUMENT WHICH COULD HAVE BEEN RAISED IN SUCH AN APPEAL . IN THOSE CIRCUMSTANCES, TO CHALLENGE THE EXECUTION WOULD BE TANTAMOUNT TO AGAIN CALLING IN QUESTION THE ENFORCEMENT ORDER AFTER THE EXPIRY OF THE STRICT TIME-LIMIT LAID DOWN BY THE SECOND PARAGRAPH OF ARTICLE 36 OF THE CONVENTION, AND WOULD THEREBY RENDER THAT PROVISION INEFFECTIVE.

31 IN VIEW OF THE MANDATORY NATURE OF THE TIME-LIMIT LAID DOWN BY ARTICLE 36 OF THE CONVENTION, THE NATIONAL COURT MUST ENSURE THAT IT IS OBSERVED . IT SHOULD THEREFORE OF ITS OWN MOTION DISMISS AS INADMISSIBLE AN APPEAL LODGED PURSUANT TO NATIONAL LAW WHEN THAT APPEAL HAS THE EFFECT OF CIRCUMVENTING THAT TIME-LIMIT.

32 NEVERTHELESS, THAT RULE, ARISING FROM THE SCHEME OF THE CONVENTION, CANNOT APPLY WHEN - AS IN THIS CASE - IT WOULD HAVE THE RESULT OF OBLIGING THE NATIONAL COURT TO IGNORE THE EFFECTS OF A NATIONAL DECREE OF DIVORCE, WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION, ON THE GROUND THAT THE DECREE IS NOT RECOGNIZED IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN .

33 AS WAS ESTABLISHED IN THE CONTEXT OF THE REPLY TO THE SECOND QUESTION, THE CONVENTION CONTAINS NO RULE COMPELLING THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT TO MAKE THE EFFECTS OF A NATIONAL DECREE OF DIVORCE CONDITIONAL ON RECOGNITION OF THAT DECREE IN THE STATE IN WHICH A FOREIGN MAINTENANCE ORDER - FALLING WITHIN THE SCOPE OF THE CONVENTION

- WAS MADE.

34 ACCORDINGLY, THE ANSWER TO BE GIVEN TO THE NATIONAL COURT' S FOURTH AND FIFTH QUESTIONS IS THAT ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER REFERRED TO IN THAT PROVISION IS THEREAFTER PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID GROUND WHICH HE COULD HAVE PLEADED IN SUCH AN APPEAL AGAINST THE ENFORCEMENT ORDER, AND THAT THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT . HOWEVER, THAT RULE DOES NOT APPLY WHEN IT HAS THE RESULT OF OBLIGING THE NATIONAL COURT TO MAKE THE EFFECTS OF A NATIONAL JUDGMENT WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION CONDITIONAL ON ITS RECOGNITION IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN.

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| **SUB** | Brussels Convention of 27 September 1968 ; Enforcement of judgments |
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| **NOTES** | Verheul, Hans: Netherlands International Law Review 1988 p.84-86<br>Gaudemet-Tallon, H.: Revue critique de droit international privé 1988 p.605-609<br>Gill, A.V.: Irish Law Times and Solicitors' Journal 1988 p.250-252<br>X: Gaceta Jurídica de la CEE - Boletín 1988 no 34 p.50-52<br>Linke, Hartmut: Recht der internationalen Wirtschaft 1988 p.822-826<br>Huet, André: Journal du droit international 1989 p.449-453<br>Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1989 p.208<br>Schack, Haimo: Praxis des internationalen Privat- und Verfahrensrechts 1989 p.139-142<br>Di Blase, Antonietta: Rivista di diritto internazionale privato e processuale 1989 p.331-342<br>Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1990 no 209<br>Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1990 p.a9<br>Hartley, Trevor: European Law Review 1991 p.64-69 |
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# CISG

## United Nations Convention on Contracts for the International Sale of Goods (1980)

### Preambel

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,

*Beeing 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 decreed as follows:

## PART I
## Sphere of Application and General Provisions

### Chapter I
### 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.

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## 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 or this article.

**Article 13**
For the purposes of this Convention "writing" includes telegram and telex.

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## 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 counter-offer.
(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 for 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.

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## PART III
## Sale of Goods

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### 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.

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## 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 related 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 clearly 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 performance.

**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.

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## 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 increases 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) or 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.

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## 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.

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## 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 to 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 instalments, 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. Exemptions**

**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 non-receipt.
(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) if 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 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.

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## 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,

# 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.

**Judgment of the Court**
**of 29 June 1994**
**Custom Made Commercial Ltd v Stawa Metallbau GmbH.**
**Reference for a preliminary ruling: Bundesgerichtshof - Germany.**
**Brussels Convention - Place of performance of an obligation - Uniform law of sale.**
**Case C-288/92.**

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Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ° Special jurisdiction ° Court of the place of performance of a contractual obligation ° Determination of the place of performance according to the substantive law, including, if appropriate, the uniform law on international sales, applicable according to the conflicts rules of the court seised

(Convention of 27 September 1968, Art. 5(1), as amended by the Accession Convention of 1978)

The place of performance of the obligation in question was chosen as the criterion of jurisdiction in Article 5(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought. That criterion makes it possible for a defendant to be sued in the courts for the place of performance of the obligation in question, even where the court thus designated is not that which has the closest connection with the dispute.

The court before which the matter is brought must determine in accordance with its own rules of conflicts of laws, including, if appropriate, a uniform law, what is the law applicable to the legal relationship in question and define, in accordance with that law, the place of performance of the contractual obligation in question. Article 5(1) of the Convention, as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

In Case C-288/92,

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Bundesgerichtshof (Federal Court of Justice) (Germany) for a preliminary ruling in the proceedings pending before that court between

Custom Made Commercial Ltd

and

Stawa Metallbau GmbH

on the interpretation of Article 5(1) and 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 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and ° amended version ° p. 77),

THE COURT,

composed of: O. Due, President, J.C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C.N. Kakouris (Rapporteur), F.A. Schockweiler, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° the German Government, by Professor Christof Boehmer, Ministerialrat at the Federal Ministry of Justice, acting as Agent,

° the Italian Government, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

° the Commission of the European Communities, by P. van Nuffel, of the Legal Service, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt, Duesseldorf,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government and the Commission of the European Communities at the hearing on 19 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 8 March 1994,

gives the following

Judgment

1 By order of 26 March 1992, received at the Court on 30 June 1992, the Bundesgerichtshof referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 (OJ 1978 L 304, p. 36) ("the Convention"), 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 (OJ 1978 L 304, p. 1 and ° amended version ° p. 77), a number of questions on the interpretation of Article 5(1) and the first paragraph of Article 17 of the Convention.

2 Those questions arose in proceedings between Stawa Metallbau GmbH ("Stawa"), which has its seat in Bielefeld (Germany), and Custom Made Commercial Ltd ("Custom Made"), which has its seat in London, concerning the payment by the latter of merely part of the price agreed under a contract for the supply of windows and doors to be manufactured by Stawa.

3 According to the order for reference, Stawa gave a verbal undertaking in London on 6 May 1988, following negotiations conducted in English, to supply the goods to Custom Made. The goods were to be used for a building complex in London. The contract, the first to be concluded between the parties, stipulated that payment was to be in sterling.

4 Stawa confirmed the conclusion of the contract by a letter of 9 May 1988 written in English, to which it attached for the first time its general business conditions written in German. Paragraph 8 of those general conditions stated that in the event of a dispute between the parties the place of performance and jurisdiction was to be Bielefeld. Custom Made did not raise any objection to those general conditions.

5 When Custom Made paid only part of the stipulated price, Stawa brought proceedings for recovery

of the balance before the Landgericht (Regional Court) Bielefeld. On 13 December 1989 that court delivered a default judgment in which it ordered Custom Made to pay to Stawa the sum of 144 742.08 plus interest.

6 In its application to have that judgment set aside, Custom Made submitted, inter alia, that the German courts lacked international jurisdiction. On 9 May 1990 the Landgericht Bielefeld delivered an interlocutory judgment declaring Stawa' s claim to be admissible.

7 Custom Made appealed against that decision to the Oberlandesgericht (Higher Regional Court) Hamm, once again claiming that the German courts lacked international jurisdiction.

8 The Oberlandesgericht dismissed that appeal by judgment of 8 March 1991, in which it based the international jurisdiction of the German courts on Article 5(1) of the Convention, in conjunction with the first part of Article 59(1) of the Uniform Law on the International Sale of Goods annexed to the Hague Convention of 1 July 1964 (United Nations Treaty Series, 1972, Vol. 834, p. 107 et seq.), which provides that the buyer must pay the price to the seller at the seller' s place of business or, if he does not have a place of business, at his habitual residence.

9 Custom Made brought an appeal on a point of law before the Bundesgerichtshof against the judgment of the Oberlandesgericht.

10 The Bundesgerichtshof took the view that the dispute gave rise to problems of interpretation of the Convention and for that reason decided to stay the proceedings until the Court had delivered a preliminary ruling on the following questions:

"1. (a) Is the place of performance under Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court hearing the case where the case concerns a claim for payment of the price brought by the supplier against the customer under a contract for manufacture and supply, according to the conflicts rules of the court hearing the case that contract is governed by uniform sales law and under that law the place of performance of the obligation to pay the price is the place of establishment of the plaintiff supplier?

(b) In the event that the Court of Justice replies in the negative to Question 1(a):

How is the place of performance under Article 5(1) of the Convention to be determined in such a case?

2. In the event that according to the answers to Questions 1(a) and (b) the German courts cannot derive jurisdiction from Article 5(1) of the Convention:

(a) Can a jurisdiction agreement validly be made under the third hypothesis in the second sentence of Article 17, first paragraph, of the Convention (in the 1978 version) where after the oral conclusion of a contract the supplier confirms the conclusion of the contract in writing and that written confirmation is accompanied for the first time by general business conditions containing a jurisdiction clause, the customer does not dispute the jurisdiction clause, there is no trade practice at the place where the customer is established to the effect that the absence of response to such a document is to be regarded as assent to the jurisdiction clause, the customer is not aware of any such trade practice and it is the first time that the parties have done business with each other?

(b) In the event that the Court of Justice replies in the affirmative to Question 2(a):

Is that also true where the general business conditions containing the jurisdiction clause are in a language which the customer does not understand and is not that in which the contract was negotiated

and concluded and where the written confirmation of the contract, written in the language in which the contract was negotiated and concluded, refers generally to the attached general business conditions but not specifically to the jurisdiction clause?

3. In the event that the Court of Justice replies in the affirmative to Questions 2(a) and (b):

In relation to a jurisdiction clause contained in general business conditions which meets the requirements laid down in Article 17 of the Convention for a valid jurisdiction agreement, does Article 17 preclude further examination, under the national substantive law which is applicable in accordance with the conflicts rules of the court hearing the case, of the question whether the jurisdiction clause is validly incorporated in the contract?"

Question 1(a)

11 In this question, as elucidated by the grounds of the order for reference, the national court asks whether Article 5(1) of the Convention is to be understood as meaning that, in the case of a claim for payment by a supplier against his customer under a contract for manufacture and supply, the place of performance of the obligation to pay must be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court seised, even if those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

12 Article 2 of the Convention sets out the general rule that the jurisdiction of a court is based on the place of the defendant' s domicile, although Article 5 also confers jurisdiction on other courts, the choice of which is a matter for the applicant. This freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may most conveniently be called upon to take cognizance of the matter (see Case 12/76 Tessili v Dunlop [1976] ECR 1473, paragraph 13). However, Article 5 does not establish that connecting factor itself as the criterion for the choice of the competent forum. It is not possible for an applicant to sue a defendant before any court having a connection with the dispute since Article 5 lists exhaustively the criteria for linking a dispute to a specific court.

13 Article 5(1) provides in particular that a defendant may, in matters relating to a contract, be sued in the courts "for the place of performance of the obligation in question". That place usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it and explains why that court has jurisdiction in contractual matters (see Case 266/85 Shenavai v Kreischer [1987] ECR 239, paragraph 18).

14 Although the connecting factor is the reason which led to the adoption of Article 5(1) of the Convention, the criterion employed in that provision is not the connection with the court seised but, rather, only the place of performance of the obligation which forms the basis of the legal proceedings.

15 The place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought.

16 It has been submitted, certainly, that the criterion of the place of performance of the obligation which specifically forms the basis of the applicant' s action, a criterion expressly laid down in Article 5(1) of the Convention, may in certain cases have the effect of conferring jurisdiction on a court which has no connection with the dispute, and that, in such a case, the criterion explicitly laid down should be departed from on the ground that the result it yields would be contrary to the

aim of Article 5(1) of the Convention.

17 That last argument cannot be accepted, however.

18 The use of criteria other than that of the place of performance, where that confers jurisdiction on a court which has no connection with the case, might jeopardize the possibility of foreseeing which court will have jurisdiction and for that reason be incompatible with the aim of the Convention.

19 The effect of accepting as the sole criterion of jurisdiction the existence of a connecting factor between the facts at issue in a dispute and a particular court would be to oblige the court before which the dispute is brought to consider other factors, in particular the pleas relied on by the defendant, in order to determine whether such a connection exists and would thus render Article 5(1) nugatory.

20 Such an examination would also be contrary to the purposes and spirit of the Convention, which requires an interpretation of Article 5 enabling the national court to rule on its own jurisdiction without being compelled to consider the substance of the case (see Case 34/82 Peters v ZNAV [1983] ECR 987, paragraph 17).

21 It follows that under Article 5(1), in matters relating to a contract, a defendant may be sued in the courts for the place of performance of the obligation in question, even where the court thus designated is not that which has the closest connection with the dispute.

22 It is accordingly necessary to identify the "obligation" referred to in Article 5(1) of the Convention and to determine its "place of performance".

23 The Court has ruled that the obligation cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff' s action is based (see Case 14/76 De Bloos v Bouyer [1976] ECR 1497, paragraphs 10 and 13).

24 Having allowed an exception in the case of contracts of employment presenting certain special features (see, in particular, Case 133/81 Ivenel v Schwab [1982] ECR 1891), in paragraph 20 of its judgment in Shenavai, cited above, the Court confirmed that the obligation referred to in Article 5(1) is the contractual obligation which forms the actual basis of the legal proceedings.

25 That interpretation was endorsed on the conclusion of the Convention of 26 May 1989 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 (OJ 1989 L 285, p. 1). On that occasion the rule in Article 5(1) of the Convention was maintained in the same terms and was supplemented by a single exception relating to contracts of employment which had already been recognized by way of interpretation in the Court' s case-law cited above.

26 With regard to the "place of performance", the Court has ruled that it is for the court before which the matter is brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction and that it must for that purpose determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define, in accordance with that law, the place of performance of the contractual obligation in question (see Tessili, cited above, paragraph 13, as referred to in paragraph 7 of Shenavai, cited above).

27 That interpretation must also be accepted in the case where the conflicts rules of the court seised refer to the application to contractual relations of a "uniform law" such as that in issue in the main proceedings.

28 That interpretation is not called in question by a provision such as Article 59(1) of the Uniform

Law, under which the place of performance of the obligation on the buyer to pay the price to the seller is the seller' s place of business or, if he does not have a place of business, his habitual residence, subject only to the proviso that the parties to the contract have not stipulated a different place for the performance of that obligation under Article 3 of that Law.

29 It follows that Article 5(1) of the Convention must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

30 In view of the reply to Question 1(a), it is not necessary to reply to the other questions asked by the national court.

Costs

31 The costs incurred by the German and Italian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to a question referred to it by the Bundesgerichtshof, by order of 26 March 1992, hereby rules:

Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

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| **DOCNUM** | 61992J0288 |
| **AUTHOR** | Court of Justice of the European Communities |
| **FORM** | Judgment |
| **TREATY** | European Economic Community |
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**CONCERNS** Interprets 41968A0927(01)-A05PT1

**SUB** Brussels Convention of 27 September 1968 ; Jurisdiction

**AUTLANG** German

**OBSERV** Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions

**NATIONA** Federal Republic of Germany

**NATCOUR**
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*P1* Bundesgerichtshof, Beschluß vom 13/10/1994 (VII ZR 258/91)

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**PROCEDU** Reference for a preliminary ruling

**ADVGEN** Lenz

**JUDGRAP** Kakouris

**DATES** of document: 29/06/1994
of application: 30/06/1992

**Judgment of the Court
of 17 September 2002
Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS).
Reference for a preliminary ruling: Corte suprema di cassazione - Italy.
Brussels Convention - Article 5(1) and (3) - Special jurisdiction - Pre-contractual liability.
Case C-334/00.**

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to tort, delict or quasi-delict - Definition - Action in pre-contractual liability founded on breach of rules of law during negotiations with a view to the formation of a contract - Included

(Brussels Convention of 27 September 1968, Art. 5(3))

$$In circumstances characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.

(see para. 27, operative part )

In Case C-334/00,

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Corte suprema di cassazione (Italy) for a preliminary ruling in the proceedings pending before that court between

Fonderie Officine Meccaniche Tacconi SpA

and

Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS),

on the interpretation of Article 5(1) and (3) of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, M. Wathelet, R. Schintgen, J.N. Cunha Rodrigues (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Fonderie Officine Meccaniche Tacconi SpA, by F. Franchi, avvocato,

- Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), by M.P. Ginelli, avvocato, and R. Rudek, Rechtsanwalt,

- the Commission of the European Communities, by A.-M. Rouchaud and G. Bisogni, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

1 By order of 9 June 2000, received at the Court on 11 September 2000, the Corte suprema di cassazione (Court of Cassation) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 (OJ 1978 L 304, p. 36) three questions on the interpretation of Article 5(1) and (3) of that convention, 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 (OJ 1978 L 304, p. 1 and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter the Brussels Convention).

2 Those questions were raised in proceedings between Fonderie Officine Meccaniche Tacconi SpA (Tacconi), a company incorporated under Italian law, established in Perugia (Italy), and Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), a company incorporated under German law, established in the Federal Republic of Germany, concerning compensation claimed from HWS by Tacconi to make good the damage allegedly caused to Tacconi by HWS's breach of its duty to act honestly and in good faith on the occasion of negotiations with a view to the formation of a contract.

Legal background

The Brussels Convention

3 The first paragraph of Article 2 of the Brussels Convention provides:

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.

4 Article 5(1) and (3) of the Brussels Convention provides:

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;...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

National law

5 Article 1337 of the Italian Codice Civile (Civil Code) provides that, in the context of the negotiation and formation of a contract, the parties must act in good faith.

The main proceedings and the questions referred for a preliminary ruling

6 On 23 January 1996 Tacconi brought an action against HWS in the Tribunale di Perugia (District Court, Perugia) for a declaration that a contract between HWS and a leasing company B.N. Commercio e Finanza SpA (BN) for the sale of a moulding plant, in respect of which BN and Tacconi had already, with the agreement of HWS, concluded a leasing contract, had not been concluded because of HWS's unjustified refusal to carry out the sale, and hence its breach of its duty to act honestly and in good faith. HWS thereby infringed the legitimate expectations of Tacconi, which had relied on the contract of sale being concluded. Tacconi therefore asked the court to order HWS to make good all the damage allegedly caused, which was calculated at ITL 3 000 000 000.

7 In its defence, HWS pleaded that the Italian court lacked jurisdiction because of the existence of an arbitration clause and, in the alternative, because Article 5(1) of the Brussels Convention was applicable. On the substance, it contended that Tacconi's claim should be dismissed and, strictly in the alternative and as a counterclaim, that Tacconi should be ordered to pay it DEM 450 248.36.

8 By application served on 16 March 1999, Tacconi applied, pursuant to Article 41 of the Italian Codice di Procedura Civile (Code of Civil Procedure) concerning preliminary decisions on jurisdiction, to the Corte suprema di cassazione for a declaration that the Italian courts had jurisdiction over the main proceedings. Tacconi claimed that no agreement had been reached between it and HWS because its proposals had all been met by counter-proposals. It therefore relied on the pre-contractual liability of HWS on the basis of Article 1337 of the Italian Civil Code and submitted that under Article 5(3) of the Brussels Convention the place where the harmful event occurred must also be understood as the place where the person claiming to have been harmed has sustained loss. The loss at issue in the main proceedings was incurred in Perugia, where Tacconi has its office.

9 In its order for reference, the national court considered that the criterion for special jurisdiction in Article 5(1) of the Brussels Convention does not appear to apply to pre-contractual liability, which does not result from the non-performance of a contractual obligation. No such obligation existed in the case at issue in the main proceedings, since no contract was concluded.

10 Since it considered that an interpretation of the Brussels Convention was thus needed in order to decide the issue of jurisdiction, the Corte suprema di cassazione decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Does an action against a defendant seeking to establish pre-contractual liability fall within the scope of matters relating to tort, delict or quasi-delict (Article 5(3) of the Brussels Convention)?

2. If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Brussels Convention), and if it does, what is "the obligation in question"?

3. If not, is the general criterion of the domicile of the defendant the only criterion applicable?

Question 1

11 By its first question the national court asks whether an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Observations submitted to the Court

12 Tacconi and the Commission submit, citing the case-law of the Court (Case 189/87 Kalfelis [1988] ECR 5565, Case C-261/90 Reichert and Kockler [1992] ECR I-2149, and Case C-26/91 Handte [1992] ECR I-3967), that since pre-contractual liability does not derive from obligations freely assumed by one party towards another, it is a matter relating to tort, delict or quasi-delict.

13 According to Tacconi, it is quite plain that at the pre-contractual stage, since the contract

has not yet been concluded, there is no contractual link which could bind the parties to each other.

14 The Commission submits that, on the basis of the Court's case-law, it is possible to state a general principle that all claims referred to by the Brussels Convention seeking to establish the liability of a defendant give rise, in any event, to the application of one of the two criteria of special jurisdiction in Article 5(1) and (3) of the convention.

15 The Commission concludes that disputes concerning pre-contractual liability fall within the scope of Article 5(3) of the Brussels Convention, since, first, an action founded on the defendant's pre-contractual liability is by definition a claim seeking to establish liability on the part of the defendant and, second, that liability is not based on obligations freely assumed by the defendant towards the claimant, but on duties as to conduct imposed, more or less specifically, by a source external to the parties involved in the pre-contractual relationship.

16 HWS submits, on the other hand, that pre-contractual liability is of a different nature from liability in tort, delict or quasi-delict. The latter applies to any person who breaches the general rule against causing harm to others and infringes absolute rights.

17 Pre-contractual liability, however, may be imputed only to a person who has a special relationship with the person who has suffered harm, namely that resulting from the negotiation of a contract. Consequently, by contrast with the principles applicable to matters relating to tort, delict or quasi-delict, pre-contractual liability cannot be assessed except by reference to the content of the negotiations.

18 Moreover, submitting that Article 5(1) of the Brussels Convention cannot be applied either in this case, since Tacconi's claim rests on the hypothesis that no contract was concluded, HWS argues that pre-contractual liability is neither liability in tort, delict or quasi-delict nor liability in contract, and that the German courts therefore have jurisdiction to hear the case in accordance with the general provision in Article 2 of the Convention.

Findings of the Court

19 It should be observed at the outset that the Court has consistently held (see Case 34/82 Martin Peters Bauunternehmung [1983] ECR 987, paragraphs 9 and 10, Reichert and Kockler, paragraph 15, and Handte, paragraph 10) that the expressions matters relating to a contract and matters relating to tort, delict or quasi-delict in Article 5(1) and (3) of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention. Those expressions cannot therefore be taken as simple references to the national law of one or the other of the Contracting States concerned.

20 Only such an interpretation is capable of ensuring the uniform application of the Brussels Convention, which is intended in particular to lay down common rules on jurisdiction for the courts of the Contracting States and to strengthen the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued (see Case C-295/95 Farrell [1997] ECR I-1683, paragraph 13, and Case C-256/00 Besix [2002] ECR I-1737, paragraphs 25 and 26).

21 As the Court has held, the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1) of the Convention (Kalfelis, paragraph 18, Reichert and Kockler, paragraph 16, and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 22).

22 Moreover, while Article 5(1) of the Brussels Convention does not require a contract to have been concluded, it is nevertheless essential, for that provision to apply, to identify an obligation,

since the jurisdiction of the national court is determined, in matters relating to a contract, by the place of performance of the obligation in question.

23 Furthermore, it should be noted that, according to the Court's case-law, the expression matters relating to contract within the meaning of Article 5(1) of the Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (Handte, paragraph 15, and Réunion Européenne and Others, paragraph 17).

24 It does not appear from the documents in the case that there was any obligation freely assumed by HWS towards Tacconi.

25 In view of the circumstances of the main proceedings, the obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations could derive only from breach of rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract.

26 In those circumstances, it is clear that any liability which may follow from the failure to conclude the contract referred to in the main proceedings cannot be contractual.

27 In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Questions 2 and 3

28 As the first question has been answered in the affirmative, there is no need to answer the other questions put by the national court.

Costs

29 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Corte suprema di cassazione by order of 9 June 2000, hereby rules:

In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.

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| **DOCNUM** | 62000J0334 |
| **AUTHOR** | Court of Justice of the European Communities |
| **FORM** | Judgment |
| **TREATY** | European Economic Community |
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| **DOC** | 2002/09/17 |
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| **CONCERNS** | Interprets 41968A0927(01)-A05PT3 |
| **SUB** | Brussels Convention of 27 September 1968 ; Jurisdiction |
| **AUTLANG** | Italian |
| **OBSERV** | Commission ; Institutions |
| **NATIONA** | Italy |
| **NATCOUR** | *A9* Corte di Cassazione, Sezioni unite civili, ordinanza del 09/06/2000 26/07/2000 (93/00)<br>- Giurisprudenza italiana (Recentissime) 2000 p.181-182 (rA¬sumA¬)<br>*P1* Corte di Cassazione, Sezioni unite civili, ordinanza del 22/05/2003 10/07/2003 (10896)<br>- Giustizia civile 2003 p.XIV (rA¬sumA¬)<br>- Il massimario del Foro italiano 2003 Col.993-994 (rA¬sumA¬)<br>- Il Corriere giuridico 2004 p.482-483<br>- Conti, Roberto: Il Corriere giuridico 2004 p.485-490 |
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**PROCEDU** Reference for a preliminary ruling

**ADVGEN** Geelhoed

**JUDGRAP** Cunha Rodrigues

**DATES** of document: 17/09/2002
of application: 11/09/2000

**Judgment of the Court (Second Chamber)**
**of 10 June 2004**
**Rudolf Kronhofer v Marianne Maier and Others.**
**Reference for a preliminary ruling: Oberster Gerichtshof - Austria.**
**Brussels Convention - Article 5(3) - Jurisdiction in matters relating to tort, delict or quasi-delict - Place where the harmful event occurred - Financial loss arising from capital investments in another Contracting State.**
**Case C-168/02.**

In Case C-168/02

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Rudolf Kronhofer

and

Marianne Maier,

Christian Möller,

Wirich Hofius,

Zeki Karan,

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the 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 (OJ 1978 L 304, p. 1, and amended text p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Republic of Portugal (OJ 1989 L 285, p. 1), 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 (OJ 1997 C 15, p. 1),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, J.N. Cunha Rodrigues (Rapporteur), R. Schintgen and N. Colneric, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Kronhofer, by M. Brandauer, Rechtsanwalt,

- Ms Maier, by M. Scherbantie, Rechtsanwältin,

- Mr Karan, by C. Ender, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the United Kingdom Government, by K. Manji, acting as Agent, and T. Ward, Barrister,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kronhofer, represented by M. Brandauer and R. Bickel, Rechtsanwälte, of Mr Karan, represented by C. Ender, and of the Commission, represented by A.-M. Rouchaud and W. Bogensberger, at the hearing on 20 November 2003,

after hearing the Opinion of the Advocate General at the sitting on

15 January 2004,

gives the following

Judgment

1. By order of 9 April 2002, received at the Court on 6 May 2002, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 a question on the interpretation of Article 5(3) of that Convention (OJ 1978 L 304, p. 36), as amended by the 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 (OJ 1978 L 304, p. 1, and amended text p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Republic of Portugal (OJ 1989 L 285, p. 1), 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 (OJ 1997 C 15, p. 1) (hereinafter the Convention').

2. That question was raised in proceedings brought by Mr Kronhofer, domiciled in Austria, against Ms Maier, Mr Möller, Mr Hofius and Mr Karan (hereinafter the defendants in the main proceedings'), each domiciled in Germany, in which Mr Kronhofer seeks to recover damages for financial loss which he claims to have suffered as a result of the wrongful conduct of the defendants in the main proceedings as directors or investment consultants of the company Protectas Vermögensverwaltungs GmbH (hereinafter Protectas'), which also has its registered office in Germany.

Legal framework

3. The first paragraph of Article 2 of the Convention states:

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.'

4. Under Article 5(3) of the Convention:

A person domiciled in a Contracting State may, in another Contracting State, be sued:

...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.'

The main proceedings and the question referred

5. Mr Kronhofer brought proceedings against the defendants in the main proceedings before the Landesgericht Feldkirch (Feldkirch Regional Court) (Austria),, , seeking to recover damages for financial loss which he claims to have suffered as a result of their wrongful conduct.

6. The defendants in the main proceedings persuaded him, by telephone, to enter into a call option contract relating to shares. However, they failed to warn him of the risks involved in the transaction. As a result, Mr Kronhofer transferred a total amount of USD 82 500 in November and December

1997 to an investment account with Protectas in Germany which was then used to subscribe for highly speculative call options on the London Stock Exchange. The transaction in question resulted in the loss of part of the sum transferred and Mr Kronhofer was repaid only part of the capital invested by him.

7. The jurisdiction of the Landesgericht Feldkirch was founded on Article 5(3) of the Convention as the court for the place where the harmful event occurred, in this case Mr Kronhofer's domicile.

8. When that action was dismissed, Mr Kronhofer appealed to the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) (Austria), which declined jurisdiction on the ground that the court of domicile was not the place where the harmful event occurred', as neither the place where the event which resulted in damage occurred nor the place where the resulting damage was sustained was in Austria.

9. An application for review on a point of law was brought before the Oberster Gerichtshof, which took the view that the Court of Justice had not yet ruled on the question whether the expression the place where the harmful event occurred' is to be so widely interpreted that, in cases of purely financial damage affecting part of the victim's assets invested in another Member State, it also encompasses the place of the victim's domicile and thus the place where his assets are concentrated.

10. As it considered that a decision on the interpretation of the Convention was necessary to enable it to give judgment, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Is the expression place where the harmful event occurred contained in Article 5(3) of the Convention... to be construed in such a way that, in the case of purely financial damage arising on the investment of part of the injured party's assets, it also encompasses in any event the place where the injured party is domiciled if the investment was made in another Member State of the Community?'

The question referred

11. By its question, the national court is essentially asking whether Article 5(3) of the Convention should be interpreted as meaning that the expression place where the harmful event occurred' may cover the place where the claimant is domiciled and where his assets are concentrated' by reason only of the fact that the claimant has suffered financial damage there resulting in the loss of part of his assets which arose and was incurred in another Contracting State.

12. It should be noted at the outset that the system of common rules of conferment of jurisdiction laid down in Title II of the Convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective of the nationality of the parties.

13. It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that Section 2 of Title II of the Convention makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of the Convention.

14. Those special jurisdictional rules must be restrictively interpreted and cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention (see Case 189/87 Kalfelis [1988] ECR 5565, paragraph 19, and Case C-433/01 Blijdenstein [2004] ECR I0000, paragraph 25).

15. According to settled case-law, the rule laid down in Article 5(3) of the Convention is based on the existence of a particularly close connecting factor between a dispute and courts other than those for the place where the defendant is domiciled, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see, inter alia, Case 21/76 Bier (Mines de Potasse d'Alsace ') [1976]

ECR 1735, paragraph 11, and Case C-167/00 Henkel [2002] ECR I8111, paragraph 46).

16. The Court has also held that where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs 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 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, so that the defendant may be sued, at the option of the claimant, in the courts for either of those places (see, inter alia, Mines de potasse d'Alsace , paragraphs 24 and 25, and Case C-18/02 DFDS Torline [2004] ECR I-0000, paragraph 40).

17. It is clear from the order for reference that the Oberster Gerichtshof takes the view that, in the case in the main proceedings, the place where the damage occurred and the place of the event giving rise to it were both in Germany. The distinguishing feature of this case lies in the fact that the financial damage allegedly suffered by the claimant in another Contracting State is said to have affected the whole of his assets simultaneously.

18. As the Advocate General rightly noted at point 46 of his Opinion, there is nothing in such a situation to justify conferring jurisdiction to the courts of a Contracting State other than that on whose territory the event which resulted in the damage occurred and the damage was sustained, that is to say all of the elements which give rise to liability. To confer jurisdiction in that way would not meet any objective need as regards evidence or the conduct of the proceedings.

19. As the Court has held, the term place where the harmful event occurred' cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere (see Case C-364/93 Marinari [1995] ECR I-2719, paragraph 14).

20. In a situation such as that in the main proceedings, such an interpretation would mean that the determination of the court having jurisdiction would depend on matters that were uncertain, such as the place where the victim's assets are concentrated' and would thus run counter to the strengthening of the legal protection of persons established in the Community which, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued, is one of the objectives of the Convention (see Case C-256/00 Besix [2002] ECR I-1699, paragraphs 25 and 26, and DFDS Torline, paragraph 36). Furthermore, it would be liable in most cases to give jurisdiction to the courts of the place in which the claimant was domiciled. As the Court found at paragraph 14 of this judgment, the Convention does not favour that solution except in cases where it expressly so provides.

21. In view of the foregoing considerations, the answer to the question referred must be that Article 5(3) of the Convention must be interpreted as meaning that the expression place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

Costs

22. The costs incurred by the Austrian, German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

0in answer to the question referred to it by the Oberster Gerichtshof by order of 9 April 2002, hereby rules:

Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Republic of Portugal, 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 must be interpreted as meaning that the expression place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

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- International Litigation Procedure 2003 p.242-249

**NOTES** X: Revue de jurisprudence de droit des affaires 2004 p.970-971
Blobel, Felix: The European Legal Forum 2004 p.187-191 (EN)

**PROCEDU** Reference for a preliminary ruling

**ADVGEN** LA¬ger

**JUDGRAP** Cunha Rodrigues

**DATES** of document: 10/06/2004
of application: 06/05/2002

**Judgment of the Court (Sixth Chamber)**
**of 27 January 2000**
**Dansommer A/S v Andreas Götz.**
**Reference for a preliminary ruling: Landgericht Heilbronn - Germany.**
**Brussels Convention - Article 16(1) - Exclusive jurisdiction in proceedings having as their object tenancies of immovable property - Scope.**
**Case C-8/98.**

Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings `which have as their object tenancies of immovable property' - Definition - Action for damages for taking poor care of premises and causing damage to holiday accommodation - Included - Plaintiff, a professional tour operator, subrogated to the rights of the owner of the property - No effect

(Convention of 27 September 1968, Art. 16(1)(a))

$$The rule laid down in Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

The ancillary clauses relating to insurance in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, do not affect the nature of the tenancy as a tenancy of immovable property within the meaning of that provision of the Convention.

(see para. 38 and operative part)

In Case C-8/98,

REFERENCE to the Court, pursuant to the Protocol of 3 June 1971 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, by the Landgericht Heilbronn (Germany) for a preliminary ruling in the proceedings pending before that court between

Dansommer A/S

and

Andreas Götz

on the interpretation of Article 16(1)(a) of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT

(Sixth Chamber),

composed of: R. Schintgen (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn and G. Hirsch, Judges,

Advocate General: A. La Pergola,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Dansommer A/S, by I. Schulze, Rechtsanwalt, Flensburg,

- A. Götz, by L. Zürn, Rechtsanwalt, Heilbronn,

- the Spanish Government, by R. Silva de Lapuerta, Abogado del Estado, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Deputy Head of the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargée de Mission in that Directorate, acting as Agents,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and M. Hoskins, Barrister,

- the Commission of the European Communities, by J.L. Iglesias, Legal Adviser, acting as Agent, assisted by B. Wägenbaur, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of the Spanish, French, Italian and United Kingdom Governments and the Commission at the hearing on 10 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 9 September 1999,

gives the following

Judgment

1 By order of 16 June 1997, received at the Court on 14 January 1998, the Landgericht (Regional Court) Heilbronn (Germany) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 a question on the interpretation of Article 16(1)(a) of that Convention (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter `the Convention').

2 That question has arisen in a dispute between Dansommer A/S, a company incorporated under Danish law and having its registered office in Denmark (`Dansommer'), and Andreas Götz, a German national who is resident in Germany.

The Convention

3 Article 16(1) of the Brussels Convention, in the version prior to the amendment made by the Convention of 26 May 1989, provided as follows:

`The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated'.

4 As amended by the Convention of 26 May 1989 (`the San Sebastian Convention'), that provision is now worded as follows:

`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'.

5 Article 29(1) of the San Sebastian Convention provides:

`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... after the entry into force of this Convention in the State of origin...'.

6 The San Sebastian Convention entered into force in Germany on 1 December 1994.

The dispute in the main proceedings

7 On 27 February 1995, Mr Götz rented from Dansommer a house in Denmark owned by a private individual resident in Denmark, with a view to spending his holidays there from 29 July 1995 to 12 August 1995.

8 In its capacity as a professional tour operator, Dansommer merely acted as intermediary.

9 Under the general terms and conditions of the contract concluded between Dansommer and Mr Götz, the price payable by the latter as consideration for the provision of the accommodation during the contractual period included a premium for insurance to cover the costs in the event of cancellation of the contract.

10 Those general terms and conditions also provided that, in accordance with Article 651k(3) of the Bürgerliches Gesetzbuch (German Civil Code), Dansommer guaranteed reimbursement of the price paid by Mr Götz in the event of the organiser's insolvency.

11 It is common ground that Dansommer was not under an obligation to provide any other services.

12 After Mr Götz had stayed in the house in question, Dansommer brought proceedings against him as lessee before the Amtsgericht (Local Court) Heilbronn. In those proceedings, Dansommer, which had previously been subrogated to the rights of the owner of the house rented by Mr Götz, claimed damages from him on the ground that he had failed to clean the house properly before his departure and had damaged the carpeting and the oven safety mechanism.

13 Following the dismissal of its action, Dansommer appealed to the referring court.

14 Since it was unsure whether it had jurisdiction to hear the dispute, the Landgericht Heilbronn decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

`Is Article 16(1)(a) of the Brussels Convention applicable if the tour operator's performance obligation is limited to making available a holiday home and automatic provision of travel cost

and cancellation insurance, but the owner and lessee of the holiday home are not domiciled in the same Contracting State?'

The question referred for preliminary ruling

15 By way of derogation from the general principle set out in the first paragraph of Article 2 of the Convention, according to which persons domiciled in a Contracting State must be sued in the courts of that State, Article 16(1) of the Convention provides that, in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, exclusive jurisdiction lies with the courts of the Contracting State in which the property is situated.

16 The dispute in the main proceedings is, however, manifestly unconnected with any right in rem in immovable property, within the meaning of Article 16(1).

17 Although the case of which the national court is seised results from the short-term letting of a holiday home, it must be stressed, as the Landgericht Heilbronn points out in its order for reference, that Article 16(1)(b), which contains a specific provision relating to short-term tenancies which was added to Article 16(1) of the Brussels Convention by the San Sebastian Convention, is not relevant to this case since not all the conditions laid down in that provision are satisfied. Thus, in the case before the national court, the owner and tenant of the property are not domiciled in the same Contracting State.

18 The national court is thus asking the Court whether Article 16(1)(a), resulting from the San Sebastian Convention, which is applicable to the dispute in the main proceedings, but the wording of which has remained unchanged in relation to Article 16(1) of the Brussels Convention in its earlier versions, covers judicial proceedings such as those of which it is seised.

19 Finally, it must be pointed out that the fact, mentioned in the question submitted, that the owner of the property and the lessee are not domiciled in the same Contracting State is immaterial, since, as is clear from the actual wording of Article 16 and subject to the proviso in subparagraph 1(b) thereof, which, as has just been held in paragraph 17 above, is not applicable to this case, the domicile of the parties is irrelevant for the purposes of Article 16 of the Convention (see, to this effect, Case 73/77 Sanders v Van der Putte [1977] ECR 2383, paragraph 10).

20 In those circumstances, the question submitted must be construed as essentially seeking to ascertain whether the rule laid down in Article 16(1)(a) of the Convention conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

21 It should be noted in this regard that Article 16, being an exception to the general rule of jurisdiction set out in the first paragraph of Article 2 of the Convention, must not be given an interpretation broader than is required by its objective, since the article deprives the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them (see Sanders, cited above, paragraphs 17 and 18; Case C-115/88 Reichert and Kockler [1990] ECR I-27, paragraph 9; and Case C-292/93 Lieber [1994] ECR I-2535, paragraph 12).

22 So, it is established in case-law that, in order for Article 16(1) of the Brussels Convention to apply, it is not sufficient for the action to be connected with immovable property (Case C-294/92 Webb [1994] ECR I-1717, paragraph 14, and Lieber, cited above, paragraph 13).

23 Nevertheless, it follows from that same case-law that, in a case such as that before the national court, which concerns not a right in rem in immovable property but a tenancy of immovable property, Article 16(1) applies to any proceedings concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether the action is based on a right in rem or on a right in personam (Lieber, paragraphs 10, 13 and 20).

24 That is precisely the position in the instant case, since the proceedings brought by Dansommer, after partial failure to perform a tenancy agreement, is based on the tenant's obligation to maintain the property let in a proper condition and to repair any damage which he has caused to it.

25 The subject-matter of the proceedings before the referring court is thus directly linked to a leasing contract concerning immovable property and consequently to a tenancy of immovable property within the meaning of Article 16(1)(a) of the Convention, with the result that those proceedings fall within the exclusive jurisdiction rule laid down in that provision.

26 This interpretation, which is, moreover, the only interpretation which does not render ineffective the rule of exclusive jurisdiction in regard to tenancies of immovable property, is borne out by the underlying purpose of the provision in question.

27 It is clear from both the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 35) and case-law that the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily, by carrying out checks, inquiries and expert assessments on the spot, and to apply the rules and practices which are generally those of the State in which the property is situated (see, in particular, Sanders, paragraph 13, and Reichert and Kockler, paragraph 10).

28 This interpretation is also borne out by the fact that the Jenard Report (cited above, pp. 34 and 35) states that the jurisdiction rules set out in Article 16 of the Brussels Convention take as their criterion the subject-matter of the action and, with specific regard to the rule of exclusive jurisdiction in the matter of tenancies of immovable property in Article 16(1), the Convention draftsmen intended it to cover, inter alia, disputes over compensation for damage caused by tenants.

29 The reasoning set out above cannot be called in question by the judgment in Case C-280/90 Hacker [1992] ECR I-1111.

30 In that judgment, the Court held, in paragraph 15, that a complex contract concerning a range of services provided in return for a lump sum paid by the customer did not constitute a tenancy of immovable property within the meaning of Article 16(1) of the Brussels Convention.

31 The contract at issue in Hacker had been concluded between a professional travel organiser and its customer at the place where both were domiciled, and even though that contract provided for a service concerning the use of short-term holiday accommodation, it also included other services, such as information and advice, where the travel organiser proposed a range of holiday offers, the reservation of accommodation during the period chosen by the customer, the reservation of seats in connection with travel arrangements, reception at the destination and the possibility of travel cancellation insurance (Hacker, cited above, paragraph 14).

32 However, the unavoidable conclusion is that the circumstances of the case now under consideration are different from those of Hacker.

33 The contract now at issue concerns exclusively the letting of immovable property.

34 The clause in the general terms and conditions of the contract relating to insurance to cover the costs in the event of cancellation is only an ancillary provision which cannot alter the status of the tenancy agreement to which it relates, especially since this clause is not in issue before

the referring court.

35 The same applies in regard to the guarantee - which is, moreover, required by German legislation - of repayment of the price paid in advance by the customer in the event of the organiser's insolvency.

36 Finally, Article 16(1)(a) of the Convention is not rendered inapplicable merely because the dispute in this case is not directly between the owner and the tenant of the immovable property, given that Dansommer brought legal proceedings against the tenant after being subrogated to the rights of the owner of the property which was the subject of the lease concluded between Dansommer and Mr Götz.

37 Suffice it to note in this regard that, through subrogation, one person steps into the shoes of another in order to enable the former to exercise rights belonging to the latter, so that, in the main proceedings in this case, Dansommer is not acting in its capacity as a professional tour operator but as if it were the owner of the property in question.

38 In view of the foregoing, the answer to be given to the question referred must be that the rule laid down in Article 16(1)(a) of the Convention conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

The ancillary clauses relating to insurance in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, do not affect the nature of the tenancy as a tenancy of immovable property within the meaning of that provision of the Convention.

Costs

39 The costs incurred by the Spanish, French, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Landgericht Heilbronn by order of 16 June 1997, hereby rules:

The rule laid down in Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property

but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

The ancillary clauses relating to insurance in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, do not affect the nature of the tenancy as a tenancy of immovable property within the meaning of that provision of the Convention.

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| **PROCEDU** | Reference for a preliminary ruling |
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**Judgment of the Court**
**of 9 December 2003**
**Erich Gasser GmbH v MISAT Srl.**
**Reference for a preliminary ruling: Oberlandesgericht Innsbruck - Austria.**
**Brussels Convention - Article 21 - Lis pendens - Article 17 - Agreement conferring jurisdiction - Obligation to stay proceedings of court second seised designated in an agreement conferring jurisdiction - Excessive duration of proceedings before courts in the Member State of the court first seised.**
**Case C-116/02.**

In Case C-116/02,

REFERENCE to the Court under the Protocol of 3 June 1971 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 by the Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

Erich Gasser GmbH

and

MISAT Srl,

on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) 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 (OJ 1997 C 15, p. 1),

THE COURT

(Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen (Rapporteur), F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Erich Gasser GmbH, by K. Schelling, Rechtsanwalt,

- MISAT Srl, by U.C. Walter, Rechtsanwältin,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara, Vice Avvocato Generale dello Stato,

- the United Kingdom Government, by K. Manji, acting as Agent, and by D. Lloyd Jones QC,

- the Commission of the European Communities, by A.-M. Rouchaud-Joet and S. Grünheid, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erich Gasser GmbH, the Italian Government, the United Kingdom Government and the Commission at the hearing on 13 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2003,

gives the following

Judgment

Costs

75 The costs incurred by the Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Full Court),

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by judgment of 25 March 2002, hereby rules:

1. A national court may, under the Protocol of 3 June 1971 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, 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

2. Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

3. Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

1 By judgment of 25 March 2002, received at the Court on 2 April 2002, the Oberlandesgericht (Higher Regional Court) Innsbruck referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 (the Protocol), a number of questions on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession

of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) 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 (OJ 1997 C 15, p. 1) (the Brussels Convention or `the Convention').

2 Those questions were raised in proceedings between Erich Gasser GmbH (`Gasser'), a company incorporated under Austrian law, and MISAT Srl (`MISAT'), a company incorporated under Italian law, following a breakdown in their business relations.

Legal background

3 The aim of the Convention, according to its preamble, is to facilitate the reciprocal recognition and enforcement of judgments in accordance with Article 293 EC and to strengthen the legal protection of persons established in the Community. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

4 The provisions on jurisdiction are contained in Title II of the Brussels Convention. Article 2 of the Convention lays down the general rule that the courts in the State in which the defendant is domiciled are to have jurisdiction. Article 5 of the Convention provides, however, that in matters relating to a contract the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed.

5 Article 16 of the Convention lays down rules governing exclusive jurisdiction. In particular, pursuant to Article 16(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 are to have exclusive jurisdiction.

6 Articles 17 and 18 of the Convention deal with the attribution of jurisdiction.

Article 17 is worded as follows:

`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.

...

Agreements... conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15 [insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

...'

7 Article 18 provides:

`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.'

8 The Brussels Convention also seeks to obviate conflicting decisions. Thus, under Article 21, concerning lis pendens:

`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.'

9 Finally, in relation to recognition, Article 27 of the Convention provides:

`A judgment shall not be recognised:

...

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.'

10 According to the first paragraph of Article 28 of the Convention, `[m]oreover, a judgment shall not be recognised if it conflicts with the provisions... [concerning insurance and consumer contracts and the matters referred to in Article 16]'.

The main proceedings and the questions referred to the Court

11 The registered office of Gasser is in Dornbirn, Austria. For several years it sold children's clothing to MISAT, of Rome, Italy.

12 On 19 April 2000 MISAT brought proceedings against Gasser before the Tribunale Civile e Penale (Civil and Criminal District Court) di Roma seeking a ruling that the contract between them had terminated ipso jure or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not failed to perform the contract and to order Gasser to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs.

13 On 4 December 2000 Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract, within the meaning of Article 5(1) of the Convention but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the latter having raised any objection in that regard. According to Gasser, that showed that, in accordance with their practice and the usage prevailing in trade between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

14 MISAT contended that the Landesgericht Feldkirch had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established, under the general rule laid down in Article 2 of the Brussels Convention. It also contested the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by Gasser before the Landesgericht Feldkirch, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship.

15 On 21 December 2001, the Landesgericht Feldkirch decided of its own motion to stay proceedings, pursuant to Article 21 of the Brussels Convention, until the jurisdiction of the Tribunale Civile e Penale di Roma had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but did not rule on the existence or otherwise of an agreement

conferring jurisdiction, observing that although the invoices issued by the claimant systematically included a reference to the courts of Dornbirn under the heading `Competent Courts', the orders, on the other hand, did not record any choice of court.

16 Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that proceedings should not be stayed.

17 The national court considers, first, that this is a case of lis pendens since the parties are the same and the claims made before the Austrian and Italian courts have the same cause of action within the meaning of Article 21 of the Brussels Convention, as interpreted by the Court of Justice (see, to that effect, Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861).

18 After noting that the Landesgericht Feldkirch had not ruled as to the existence of an agreement conferring jurisdiction, the national court raises the question whether the fact that one of the parties repeatedly and without objection settled invoices sent by the other even though those invoices contained a jurisdiction clause can be seen as acceptance of that clause, in accordance with Article 17(1)(c) of the Brussels Convention. The national court states that such conduct by the parties reflects a usage in international trade and commerce which is applicable to the parties and of which they are aware or are deemed to be aware. In the event of the existence of an agreement conferring jurisdiction being established, then, according to the national court, the Landesgericht Feldkirch alone has jurisdiction to deal with the dispute under Article 17 of the Convention. In those circumstances, the question arises whether the obligation to stay proceedings, provided for in Article 21 of the Convention, should nevertheless apply.

19 In addition, the national court asks to what extent the excessive and generalised slowness of legal proceedings in the Contracting State where the court first seised is established is liable to affect the application of Article 21 of the Brussels Convention.

20 It was in those circumstances that the Oberlandesgericht Innsbruck stayed proceedings and referred the following questions to the Court for a preliminary ruling:

`1. May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ["the Brussels Convention"], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

4. Do the legal consequences provided for by Italian Law No 89 of 24 March 2001 justify the application of Article 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Article 21?

5. Under what conditions must the court other than the court first seised refrain from applying

Article 21 of the Brussels Convention?

6. What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Article 21 of the Brussels Convention?

Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Article 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.'

The first question

21 By its first question, the national court seeks in essence to ascertain whether a national court may, under the Protocol, seek an interpretation of the Brussels Convention from the Court of Justice even where the national court is relying on the submissions of a party to the main proceedings, the merits of which it has not yet assessed.

22 In this case, the national court refers to the fact that the second question is based on the premiss, not yet confirmed by the trial judge, that an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention designates the court within whose jurisdiction Dornbirn is located as the court having jurisdiction to settle the dispute in the main proceedings.

23 It must be borne in mind in that connection that, in the light of the division of responsibilities in the preliminary-ruling procedure laid down by the Protocol, it is for the national court alone to define the subject-matter of the questions which it proposes to refer to the Court. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-220/95 Van den Boogaard [1997] ECR I-1147, paragraph 16; Case C-295/95 Farrell [1997] ECR I-1683, paragraph 11; Case C-159/97 Castelletti [1999] ECR I-1597, paragraph 14, and Case C-111/01 Gantner Electronic [2003] ECR I-0000, paragraphs 34 and 38).

24 However, the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that the national court should define the legal and factual context of the interpretation sought and it is essential for it to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see to that effect Gantner Electronic, cited above, paragraphs 35, 37 and 38).

25 According to the account of the facts given by the national court, the proposition that there may be an agreement conferring jurisdiction is not purely hypothetical.

26 Moreover, as has been emphasised both by the Commission and by the Advocate General in points 38 to 41 of his Opinion, the national court, before verifying the existence of a clause conferring jurisdiction within the meaning of Article 17 of the Brussels Convention and the existence of usage in international trade and commerce in that connection - a process which may necessitate delicate and costly investigations - considered it necessary to refer to the Court the second question, to establish whether the existence of an agreement conferring jurisdiction allows non-application of Article 21 of the Brussels Convention. If that question is answered in the affirmative, the national court will have to rule as to the existence of such an agreement conferring jurisdiction and, if the existence thereof is established, it will have to consider itself to have exclusive jurisdiction to give judgment in the main proceedings. Conversely, if the answer is in the negative,

Article 21 of the Brussels Convention will have to apply, so that the question whether there is an agreement conferring jurisdiction will no longer be an issue with which the national court is concerned.

27 Consequently, the answer to the first question must be that a national court may, under the Protocol, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

The second question

28 By its second question, the national court seeks in essence to establish whether Article 21 of the Brussels Convention must be interpreted as meaning that, where a court is the second court seised and has exclusive jurisdiction under an agreement conferring jurisdiction, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction.

Observations submitted to the Court

29 According to Gasser and the United Kingdom Government, this question should be answered in the affirmative. In support of their interpretation, they rely on the judgment in Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, in which it was held that it is `without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof' that the Court held that Article 21 of the Brussels Convention was to be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised. According to Gasser and the United Kingdom Government, there is no reason to treat Articles 16 and 17 of the Convention differently in relation to the lis pendens rule.

30 The United Kingdom Government states that, whilst Article 17 comes below Article 16 in the hierarchy of the bases of jurisdiction provided for in the Brussels Convention, it nevertheless prevails over the other bases of jurisdiction, such as Article 2 and the special rules on jurisdiction contained in Articles 5 and 6 of the Convention. The national courts are thus required to consider of their own motion whether Article 17 is applicable and requires them, if appropriate, to decline jurisdiction.

31 The United Kingdom Government adds that it is necessary to examine the relationship between Articles 17 and 21 of the Brussels Convention taking account of the needs of international trade. The commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. Such clauses contribute to legal certainty in commercial relationships, since they enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it.

32 Admittedly, the United Kingdom Government observes that, to justify the general rule embodied in Article 21 of the Brussels Convention, the Court held, in paragraph 23 of Overseas Union Insurance, that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. However, that reasoning is not applicable to cases in which the court second seised has exclusive jurisdiction under Article 17 of the Brussels Convention. In such cases, the court designated by the agreement conferring jurisdiction will, in general,

be in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated.

33 Finally, the United Kingdom Government concedes that the thesis which it defends might give rise to a risk of irreconcilable judgments. To avoid that risk, it proposes that the Court hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction.

34 MISAT, the Italian Government and the Commission, on the other hand, favour the application of Article 21 of the Brussels Convention and therefore consider that the court second seised is required to stay proceedings.

35 The Commission, like the Italian Government, considers that the derogation under which the court second seised has jurisdiction, on the ground that it enjoys exclusive jurisdiction under Article 16 of the Brussels Convention, cannot be extended to a court designated under a choice-of-court clause.

36 The Commission justifies the derogation from the rule laid down in Article 21, in the event of recourse to Article 16, by reference to the first paragraph of Article 28 of the Brussels Convention, according to which decisions given in the State of the court first seised in disregard of the exclusive jurisdiction of the court second seised, based on Article 16 of the Convention, cannot be recognised in any Contracting State. It would therefore be inconsistent to require, under Article 21 of the Convention, that the second court, which alone has jurisdiction, should stay proceedings and decline jurisdiction in favour of a court which has no jurisdiction. Such a course of action would result in parties obtaining a decision from a court lacking jurisdiction, which could not take effect in the Contracting State where it was given. In such circumstances, the aim of the Brussels Convention, which is to improve legal protection and for that purpose to ensure the cross-border recognition and enforcement of judgments in civil matters would not be attained.

37 The foregoing considerations do not apply, however, in the event of jurisdiction being conferred on the court second seised under Article 17 of the Brussels Convention. Article 28 of the Convention does not apply to the infringement of Article 17, which forms part of Section 6 of Title II of the Convention. A decision given in breach of the exclusive jurisdiction which the court second seised derives from a choice-of-court clause should be recognised and enforced in all the Contracting States.

38 The Commission also states that Article 21 of the Brussels Convention seeks not only to obviate irreconcilable decisions which, under Article 27(3) of the Convention, are not recognised, but also to uphold economy of procedure, the court second seised being required initially to stay proceedings, and then to decline jurisdiction as soon as the jurisdiction of the Court first seised is established. That clear rule is conducive to legal certainty.

39 Referring to paragraph 23 of Overseas Union Insurance, the Commission considers that the court second seised is not in any circumstances in a better position than the court first seised to determine whether the latter has jurisdiction. In this case, the Italian Court is in as good a position as the Austrian Court to establish whether it has jurisdiction under Article 17 of the Brussels Convention, because, by virtue of commercial usage between Austria and Italy, the parties conferred exclusive jurisdiction upon the court in whose jurisdiction the registered office of the claimant in the main proceedings is located.

40 Finally, the Commission and the Italian Government observe that the jurisdiction referred to in Article 17 of the Brussels Convention is distinguished from that referred to in Article 16 thereof in that, within the scope of the latter article, the parties cannot conclude agreements

conferring jurisdiction contrary to Article 16 (Article 17(3)). Moreover, the parties are entitled at any time to cancel or amend a jurisdiction clause of the kind referred to in Article 17. Such a case would arise, for example, where, under Article 18 of the Convention, a party brought an action in a State other than that to the courts of which jurisdiction has been attributed and the other party enters an appearance before the court seised without contesting its jurisdiction (see to that effect Case 150/80 Elefanten Schuh [1981] ECR 1671, paragraphs 10 and 11).

Findings of the Court

41 It must be borne in mind at the outset that Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, which is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought (see Gubisch Maschinenfabrik, cited above, paragraph 8). It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States, irrespective of the parties' domicile (Overseas Union Insurance, cited above, paragraph 16).

42 From the clear terms of Article 21 it is apparent that, in a situation of lis pendens, the court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter.

43 In that regard, as the Court also observed in paragraph 13 of Overseas Union Insurance, Article 21 does not draw any distinction between the various heads of jurisdiction provided for in the Brussels Convention.

44 It is true that, in paragraph 26 of Overseas Union Insurance, before holding that Article 21 of the Brussels Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised, the Court stated that its ruling was without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof.

45 However, it is clear from paragraph 20 of the same judgment that, in the absence of any claim that the court second seised had exclusive jurisdiction in the main proceedings, the Court of Justice simply declined to prejudge the interpretation of Article 21 of the Convention in the hypothetical situation which it specifically excluded from its judgment.

46 In this case, it is claimed that the court second seised has jurisdiction under Article 17 of the Convention.

47 However, that fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

48 Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them (see, to that effect, Overseas Union Insurance,

paragraph 23).

49 Thus, where there is an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention, not only, as observed by the Commission, do the parties always have the option of declining to invoke it and, in particular, the defendant has the option of entering an appearance before the court first seised without alleging that it lacks jurisdiction on the basis of a choice-of-court clause, in accordance with Article 18 of the Convention, but, moreover, in circumstances other than those just described, it is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seised as having exclusive jurisdiction.

50 The fact nevertheless remains that, despite the reference to usage in international trade or commerce contained in Article 17 of the Brussels Convention, real consent by the parties is always one of the objectives of that provision, justified by the concern to protect the weaker contracting party by ensuring that jurisdiction clauses incorporated in a contract by one party alone do not go unnoticed (Case C-106/95 MSG [1997] ECR I-911, paragraph 17 and Castelletti, paragraph 19).

51 In those circumstances, in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of lis pendens, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17 (see, to that effect, Case C-214/89 Powell Duffryn [1992] ECR I-1745, paragraph 14).

52 Moreover, the interpretation of Article 21 of the Brussels Convention flowing from the foregoing considerations is confirmed by Article 19 of the Convention which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it 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'. Article 17 of the Brussels Convention is not affected by Article 19.

53 Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

54 In view of the foregoing, the answer to the second question must be that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

The third question

55 By its third question, the national court seeks in essence to ascertain whether Article 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

Admissibility

56 The Commission raises doubts as to the admissibility of this question and, therefore, of the questions which follow it and are related to it, on the ground that the national court has not provided concrete information such as to allow the inference that the Tribunale Civile e Penale di Roma has failed to fulfil its obligation to give judgment within a reasonable time and thereby infringed Article 6 of the European Convention for the safeguard of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter `the ECHR').

57 That view cannot be accepted. As observed by the Advocate General in point 87 of his Opinion, it was indeed in relation to the fact that the average duration of proceedings before courts in the Member State in which the court first seised is established is excessively long that the national court submitted the question whether the court second seised may validly decline to apply Article 21 of the Brussels Convention. To answer that question, which the latter court considered relevant for the decision to be given in the main proceedings, it is not necessary for it to provide information as to the conduct of procedure before the Tribunale Civile e Penale di Roma.

58 It is therefore necessary to answer the third question.

Substance

Observations submitted to the Court

59 According to Gasser, Article 21 of the Brussels Convention must be interpreted in any event as excluding excessively protracted proceedings (that is to say of a duration exceeding three years), which are contrary to Article 6 of the ECHR and would entail restrictions on freedom of movement as guaranteed by Articles 28 EC, 39 EC, 48 EC and 49 EC. It is the responsibility of the European Union authorities or the national courts to identify those States in which it is well known that legal proceedings are excessively protracted.

60 Therefore, in a case where no decision on jurisdiction has been given within six months following the commencement of proceedings before the court first seised or no final decision on jurisdiction has been given within one year following the commencement of those proceedings, it is appropriate, in Gasser's view, to decline to apply Article 21 of the Brussels Convention. In any event, the courts of the State where the court second seised is established are entitled themselves to rule both on the question of jurisdiction and, after slightly longer periods, on the substance of the case.

61 The United Kingdom Government also considers that Article 21 of the Brussels Convention must be interpreted in conformity with Article 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years.

62 The automatic application of Article 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings.

63 In those circumstances, the United Kingdom Government suggests that the Court should recognise an exception to Article 21 whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where

(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and

(2) the court first seised has not decided the question of its jurisdiction within a reasonable time.

64 The United Kingdom Government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances.

65 MISAT, the Italian Government and the Commission, on the contrary, advocate the full applicability of Article 21 of the Brussels Convention, notwithstanding the excessive duration of court proceedings in one of the States concerned.

66 According to MISAT, the effect of an affirmative answer to the third question would be to create legal uncertainty and increase the financial burden for litigants, who would be required to pursue proceedings at the same time in two different States and to appear before the two courts seised, without being in a position to foresee which court would give judgment before the other. The already abundant litigation on the jurisdiction of courts would thereby be pointlessly increased, contributing to paralysis of the legal system.

67 The Commission states that the Brussels Convention is based on mutual trust and on the equivalence of the courts of the Contracting States and establishes a binding system of jurisdiction which all the courts within the purview of the Convention are required to observe. The Contracting States can therefore be obliged to ensure mutual recognition and enforcement of judgments by means of simple procedures. This compulsory system of jurisdiction is at the same time conducive to legal certainty since, by virtue of the rules of the Brussels Convention, the parties and the courts can properly and easily determine international jurisdiction. Within this system, Section 8 of Title II of the Convention is designed to prevent conflicts of jurisdiction and conflicting decisions.

68 It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on lis pendens only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does the Convention provide that courts may use the pretext of delays in procedure in other contracting States to excuse themselves from applying its provisions.

69 Moreover, the point from which the duration of proceedings becomes excessively long, to such an extent that the interests of a party may be seriously affected, can be determined only on the basis of an appraisal taking account of all the circumstances of the case. That is an issue which cannot be settled in the context of the Brussels Convention. It is for the European Court of Human Rights to examine the issue and the national courts cannot substitute themselves for it by recourse to Article 21 of the Convention.

Findings of the Court

70 As has been observed by the Commission and by the Advocate General in points 88 and 89 of his Opinion, an interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention.

71 First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.

72 Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary

the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

73 In view of the foregoing, the answer to the third question must be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

The fourth, fifth and sixth questions

74 In view of the answer given to the third question, it is unnecessary to answer the fourth, fifth and sixth questions, which were submitted by the national court only in the event of the third question being answered in the affirmative.

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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.

# Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
/* COM/99/0348 final - CNS 99/0154 */

recognition and enforcement of judgments in civil and commercial matters (presented by the Commission)

EXPLANATORY MEMORANDUM

Contents



## 1. GENERAL

### 1.1. Background

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, enjoying facilities equivalent to those they enjoy in the courts of their own country.

To establish such an area the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the sound operation of the internal market. Reinforcement of judicial cooperation in civil matters, which many believe has developed too slowly, represents a fundamental stage in the creation of a European judicial area which will bring tangible benefits for every Union citizen [1].

[1] 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, point 16: OJ C 19, 23.1.1999.

The sound operation of the internal market creates a need to create clear rules on jurisdiction and to improve and speed up the recognition and enforcement of judgments in civil and commercial matters. To this end, rapid enforcement procedures and legal certainty as regards jurisdiction are of the essence at a time when the increasing frequency of exchanges between persons and economic operators in different Member States leads to a growth in litigation.

### 1.2. Work on revision of the Brussels and Lugano Conventions

On 27 September 1968, the six Member States of the European Economic Community concluded a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention) on the basis of Article 293(4) (formerly 220(4)) of the EEC Treaty. A Protocol concerning the interpretation of the Convention by the Court of Justice of the European Communities was signed in 1971. The Convention and the Protocol, which are part of the Community acquis, have been extended successively to all the new Member States [2]. The Brussels Convention was also taken as a model for the drafting of a similar Convention between the Member States and the States belonging to the European Free Trade Association - the Lugano Convention - signed on 16 September 1988 [3].

[2] The consolidated version of the Convention and the Protocol following the accession of Austria, Finland and Sweden were published in OJ C 27, 26.1.1998.

[3] OJ L 319, 25.11.1988.

At its meeting on 4 and 5 December 1997 the Council instructed an ad hoc working party composed of representatives of all the Member States and the EFTA States parties to the Lugano Convention, with observers from various sources, to undertake work on the parallel revision of the Brussels and Lugano Conventions. The Commission presented a proposal for a Convention to replace the Brussels Convention on the basis of Article K.3(2) of the Treaty on European Union [4]. The proposal has been presented to the European Parliament, which has not yet given its Opinion, and to the Council.

[4] OJ C 33, 31.1.1998.

Work continued on the basis of Article 293(4) (formerly 220) of the EC Treaty, the Commission being closely involved, until the Amsterdam Treaty entered into force on 1 May 1999. On 28 May, the Council gave its political agreement on the outcome of the work done by the ad hoc working party.

## 2. PROPOSAL FOR A COUNCIL REGULATION

### 2.1. Subject-matter

The purpose of this proposal for a Regulation is to uniformise the rules of private international law in the Member States relating to jurisdiction and to improve the recognition and enforcement of judgments in civil and commercial matters. It replaces and updates the Brussels Convention of 1968 and the Protocol to it, with a view inter alia to take account of new forms of commerce which did not exist in 1968. The proposal broadly takes over the results of the Council ad hoc working party's revision negotiations preceding the entry into force of the Amsterdam Treaty. It thus incorporates the substance of the agreement reached in the Council on the balance needed between the interests of the different parties who might be involved in litigation. It is clear that the choice made for the purposes of achieving this balance may have consequences for those who engage in these new forms of commerce (see in particular the comments on Article 15 below).

The effect of incorporating the revision in a Community instrument will be that the new rules enter into force on a well-known, uniform and not-too-distant date. The Brussels Convention, as amended following the accession negotiations with Austria, Finland and Sweden, has not yet entered into force for all the Member States as only a minority of them have ratified it. But the Lugano Convention, to which non-member States are parties, cannot be taken over in the same way.

### 2.2. Legal basis

The subject-matter covered by the Convention is now within the ambit of Article 65 of the Treaty; the legal basis for this proposal is Article 61(c) of that Treaty.

The form chosen for the instrument - a regulation - is warranted by a number of considerations. The Member States cannot be left with the discretion not only to determine rules of jurisdiction, the purpose of which is to achieve certainty in the law for the benefit of individuals and economic operators, but also the procedures for the recognition and enforcement of judgments, which must be clear and uniform in all Member States.

Moreover, transparency is a vital objective in this context; it must be possible to come to an immediate uniform understanding of the rules applicable in the Community without the need to seek the provisions of national law that transpose the content of the Community instrument, bearing in mind that national law will very often be foreign to the plaintiff. And opting for a Regulation enables the Court of Justice to ensure that it is applied uniformly throughout the Member States.

The instrument falls to be adopted by the procedure of Article 67 of the Treaty, which provides that, during a transitional period of five years, the Council is to act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

The new Title IV of the EC Treaty, which applies to the matters covered by this proposal for a Directive, is not applicable in the United Kingdom and Ireland, unless they "opt in" in the manner provided by the Protocol annexed to the Treaties. At the Council meeting (Justice and Home Affairs) held 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. It will be for them to embark on the procedure of Article 3 of the Protocol in due course.

Title IV of the EC Treaty is likewise not applicable in Denmark, by virtue of the relevant Protocol. But Denmark may waive its opt-out at any time. Denmark has so far given no notice of its intention of embarking on the procedure of Article 7 of the Protocol.

The proposal has been drafted on the basis of the current situation. If the Regulation were to be applicable in one or more of these Member States, the requisite adjustments will have to be made.

3. JUSTIFICATION FOR PROPOSAL IN TERMS OF PROPORTIONALITY AND SUBSIDIARITY PRINCIPLES

What are the objectives of the proposed measure in relation to the obligations imposed on the Community?

The objectives of the proposal are to improve and expedite the free movement of judgments in civil and commercial matters within the internal market. This will contribute to the establishment of an area of freedom, security and justice within which the free movement of persons is assured and litigants can assert their rights, enjoying facilities equivalent to those they enjoy in the courts of their own country. To establish such an area the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the sound operation of the internal market.

Does the measure satisfy the criteria of subsidiarity?

Its objectives cannot be attained by the Member States acting alone and must therefore, by reason of the cross-border impact, be attained at Community level.

Are the means deployed at Community level proportional to the objectives?

The proposed instrument is confined to the minimum needed for the attainment of these objectives and does not exceed what is necessary for that purpose.

4. INDIVIDUAL PROVISIONS

4.1. General objective

Like the Convention it is to replace, the Regulation, which takes over its essential structure and most of its fundamental principles, aims to:

- introduce uniform modern standards for jurisdiction in civil and commercial matters; and
- simplify the formalities governing the rapid and automatic recognition and enforcement of the relevant judgments by a simple and uniform procedure.

4.2. Continuity

The proposed Regulation closely corresponds to the Brussels Convention and the results of the negotiations in the ad hoc working party for the revision of the Brussels and Lugano Conventions, which it takes over to a substantial extent.

The chief innovations following the work done by the working party are in the following areas:

1. Rules of jurisdiction:

- The concept of the domicile of natural persons is maintained, but there is now an autonomous definition of the seat of a legal person in place of a reference to the rules of private international law of the State in which jurisdiction is exercised. But there is still a reference to that law as regards the validity, nullity and dissolution of legal persons and decisions of their managing bodies;
- The alternative jurisdiction under Article 5(1) (contracts) has been reframed. The place of performance of the obligation underlying the claim will now be given an autonomous definition in two categories of situation: the sale of goods and the provision of services. This solution obviates the need for reference to the rules of private international law of the State whose courts are seised.
- The material scope of the provisions governing consumer contracts has been extended so as to offer consumers better protection, notably in the context of electronic commerce;
- To make the lis pendens rules (Article 27) more effective, the Regulation provides an autonomous definition of the date on which a case is "pending" (Article 30).

2. Procedure for recognition and enforcement:

- The procedure has been modified to improve the time taken for the declaration of enforceability and therefore the enforcement of judgments for the creditor. In particular, the first stage of the enforcement procedure in the Member State requested becomes virtually automatic, as no grounds for non-recognition or non-enforcement may be raised automatically. A uniform certificate, containing certain basic information, will help to expedite and facilitate the procedure. The protection afforded to the claimant is maintained: he may now appeal against the decision.

4.3. Adaptations

Apart from the changes of substance described at 4.5 below, the obvious differences between the two types of instrument warrant departures from the Brussels Convention in a number of respects:

- the 1971 Protocol concerning the interpretation of the Convention by the Court of Justice of the European Communities is now superfluous in view of Articles 293 et seq. of the EC Treaty, which will apply here subject to Article 68. It should, however, be noted that where a case is brought in a national court before the Regulation enters into force, and the Brussels Convention accordingly applies, the Protocol will continue to apply to such case;
- Given the position of the United Kingdom, Ireland and Denmark, the specific provisions of Articles 3, 5(6), 17(3), 30(2), 31(2), 32, 37, 38(2), 40, 41, 44(2), 53(2), 54(2), 54a and 55 of the Brussels

Convention are deleted;

- the formal provisions of Articles 60 to 68 of the Convention would be out of place in a Community instrument. Articles 249 and 254 of the Treaty are fully applicable to the entry into force of the Regulation. The Commission, acting under Article 211 of the Treaty, will fully assume the role of proposing amendments if need be;
- Article 59 of the Convention, which permitted the signing of bilateral agreements not to recognise judgments given against nationals of non-member countries on grounds of excess of jurisdiction would be out of place in a Community instrument. Such agreements by their very nature affect the Community rules of recognition and, after adoption of the Regulation, will be within the exclusive powers of the Community without the need for an express provision to that effect. Articles 28(1) and 59 of the Convention have accordingly been dropped in the Regulation. But agreements already entered into between Member States and non-member countries should be preserved;
- since the Regulation will be binding on some Member States but not others, provision should be made for rules implementing the rules on jurisdiction in the Regulation and in the Brussels Convention and on recognition and enforcement under the Regulation of judgments given on the basis of the Convention;
- the Protocol annexed to the Convention is dropped. Certain articles are incorporated in the Regulation itself, either because they apply to all the Member States or because they reflect specific procedural rules of individual Member States. But some derogations in the Protocol for certain Member States have not been taken over (Articles I and Vb). If the relevant Member States wish to preserve them, they must demonstrate the need for them to be reinstated in the Regulation itself.

4.4. Comparative table

Brussels Convention [5] // Proposal for a Regulation

[5] OJ C 27, 26.1.1998.

Preamble // Deleted

// Recital 1 (Objective)

// Recital 2 (Unification)

// Recital 3 (Scope)

// Recital 4 (subsidiarity, proportionality)

// Recital 5 (Continuity)

// Recital 6 (Scope)

// Recital 7 (Material scope)

// Recital 8 (Geographical scope)

// Recital 9 (Coordination of instruments for judicial cooperation in the Union)

// Recital 10 (Basic jurisdiction)

// Recital 11 (Special jurisdiction)

// Recital 12 (Special protection)

// Recital 13 (New technologies)

// Recital 14 (Autonomous determination by parties)

// Recital 15 (Changes to Regulation)
// Recital 16 (Parallel proceedings)
// Recital 17 (Recognition)
// Recital 18 (Enforcement)
// Recital 19 (Redress procedures)
// Recital 20 (Transitional provisions)
// Recital 21 (Situation of United Kingdom, Ireland and Denmark)
// Recital 22 (Coordination between Regulation and Convention)
// Recital 23 (Other Community instruments)
// Recital 24 (International commitments)
Article 1 // Article 1
Article 2 // Article 2
Article 3 // Article 3
Article 4 // Article 4
Article 5 // Article 5
Article 6 // Article 6
Article 6a // Article 7
Article 7 // Article 8
Article 8 // Article 9
Article 9 // Article 10
Article 10 // Article 11
Article 11 // Article 12
Article 12 // Article 13
Article 12a // Article 14
Article 13 // Article 15
Article 14 // Article 16
Article 15 // Article 17
// Articles 18 to 21: new section
Article 16 // Article 22
Article 17 // Article 23
Article 18 // Article 24
Article 19 // Article 25
Article 20 // Article 26
Article 21 // Article 27

Article 22 // Article 28

Article 23 // Article 29

// Addition of Article 30

Article 24 // Article 31

Article 25 // Article 32

Article 26 // Article 33

Article 27 // Article 41

Article 28 // Article 42

Article 29 // Article 41

Article 30 // Article 43

Article 31 // Article 34

Article 32 // Article 35

Article 33 // Article 36

Article 34 // Article 37 (recast)

Article 35 // Article 38

Article 36 (deleted) //

Article 37 (deleted) //

// Article 39

// Article 40

Article 38 // Deleted

Article 39 // Article 44

Article 40 (deleted) //

Article 41 (deleted) //

Article 42 // Article 45

Article 43 // Article 46

Article 44 // Article 47

Article 45 // Article 49

// Article 52 - new

Article 46 // Article 50

Article 47 (amended) // Article 50

Article 48 // Article 52

Article 49 // Article 53

Article 50 // Article 54

Article 51 // Article 55

Article 52 // Article 56

Article 53 // Article 57

Article 54 // Article 58

Article 54a // Deleted

Article 57(3) // Article 59

// Article 60

Article 55 // Article 61

Article 56 // Article 62

Article 57 // Article 63

// Article 64

Article 58 // Deleted

Article 59 // Deleted

Article 60 // Deleted

Article 61 // Deleted

Article 62 // Article 67

Article 63 // Deleted

Article 64 // Deleted

Article 65 // Deleted

Article 66 // Deleted

Article 67 (Amendments) // Article 65 (Review)

// Article 66 (Amendment of list of courts and redress procedures)

Article 68 // Deleted

4.5. Individual Articles

Given the great similarity between the current Brussels Convention and this proposal, only departures from the Convention are considered here.

Certain language versions of the proposed Regulation contain minor corrections in relation to the Convention, designed to restore perfect concordance of all versions.

Many Articles of the Convention have been taken over unchanged. For those Articles, refer to the Explanatory Reports published on the occasion of successive accessions [6].

[6] OJ C 59, 6.3.1979; OJ C 189, 28.7.1990.

Chapter I - Scope

*Article 1*

This Chapter contains a single Article, which is unchanged. The scope is the same as that of the Brussels Convention; it should be remembered that the Commission has presented a proposal for

a Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters [7], and Germany and Finland have presented the Council with a proposal for a Regulation on insolvency procedures [8].

[7] COM(1999) 220.

[8] OJ C 221, 3.8.1999.

Chapter II - Jurisdiction

Section 1 - General provisions

*Article 2*

This Article establishes the principle of the defendant's domicile as the general ground for jurisdiction. It contains two new paragraphs. The purpose of paragraph 3 is to make the text more transparent; it refers to Article 57 for the definition of domicile in relation to legal persons. Paragraph 4 defines the concept of "Member State" as being a Member State bound by the Regulation. Denmark, the United Kingdom and Ireland are not concerned by the Regulation. But they cannot be treated as non-member countries, either as regards the rules of jurisdiction to be applied there or as regards the recognition of judgments given there.

*Article 3*

The list of national grounds of jurisdiction that may be used in the Member States against defendants not domiciled in a Member State are given in Annex I to the Regulation. The Annex may be amended if need be and will be published in the Official Journal. The list has been amended very slightly to reflect a subsequent change in Italian national legislation.

*Article 4*

The rule determining the scope rationae personae distinguishes between two situations: cases where the defendant is domiciled in a non-member country and cases where the defendant is domiciled in a Member State not bound by the Regulation.

Where the defendant is domiciled in a non-member country, national rules will apply. But this rule does not operate where a court in a Member State has exclusive jurisdiction (Article 22). Nor will it operate where the defendant, although domiciled in a non-member country, has signed a contract containing a clause conferring jurisdiction on a court in a Member State. By Article 23, it is enough that one of the parties to the case (not necessarily the claimant) be domiciled in a Member State.

Where the defendant is domiciled in a Member State not bound by the Regulation, the Brussels Convention rules on jurisdiction will, of course, be applicable.

Section 2 - Special jurisdiction

*Article 5*

The Brussels Convention rule regarding contractual obligations is maintained. But to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised [9], the second subparagraph of Article 5(1) gives an autonomous definition of the place for enforcement of "the obligation in question" in two specific situations. For the sale of goods, it will be the place where, under the contract, the goods were or should have been delivered. In the case of the provision of services, it will be the place where, still under the contract, the services were or should have been provided. This pragmatic determination of the place of enforcement applies regardless of the obligation in question, even where this obligation is the payment of the financial consideration for the contract. It also applies where the claim relates to several obligations. The rule may, however, be "displaced" by an explicit agreement on the place of performance.

[9] Case 12/76 Tessili [1976] ECR 1473 (judgment given on 6 October 1976).

Where the effect of the autonomous definition is to designate a court in a non-member country, rule (a) will apply rather than rule (b). Jurisdiction will lie with the court designated by the rules of private international law of the State seised as the court for the place of performance of the obligation in question (c).

Article 5(3) covers not only cases where the harmful event has occurred but also those where it may occur. The proposed text removes an ambiguity in the interpretation of Article 5(3) of the Convention. It offers litigants a clear ground of jurisdiction for preventive measures. And since the Protocol annexed to the Brussels Convention is deleted, Article II of the Protocol (proceedings for involuntary offences before criminal courts) is incorporated here.

*Article 6*

Paragraph 1 explicitly makes the subjecting of cases involving several defendants to a single forum conditional on the claims being so closely linked that there is a risk of irreconcilable judgments. It expressly takes over the rule posited by the Court of Justice for the interpretation of this Article [10].

[10] Case 189/87 Kalfelis v Banque Schröder [1988] ECR 5565 (judgment given on 27 September 1988).

Paragraph 2 contains a new subparagraph incorporating the provision earlier contained in Article V of the Protocol to the Brussels Convention in favour of Austria and Germany, where the procedural law makes no provision for claims for guarantees or intervention but only "litis denuntiatio" (third-party notices).

Section 3 - Jurisdiction in matters relating to insurance

The jurisdiction conferred by this Section is substituted for that conferred by Sections 1 and 2.

*Article 8*

This Article is unchanged. But in matters of reinsurance it must be interpreted as not applying

in relations between insurers or in relations between insurers and reinsurers. There is no particular need for weaker-party protection. On the other hand the Article does apply actions brought by policy-holders against reinsurers.

*Article 9*

The right of the applicant to sue in his own courts, originally conferred by this Article solely on insurance policy-holders (first paragraph, point (2)) is now extended to the insured person and the beneficiary where they are the applicant. The objective of protecting the weaker party in the case, which warrants an exception from the principle that jurisdiction lies in the defendant's domicile in favour of the applicant's domicile, also applies to applicants who are insured persons or beneficiary, who are likewise in a weak position in relation to the insurer.

*Article 11*

As in Article 6, Article V of the Protocol applicable to Austria and Germany, where the procedural law makes no provision for claims for guarantees or intervention but only "litis denuntiatio" (third-party notices).

Articles 13 and 14

The derogation provided for by paragraph 5 of Article 13 from the strict rules governing clauses conferring jurisdiction in relation to insurance is extended to all "large risks" that are or will be defined in Article 5(d) of 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, as amended by Council Directives 88/357/EEC and 90/618/EEC, and to ancillary risks. Subsequent amendments to Directive 73/239/EEC will affect the scope of the concept of large risks to which Article 14 applies.

Section 4 - Jurisdiction over consumer contracts

The jurisdiction conferred by this Section is substituted for that conferred by Sections 1 and 2.

*Article 15*

Article 15 confirms the orientation reached in the Council concerning the need to protect consumers, as the weaker parties to a contract. The contracts traditionally covered by this Article - sale of goods on instalment credit terms and contracts for loans repayable by instalments other and similar credit arrangements to finance the sale of goods - automatically entitle the consumer to sue in the courts for his domicile, and in this respect there is no change to the content of Article 13 of the Brussels Convention. It is also proposed that Article 15, first paragraph, point (3), be amended to extend this entitlement to all other consumer contracts, provided certain conditions are met.

The use of general terms makes clear that all the contracts mentioned in points (1), (2) and (3), whether they relate to goods or to services, are within Article 15 as long as they are consumer contracts. "Time-share" contracts [11] are within Article 15 and not Article 22(1)(a), unlike

contracts for the sale of real property.

[11] Directive 94/47/EC of the European Parliament and 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 (OJ L 280, 29 October 1994).

The criteria given in Article 13(3) of the Brussels Convention have been reframed to take account of developments in marketing techniques. For one thing, the fact that the condition in old Article 13 that the consumer must have taken the necessary steps in his State has been removed means that Article 15, first paragraph, point (3), applies to contracts concluded in a State other than the consumer's domicile. This removes a proved deficiency in the text of old Article 13, namely that the consumer could not rely on this protective jurisdiction when he had been induced, at the cocontractor's instigation, to leave his home State to conclude the contract. For another, the consumer can avail himself of the jurisdiction provided for by Article 16 where the contract is concluded with a person pursuing commercial or professional activities in the State of the consumer's domicile directing such activities towards that State, provided the contract in question falls within the scope of such activities.

The concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. The contract is thereby treated in the same way as a contract concluded by telephone, fax and the like, and activates the grounds of jurisdiction provided for by Article 16.

The removal of the condition in old Article 13(3)b) that the consumer must have taken necessary steps for the conclusion of the contract in his home State shall also be seen in the context of contracts concluded via an interactive website. For such contracts the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract and the consumer's State. The philosophy of new Article 15 is that the cocontractor creates the necessary link when directing his activities towards the consumer's State.

Article 15, third paragraph, also contains an amendment. The exclusion of transport contracts does not apply where the contract covers both travel and accommodation for an all-in price (package holidays) [12].

[12] Council Directive 90/314/EC of 13 June 1990 on package travel, package holidays and package tours: OJ L 158, 23.6.1990.

The Commission has noted that the wording of Article 15 has given rise to certain anxieties among part of the industry looking to develop electronic commerce. These concerns relate primarily to the fact that companies engaging in electronic commerce will have to contend with potential litigation in every Member State, or will have to specify that their products or services are not intended for consumers domiciled in certain Member States. One such concern relates to the perceived problems with the notion of "directing his activities" in Article 15, first paragraph, point (3), which is considered difficult to comprehend in the Internet world.

In order to further clarify the legal implications and requirements of electronic commerce, in particular in respect of jurisdiction and applicable law, as a result of the economic, transborder development of electronic commerce, the Commission will organise a hearing on this subject in the autumn of 1999 with the participation of regulators, legislators, consumers, industry and other interested parties.

The Commission intends to report in accordance with Article 65 on the application of Article 15 not later than two years after the entry into force of the Regulation.

*Article 16*

To increase consumer protection, the option available to the consumer in case of dispute is either the Member State where the other party is domiciled or the courts of the place where he is domiciled (and not the Member State where he is domiciled). This departure from the rule that the Regulation applies only to international jurisdiction and not to jurisdiction within a Member State is warranted by the concern to enable the consumer to sue the other party as close as possible to his home.

Section 5 - Jurisdiction over individual contracts of employment

The jurisdiction conferred by this Section is substituted for that conferred by Sections 1 and 2.

The provisions concerning jurisdiction in relation to employment contracts undergo little change of substance but are regrouped in a specific section as is the case for insurance and consumer contracts. The rules of jurisdiction in Articles 19 and 20 apply without prejudice to the rule laid down by Parliament and Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [13].

[13] OJ L 18, 21.1.1997.

*Article 18*

Article 18(2) applies where the employer, although not domiciled in a Member State, operates a branch, agency or other establishment there. The employer is then presumed to be domiciled in a Member State. This increases the protection given the worker, considered to be the weaker party to the contract. The same protection is already available to the insurance policy-holder and is now extended to the insured and the beneficiary (Article 9(2)) and to the consumer (Article 15(2)), who again are the weaker parties enjoying enhanced protection.

Section 6 - Exclusive jurisdiction

*Article 22*

There is now greater flexibility in the rules derogating from the principle of jurisdiction governed by the lex loci situationis in respect of short-term leases (paragraph 1). To enable the defendant to be sued also in the courts for his domicile, it will now suffice for the tenant to be a natural person, irrespective of whether the landlord is a natural or a legal person, and for both landlord and tenant to be domiciled in the same Member State. This solution lies midway between the solutions accepted in the Brussels and Lugano Conventions.

Contrary to the autonomous rule now laid down in Article 57, the location of the "seat", which is the exclusive linking factor as regards the validity, nullity and dissolution of companies, legal persons and associations, and the validity of decisions of their organs, is determined in accordance with the rules of private international law of the court seised.

Lastly, the reason for the amendment to paragraph 4 is that there are other relevant instruments governing the deposit or registration of patents, trade-marks, designs, models and the like. The exclusive jurisdiction conferred by paragraph 4 on the courts of the State of deposit or registration extends to Community and European patents. The effect of this amendment is to reinstate in the Regulation Article Vd of the Protocol since the Luxembourg Convention of 15 December 1975 has never entered into force.

Section 7 - Extension of jurisdiction

*Article 23*

Two amendments are made to this Article. The first (paragraph 1) confirms that the jurisdiction conferred by a choice-of-forum clause is an exclusive jurisdiction [14], while enabling the parties to agree that this jurisdiction is not exclusive. This additional flexibility is warranted by the need to respect the autonomous will of the parties.

[14] Case 23/78 Meeth v Glacetal [1978] ECR 2133 (judgment given on 9 November 1978).

The second (paragraph 3) takes account of the development of new communication techniques. The need for an agreement "in writing or evidenced in writing" should not invalidate a choice-of-forum clause concluded in a form that is not written on paper but accessible on screen. The reference, of course, is mainly to clauses in contracts concluded by electronic means. This amendment is also directed to the objectives pursued by the Commission proposal for a Council Directive on certain legal aspects of electronic commerce in the internal market [15].

[15] OJ C 30, 5 February 1990, COM(1998) 586.

*Article 24*

Certain language versions of this Article have been amended to clarify the point that a defendant who enters an appearance may contest the jurisdiction of the court seised no later than the time at which he is considered by national law as presenting his defence on the merits. In other words, the fact of presenting a defence on the merits may render the argument contesting the jurisdiction nugatory only if that argument is presented no later than the defence on the merits [16].

[16] Case 150/80 [1981] ECR 1671 (judgment given on 24 June 1981).

Section 8 - Examination as to jurisdiction and admissibility

*Article 26*

The amendment to this Article is basically technical. Its purpose is to be coherent with the proposal for a Directive on the transmission of documents for service in the Member States of the European Union in civil and commercial matters, now before the Council [17]. Once this proposal has been adopted and transposed in all the Member States, the national transposal provisions will supersede the Hague Convention of 1965 on the service abroad of judicial documents in civil and commercial matters, currently in force in virtually all the Member States.

[17] COM(1999) 219.

Section 9 - Lis pendens and related actions

No change has been made to the basic lis pendens and related actions machinery, which proceeds from the priority given to the court first seised. But the date on which an action is "pending" for the purposes of this section is defined autonomously, and a mistake in the framing of the related actions rule in the Brussels Convention has been corrected.

*Article 28*

The amendments to paragraph 2 rectify an anomaly originating in the negotiations for the 1968 Brussels Convention. To permit the stay of proceedings in the court first seised in the event of related actions, there is no need for the actions to be both pending at the first-instance stage.

But if the court second seised is minded to decline jurisdiction in favour of the first, the actions must both be pending at first instance; otherwise the parties might lose the benefit of the two-stage procedure. The court first seised must also have jurisdiction to hear the two applications and its law must permit the related actions to be joined.

*Article 30*

This Article fills in a gap in the Brussels Convention [18] by giving a definition of the date on which an action is "pending" for the purposes of Articles 27 and 28. Treating an action as "pending" when the claim has been lodged with the court has the advantage of simplicity. But this solution is particularly unfair on the party commencing proceedings in a Member State where proceedings are commenced after service on the defendant of the document instituting proceedings. Yet to consider that the case is "pending" once the complaint has been served on the defendant again has the advantage of simplicity. But this solution penalises the party which commences the proceedings in a Member State where the court must be seised before notice is served. Another, legally sound, solution consists of considering that an action is pending only when the two procedural steps of notification or service and registration of the case in the court having jurisdiction have been performed. But this solution has the negative effect of delaying the determination that there is a lis pendens situation.

[18] Case 129/83 Zelger v Salinitri [1984] ECR 2397 (judgment given on 7 June 1984).

Article 30 proposes a third course, which reconciles the various procedural systems while ensuring both that applicants will all be on an equal footing and that there can be no abuse of procedures. The date on which an action is considered to be "pending" will depend on the procedural system:

- in Member States where the claim is lodged with the court before service of the document instituting the proceedings on the defendant, the action will be pending from the date of lodging, provided the plaintiff takes all the requisite steps to have it served on the defendant. These steps will depend on the legal system: they may include transmission to the court of all material facts enabling it to serve notice of the action, or the handing over of the document already registered at the court to the competent authority for service;
- in Member States where service precedes lodging with the Court, the action becomes pending when the document is handed over to the authority responsible for service (and not on the date of actual service), provided the applicant lodges the document with the court as soon as he is required to do so by the lex fori.

Section 10 - Provisional, including protective, measures

*Article 31*

Article 31, the sole article in this section, is unchanged. Like the other provisions of the Regulation, it must be read in the light of preliminary rulings given by the Court of Justice under the Protocol to the Brussels Convention [19].

[19] E.g. Case C-391/95 Van Uden v Deco Line [1998] ECR I-7091 (judgment given on 17 November 1998) and Case C-99/96 H.H. MIETZ v Intership Yachting Sneek BV (judgment given on 27 April 1999).

Chapter 3 - Recognition and enforcement

This Chapter deals in turn with recognition and enforcement of judgments. The sole Article in Section 1 lays down the principle of automatic recognition and refers, for formal recognition, to the exequatur procedure. It also provides for the possibility of relying on the grounds for non-enforcement provided for by Articles 41 and 42 in the event of recognition being an incidental issue. Section 2 sets out the procedural requirements for a declaration of enforceability.

*Article 32*

This Article defines what judgments may be eligible for recognition and enforcement. It also reflects specific features of procedural law in Sweden and incorporates the provisions of Article II of the Protocol annexed to the Brussels Convention.

Section 1 - Recognition

*Article 33*

This Article lays down the principle of automatic recognition of judgments given in the European Community. The consequence of this automatic recognition, founded on mutual trust between the Member States' judicial authorities, is that the same proceedings cannot be recommenced in another Member State.

But it may be that a party against whom judgment has been given may contest recognition. The Regulation provides that in such cases the procedure to be followed is that provided for by the section (Section 2) governing enforcement.

The question of recognition of a judgment may also be raised as an incidental issue in another action. Recognition can then be contested on the basis of one of the grounds for non-enforcement set out in Articles 41 and 42.

Section 2 - Enforcement

This Section describes the procedure to be followed either for formal recognition under Article 33(2) or for a declaration of enforceability in a Member State other than the State of origin of the judgment. The purpose of this procedure, of course, is to declare a judgment that is enforceable in the State of origin enforceable; there is no effect on actual enforcement of the judgment in

the Member State addressed. The procedure is directed towards obtaining a rapid decision. Considerable changes have accordingly been made to the Brussels Convention mechanism. For one thing, the court or authority responsible for declaring the judgment enforceable in the Member State addressed has no power to proceed of its own motion to review the grounds for non-enforcement of the judgment provided for by Articles 41 and 42. These may be reviewed, if at all, only in the course of an appeal from the party against whom enforcement has been authorised. The court or competent authority is limited to making formal checks on the documents presented in support of the application; they are determined by the Regulation. Moreover, the grounds for non-recognition or non-enforcement have been narrowed down quite considerably.

*Article 35*

This Article governs jurisdiction to receive applications for a declaration of enforceability. The list of courts and competent authorities in the Member States that may examine applications is given at Annex II. The authorities designated may be judicial or administrative.

A degree of flexibility is introduced into paragraph 2, relating to geographic jurisdiction ratione loci in the enforcement procedure. Jurisdiction depends on the domicile of the party against whom enforcement is sought or by the place of enforcement.

*Article 36*

The purpose of paragraph 3 is to release the applicant from the need to elect an address for service within the area of jurisdiction of the competent authority applied to where an administrative authority is concerned. The same applies to appointments of representatives ad litem.

*Article 37*

In order substantially to reduce the time taken by the enforcement procedure, this Article introduces binding provisions addressed to the courts or other authorities designated pursuant to Article 35 to receive applications. They must declare the judgment enforceable immediately on completion of the formalities provided for by Article 50. In particular, the court may not of its own motion review the existence of one of the grounds for non-recognition or non-enforcement provided for by Articles 41 and 42. These grounds can be reviewed subsequently on application from the party against whom enforcement is sought, in accordance with Articles 39 and 40. In other words, an application for enforcement must not be treated as just another case. The Member States must take the requisite measures to ensure that such applications are given priority so as to avoid further complicating the judgment creditor's procedural burden. It is also particularly important that the procedure should remain ex parte; the defendant must not be informed of the application nor summoned to hearings which have no reason not take place.

Articles 39 and 40

The redress procedures available to the two parties are regrouped in these two Articles, with no change of substance. Unlike the first stage of the procedure, which is entirely unilateral and must never involve hearings of the parties, these appeal procedures are of an adversarial nature.

*Article 41*

This Article determines the sole grounds on which a court seised of an appeal may refuse or revoke a declaration of enforceability. These grounds have been reframed in a restrictive manner to improve the free movement of judgments.

For one thing, adding the adverb "manifestly" in point 1 underscores the exceptional nature of the public policy ground. For another, the ground most commonly relied on by debtors to oppose enforcement has been modified to avoid abuses of procedure. To prevent enforcement being excluded, it will be enough for the defaulting defendant in the State of origin to have been served with notice in sufficient time and in such a way as to enable him to arrange for his defence. A mere formal irregularity in the service procedure will not debar recognition or enforcement if it has not prevented the debtor from arranging for his defence. Moreover, if the debtor was in a position to appeal in the State of origin on grounds of a procedural irregularity and has not done so, he is not entitled to invoke that procedural irregularity as a ground for refusing or revoking a declaration in the State addressed. Thirdly, the ground of failure to abide by a rule of private international law in the State addressed relating to personal status and capacity of natural persons has been dropped as these rules are gradually being approximated in the Member States. Lastly, to fill a gap in the Brussels Convention, the ground of irreconcilable judgments has been extended to cover judgments given in another Member State. Of course, the court may not review the judgment as to substance.

*Article 42*

This Article defines the rules of jurisdiction that may be reviewed by a court hearing an appeal pursuant to Articles 39 and 40. These are the rules of jurisdiction over insurance and consumer contracts and exclusive jurisdiction. Employment contracts are not concerned here, as any review of jurisdiction would affect only the applicant, who will generally be the worker.

*Article 43*

To ensure flexibility and avoid the potentially irreversible consequences of enforcement, the court hearing an appeal must be able to stay proceedings if the original judgment, although enforceable, is under appeal in the Member State of origin. It may also declare the judgment enforceable while subjecting enforcement to the provision of security. This rule must be applicable at all levels of appellate jurisdiction.

*Article 44*

This Article defines the rules applicable to provisional, including protective, measures to be taken by the State addressed where the foreign judgment is to be recognised under the Regulation. Firstly, the power to take provisional measures in relation to a defendant against whom enforcement is sought is implied by the declaration of enforceability. In addition, where there is a judgment on the merits provisional, including protective, measures may be applied for in accordance with

the law of the Member State addressed even before the judgment on the merits has been declared enforceable by the court or other competent authority in that State. Article 44 is the extension, as it were, of Article 31. In most Member States the existence of a foreign judgment will ground a credit claim warranting provisional measures.

In all cases, the declaration of enforceability implies the power to order provisional measures and no further procedure can be required of the applicant for authorisation to order them.

*Article 49*

The purpose of this rule is to cut the costs of the procedure for obtaining a declaration of enforceability. It was previously in the Protocol annexed to the Brussels Convention.

Section 3 - Common provisions

Articles 50 and 51

To simplify the procedural formalities incumbent on the applicant, it is provided that the only documents of which the court or competent authority responsible for examining the appeal must be notified are a certified copy of the judgment and a certificate from the court or competent authority of the Member States of origin. The certificate (a model appears in Annex 4 to the Regulation) provides the court or competent authority in the Member States addressed with all the information it needs to declare the judgment enforceable.

Chapter IV - Authentic instruments and judicial settlements

Articles 54 and 55

The new procedure for recognition or enforcement provided for by Chapter III applies mutatis mutandis to authentic documents that have been drawn up and are enforceable in a Member State. The sole ground for non-recognition or non-enforcement, which can be raised only if there is an appeal, is where recognition or enforcement is manifestly contrary to public policy in the Member State addressed.

Settlements approved by a court in the course of proceedings are now treated in the same way as authentic documents. The same applies to arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them in certain Member States, notably in Scandinavia. This rule was already in Article Va of the Protocol annexed to the Brussels Convention.

Authentic documents, court settlements and arrangements relating to maintenance obligations must be accompanied by the certificate in Annex 5 to the Regulation, which provides the court or competent authority in the Member States addressed with all the information it needs to declare that it is enforceable.

Chapter V - General provisions

*Article 57*

The approach to determining the domicile of companies and other legal persons has changed. The definition of autonomous concepts is now the preferred approach. It is no longer necessary for a Member State to refer to its rules of private international law to locate the "seat" of a body corporate. This will avoid negative or positive conflicts of jurisdiction. The domicile of companies

and other legal persons is now defined by three alternative criteria - the statutory seat, the central administration or the principal place of business. They correspond to the three criteria in Article 48 (ex-58) of the EC Treaty (right of establishment of companies within the Community).

Chapter VI - Transitional provisions

*Article 58*

This is the sole Article constituting the Chapter; it provides for recognition or enforcement of judgments given during the transitional period, taking over a rule already laid down by the Brussels Convention. It has been modified to allow a smooth changeover from the old instrument - the Brussels Convention - to the new one - this Regulation. Judgments given in a Member State after the date of entry into force of the Regulation but in actions begun before then are to be recognised and enforced under the Regulation if they are given by a court that enjoys jurisdiction under the Brussels Convention.

Chapter VII - Relations with other instruments

This Chapter is restructured in three sections to circumscribe and define the rules governing relations between the Regulation and, in turn, Community secondary legislation, the Brussels Convention, which will remain in force as several Member States are not bound by the Regulation, and other general or specific Conventions.

*Article 59*

This takes over a rule that was already in the Brussels Convention. It preserves existing and future rules on conflict of jurisdictions in sectoral Community instruments.

*Article 60*

The basic rule is that the Regulation replaces the Brussels Convention in relations between Member States other than the United Kingdom, Ireland and Denmark. In other words, as the criterion for application of the Regulation is still the defendant's domicile in one of the Member States bound by the Regulation, a defendant domiciled there must be sued in a court enjoying jurisdiction under the Regulation.

But if the defendant is domiciled in one of the Member States not bound by the Regulation, or if Articles 16 and 17 of the Brussels Convention confer jurisdiction on such a State, the Brussels Convention rules of jurisdiction remain applicable. This rule complements Article 4(1) allowing courts to apply their national rules in relation to defendants domiciled in a non-member country. The Regulation makes a distinction between the rules applying to a defendant domiciled in a non-member country or in a Member States not bound by the Regulation. Likewise the lis pendens rules of the Brussels Convention will apply where claims are made in a Member State not bound by the Regulation and in a Member State that is so bound.

In any event, judgments given in any Member State, whether or not bound by the Regulation, will be recognised and enforced in Member States bound by the Regulation. This rule amplifies the rule on jurisdiction in Article 4(3) (Chapter 1). Of course, judgments given in a Member State against

a defendant domiciled in a non-member country will also be recognised and enforced under the Regulation.

Article 62 and 63

For the sake of transparency, the Regulation enumerates the specific conventions to which the Member States are parties and which will continue to apply. This closed list will be extended in light of the information to be supplied by the Member States. It should be noted that, unlike the Brussels Convention (Article 57), this provision no longer allows the Member States, after the entry into force of this Regulation, to accede to existing or future conventions governing jurisdiction and the recognition and enforcement of judgments in specific matters.

In accordance with Brussels Convention practice, judgments given in a Member State under one of the specific conventions are to be recognised and enforced in another Member State under the rules on recognition and enforcement either of the relevant convention or of the Regulation.

*Article 64*

The purpose of this new Article is to take account of the removal of Article 59 of the Brussels Convention, whereby a Member State, in a convention on the recognition and enforcement of judgments, could depart from the general obligations of the Convention. Such conventions are now excluded, and Article 59 is accordingly not taken over in the Regulation. But account must be taken of agreements already signed by Member States with non-member countries on the basis of Article 59. Such agreements may continue to be applied pursuant to the Regulation.

Chapter VIII - Final provisions

*Article 65*

This is a new Article not found in the Convention. It is for the Commission, by virtue of Article 211 of the EC Treaty, to ensure that the Regulation is applied. No later than five years after the date of adoption of the Regulation, the Commission is to report on its application, with proposals for adaptations if need be.

*Article 66*

This is a also new Article, providing that the Member States are to notify the Commission of changes to the lists of courts and redress procedures; the Commission is to publish them in the Official Journal of the European Communities.

*Article 67*

Another new provision specifies the date of entry into force, in accordance with Article 254 of the Treaty.

Proposal for a COUNCIL REGULATION (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

# Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty)
# /* COM/2000/0689 final - CNS 99/0154 */

Amended proposal for a COUNCIL REGULATION on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty)

EXPLANATORY MEMORANDUM [1]

[1] Amendments to the original Commission proposal are highlighted using "strikethrough" for deleted passages and "bold" and "underline" for new or amended passages.

1. Background

On 14 July 1999, the Commission adopted a proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [2] The proposal was transmitted to Parliament and the Council on 7 September 1999. At its March 2000 session, the Economic and Social Committee issued its Opinion on the proposal. [3] The European Parliament, consulted under the consultation procedure, referred the proposal to its Legal Affairs and Internal Market Committee (responsible for the report) and its Committee on Public Liberties and Citizens' Rights (for opinion). The Legal Affairs and Internal Market Committee, having received and considered the opinion of the Committee on Public Liberties and Citizens' Rights (adopted on 27 January 2000) approved its report on 4 September 2000. At the plenary session on 21 September 2000, the European Parliament adopted its opinion approving the Commission proposition subject to a number of amendments and asked the Commission to amend its proposal in accordance with Article 250(2) of the EC Treaty.

[2] COM (1999)348 final, 14.7.1999; JO C 376, 28.12.1999.

[3] JO C 117, 26.4.2000.

2. The amended proposal

This amended proposal is adopted in response to amendments voted on by Parliament. The Commission can accept a number of Parliament's amendments.

2.1. Amendments accepted in whole or in part

2.1.1. Amendments to take account of the special position of the United Kingdom and Ireland

Under the Protocol on the position of the United Kingdom and Ireland, these Member States do not participate in the adoption of measures under Title IV of the EC Treaty. But in the meantime they have given notice of their intention to participate in the negotiations on this initiative, using the possibility offered by the Protocol.

The amendments by Parliament to take account of this new situation should therefore be accepted and provisions relating to trusts should be inserted. These provisions or equivalents are already in the Brussels Convention, [4] but, given the position of the two Member States under the Protocol, were not incorporated in the proposal of 14 July 1999.

[4] JO C 27, 26.1.1998.

Provisions concerned

- Article 5(5a),

- Article 23, 4th and 5th paragraphs,

- Article 57, 5th paragraph.

The Commission accordingly accepts amendments 21 and 27 and reincorporates the full text of the current provisions of the Brussels Convention relating to trusts in its amended proposal.

2.1.2. Amendments to treat authentic instruments in the same way as judicial decisions, in terms de of automatic recognition

(a) The European Parliament proposes providing for the automatic recognition of authentic instruments in the same way as judgments. The Commission can accept the principle of this extension. The automatic recognition of authentic instruments is already provided for by the Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children. [5]

[5] OJ L 160, 30 June 2000.

It also intends, as in the case of the Bruxelles II Regulation, to treat judgments and authentic instruments in exactly the same way for recognition purposes. The amended proposal accordingly incorporates amendment No 29 and further lays down the same rules for authentic instruments as are laid down by Article 33 for judgments, and in particular the possibility of a formal procedure for recognition of them.

Provisions concerned

- Recitals 17 and 18,

- Article 54.

The Commission can thus accept amendments 18 (a), 19 and 29 (first part)

(b) The Commission can likewise accept that notaries be expressly assimilated to authorities involved in procedures for obtaining a declaration of enforceability. It actually considered that the word "authority" already included notaries.

Provisions concerned:

- Article 35, first paragraph,

- Annexes II and VI, point 3.

The Commission can thus accept amendments 28, 29 (end), 33 and 34.

2.1.3. Amendment relating to jurisdiction in insurance matters

Parliament proposes limiting the multiplicity of courts having jurisdiction in insurance matters pursuant to Article 9(2), the purpose of which is to enable an insurer to be sued in the courts for the place where the policy-holder, the insured or a beneficiary is domiciled, regardless of the nature of the insurance contract (individual or group). [6] Parliament considers that the protection of the courts should be confined to individual insurance contracts so as to avoid excessive scattering of jurisdiction, the financial consequences of which would be excessive for insurers. It is therefore proposed that the article be amended so that the protection of the courts will be available only for individual insurance contracts.

[6] Article 8 of the Brussels Convention allows the protection only for the policy-holder, not for the insured or the beneficiary.

The Commission can accept part of this amendment. The possibility offered to the policy-holder of suing in the courts for the place where he is domiciled, regardless of the nature of the contract,

is already provided for by the Brussels Convention and there is no need to withdraw it, which would be a retrograde step. But the Commission can accept that the extension of the protection of the courts to the insured person and the beneficiary be confined to situations where the contract is an individual contract, in order to avoid undesirable multiplication of courts having jurisdiction.

Provision concerned: Article 9, point 2 of first paragraph.

The Commission can thus accept part of amendment 22.

2.1.3.1. Amendment of the time prescribed for presentation of a report on the application of the Regulation.

Parliament proposes that the report should take account of the Regulation's impact on small business and should be made within two rather than five years.

The Commission can accept the first part of the amendment. But it cannot accept the reduction from five to two years. It would be impossible, given the duration of judicial procedures in the Member States, to accumulate the necessary statistics and number of judgments under the Regulation to prepare the report.

Provision concerned: Article 65

The Commission accepts amendment 31 (second part).

2.1.3.2. Amendment providing for a time-lag between adoption and entry into force

As a rule a regulation enters into force on the 20th day following its adoption. But given the complexity of the subject-matter, a longer period should be allowed for those concerned to adapt to it (six months). But the period should run from the adoption of the regulation rather than from its publication in the Official Journal.

Provision concerned: Article 67

The Commission can accept amendment 32 in part.

2.2. AMENDMENTS NOT ACCEPTED

2.2.1. Amendments relating to the addition of a new Article 17a (authorisation of clauses referring consumer disputes to a non-judicial dispute-settlement body)

The Commission observes that Parliament has not amended Article 16, laying down rules as to jurisdiction in consumer-protection matters. It also did not wish to authorise contract clauses allowing consumer contracts to refer consumer disputes to courts other than those for the place where the consumer is domiciled, thus derogating from the protection principle of Article 16 (jurisdiction at the place where the consumer is domiciled). On this point the Commission is attentive to the debates which took place in Parliament. It will review the system as soon as the Regulation has come into force on the basis of a stock-taking of alternative dispute-settlement schemes. The Commission is inserting a new recital 14a to that effect.

But Parliament proposes a provision that the consumer and the supplier may agree a contractual clause whereby disputes are referred, prior to any court action, to a non-judicial dispute-settlement scheme. A number of conditions are provided for, including prior approval of the scheme by the Commission.

The Commission shares the concerns underlying this amendment and Parliament's desire to consider the proposed Regulation as one component of a package of legislative and non-legislative measures, including the establishment of non-judicial dispute-settlement schemes. It acknowledges that it is desirable for parties to be able to settle their disputes on an amicable basis rather than going

straight to the courts and that reference to the courts should be the last resort. It also observes that in practice the consumer will tend to prefer non-judicial solutions where they are available. To this end, a large number of projects are in hand, both by operators and by institutions, to promote the establishment of such alternative dispute-settlement schemes. [7]

[7] See the Commission document and the Council Resolution on creation of the European Extra-Judicial Network for the settlement of consumer disputes (EEJ-Net).

But in the current state of progress it is not possible to make the options available to the consumer under the Regulation in terms of international jurisdiction subject to an obligation to go first to a non-judicial dispute-settlement scheme. For one thing, this solution could raise constitutional difficulties in certain Member States. For another, the schemes that this obligation would presuppose are not yet in operation. And thirdly, the procedural relationships between alternative dispute-settlement schemes and the courts (regarding limitation periods, for example) are highly complex and need further study.

In any event the Commission is planning to pursue current initiatives on alternative consumer dispute-settlement schemes. In the report that it is to make five years after the entry into force of the Regulation under Article 65, it will take stock of the situation and review the relevant provisions of the Regulation.

Provision concerned: Article 16 and new Article 17a

The Commission cannot accept amendments 38 and 39.

2.2.2. Amendments relating to Article 15 (definition of consumer contracts covered by the rules on jurisdiction in Article 16)

Parliament proposes a new paragraph to define the concept of activities directed towards one or more Member States, and takes as one of its assessment criteria for the existence of such an activity any attempt by an operator to confine its business to transactions with consumers domiciled in certain Member States.

The Commission cannot accept this amendment, which runs counter to the philosophy of the provision. The definition is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas that concept is quite foreign to the approach taken by the Regulation. Moreover, the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled. Lastly, this definition is not desirable as it would generate fresh fragmentation of the market within the European Community.

Provisions concerned: Recital 13 and Article 15

The Commission cannot accept amendments 36 and 37.

2.2.3. Insertion of a new Article 55a concerning the enforceability of settlements agreed within an alternative dispute-settlement scheme

Parliament proposes that such settlements should be enforceable in the same way as authentic instruments.

The Commission cannot accept this assimilation, which is radically contrary to the philosophy underlying the Regulation. A settlement obtained in an alternative dispute-settlement scheme is by definition neither ordered nor recorded by a person exercising public authority and cannot, therefore, be treated in the same way as an enforceable authentic instrument.

Provision concerned: new Article 55a

The Commission cannot accept amendment 41, nor the last part (b) of amendment 18 (see supra, 2.1.2)

2.2.4. Other amendments not accepted

2.2.4.1. Insertion of a new Recital 4d (amendment 5)

The Commission cannot accept this amendment, which would situate this proposal for a Regulation in the context of a package of legislative and non-legislative measures and refer to a further Commission decision relating to the establishment of non-judicial dispute-settlement schemes and small claims procedures. This recital is not compatible with the principle that the sole purpose of a recital is to explain the provisions of the Regulation. Moreover, even if the Commission shares Parliament's desire for rapid development of alternative dispute-settlement schemes, it cannot accept the adoption of the Regulation being subject to that development. For one thing, the Regulation serves a horizontal purpose - to determine rules of jurisdiction for the entire range of civil and commercial matters and not just for consumer disputes. For another, the jurisdiction rules will still be needed even after the alternative schemes have been set up.

2.2.4.2. Amendment of recital 5 (amendment 14)

The Commission cannot accept this amendment (Regulation not to be adopted before the Brussels Convention has been revised) as it would be contrary to the Amsterdam Treaty and does not reflect the communitisation of judicial cooperation in civil matters.

2.2.4.3. Other amendments to the recitals

Amendments 2, 7, 8, 10, 12, 13, 20 and 36 either restate principles that flow from the Treaties or contain commitments to be borne by the Commission or are unrelated to the Regulation's provisions. The Commission cannot accept them.

1999/0154 (CNS)

Amended proposal for a COUNCIL REGULATION 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) thereof,

Having regard to the proposal from the Commission, [8]

[8] OJ C 376, 28.12.1999; COM(1999)348 final.

Having regard to the Opinion of the European Parliament, [9]

[9] OJ ...

Having regard to the Opinion of the Economic and Social Committee, [10]

[10] OJ C 117, 26.4.2000.

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. In order to establish progressively such an area, the Community is to adopt, amongst other things, the measures relating to judicial cooperation in civil matters needed for the sound operation of the internal market.

(2) 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

**Judgment of the Court**
**of 28 March 2000**
**Dieter Krombach v André Bamberski.**
**Reference for a preliminary ruling: Bundesgerichtshof - Germany.**
**Brussels Convention - Enforcement of judgments - Public policy.**
**Case C-7/98.**

1. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Assessment by the court before which enforcement is sought - Limits - Review by the Court

(Convention of 27 September 1968, Art. 27(1))

2. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Jurisdiction of the original court founded on the nationality of the victim of an offence - Account taken by the court before which enforcement is sought - Not permissible

(Convention of 27 September 1968, Art. 27(1))

3. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Definition

(Convention of 27 September 1968, Art. 27(1)

4. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Defendant prosecuted for an intentional offence - Refusal of the original court to allow the defendant to have his defence presented unless he appeared in person - Account taken by the court before which enforcement is sought - Whether permissible

(Convention of 27 September 1968, Art. 27(1) and Protocol, Art. II)

1. While the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.

(see paras 22-23 )

2. The court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

(see para. 34 and operative part )

3. Recourse to the public-policy clause in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting

State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

(see para. 37 )

4. Recourse to the public-policy clause in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the European Convention on Human Rights. Consequently, Article II of the Protocol annexed to the Convention, which recognizes the right of persons domiciled in one Contracting State, who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals, to have their defence presented even if they do not appear in person only where the offence in question was not intentionally committed, cannot be construed as precluding the court of the State in which enforcement is sought from being entitled, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, to take account, in relation to the public-policy clause in Article 27, point 1, of the fact that the court of the State of origin refused to allow the defendant to have his defence presented unless he appeared in person.

(see paras 44-45 and operative part )

In Case C-7/98,

REFERENCE to the Court pursuant to the Protocol of 3 June 1971 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 by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Dieter Krombach

and

André Bamberski

on the interpretation of Article 27, point 1, of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended version - p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevon, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: A. Saggio,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Bamberski, by H. Klingelhöffer, Rechtsanwalt, Ettlingen,

- the German Government, by R. Wagner, Regierungsdirektor in the Federal Ministry of Justice, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Deputy Head of the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargée de Mission in that Directorate, acting as Agents,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, acting as Agent, assisted by B. Wägenbaur, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government and the Commission at the hearing on 2 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1999,

gives the following

Judgment

Costs

47 The costs incurred by the German and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof by order of 4 December 1997, hereby rules:

Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be interpreted as follows:

(1) The court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of that Convention, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

(2) The court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of that Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.

1 By order of 4 December 1997, received at the Court on 14 January 1998, the Bundesgerichtshof (Federal Court of Justice), Germany, referred to the Court for a preliminary ruling pursuant to the Protocol of 3 June 1971 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 three questions concerning the interpretation of Article 27, point 1, of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended version - p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter the Convention).

2 Those questions have arisen in proceedings between Mr Bamberski, who is domiciled in France, and Mr Krombach, who is domiciled in Germany, relating to the enforcement, in the latter Contracting State, of a judgment delivered on 13 March 1995 by the Cour d'Assises de Paris (Paris Assizes) which ordered Mr Krombach to pay to Mr Bamberski, the plaintiff in a civil claim, compensation in the amount of FRF 350 000.

The Convention

3 The first paragraph of Article 1 provides that the Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal.

4 With regard to jurisdiction, the rule of principle, set out in the first paragraph of Article 2 of the Convention, states that persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. The second paragraph of Article 3 prohibits a plaintiff from relying on certain rules of exorbitant jurisdiction, in particular, so far as France is concerned, those based on nationality which derive from Articles 14 and 15 of the Code Civil (Civil Code).

5 The Convention also sets out special rules of jurisdiction. Thus, Article 5 of the Convention provides:

A person domiciled in a Contracting State may, in another Contracting State, be sued:

...

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.

6 In matters relating to the recognition and enforcement of judgments, the rule of principle, set out in the first paragraph of Article 31 of the Convention, provides that a judgment given in a Contracting State and enforceable in that State is to be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.

7 Under the second paragraph of Article 34, [t]he application may be refused only for one of the reasons specified in Articles 27 and 28.

8 Article 27, point 1, of the Convention states:

A judgment shall not be recognised:

1. if such recognition is contrary to public policy in the State in which recognition is sought.

9 Article 28, third paragraph, of the Convention states:

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.

10 Article 29 and the third paragraph of Article 34 of the Convention provide:

Under no circumstances may a foreign judgment be reviewed as to its substance.

11 Article II of the Protocol annexed to the Convention (hereinafter the Protocol), which, according

to Article 65 of the Convention, forms an integral part thereof, provides:

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 recognised or enforced in the other Contracting States.

The dispute in the main proceedings

12 Mr Krombach was the subject of a preliminary investigation in Germany following the death in Germany of a 14-year-old girl of French nationality. That preliminary investigation was subsequently discontinued.

13 In response to a complaint by Mr Bamberski, the father of the young girl, a preliminary investigation was opened in France, the French courts declaring that they had jurisdiction by virtue of the fact that the victim was a French national. At the conclusion of that investigation, Mr Krombach was, by judgment of the Chambre d'Accusation (Chamber of Indictments) of the Cour d'Appel de Paris (Paris Court of Appeal), committed for trial before the Cour d'Assises de Paris.

14 That judgment and notice of the introduction of a civil claim by the victim's father were served on Mr Krombach. Although Mr Krombach was ordered to appear in person, he did not attend the hearing. The Cour d'Assises de Paris thereupon applied the contempt procedure governed by Article 627 et seq. of the French Code of Criminal Procedure. Pursuant to Article 630 of that Code, under which no defence counsel may appear on behalf of the person in contempt, the Cour d'Assises reached its decision without hearing the defence counsel instructed by Mr Krombach.

15 By judgment of 9 March 1995 the Cour d'Assises imposed on Mr Krombach a custodial sentence of 15 years after finding him guilty of violence resulting in involuntary manslaughter. By judgment of 13 March 1995, the Cour d'Assises, ruling on the civil claim, ordered Mr Krombach, again as being in contempt, to pay compensation to Mr Bamberski in the amount of FRF 350 000.

16 On application by Mr Bamberski, the President of a civil chamber of the Landgericht (Regional Court) Kempten (Germany), which had jurisdiction ratione loci, declared the judgment of 13 March 1995 to be enforceable in Germany. Following dismissal by the Oberlandesgericht (Higher Regional Court) of the appeal which he had lodged against that decision, Mr Krombach brought an appeal on a point of law (Rechtsbeschwerde) before the Bundesgerichtshof in which he submitted that he had been unable effectively to defend himself against the judgment given against him by the French court.

17 Those are the circumstances in which the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. May the provisions on jurisdiction form part of public policy within the meaning of Article 27, point 1, of the Brussels Convention where the State of origin has based its jurisdiction as against a person domiciled in another Contracting State (first paragraph of Article 2 of the Brussels Convention) solely on the nationality of the injured party (as in the second paragraph of Article 3 of the Brussels Convention in relation to France)?

If Question 1 is answered in the negative:

2. May the court of the State in which enforcement is sought (first paragraph of Article 31 of the Brussels Convention) take into account under public policy within the meaning of Article 27,

point 1, of the Brussels Convention that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an intentional offence and did not appear in person?

If Question 2 is also answered in the negative:

3. May the court of the State in which enforcement is sought take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the court of the State of origin based its jurisdiction solely on the nationality of the injured party (see Question 1 above) and additionally prevented the defendant from being legally represented (see Question 2 above)?

Preliminary observations

18 By its questions, the national court is essentially asking the Court how the term public policy in the State in which recognition is sought in point 1 of Article 27 of the Convention should be interpreted.

19 The Convention is intended to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (see, inter alia, Case C-414/92 Solo Kleinmotoren v Boch [1994] ECR I-2237, paragraph 20, and Case C-267/97 Coursier v Fortis Bank [1999] ECR I-2543, paragraph 25).

20 It follows from the Court's case-law that this procedure constitutes an autonomous and complete system independent of the legal systems of the Contracting States and that the principle of legal certainty in the Community legal system and the objectives of the Convention in accordance with Article 220 of the EC Treaty (now Article 293 EC), on which it is founded, require a uniform application in all Contracting States of the Convention rules and the relevant case-law of the Court (see, in particular, Case C-432/93 SISRO v Ampersand [1995] ECR I-2269, paragraph 39).

21 So far as Article 27 of the Convention is concerned, the Court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (Solo Kleinmotoren, cited above, paragraph 20). With regard, more specifically, to recourse to the public-policy clause in Article 27, point 1, of the Convention, the Court has made it clear that such recourse is to be had only in exceptional cases (Case 145/86 Hoffmann v Krieg [1988] ECR 645, paragraph 21, and Case C-78/95 Hendrikman and Feyen v Magenta Druck &Verlag [1996] ECR I-4943, paragraph 23).

22 It follows that, while the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention.

23 Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.

24 It should be noted in this regard that, since the Convention was concluded on the basis of Article 220 of the Treaty and within the framework which it defines, its provisions are linked to the Treaty (Case C-398/92 Mund & Fester v Hatrex Internationaal Transport [1994] ECR I-467, paragraph 12).

25 The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, in particular, Opinion 2/94 [1996] ECR

I-1759, paragraph 33). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) has particular significance (see, inter alia, Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18).

26 The Court has thus expressly recognised the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraphs 20 and 21, and judgment of 11 January 2000 in Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-0000, paragraph 17).

27 Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU) embodies that case-law. It provides: The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

28 It is in the light of those considerations that the questions submitted for a preliminary ruling fall to be answered.

The first question

29 By this question, the national court is essentially asking whether, regard being had to the public-policy clause contained in Article 27, point 1, of the Convention, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State, take into account the fact that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

30 It should be noted at the outset that it follows from the specific terms of the first paragraph of Article 1 of the Convention that the Convention applies to decisions given in civil matters by a criminal court (Case C-172/91 Sonntag v Waidmann and Others [1993] ECR I-1963, paragraph 16).

31 Under the system of the Convention, with the exception of certain cases exhaustively listed in the first paragraph of Article 28, none of which corresponds to the facts of the case in the main proceedings, the court before which enforcement is sought cannot review the jurisdiction of the court of the State of origin. This fundamental principle, which is set out in the first phrase of the third paragraph of Article 28 of the Convention, is reinforced by the specific statement, in the second phrase of the same paragraph, that the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction.

32 It follows that the public policy of the State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction.

33 Having regard to the generality of the wording of the third paragraph of Article 28 of the Convention, that statement of the law must be regarded as being, in principle, applicable even where the court of the State of origin wrongly founded its jurisdiction, in regard to a defendant domiciled in the territory of the State in which enforcement is sought, on a rule which has recourse to a criterion of nationality.

34 The answer to the first question must therefore be that the court of the State in which enforcement

is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

The second question

35 By this question, the national court is essentially asking whether, in relation to the public-policy clause in Article 27, point 1, of the Convention, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in its territory and charged with an intentional offence, take into account the fact that the court of the State of origin refused to allow that defendant to have his defence presented unless he appeared in person.

36 By disallowing any review of a foreign judgment as to its substance, Article 29 and the third paragraph of Article 34 of the Convention prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin.

37 Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

38 With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States.

39 More specifically still, the European Court of Human Rights has on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing (see the following judgments of the European Court of Human Rights: judgment of 23 November 1993 in Poitrimol v France, Series A No 277-A; judgment of 22 September 1994 in Pelladoah v Netherlands, Series A No 297-B; judgment of 21 January 1999 in Van Geyseghem v Belgium, not yet reported).

40 It follows from that case-law that a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right.

41 The national court is, however, unsure as to whether the court of the State in which enforcement is sought can take account, in relation to Article 27, point 1, of the Convention, of a breach of this nature having regard to the wording of Article II of the Protocol. That provision, which involves extending the scope of the Convention to the criminal field because of the consequences which a judgment of a criminal court may entail in civil and commercial matters (Case 157/80 Rinkau [1981] ECR 1391, paragraph 6), recognises the right to be defended without appearing in person before the criminal courts of a Contracting State for persons who are not nationals of that State and who are domiciled in another Contracting State only in so far as they are being prosecuted

for an offence committed unintentionally. This restriction has been construed as meaning that the Convention clearly seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this (Rinkau, cited above, paragraph 12).

42 However, it follows from a line of case-law developed by the Court on the basis of the principles referred to in paragraphs 25 and 26 of the present judgment that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, inter alia, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraph 39, and Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).

43 The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing (Case 49/84 Debaecker and Plouvier v Bouwman [1985] ECR 1779, paragraph 10).

44 It follows from the foregoing developments in the case-law that recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing.

45 The answer to the second question must therefore be that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.

The third question

46 In light of the reply to the second question, it is unnecessary to answer the third question.

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41968A0927(01)-A28L3PT2 : N 31
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41968A0927(01)-A34L3 : N 10 36
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61992J0398-N12 : N 24
61992J0414-N20 : N 19 21
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61995J0032-N21 : N 42
61995J0078-N23 : N 21
61995J0185-N20 : N 26
61995J0185-N21 : N 26
61997J0267-N25 : N 19
61998J0174-N17 : N 26

**CONCERNS** Interprets 41968A0927(01)-A27PT1

**SUB** Brussels Convention of 27 September 1968 ; Jurisdiction

**AUTLANG** German

**OBSERV** Federal Republic of Germany ; France ; Commission ; Member States ; Institutions

**NATIONA** Federal Republic of Germany

**NATCOUR**

*A9* Bundesgerichtshof, Vorlagebeschluß vom 04/12/1997 (IX ZB 23/97)
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**ADVGEN** Saggio

**JUDGRAP** Jann

**DATES** of document: 28/03/2000
of application: 14/01/1997

**Judgment of the Court (Third Chamber)**
**of 14 October 2004**
**Mærsk Olie & Gas A/S v Firma M. de Haan en W. de Boer.**
**Reference for a preliminary ruling: Højesteret - Denmark.**
**Brussels Convention - Proceedings to establish a fund to limit liability in respect of the use of a ship - Action for damages - Article 21 - Lis pendens - Identical parties - Court first seised - Identical subject-matter and cause of action - None - Article 25 - 'Judgment' - Article 27(2) - Refusal to recognise.**
**Case C-39/02.**

In Case C-39/02,

REFERENCE to the Court under the Protocol of 3 June 1971 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,

brought by the Højesteret (Denmark), by decision of

8 February 2002

, received at the Court on

13 February 2002

, for a preliminary ruling in the proceedings pending before that court between:

Mærsk Olie &

38; Gas A/S</emphasis></para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl><ctrl><prop type="Name">imgAdd_PartReq__000</prop><prop type="[Type]">Image</prop><prop type="Top">467</prop><prop type="Left">444</prop><prop type="Height">12</prop><prop type="Width">12</prop><prop type="Tag">Add;group=PartReq__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Image">..\plus.bmp</prop></ctrl><ctrl><prop type="Name">imgDel_PartReq__000</prop><prop type="[Type]">Image</prop><prop type="Top">479</prop><prop type="Left">444</prop><prop type="Height">12</prop><prop type="Width">12</prop><prop type="Tag">Del;group=PartReq__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Image">..\moins.bmp</prop></ctrl></group><group modele="Part_EtEntre" name="Part_EtEntre__000" height="30"><footnote/><ctrl><prop type="Name">lblPart_EtEntre__000</prop><prop type="[Type]">Label</prop><prop type="Top">555</prop><prop type="Left">18</prop><prop type="Height">12</prop><prop type="Width">100</prop><prop type="Tag">group=Part_EtEntre__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Caption">Mention "et entre":</prop></ctrl><ctrl><prop type="Name">rtfPart_EtEntre__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">567</prop><prop type="Left">18</prop><prop type="Height">18</prop><prop type="Width">60</prop><prop type="Tag">singleline;group=Part_EtEntre__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para>and</para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl></group></Applicant><Defendant><group modele="PartDef" name="PartDef__001" height="88"><footnote/><ctrl><prop type="Name">lblPartDef__001</prop><prop type="[Type]">Label</prop><prop type="Top">597</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">100</prop><prop type="Tag">group=PartDef__001;</prop><prop type="IndexAff">1</prop><prop type="Numero">1</prop><prop type="Caption">Partie défenderesse:</prop></ctrl><ctrl><prop type="Name">rtfPartDef__001</prop><prop type="[Type]">RichEdit</prop><prop type="Top">609</prop><prop type="Left">6</prop><prop type="Height">75.75</prop><prop type="Width">438</prop><prop type="Tag">spacebefore=18;group=PartDef__001;</prop><prop type="IndexAff">1</prop><prop type="Numero">1</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para><emphasis role="bold">Firma M. de Haan en W. de Boer,</emphasis></para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl><ctrl><prop type="Name">imgAdd_PartDef__001</prop><prop type="[Type]">Image</prop><prop type="Top">609</prop><prop type="Left">444</prop><prop type="Height">12</prop><prop type="Width">12</prop><prop type="Tag">Add;group=PartDef__001;</prop><prop type="IndexAff">1</prop><prop

type="[Type]">Image</prop><prop type="Top">621</prop><prop type="Left">444</prop><prop type="Height">12</prop><prop type="Width">12</prop><prop type="Tag">Del;group=PartDef__001;</prop><prop type="IndexAff">1</prop><prop type="Numero">1</prop><prop type="Image">..\moins.bmp</prop></ctrl></group></Defendant></group><group modele="Titre2" name="Titre2__000" height="18"><footnote/><ctrl><prop type="Name">lblTitre2__000</prop><prop type="[Type]">Label</prop><prop type="Top">697</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">100</prop><prop type="Tag">group=Titre2__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Caption">Second titre:</prop></ctrl><ctrl><prop type="Name">rtfTitre2__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">697</prop><prop type="Left">126</prop><prop type="Height">18</prop><prop type="Width">198</prop><prop type="Tag">center;spacebefore=42;spaceafter=42;group=Titre2__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para>THE COURT</para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl><ctrl><prop type="Name">cboFormation2__000</prop><prop type="[Type]">ComboBox</prop><prop type="Top">697</prop><prop type="Left">330</prop><prop type="Height">18</prop><prop type="Width">114</prop><prop type="Tag">formations;text=,;group=Titre2__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="SelectedItem" option="III">Third Chamber</prop></ctrl></group><group modele="Compo" name="Compo__000" height="60"><footnote/><ctrl><prop type="Name">lblCompo__000</prop><prop type="[Type]">Label</prop><prop type="Top">727</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">100</prop><prop type="Tag">group=Compo__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Caption">Nom des membres:</prop></ctrl><ctrl><prop type="Name">rtfCompo__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">739</prop><prop type="Left">6</prop><prop type="Height">48</prop><prop type="Width">438</prop><prop type="Tag">group=Compo__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para>composed of: A. Rosas, acting as President of the Third Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,</para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl></group><group modele="AvGen" name="AvGen__000" height="30"><footnote/><ctrl><prop type="Name">lblAvGen__000</prop><prop type="[Type]">Label</prop><prop type="Top">799</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">100</prop><prop type="Tag">group=AvGen__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Caption">Nom de l'avocat général:</prop></ctrl><ctrl><prop type="Name">rtfAvGenTitre__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">811</prop><prop type="Left">6</prop><prop type="Height">18</prop><prop type="Width">81</prop><prop type="Tag">singleline;spacebefore=12;group=AvGen__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para>Advocate General: </para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl><ctrl><prop type="Name">rtfAvGen__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">811</prop><prop type="Left">86</prop><prop type="Height">18</prop><prop type="Width">357.75</prop><prop type="Tag">singleline;spacebefore=12;spaceafter=0;group=AvGen__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para>P. Léger,</para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl></group><group modele="Greffier" name="Greffier__000" height="30"><footnote/><ctrl><prop type="Name">lblGreffier__000</prop><prop type="[Type]">Label</prop><prop type="Top">841</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">100</prop><prop type="Tag">group=Greffier__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Caption">Nom du greffier:</prop></ctrl><ctrl><prop type="Name">rtfGreffTitre__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">853</prop><prop type="Left">6</prop><prop type="Height">18</prop><prop type="Width">81</prop><prop type="Tag">singleline;group=Greffier__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para>Registrar: </para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop><ctrl><prop

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38; Gas A/S, by S. Johansen, advokat,</para></listitem><!--Slb1:lb1:Slb1 Sindoc --><listitem id="ç "><para>Firma M. de Haan and W. de Boer, by J.-E. Svensson, advokat,</para></listitem><!--Slb1:lb1:Slb1 Sindoc --><listitem id="ç "><para>the Netherlands Government, by H.G. Sevenster et J. van Bakel, acting as Agents,</para></listitem><!--Slb1:lb1:Slb1 Sindoc --><listitem id="ç "><para>the United Kingdom Government, by P. Ormond, acting as Agent, assisted by A. Layton, Barrister,</para></listitem><!--Slb1:lb1:Slb1 Sindoc --><listitem id="ç "><para>the Commission of the European Communities, by N.B. Rasmussen and A.-M. Rouchaud, acting as Agents,</para></listitem><!--Slb1:*EOF*: Sindoc --></itemizedlist><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl></group><group modele="Cavg" name="Cavg__000" height="30"><footnote/><ctrl><prop type="Name">lblCavg__000</prop><prop type="[Type]">Label</prop><prop type="Top">1027</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">300</prop><prop type="Tag">group=Cavg__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Caption">Mention "ayant entendu l'avocat général en ses conclusions à l'audience du":</prop></ctrl><ctrl><prop type="Name">rtfCavg__000</prop><prop type="[Type]">RichEdit</prop><prop type="Top">1039</prop><prop type="Left">6</prop><prop type="Height">18</prop><prop type="Width">330</prop><prop type="Tag">singleline;group=Cavg__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="TextRTF"><Rtf><!--Sindoc:p:Sindoc --><para> after hearing the Opinion of the Advocate General at the sitting on </para><!--Sindoc:*EOF*:Sinfile --></Rtf></prop></ctrl><ctrl><prop type="Name">dtpAvGenConc__000</prop><prop type="[Type]">DTPicker</prop><prop type="Top">1039</prop><prop type="Left">342</prop><prop type="Height">18</prop><prop type="Width">102</prop><prop type="Tag">text=,;group=Cavg__000;</prop><prop type="IndexAff">0</prop><prop type="Numero">0</prop><prop type="Date">13/07/2004</prop><prop type="DateFull">13 July 2004</prop><prop type="Jour">13</prop><prop type="Mois">7</prop><prop type="Annee">2004</prop></ctrl></group><group modele="RendPresent" name="RendPresent__000" height="30"><footnote/><ctrl><prop type="Name">lblRendPresent__000</prop><prop type="[Type]">Label</prop><prop type="Top">1069</prop><prop type="Left">6</prop><prop type="Height">12</prop><prop type="Width">200</prop><prop type="Tag">group=RendPresent__000;</prop><prop type="IndexAff">0</prop><prop t& Gas A/S

and

Firma M. de Haan en W. de Boer,

THE COURT (Third Chamber),

composed of: A. Rosas, acting as President of the Third Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,



ritten procedure and further to the hearing on 1 April 2004,

after considering the observations submitted on behalf of:

- Mærsk Olie & Gas A/S, by S. Johansen, advokat,

- Firma M. de Haan and W. de Boer, by J.-E. Svensson, advokat,

- the Netherlands Government, by H.G. Sevenster et J. van Bakel, acting as Agents,

- the United Kingdom Government, by P. Ormond, acting as Agent, assisted by A. Layton, Barrister,

- the Commission of the European Communities, by N.B. Rasmussen and A.-M. Rouchaud, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

13 July 2004,

gives the following

Judgment

Costs

63. As these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. The costs involved in submitting observations to the Court, other than those of the parties to the main proceedings, are not recoverable.

On those grounds, the Court (Third Chamber), hereby rules:

1. An application to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of lis pendens within the terms of Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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.

2. A decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of that Convention.

3. A decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of that Convention, on condition that it was duly served on or notified to the defendant in good time.

1. This reference for a preliminary ruling relates to the interpretation of Articles 21, 25 and 27 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77) (the Brussels Convention').

2. This reference has been made in the course of a dispute between the company Mærsk Olie & Gas A/S (Mærsk') and the partnership of Mr M. de Haan and Mr W. de Boer (the shipowners') concerning an action for damages in respect of damage allegedly caused to underwater pipelines in the North Sea by a trawler belonging to the shipowners.

The legal framework

The 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships

3. Article 1(1) of the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships of 10 October 1957 (International Transport Treaties, suppl. 1-10, January 1986, p. 81) (the 1957 Convention') provides that the owner of a sea-going ship may limit his liability to a specified amount in respect of one of the claims there listed, unless the occurrence giving rise to the claim resulted from the actual fault of the owner. The claims listed include, under Article 1(1)(b), damage to any property caused by the act, neglect or default of any person on board the ship in connection with the navigation thereof.

4. Under Article 3(1) of the 1957 Convention the amount to which liability may be limited is calculated according to the ship's tonnage and will vary depending on the nature of the damage caused. Thus, in the case where the harmful event has resulted in damage only to property, the amount to which the shipowner may limit his liability corresponds to 1 000 francs Poincaré for each tonne of the ship's tonnage.

5. In the case where the aggregate of the claims resulting from the same harmful event exceeds the limits of liability as thus defined, Article 2(2) and (3) of the 1957 Convention provides that a fund, corresponding to that limit, may be constituted for the purpose of being available only for the payment of claims in respect of which limitation of liability may be invoked. Article 3(2) provides that this fund is to be distributed among the claimants... in proportion to the amounts of their established claims'.

6. Article 1(7) of the 1957 Convention provides: The act of invoking limitation of liability shall not constitute an admission of liability'.

7. Article 4 of the 1957 Convention provides as follows:

... the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted.'

8. According to the case-file, the Kingdom of the Netherlands was bound by the 1957 Convention at the time of the events in issue in the main proceedings.

The Brussels Convention

9. According to its preamble, the purpose of the Brussels Convention is to facilitate the reciprocal recognition and enforcement of judgments of courts or tribunals, in accordance with Article 293 EC, and to strengthen in the Community the legal protection of persons therein established. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

10. Article 2 of the Brussels Convention lays down the general rule that jurisdiction is vested in the courts of the State in which the defendant is domiciled. Article 5 of the Convention, however, provides that, in matters relating to tort, delict or quasi-delict', the defendant may be sued in the courts for the place where the harmful event occurred'.

11. Article 6a of the Brussels Convention adds:

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.'

12. The Brussels Convention also seeks to prevent conflicting decisions being delivered. Thus, Article 21, dealing with lis pendens , provides as follows:

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.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.'

13. Article 22 of the Brussels Convention provides as follows:

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.'

14. With regard to recognition, Article 25 of the Convention states as follows:

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.'

15. The first paragraph of Article 26 of the Brussels Convention provides:

A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.'

16. Article 27, however, provides as follows:

A judgment shall not be recognised:

...

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;

...'.

17. Article IV of the Protocol annexed to the Brussels Convention states:

Judicial and extrajudicial documents... 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.

...'.

The dispute in the main proceeedings and the questions referred for preliminary ruling

18. In May 1985 Mærsk laid oil and gas pipelines in the North Sea. In the course of June 1985 a trawler belonging to the shipowners was fishing in the area in which those pipelines had been laid. Mærsk established that the pipelines had been damaged.

19. By letter of 3 July 1985 Mærsk informed the shipowners that it held them responsible for that damage, the repair work in respect of which it was estimated would cost USD 1 700 019 and GBP 51 961.58.

20. On 23 April 1987 the shipowners lodged with the Arrondissementsrechtbank (District Court) Groningen (Netherlands), the place in which their vessel was registered, an application for limitation of their liability. That court made an order on 27 May 1987 provisionally fixing that limitation at NLG 52 417.40 and enjoining the shipowners to lodge that sum together with NLG 10 000 to cover the legal costs. The shipowers' legal respresentatives informed Mærsk of that decision by telex of 5 June 1987.

21. On 20 June 1987 Mærsk brought an action for damages against the shipowners before the Vestre Landsret (Western Regional Court) (Denmark).

22. On 24 June 1987 Mærsk appealed to the Gerechtshof (Court of Appeal) Leeuwarden (Netherlands) against the decision of the Arrondissementsrechtbank Groningen on the ground that the latter court did not have jurisdiction. On 6 January 1988 the Gerechtshof upheld the decision delivered at first instance, referring to, inter alia, Articles 2 and 6a of the Brussels Convention. Mærsk did not lodge an appeal to have the decision of the Gerechtshof quashed.

23. By registered letter of 1 February 1988 the administrator notified Mærsk's lawyer of the order of the Arrondissementsrechtbank establishing the liability limitation fund and, by letter of 25 April 1988, requested Mærsk to submit its claim.

24. Mærsk did not accede to that request, choosing instead to pursue its action before the Danish court. In the absence of any claims submitted by injured parties, the sum lodged with the Arrondissementsrechtbank in the Netherlands was returned to the shipowners in December 1988.

25. By decision of 27 April 1988 the Vestre Landsret held that the rulings of the Netherlands courts of 27 May 1987 and of 6 January 1988 had to be treated as being judgments within the terms of Article 25 of the Brussels Convention in view of the fact that Mærsk had had the opportunity to defend its position during the corresponding proceedings.

26. As it took the view that the proceedings brought in the Netherlands and in Denmark were between the same parties, had the same subject-matter and related to the same cause of action, and that this finding could not be invalidated by the fact that Mærsk had not defended its interests in the proceedings relating to the limitation of liability, the Vestre Landsret ruled that the conditions governing a finding of lis pendens pursuant to Article 21 of the Brussels Convention had been satisfied.

27. In view of the fact that proceedings had been brought earlier in the Netherlands (23 April 1987) than in Denmark, and in view of the finding of the Arrondissementsrechtbank Groningen, upheld on appeal, that it had jurisdiction to deliver its decision, the Vestre Landsret, acting pursuant to the second paragraph of Article 21 of the Brussels Convention, declined jurisdiction in favour of the Netherlands court.

28. Mærsk appealed against that decision to the Højesteret (Danish Supreme Court).

29. As it took the view that the case raised questions on the interpretation of Articles 21, 25 and 27 of the Brussels Convention, the Højesteret decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Does a procedure to establish a liability limitation fund pursuant to an application by a shipowner under the Brussels Convention of 10 October 1957 constitute proceedings within the meaning of Article 21 of the 1968 Brussels Convention where it is evident from the application, where the relevant names are stated, who might be affected thereby as a potential injured party?

2. Is an order to establish a liability limitation fund under the Netherlands procedural rules in force in 1986 a judgment within the meaning of Article 25 of the 1968 Brussels Convention?

3. Can a limitation fund which was established on 27 May 1987 by a Netherlands court pursuant to Netherlands procedural rules then in force without prior service on an affected claimant now be denied recognition in another Member State in relation to the claimant concerned pursuant to Article 27(2) of the 1968 Brussels Convention?

4. If Question 3 is answered in the affirmative, is the claimant concerned deprived of its right to rely on Article 27(2) by virtue of the fact that in the Member State which established the limitation fund it raised the matter of jurisdiction before a higher court without having previously objected to default of service?'

The first question

30. By its first question, the Højesteret is essentially asking whether an application brought before a court of a Contracting State by a shipowner seeking to have a liability limitation fund established, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner constitute proceedings that have the same subject-matter, involve the same cause of action and are between the same parties, within the terms of Article 21 of the Brussels Convention.

31. It should be borne in mind at the outset that Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of that Convention, which is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say, the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought (see Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861, paragraph 8, and Case C-116/02 Gasser [2003] ECR I-0000, paragraph 41).

32. It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States, irrespective of the parties' domicile (Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 16, and Gasser , cited above, paragraph 41).

33. It is, in the present case, common ground that proceedings relating to the establishment of a liability limitation fund, such as those brought before the Netherlands court, are intended to allow a shipowner who could be declared liable under one of the heads of claim listed in Article 1(1) of the 1957 Convention to limit his liability to an amount calculated in accordance with Article 3 of that Convention, such that claimants cannot recover from the shipowner, in respect of the same harmful event, amounts other than those to which they would be entitled under such proceedings.

34. An application of this kind for the establishment of a liability limitation fund undoubtedly constitutes proceedings for the purposes of Article 21 of the Brussels Convention. It is, however, also necessary to examine whether it involves the same subject-matter and cause of action as an action for damages brought by the victim against the shipowner before a court of another Contracting State and whether those sets of proceedings have been brought between the same parties. Those three cumulative conditions must be satisfied before there can be a situation of lis pendens within the terms of Article 21 of the Brussels Convention.

35. The applications under consideration clearly do not have the same subject-matter. Whereas an

action for damages seeks to have the defendant declared liable, an application to limit liability is designed to ensure, in the event that the person is declared liable, that such liability will be limited to an amount calculated in accordance with the 1957 Convention, it being borne in mind that, under Article 1(7) of that Convention, the act of invoking limitation of liability shall not constitute an admission of liability'.

36. The fact that, in proceedings for the establishment of a liability limitation fund, the claims are verified by an administrator or may also be challenged by the debtor is not such as to cast doubt on that analysis. As the Court has already ruled, in order to determine whether two sets of proceedings have the same subject-matter under Article 21 of the Brussels Convention, account should be taken, as is evident from the wording of that article, only of the applicants' respective claims in each of the sets of proceedings, and not of the defence which may be raised by a defendant (Case C-111/01 Gantner Electronic [2003] ECR I4207, paragraph 26).

37. Nor do the applications under consideration involve the same cause of action, within the terms of Article 21 of the Convention.

38. As the cause of action' comprises the facts and the legal rule invoked as the basis for the application (see Case C-406/92 The Tatry [1994] ECR I-5439, paragraph 39), the unavoidable conclusion is that, even if it be assumed that the facts underlying the two sets of proceedings are identical, the legal rule which forms the basis of each of those applications is different, as has been pointed out by Mærsk, the Commission and the Advocate General at point 41 of his Opinion. The action for damages is based on the law governing non-contractual liability, whereas the application for the establishment of a liability limitation fund is based on the 1957 Convention and on the Netherlands legislation which gives effect to it.

39. Accordingly, without it being necessary to examine the third condition that the proceedings must be between the same parties, the conclusion must be drawn that, in the absence of identical subject-matter and an identical cause of action, there is no situation of lis pendens within the terms of Article 21 of the Brussels Convention between a set of proceedings seeking the establishment of a fund to limit the liability of a shipowner, such as the application made in the main proceedings before a court in the Netherlands, and an action for damages brought before the court making the reference for a preliminary ruling.

40. That conclusion does not, in principle, preclude application of Article 22 of the Brussels Convention, as has been pointed out by the United Kingdom Government and by the Advocate General at point 45 of his Opinion. Applications such as those in issue in the main proceedings are sufficiently closely connected to be capable of being regarded as related' within the meaning of the third paragraph of Article 22, with the result that the court second seised may stay proceedings.

41. There are, however, no grounds in the present case for examining the conditions governing application of Article 22 of the Brussels Convention or, in particular, for determining which would, in that event, have been the court first seised, as it is clear from the order making the reference that the proceedings before the Arrondissementsrechtbank Groningen have been definitively terminated and that, in the absence of any claims having been submitted by persons injured, the sum lodged with the Arrondissementsrechtbank was returned to the shipowners in December 1988. In those circumstances, there are no longer any related actions' within the meaning of Article 22 of the Convention.

42. In the light of the foregoing, the answer to the first question must be that an application to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of lis pendens within the terms of Article 21 of the Brussels Convention.

The second question

43. By its second question, the Højesteret asks whether a decision ordering the establishment of a liability limitation fund, such as that in issue in the main proceedings, is a judgment within the meaning of Article 25 of the Brussels Convention.

44. In this connection, it should be borne in mind that, under Article 25, a judgment' for the purposes of the Brussels Convention, means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called'.

45. As the Court has already ruled (see Case C-414/92 Solo Kleinmotoren [1994] ECR I-2237, paragraph 17), in order to be a judgment' for the purposes of the Convention the decision in question must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.

46. As is pointed out in the Report on the Brussels Convention (OJ 1979 C 59, p. 71, point 184), Article 25 of that Convention is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions.

47. Consequently, a decision such as the order made on 27 May 1987 by the Arrondissementsrechtbank Groningen, which provisionally fixed the amount to which the liability of a shipowner would be limited, comes within the scope of Article 25 of the Brussels Convention.

48. Mærsk nevertheless submits that this order cannot be a judgment within the meaning of Article 25 as it was made at the conclusion of non-contested proceedings.

49. That objection cannot be accepted.

50. While it is true that, according to settled case-law, the Convention is concerned essentially with judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin, and under various procedures, of an inquiry in contested proceedings (Case 125/79 Denilauler [1980] ECR 1553, paragraph 13), it must be stated clearly that, even if it was taken at the conclusion of an initial phase of the proceedings in which both parties were not heard, the order of the Netherlands court could have been the subject of submissions by both parties before the issue of its recognition or its enforcement pursuant to the Convention came to be addressed (see also, along these lines, Case C-474/93 Hengst Import [1995] ECR I-2113, paragraph 14).

51. It is thus evident from the case-file that such an order does not have any effect in law prior to being notified to claimants, who may then assert their rights before the court which has made the order by challenging both the right of the debtor to benefit from a limitation of liability and the amount of that limitation. Claimants may, in addition, lodge an appeal against that order challenging the jurisdiction of the court which adopted it - as indeed happened in the main proceedings in the present case.

52. In the light of the foregoing, the answer to the second question must be that a decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of the Brussels Convention.

The third and fourth questions

53. By its third and fourth questions, which it is appropriate to examine together, the Højesteret asks whether a decision establishing a liability limitation fund, in the absence of prior service on the claimant concerned, may be refused recognition in another Contracting State pursuant to Article 27(2) of the Brussels Convention, even in the case where the claimant has appealed against that decision in order to challenge the jurisdiction of the court which delivered it but without

having previously objected to default of service of the document instituting the proceedings.

54. It should be borne in mind in this regard that Article 27 of the Convention sets out the conditions governing recognition, in one Contracting State, of judgments delivered in another Contracting State. Article 27(2) states that recognition of a judgment is to be refused 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'.

55. According to settled case-law, the purpose of Article 27(2) of the Convention is to ensure that a judgment will not be recognised or enforced under the Convention if the defendant has not had an opportunity to put his defence before the court which gave the judgment (Case 166/80 Klomps [1981] ECR 1593, paragraph 9, Case C172/91 Sonntag [1993] ECR I-1963, paragraph 38, and Hengst Import , cited above, paragraph 17).

56. It follows that non-recognition of a judgment for the reasons set out in Article 27(2) of the Brussels Convention is possible only where the defendant was in default of appearance in the original proceedings. That provision cannot therefore be relied on where the defendant appeared, at least if he was notified of the elements of the claim and had the opportunity to arrange for his defence (Sonntag , cited above, paragraph 39).

57. In the present case, Mærsk did not at any time make an appearance in the proceedings for the establishment of a liability limitation fund. Although it appealed against the order of 27 May 1987, that appeal, which, as the Advocate General has stated at point 60 of his Opinion, related only to the jurisdiction of the court which issued the order, cannot be treated as equivalent to an appearance by a defendant in proceedings for limiting the liability of shipowners to a specific maximum amount. The defendant must therefore be considered in default of appearance within the terms of Article 27(2) of the Convention.

58. That being so, in order that the decision establishing a liability limitation fund could be recognised in accordance with the Brussels Convention, the document instituting the proceedings must have been duly served on Mærsk and in sufficient time to enable it to arrange for its defence.

59. Account must be taken in this regard of the special features of the procedure for the establishment of a liability limitation fund, as governed by Netherlands law, under which an order provisionally determining the maximum amount of liability is at first provisionally adopted by the court at the conclusion of a unilateral procedure, which is then followed by reasoned submissions by both parties, as has been pointed out in paragraph 50 of the present judgment. Such an order must be treated as a document that is equivalent to a document instituting proceedings within the meaning of Article 27(2) of the Convention.

60. According to the case-file, the administrator appointed by the Arrondissementsrechtbank Groningen informed Mærsk by registered letter of 1 February 1988 of the content of the order of 27 May 1987 and, according to the information provided by the Netherlands Government, such notification is due and proper under Netherlands law and under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed in The Hague on 15 November 1965, which was, at the time of the facts in the main proceedings in the present case, binding on the Kingdom of the Netherlands and the Kingdom of Denmark.

61. It is for the court in which enforcement is sought to determine whether notification was effected in the due and proper form and in sufficient time to enable the defendant to arrange its defence effectively, account being taken of all the circumstances of the case (Klomps , cited above, paragraph 20, and Case 49/84 Debaecker and Plouvier [1985] ECR 1779, paragraph 31).

62. In the light of the foregoing, the reply to the third and fourth questions must be that a decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of the Brussels Convention, on condition that it was duly served on or notified to the defendant in good time.

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**JUDGRAP** Schintgen

**DATES** of document: 14/10/2004
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**Judgment of the Court (Fifth Chamber)**
**of 6 June 2002**
**Italian Leather SpA v WECO Polstermöbel GmbH & Co..**
**Reference for a preliminary ruling: Bundesgerichtshof - Germany.**
**Brussels Convention - Article 27(3) - Irreconcilability - Enforcement procedures in the State where enforcement is sought.**
**Case C-80/00.**

1. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement - Grounds for refusal - Irreconcilable judgments - Interlocutory judgments, one granting an injunction the other refusing to grant an injunction

(Brussels Convention of 27 September 1968, Art. 27(3))

2. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement - Grounds for refusal - Irreconcilable judgments - Mandatory nature of requirement to refuse recognition

(Brussels Convention of 27 September 1968, Art. 27(3))

$$1. On a proper construction of Article 27(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

(see para. 47, operative part 1 )

2. Where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

(see para. 52, operative part 2 )

In Case C-80/00,

REFERENCE to the Court, under the Protocol of 3 June 1971 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, by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Italian Leather SpA

and

WECO Polstermöbel GmbH & Co.,

on the interpretation of Title III, headed Recognition and enforcement, of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Italian Leather SpA, by J. Kummer, Rechtsanwalt,

- WECO Polstermöbel GmbH & Co., by J. Schütze, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent,

- the Greek Government, by S. Khala and K. Grigoriou, acting as Agents,

- the Italian Government, by U. Leanza, acting as Agent, and O. Fiumara, avvocato dello Stato,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Layton QC,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, acting as Agent, and B. Wägenbaur, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Italian Leather SpA, represented by J. Kummer; the Greek Government, represented by K. Grigoriou; the United Kingdom Government, represented by A. Layton; and the Commission, represented by A.-M. Rouchaud, acting as Agent, and B. Wägenbaur, at the hearing on 22 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

Costs

54 The costs incurred by the German, Greek, Italian and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 10 February 2000, hereby rules:

1. On a proper construction of Article 27(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

2. Where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

1 By order of 10 February 2000, received at the Court on 7 March 2000, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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 three questions on the interpretation of Title III, headed Recognition and enforcement, of that Convention (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1 and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter the Brussels Convention).

2 Those questions were raised in proceedings between Italian Leather SpA (hereinafter Italian Leather), a company governed by Italian law established in Bironto (Italy), and WECO Polstermöbel GmbH & Co. (hereinafter WECO), a limited partnership governed by German law established in Leimbach (Germany), concerning the conditions of use of a brand name under a contract for the exclusive distribution of leather-upholstered furniture.

Legal context

The Brussels Convention

3 As stated in the first paragraph of Article 1, the Brussels Convention applies in civil and commercial matters whatever the nature of the court or tribunal.

4 Article 24 of the Brussels Convention states:

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.

5 Title III of the Brussels Convention lays down the rules under which judgments given by the courts of a Contracting State are recognised and enforced in the other Contracting States.

6 Article 25 of the Brussels Convention provides:

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.

7 The first paragraph of Article 26 of the Brussels Convention states:

A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.

8 Article 27 of the Brussels Convention is worded as follows:

A judgment shall not be recognised:

...

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;

...

9 The first paragraph of Article 31 of the Brussels Convention states:

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.

10 The first paragraph of Article 34 of the Brussels Convention provides:

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.

German legislation

11 According to the Bundesgerichtshof, under Paragraph 935 of the Zivilprozessordnung (German Code of Civil Procedure, hereinafter the ZPO) an interim measure may be granted if it is feared that a change in the current situation could prevent or substantially impede the assertion by a party of his rights. Accordingly, the court seised is called on essentially to maintain the status quo.

12 The Bundesgerichtshof further points out that, under Paragraph 940 of the ZPO, the court seised may also make an interim order regulating a legal relationship, in so far as that appears to be necessary in order to prevent substantial prejudice or imminent use of force or for other reasons.

13 Under Paragraph 890(1) of the ZPO, decisions of German courts which impose restraining orders may also give rise to an administrative penalty payment or, where such payment cannot be recovered, to imprisonment.

The main proceedings and the questions referred for a preliminary ruling

14 Italian Leather is a company which sells leather-upholstered furniture under the name LongLife. WECO sells furniture of the same type.

15 In 1996 Italian Leather granted WECO, under an exclusive contract, the right to distribute its goods for five years within a specified geographical area. That contract contained inter alia the following clauses:

(2) Dealers may use the LongLife brand name only when marketing suites that are covered in LongLife leather.

...

(4) No dealer may use the LongLife brand name for its own advertising without written authorisation from the supplier.

16 The parties agreed that the courts of Bari (Italy) would have jurisdiction to deal with disputes relating to that contract.

17 In 1998 WECO complained of defective performance of the contract by Italian Leather. It informed Italian Leather that, as a consequence, it would not be a party to any joint sales message at forthcoming exhibitions and that it would present its own WECO mark.

18 Italian Leather brought proceedings for interim relief against WECO before the Landgericht Koblenz (Regional Court, Koblenz, Germany), the court within whose jurisdiction WECO's registered office is situated, to restrain it from marketing products presented as being in easy-care leather under the brand name naturia longlife by Maurizio Danieli.

19 By judgment of 17 November 1998 the Landgericht Koblenz, which had been seised in accordance with Article 24 of the Brussels Convention, dismissed the application because there was no ground justifying the grant of interim relief.

20 The Landgericht Koblenz took the view that to grant Italian Leather's application would be tantamount to ordering WECO to perform the contract. However, Italian Leather had not proved that there was a risk of irreparable damage or of a definitive loss of rights, conditions which had to be met under German law before the relief sought could be granted. Furthermore, WECO had already taken concrete steps to advertise and market its products with leather from other suppliers. Accordingly, it too would suffer considerable damage if the prohibition sought were granted.

21 A few days before the Landgericht Koblenz delivered its judgment of 17 November 1998, Italian Leather had applied to the Tribunale di Bari (Bari District Court) for interim measures. In its order of 28 December 1998, the Tribunale di Bari took a different view on the condition of urgency. It held in this regard that the periculum in mora (urgency) lies in the plaintiff's economic loss and the possible "extinction" of its rights resulting therefrom, for which there would be no compensation.

22 Consequently, the Tribunale di Bari prohibited WECO from using the word LongLife for the distribution of its leather furniture products in certain Member States, including Germany.

23 On application by Italian Leather, the Landgericht Koblenz, by order of 18 January 1999 (hereinafter the order for enforcement), endorsed a warrant for execution in the order of the Tribunale di Bari, coupling it with a financial penalty on the basis of Paragraph 890(1) of the ZPO.

24 On an appeal brought by WECO, the Oberlandesgericht (the competent Higher Regional Court) varied the order for enforcement, holding that the order of the Tribunale di Bari was irreconcilable, within the meaning of Article 27(3) of the Brussels Convention, with the judgment of 17 November 1998 by which the Landgericht Koblenz had dismissed Italian Leather's application seeking to prohibit WECO from using the LongLife brand name for the marketing of its leather products.

25 Italian Leather appealed against the decision of the Oberlandesgericht to the Bundesgerichtshof.

26 The Bundesgerichtshof is unsure as to the correct interpretation of Article 27(3) of the Brussels Convention.

27 According to the Bundesgerichtshof, the Court of Justice's case-law on whether the legal consequences of different judgments are mutually exclusive has, until now, only concerned situations in which there were divergences in substantive law. However, the case before the Bundesgerichtshof has the particular feature that the conflict between the two decisions on interim measures at issue is attributable only to divergences as to procedural requirements.

28 The Bundesgerichtshof states that, if those decisions are irreconcilable, the court of the State in which enforcement is sought should nevertheless have the power to disapply Article 27(3) of the Brussels Convention if it considers that, from the point of view of that State, the divergence is not sufficiently significant. The sole purpose of Article 27(3) is to prevent the rule of law in a Contracting State from being disrupted by advantage being taken of two conflicting judgments. The risk of such disruption in a given case is to be assessed solely from the point of view of the State in which enforcement is sought.

29 The Bundesgerichtshof is also uncertain whether, if it were to uphold the order for enforcement, it may, or must, maintain the financial penalty which the Landgericht Koblenz, on the basis of German law, attached to the order of the Tribunale di Bari in case the latter order was not enforced.

30 Pointing out that the Brussels Convention is designed to further the transnational recognition of judgments, the Bundesgerichtshof interprets the first paragraph of Article 31 and the first

paragraph of Article 34 of the Convention as, in general terms, requiring the court of the State where enforcement of a foreign judicial decision is sought to create, so far as possible, the same favourable conditions for its enforcement as apply to a comparable decision of a national court.

31 In this connection, the Bundesgerichtshof observes that under Italian law there is no direct method of enforcement of restraining orders other than payment of damages.

32 Accordingly, the application of coercive measures provided for by German law in order to enforce immediately a restraining order made by an Italian court would have more powerful effects than those envisaged by the law of the State of origin. The Bundesgerichtshof has doubts as to whether the first paragraph of Article 31 and the first paragraph of Article 34 of the Brussels Convention permit or require such a solution.

33 Consequently, the Bundesgerichtshof decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Can judgments be irreconcilable within the meaning of Article 27(3) of the Brussels Convention when the only difference between them lies in the specific requirements for the adoption of a particular type of autonomous provisional measure (within the meaning of Article 24 of the Convention)?

(2) May and must the court of the State of enforcement which has declared a foreign judgment requiring the party against whom enforcement is sought to desist from certain activities to be enforceable in accordance with the first paragraph of Article 34 and the first paragraph of Article 31 of the Convention at the same time order the measures necessary, under the law of the State of enforcement, for enforcement of a restraining order?

(3) If the answer to Question 2 is in the affirmative, must the measures necessary, under the law of the State of enforcement, for enforcement of the restraining order be ordered even if the judgment to be recognised does not itself include comparable measures in accordance with the law of the State of origin, and that law makes no provision at all for the immediate enforceability of such restraining orders?

Question 1

34 By this question, the national court is essentially asking, first, whether, on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought, even though the respective effects of those decisions are attributable to divergences as to the procedural requirements for the grant of such an order under the national law of the State of origin and of the State where recognition is sought. If so, it asks, second, whether a court of the latter State is required to refuse to recognise the foreign decision or whether the Brussels Convention allows it to refuse recognition only if it finds that the coexistence of two conflicting decisions would cause real and appreciable disruption to the rule of law in the State where recognition is sought.

Observations of the parties

35 So far as concerns the first part of the first question, the United Kingdom Government submits in its written observations that the concept of irreconcilability requires the court of the State in which recognition is sought to draw certain distinctions, such as that existing between the procedural requirements for the adoption of a particular type of measure and the effects of the judgment adopting or refusing to grant such a measure, or the distinction between the substantive and procedural requirements upon which grant of the measure sought is conditional.

36 The United Kingdom Government observes with regard to the first distinction that Article 27(3)

of the Brussels Convention concerns solely the legal effects of a judgment and not the procedural requirements for its adoption. Examination of those requirements may, however, be necessary in order to determine the legal effects of the judgment concerned and to assess, by way of consequence, to what extent it is irreconcilable with another judgment. That is particularly the case where the measure sought has been refused. It may then be necessary to refer to the requirements for the adoption of the measure in order to understand the content of the judgment refusing to grant it.

37 As regards the second distinction referred to in paragraph 35 of the present judgment, the court may, in order to appraise the content and effect of each of the competing judgments, examine whether the requirements for the adoption of the measures in question are substantive or procedural. That will be particularly true where the court of the State in which recognition is sought is faced with a judgment refusing to order a particular measure because, in that case, there will be no measure as such to examine.

38 At the hearing, the United Kingdom Government inferred therefrom that, in the main proceedings, it was difficult to regard the negative effects of the judgment of 17 November 1998 of the Landgericht Koblenz as being irreconcilable with the positive effects of the order of the Tribunale di Bari of 28 December 1998. Only if the respective criteria applied by those two courts and the evidence adduced before them were identical could the effects of the decisions made by them be regarded as irreconcilable.

Findings of the Court

39 By way of preliminary point, the Court proceeds on the assumption that, the court competent to adjudicate on the substance being the Tribunale di Bari, the Landgericht Koblenz did not by its judgment of 17 November 1998 exceed the limits, as interpreted by the Court, of the jurisdiction which it derived from Article 24 of the Brussels Convention (see Case C-391/95 Van Uden [1998] ECR I-7091, paragraphs 37 to 47, and Case C-99/96 Mietz [1999] ECR I-2277, paragraphs 42, 46 and 47).

40 First, it is clear from the Court's case-law that, in order to ascertain whether two judgments are irreconcilable within the meaning of Article 27(3) of the Brussels Convention, it should be examined whether they entail legal consequences that are mutually exclusive (Case 145/86 Hoffmann [1988] ECR 645, paragraph 22).

41 Second, it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance. As Article 27(3) of the Brussels Convention, following the example of Article 25, refers to judgments without further precision, it has general application. Consequently, decisions on interim measures are subject to the rules laid down by the Convention concerning irreconcilability in the same way as the other judgments covered by Article 25.

42 Third, it is equally immaterial that national procedural rules as to interim measures are liable to vary from one Contracting State to another to a greater degree than rules governing proceedings on the substance.

43 The object of the Brussels Convention is not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments (see Case C-365/88 Hagen [1990] ECR I-1845, paragraph 17, and Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 35).

44 Moreover, as follows from paragraph 22 of the judgment in Hoffmann, cited above, irreconcilability

lies in the effects of judgments. It does not concern the requirements governing admissibility and procedure which determine whether judgment can be given and which may vary from one Contracting State to another.

45 In the light of the foregoing, it is clear that decisions on interim measures such as the decisions here at issue in the main proceedings are irreconcilable.

46 The Tribunale di Bari granted the application made by Italian Leather seeking to prohibit WECO from using the LongLife brand name for the marketing of its leather products after the Landgericht Koblenz had dismissed an identical application made by the same plaintiff against the same defendant.

47 The answer to the first part of the first question must therefore be that, on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

48 As regards the second part of the first question, concerning the consequences which result where a foreign judgment and a judgment of a court of the State in which recognition is sought are irreconcilable, it should be noted first of all that, as stated in the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 45), 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.

49 Next, it must be remembered that Article 27(3) of the Brussels Convention provides that a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought.

50 Article 27(3) of the Brussels Convention therefore sets out a ground for refusing to recognise judgments which is mandatory, in contrast to the second paragraph of Article 28 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), under which recognition of a judgment may be refused in any case provided for in Articles 54B(3) or 57(4) of that Convention.

51 Finally, it would be contrary to the principle of legal certainty, which the Court has repeatedly held to be one of the objectives of the Brussels Convention (see Case 38/81 Effer [1982] ECR 825, paragraph 6, Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraph 23, and Case C-256/00 Besix [2002] ECR I-0000, paragraph 24), to interpret Article 27(3) as conferring on the court of the State in which recognition is sought the power to authorise recognition of a foreign judgment when it is irreconcilable with a judgment given in that Contracting State.

52 In view of the foregoing, the answer to the second part of the first question must be that, where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

Questions 2 and 3

53 In view of the answer given to the first question, there is no need to answer the second and third questions.

**DOCNUM** 62000J0080

**AUTHOR** Court of Justice of the European Communities

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|---|---|
| **FORM** | Judgment |
| **TREATY** | European Economic Community |
| **TYPDOC** | 6 ; CJUS ; cases ; 2000 ; J ; judgment |
| **PUBREF** | European Court reports 2002 Page I-04995 |
| **DOC** | 2002/06/06 |
| **LODGED** | 2000/03/07 |
| **JURCIT** | 41968A0927(01)-A24 : N 39<br>41968A0927(01)-A25 : N 41<br>41968A0927(01)-A27PT3 : N 39 - 52<br>61977J0440 : N 51<br>61981J0038 : N 51<br>61986J0145 : N 40 44<br>41988A0592-A28L2 : N 50<br>41988A0592-A54TERP3 : N 50<br>41988A0592-A57P4 : N 50<br>61988J0365 : N 43<br>61993J0068 : N 43<br>61995J0391 : N 39<br>61996J0099 : N 39<br>62000J0256 : N 51 |
| **CONCERNS** | Interprets 41968A0927(01)-A27PT3 |
| **SUB** | Brussels Convention of 27 September 1968 ; Enforcement of judgments |
| **AUTLANG** | German |
| **OBSERV** | Federal Republic of Germany ; Greece ; Italy ; United Kingdom ; Member States ; Commission ; Institutions |
| **NATIONA** | Federal Republic of Germany |
| **NATCOUR** | *A9* Bundesgerichtshof, Beschluß vom 10/02/2000 (IX ZB 31/99)<br>- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 2000 p.325-330<br>- Neue juristische Wochenschrift 2000 p.1440 (résumé)<br>- Wertpapier-Mitteilungen 2000 p.635-638<br>- Jahrbuch für italienisches Recht p.324-325 (résumé)<br>- International Litigation Procedure 2000 p.668-676<br>*P1* Bundesgerichtshof, Schreiben vom 19/07/2002 (IX ZB 31/99) |
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Kramer, Xandra E.: Common Market Law Review 2003 p.953-964
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**PROCEDU** Reference for a preliminary ruling

**ADVGEN** Léger

**JUDGRAP** Wathelet

**DATES** of document: 06/06/2002
of application: 07/03/2000

**Judgment of the Court (Fifth Chamber)**
**of 17 June 1999**
**Unibank A/S v Flemming G. Christensen.**
**Reference for a preliminary ruling: Bundesgerichtshof - Germany.**
**Brussels Convention - Interpretation of Article 50 - Meaning of 'document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State' - Document drawn up without any involvement of a public officer - Articles 32 and 36.**
**Case C-260/97.**

Convention on Jurisdiction and the Enforcement of Judgments - Enforcement of a document which has been formally drawn up and registered as an authentic instrument and is enforceable in a Contracting State - Definition of `authentic instruments' - Document drawn up without any involvement of a competent authority - Excluded

(Convention of 27 September 1968, Art. 50)

$$An acknowledgment of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity, since the instruments covered by Article 50 are enforced under exactly the same conditions as judgments.

In Case C-260/97,

REFERENCE to the Court under the Protocol of 3 June 1971 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, by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Unibank A/S

and

Flemming G. Christensen,

on the interpretation of Articles 32, 36 and 50 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 (OJ 1978 L 304, p. 1 and - amended text - p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Unibank A/S, by Hans Klingelhöffer, Rechtsanwalt, Ettlingen,

- Mr Christensen, by Rüdiger Stäglich, Rechtsanwalt, Darmstadt,

- the German Government, by Rolf Wagner, Regierungsdirektor, Federal Ministry of Justice, acting as Agent,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and

- the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, acting as Agent, assisted by Bertrand Wägenbaur, of the Brussels Bar,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 2 February 1999,

gives the following

Judgment

1 By order of 26 June 1997, received at the Court on 18 July 1997, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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, two questions on the interpretation of Articles 32, 36 and 50 of that Convention (OJ 1972 L 299, p. 32), 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 (OJ 1978 L 304, p. 1 and - amended text - p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter `the Brussels Convention').

2 Those questions have been raised in proceedings between Unibank A/S (`Unibank') and Mr Christensen concerning the former's application for three acknowledgements of indebtedness to be declared enforceable.

Legal background

3 Article 32(2) of the Brussels Convention provides:

`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.'

4 Article 36 of the Brussels Convention states:

`If enforcement is authorised, 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 authorising 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.'

5 Article 50 of the Brussels Convention provided:

`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, have an order for its enforcement issued 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.

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.'

6 The first sentence of the first paragraph of Article 50 of the Brussels Convention was amended by Article 14 of the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1, hereinafter `the Third Accession Convention'), as follows:

`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.'

7 Following that amendment, the wording of Article 50 of the Brussels Convention coincides exactly with that of Article 50 of the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9, hereinafter `the Lugano Convention').

8 Under Article 478(1)(5) of the Retsplejelov (Danish Code of Civil Procedure), execution may be levied on the basis of written acknowledgements of indebtedness provided that they contain an express provision to that effect.

The dispute in the main proceedings and the questions referred to the Court

9 Between 1990 and 1992 Mr Christensen signed in favour of Unibank, a bank established under Danish law in Arhus (Denmark) three acknowledgments of indebtedness (Gældsbrev) for DKK 270 000, DKK 422 000 and DKK 138 000, together with interest thereon. The three documents are typewritten and also bear the signature of a third person, apparently an employee of Unibank, who witnessed the debtor's signature. The documents expressly state that they may be used, pursuant to Article 478 of the Retsplejelov, as a basis for execution to be levied.

10 When the acknowledgments of indebtedness were drawn up, the debtor resided in Denmark. He then moved to Weiterstadt, Germany, where the acknowledgments of indebtedness were presented to him for payment. At the request of Unibank, the Landgericht Darmstadt, in whose jurisdiction Weiterstadt is located, authorised enforcement of those documents. Mr Christensen appealed against that decision to the Oberlandesgericht (Higher Regional Court) Frankfurt am Main. In the course of the proceedings, Mr Christensen had indicated that he had left Germany, but had not disclosed his new address. The appeal court thereupon held that Unibank no longer had an interest in pursuing proceedings since it could no longer levy execution in respect of the acknowledgments of indebtedness in Germany and, accordingly, upheld the appeal.

11 Unibank appealed to the Bundesgerichtshof, which stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

`1. Is an acknowledgment of indebtedness signed by a debtor without the involvement of a public official - such as the Gældsbrev under Danish law (Paragraph 478(1)(5) of the Danish Code of Civil Procedure) - an authentic instrument within the meaning of Article 50 of the Brussels Convention, if that acknowledgment of indebtedness expressly specifies that it can serve as the basis for enforcement and if it can constitute the basis for enforcement under the law of the State in which it was drawn up, albeit subject to the condition that the court with jurisdiction to enforce it may refuse the creditor's application for enforcement if, as a result of objections to the basis for enforcement, there are doubts as to whether enforcement proceedings should be continued?

If the answer to Question 1 is in the affirmative:

2. Can an application for recognition of a decision or authentic instrument submitted to a court having local jurisdiction within the meaning of Article 32(2) of the Brussels Convention be rendered

inadmissible or unfounded by reason of the fact that, while appeal proceedings (Article 36 of the Brussels Convention) are pending, the debtor has left the State in which the proceedings were instituted and his new place of residence is unknown?'

The first question

12 By its first question, the national court seeks essentially to ascertain whether an enforceable acknowledgment of indebtedness which has been drawn up without the involvement of a public authority constitutes an authentic instrument within the meaning of Article 50 of the Brussels Convention.

13 Unibank submits that the answer to that question should be in the affirmative. Conversely, Mr Christensen, the German and United Kingdom Governments and the Commission contend that the adjective `authentic' means that the procedures for enforcement provided for by the Brussels Convention apply not to every instrument but only to those whose authenticity has been established by a competent public authority.

14 It must be borne in mind at the outset that Article 50 of the Brussels Convention treats a `document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State' in the same way, with regard to its enforceability in the other Contracting States, as judgments within the meaning of Article 25 of that Convention, in that it declares the provisions on enforcement contained in Article 31 et seq. thereof also to be applicable to such documents. The purpose of those provisions is to achieve one of the fundamental objectives of the Brussels Convention, which is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (see Case 148/84 Deutsche Genossenschaftsbank [1985] ECR 1981, paragraph 16, and Case C-414/92 Solo Kleinmotoren [1994] ECR I-2237, paragraph 20).

15 Since the instruments covered by Article 50 of the Brussels Convention are enforced under exactly the same conditions as judgments, the authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.

16 That interpretation of Article 50 of the Brussels Convention is supported by the Jenard-Möller Report on the Lugano Convention (OJ 1990 C 189, p. 57, hereinafter `the Jenard-Möller Report').

17 Paragraph 72 of the Jenard-Möller Report states that the representatives of the Member States of the European Free Trade Area (EFTA) requested that the conditions which had to be fulfilled by authentic instruments in order to be regarded as authentic within the meaning of Article 50 of the Lugano Convention should be specified. In that connection the report mentions three conditions, namely: `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'.

18 According to the same report, the involvement of a public authority is therefore essential for an instrument to be capable of being classified as an authentic instrument within the meaning of Article 50 of the Lugano Convention.

19 It is true that Article 50 of the Brussels Convention and Article 50 of the Lugano Convention were not identically worded at the material time in the present case and that the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) does not indicate the criteria to be fulfilled by authentic instruments but merely reproduces the conditions laid down by Article 50 of the latter Convention.

20 However, the only difference in the wording of the two Conventions on that point was that the Brussels Convention used the expression `have an order for its enforcement issued' whereas the Lugano Convention used the expression `declared enforceable'. Moreover, it is clear from paragraph 29 of the De Almeida Cruz, Desantes Real and Jenard Report on the Third Accession Convention (OJ 1990 C 189, p. 35) that the latter Convention, by adopting for Article 50 of the Brussels Convention the same wording as that of Article 50 of the Lugano Convention, sought to bring the wording of the two Conventions into line with each other on that point, the two expressions cited above being considered virtually equivalent.

21 It follows from all the foregoing that the answer to the first question must be that an acknowledgment of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 of the Brussels Convention.

The second question

22 In view of the answer given to the first question, it is unnecessary to answer the second.

Costs

23 The costs incurred by German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber)

in answer to the questions referred to it by the Bundesgerichtshof by order of 26 June 1997, hereby rules:

An acknowledgment of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Republic.

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| **DOCNUM** | 61997J0260 |
| **AUTHOR** | Court of Justice of the European Communities |
| **FORM** | Judgment |
| **TREATY** | European Communities |
| **TYPDOC** | 6 ; CJUS ; cases ; 1997 ; J ; judgment |

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| **PUBREF** | European Court reports 1999 Page I-03715 |
| **DOC** | 1999/06/17 |
| **LODGED** | 1997/07/18 |
| **JURCIT** | 41968A0927(01)-A25 : N 14<br>41968A0927(01)-A31 : N 14<br>41968A0927(01)-A32 : N 1<br>41968A0927(01)-A32L2 : N 3<br>41968A0927(01)-A36 : N 1 4<br>41968A0927(01)-A50 : N 1 5 7 12 14 - 16 19 - 21<br>41968A0927(01)-A50L1 : N 6<br>41978A1009(01) : N 1<br>41982A1025(01) : N 1<br>61984J0148-N16 : N 14<br>41988A0592-A50 : N 7 17 - 20<br>41989A0535-A14 : N 6<br>61992J0414-N20 : N 14 |
| **CONCERNS** | Interprets 41968A0927(01)-A50 |
| **SUB** | Brussels Convention of 27 September 1968 ; Enforcement of judgments |
| **AUTLANG** | German |
| **OBSERV** | Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions |
| **NATIONA** | Federal Republic of Germany |
| **NATCOUR** | *A9* Bundesgerichtshof, Vorlagebeschluß vom 26/06/1997 (IX ZB 11/97)<br>- Entscheidungen zum Wirtschaftsrecht 1997 p.843 (résumé)<br>- Europäisches Wirtschafts- & Steuerrecht - EWS 1997 p.359-360<br>- Wertpapier-Mitteilungen 1997 p.1521-1523<br>- Zeitschrift für Zivilprozeß 1998 p.89-92<br>- Zeitschrift für Zivilprozess 1998 p.89-92<br>- Europäische Zeitschrift für Wirtschaftsrecht 1999 p.224 (résumé)<br>- International Litigation Procedure 1998 p.224-230<br>- Mankowski, Peter: Entscheidungen zum Wirtschaftsrecht 1997 p.843-844<br>- Leutner, Gerd: Zeitschrift für Zivilprozeß 1998 p.93-100<br>*P1* Bundesgerichtshof, Schreiben vom 09/08/1999 (IX ZB 11/97) |
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| | Geimer, Reinhold: Praxis des internationalen Privat- und Verfahrensrechts 2000 p.366-369<br>Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2000 no 478<br>Mallet, Nicolai ; Jaspers, Michael Bo: Ugeskrift for Retsvæsen B 2001 p.71-77 |
| **PROCEDU** | Reference for a preliminary ruling |
| **ADVGEN** | La Pergola |
| **JUDGRAP** | Edward |
| **DATES** | of document: 17/06/1999<br>of application: 18/07/1997 |

**Judgment of the Court (Full Court)**
**of 27 April 2004**
**Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA.**
**Reference for a preliminary ruling: House of Lords - United Kingdom.**
**Brussels Convention - Proceedings brought in a Contracting State - Proceedings brought in another Contracting State by the defendant in the existing proceedings - Defendant acting in bad faith in order to frustrate the existing proceedings - Compatibility with the Brussels Convention of the grant of an injunction preventing the defendant from continuing the action in another Member State.**
**Case C-159/02.**

In Case C-159/02,

REFERENCE to the Court under the Protocol of 3 June 1971 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, by the House of Lords (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Gregory Paul Turner

and

Felix Fareed Ismail Grovit,

Harada Ltd,

Changepoint SA ,

on the interpretation of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT (FULL COURT)

composed of: V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas, Presidents of Chambers, A. La Pergola, J.-P. Puissochet, R. Schintgen, N. Colneric and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Grovit, Harada Ltd and Changepoint SA, by R. Beynon, Solicitor, and T. de La Mare, Barrister,

- the United Kingdom Government, by K. Manji, acting as Agent, assisted by S. Morris QC,

- the German Government, by R. Wagner, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara, vice avvocato generale dello Stato,

- the Commission of the European Communities, by C. O'Reilly and A.-M. Rouchaud-Joet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Turner and of the United Kingdom Government, of Mr Grovit, of Harada Ltd and of Changepoint SA, and of the Commission, at the hearing on 9 September 2003,

after hearing the Advocate General at the sitting on

20 November 2003,

gives the following

Judgment

1. By order of 13 December 2001, received at the Court on 29 April 2002, the House of Lords referred to the Court of Justice for a preliminary ruling under the Protocol of 3 June 1971 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 a question on the interpretation of that convention (OJ 1978 L 304, p. 36), 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 (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1, the Convention').

2. That question was raised in proceedings between Mr Turner, on the one hand and, on the other, Mr Grovit, Harada Limited (Harada') and Changepoint SA (Changepoint') concerning breach of Mr Turner's employment contract with Harada.

The dispute in the main proceedings

3. Mr Turner, a British citizen domiciled in the United Kingdom, was recruited in 1990 as solicitor to a group of undertakings by one of the companies belonging to that group.

4. The group, known as Chequepoint Group, is directed by Mr Grovit and its main business is running bureaux de change. It comprises several companies established in different countries, one being China Security Ltd, which initially recruited Mr Turner, Chequepoint UK Ltd, which took over Mr Turner's contract at the end of 1990, Harada, established in the United Kingdom, and Changepoint, established in Spain.

5. Mr Turner carried out his work in London (United Kingdom). However, in May 1997, at his request, his employer allowed him to transfer his office to Madrid (Spain).

6. Mr Turner started working in Madrid in November 1997. On 16 November 1998, he submitted his resignation to Harada, the company to which he had been transferred on 31 December 1997.

7. On 2 March 1998 Mr Turner brought an action in London against Harada before the Employment Tribunal. He claimed that he had been the victim of efforts to implicate him in illegal conduct, which, in his opinion, were tantamount to unfair dismissal.

8. The Employment Tribunal dismissed the objection of lack of jurisdiction raised by Harada. Its decision was confirmed on appeal. Giving judgment on the substance, it awarded damages to Mr Turner.

9. On 29 July 1998, Changepoint brought an action against Mr Turner before a court of first instance in Madrid. The summons was served on Mr Turner around 15 December 1998. Mr Turner did not accept service and protested the jurisdiction of the Spanish court.

10. In the course of the proceedings in Spain, Changepoint claimed damages of ESP 85 million from Mr Turner as compensation for losses allegedly resulting from Mr Turner's professional conduct.

11. On 18 December 1998 Mr Turner asked the High Court of Justice of England and Wales to issue an injunction under section 37(1) of the Supreme Court Act 1981, backed by a penalty, restraining

Mr Grovit, Harada and Changepoint from pursuing the proceedings commenced in Spain. An interlocutory injunction was issued in those terms on 22 December 1998. On 24 February 1999, the High Court refused to extend the injunction.

12. On appeal by Mr Turner, the Court of Appeal (England and Wales) on 28 May 1999 issued an injunction ordering the defendants not to continue the proceedings commenced in Spain and to refrain from commencing further proceedings in Spain or elsewhere against Mr Turner in respect of his contract of employment. In the grounds of its judgment, the Court of Appeal stated, in particular, that the proceedings in Spain had been brought in bad faith in order to vex Mr Turner in the pursuit of his application before the Employment Tribunal.

13. On 28 June 1999, in compliance with that injunction, Changepoint discontinued the proceedings pending before the Spanish court.

14. Mr Grovit, Harada and Changepoint then appealed to the House of Lords, claiming in essence that the English courts did not have the power to make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Convention.

The order for reference and the questions submitted to the Court

15. According to the order for reference, the power exercised by the Court of Appeal in this case is based not on any presumed entitlement to delimit the jurisdiction of a foreign court but on the fact that the party to whom the injunction is addressed is personally amenable to the jurisdiction of the English courts.

16. According to the analysis made in the order for reference, an injunction of the kind issued by the Court of Appeal does not involve a decision upon the jurisdiction of the foreign court but rather an assessment of the conduct of the person seeking to avail himself of that jurisdiction. However, in so far as such an injunction interferes indirectly with the proceedings before the foreign court, it can be granted only where the claimant shows that there is a clear need to protect proceedings pending in England.

17. The order for reference indicates that the essential elements which justify the exercise by the Court of Appeal of its power to issue an injunction in this case were that:

- the applicant was a party to existing legal proceedings in England;

- the defendants had in bad faith commenced and proposed to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in England;

- the Court of Appeal considered that in order to protect the legitimate interest of the applicant in the English proceedings it was necessary to grant the applicant an injunction against the defendants.

18. Taking the view, however, that the case raised a problem of interpretation of the Convention, the House of Lords stayed its proceedings pending a preliminary ruling from the Court of Justice on the following question:

Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?'

The question referred to the Court

19. By its question, the national court seeks in essence to ascertain whether the Convention precludes

the grant of an injunction by which a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court in another Contracting State even where that party is acting in bad faith in order to frustrate the existing proceedings.

Observations submitted to the Court

20. The defendants in the main proceedings, the German and Italian Governments and the Commission submit that an injunction of the kind at issue in the main proceedings is not compatible with the Convention. They consider, in essence, that the Convention provides a complete set of rules on jurisdiction. Each court is entitled to rule only as to its own jurisdiction under those rules but not as to the jurisdiction of a court in another Contracting State. The effect of an injunction is that the court issuing it assumes exclusive jurisdiction and the court of another Contracting State is deprived of any opportunity of examining its own jurisdiction, thereby negating the principle of mutual cooperation underlying the Convention.

21. Mr Turner and the United Kingdom Government observe, first, that the question on which a ruling is sought concerns only injunctions prompted by an abuse of procedure, addressed to defendants who are acting in bad faith and with the intention of frustrating proceedings before an English court. In pursuit of the aim of protecting the integrity of the proceedings before the English court, only an English court is in a position to decide whether the defendant's conduct undermines or threatens that integrity.

22. In common with the House of Lords, Mr Turner and the United Kingdom Government also submit that the injunctions at issue do not involve any assessment of the jurisdiction of the foreign court. They should be regarded as procedural measures. In that regard, referring to the judgment in Case C-391/95 Van Uden [1998] ECR I-7091, they contend that the Convention imposes no limitation on measures of a procedural nature which may be adopted by a court of a contracting State, provided that that court has jurisdiction under the Convention over the substance of a case.

23. Finally, Mr Turner and the United Kingdom Government maintain that the grant of an injunction may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings.

Findings of the Court

24. At the outset, it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments (Case C-116/02 Gasser [2003] ECR I-0000, paragraph 72).

25. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them (see, to that effect, Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 23, and Gasser, paragraph 48).

26. Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State (see, to that effect, Overseas Union Insurance and Others , paragraph 24).

27. However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paragraphs 24 to 26 of this judgment, underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.

29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.

30. The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.

31. Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

Costs

32. The costs incurred by the United Kingdom, German and Italian Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the House of Lords by order of 13 December 2001,

hereby rules:

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

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**ADVGEN** Ruiz-Jarabo Colomer

**JUDGRAP** Jann

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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.

*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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# 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)

Work under the auspices of the Commission

>PIC FILE= "T0035311"> Work under the auspices of the Council

>PIC FILE= "T0035312"> (1) Other specialist experts who do not appear on this list, have been consulted on the examination of certain specific questions, and in particular concerning insurance, labour law, interpretation of the Convention by the Court of Justice of the European Communities. >PIC FILE= "T0035313">

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# Cases - Details

## FRANCE • Cour de cassation, 1ère ch. civ. • 2000, January 25

**Parties** Banque nationale de Paris c. société Agro Alliance et autres.

**Reference** 98-17.359.

**History** *No related case*

**Publications**

- Bulletin des arrêts de la Cour de cassation 2000, I, n° 21.
- Gazette du Palais 2000, II, Panorama, p. 13 (résumé.)
- La Semaine juridique, éd. générale 2000, IV, 1446 (résumé.)
- La Semaine juridique, éd. entr. et aff. 2000, p. 439 (résumé.)
- Revue critique de droit international privé, 2000,

**Notes**

**Summary** By contract concluded in 1991 with the « Office algérien interprofessionnel des céréales » (hereinafter OAIC), a French company (Agro Alliance) agreed to produce cereals seeds packaging plants.
According to the contract, Agro Alliance also agreed to provide several guarantees and counter guarantees in favour of the OAIC. The parties agreed to submit them to the Algerian law.
To Agro Alliance's request, the « Banque National de Paris » (hereinafter the BNP) provided several counter guarantees on first demand in favour of the « Banque algérienne de développement » (hereinafter BAD) which was to deliver the first rank security.
Later on, also to the French company's request, a term for the validity of the securities has been unilaterally fixed by the BNP.
In April 1994, the OAIC, which had interrupted the performing of the contract due to an act of God, refused to grant the discharge of the guarantees.
In January 1997, Agro Alliance brought an action against the BNP, asserting that the securities' term was over and that commissions paid to the BNP after the term were undue and should be reimbursed.
One month later, the BAD called for BNP's guaranty.
The « Cour d'appel » decided that the security bonds in dispute had expired and acceded to Agro Alliance's request. Indeed, according to the court, the dispute did not concern the performance of the guaranties but the validity of the clause providing a term. The court also pointed out that both the BAD and the OAIC had given their consent to the term so that the clause constituted the contractual agreement between parties.
The « Cour de cassation » quashed this judgement on the ground that the « Cour d'appel » transgressed article 3.1 of the Rome convention, the securities issued being ruled by the Agerian law chosen by the parties.

**Provisions** 3 3.1

**Held** According to article 3.1 of the Rome convention, « 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 (...) ». The « Cour d'appel » transgresses this stipulation in deciding to give effect to a clause fixing a term to a security on the ground that the dispute does not concern the performance of the security but the validity of the clause and that such a clause constitutes a contractual agreement between parties, whereas the security agreement included a choice of law clause.

**Keywords** choice of law. contractual terms. companies. performance. payment. validity.

**Comment**


# Cases - Details

## ITALY • Corte di Cassazione (Cass.) • 2000, March 10

**Parties** Krauss Maffei Verfahrenstechnik GmbH, Kraus Maffei AG v. Bristol Myers Squibb S.p.A.

**Reference** SU 58

**History** Follow-up of case

- ITALY • Corte di cassazione (Cass.) • 2001, July 20

**Publications**

**Notes**

**Summary** Following the alleged defective quality of the goods delivered under a contract concluded between a German seller and an Italian buyer, the latter asked the Italian courts to terminate the contract. The seller contested that the Italian courts had juridiction under the Brussels convention and invoked an arbitration clause inserted int the contract.
For lack of formal validity, the court disregarded the abitration clause. Under the Brussels convention (article 5, para. 1)a article 4 of the Rome convention, the court considered that the contract did not only involved delivery of the machines, but also included their montage and an agreed guarantee. Under Italian law (art. 1182 civil code) these obligations must be performed in Italy, with which the contract is accordingly most closely connected.

**Provisions** 4

**Held** A contract for the sale of technical equipments, which includes not only for the seller the obligation to deliver but also an obligation to make and guarentee the funtionning of the goods, is governed, as far as it relates to the latter obligation, by the law where these obligtion are to be perfomed, ie at the place of the buyer.

**Keywords** sale breach absence of choice characteristic performance closer connection

**Comment**

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# Cases - Details

## FRANCE • Cour de cassation, 1ère chambre civile. • 2000, May 30

**Parties** Soc. Hick Hargreaves c/ Soc. CAC Degremont et a.

**Reference** 98-16.104

**History** *No related case*

**Publications**

- Bulletin civ. I, n° 160.

**Notes**

**Summary** In 1993, a French company (CAC Degremont) ordered equipment for an electric power plant, to an English company (Hick Hargreaves, hereinafter HH); the contract included a choice of law clause in favor of English law. The English company in turn engaged a French subcontractor (Sofferi) to perform a part of this contract. Alleging the delivered equipment did not conform to the contract, CAC Degremont brought an action against HH before the French "juge des référés" (summary proceeding), and asked him for the nomination of an expert. HH replied in calling Sofferi in warranty. This proceeding was handled with, both by the parties and the judge, under French law. Once the expert report delivered, CAC Degremont brought the action on the merits (against both HH and Sofferi) before the French Tribunal de commerce. The lower courts settled the case under French law, considering that the silence kept by HH in the summary action as to the applicability of English law amounted to a modification, in favour of French law, of the prior choice of English law.
This decision was quashed by the French Cour de cassation, as violating article 3§2 of the Rome convention, since the English company did not expressly claim the settlement of the case under French law in the summary proceeding, and since it did expressly requested the jurisdiction of English law, as of the begining of the action on the merits.

**Provisions** 3 3.2

**Held** A lower court violates article 3§2 of the Rome convention in deciding to settle a case under French law, as a result of an alleged modification of the intention of parties as to the choice of law, due to silence kept by litigants on the issue of the title of English law to govern the case in a summary proceeding, whereas the defendant did not expressly claim the settlement of the case under French law in the summary proceeding, but on the contrary did he expressly request, as of the beginning of the action on the merits, that the case be governed by English law as the law designated by a contractual choice of law clause.

**Keywords** choice of law convention interpretation lex fori procedure specific invitation

**Comment**

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# Cases - Details

## FRANCE • Cour de cassation, 1ère chambre civile. • 2000, July 18

**Parties** M. R. Bismuth c/ Association L'Avenir Sportif de La Marsa et Société Olympique de Marseille.

**Reference** 003002

**History** *No related case*

**Publications**

- Journal du droit international, 2001, p. 97-99.

**Notes** E. LOQUIN et G. SIMON: Journal du droit international, 2001, p. 100-107.

**Summary** A contract of agency has been entered into by a Tunisian footbal club, « l'association Avenir sportif de La Marsa » (hereinafter ASM) and by a go-between doing business in France. The agent had to negociate the transfer of a football player in a French club, « l'Olympique de Marseille ». Once the transfer operated, ASM refused to pay the commission, asserting it would be contrary to the French law relating to Sport Activities and especially to its provisions relating to sporting agent.
The « Cour de cassation » decided that under article 4 of the Rome convention, French law was entitled to govern the contract, insofar as the habitual residence of the go-between, debtor of the characteristic performance, was located in France at the time of conclusion of the contract.

**Provisions** 4 4.1 4.2 7

**Held** In pursuance of articles 4.1 and 4.2 of the Rome convention, in the absence of choice by the parties, a contract is to be governed by the law of the country with which it is most connected. This country is presumed to be 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. Insofar as the « Cour d'appel » pointed out that the go-between which was the debtor of the characteristic performance of the contract, had his habitual residence in France at the time of conclusion of the contract, applied with good reason the French law.

**Keywords** absence of choice. specific contract. agent. characteristic performance. mandat

**Comment** Questionable decision chosing French law as applicable law under article 4-2 of the Rome convention, whereas the provisions in question were apparently internationaly imperative according to article 7 of the Rome convention, their scope having to be delimited under this article.
The French provisions governing sporting agency and in force at that time intend to cleanse the business practice in the circle of sport go-between :
- prior to start operating, the agent has to inform the sport ministry of its activity ;
- the amount of the commission is limited to 10% of the global amount of the transfer.

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# Cases - Details

## FRANCE • Cour d'appel de Paris, chambre 1. • 2000, October 12

**Parties** SA Cofermet c/ Société Gottscholl Alcuilux.

**Reference** 124832.

**History** *No related case*

**Publications**

**Notes**

**Summary** A Luxemburger company had written a comfort letter in favor of one of its French subsidiaries, according to which it promised in particular to support it financially. Another French company delivered goods to the subsidiary which in turn could not pay its debt. The creditor then sued before the French courts the parent company on the ground of the promise contained in the comfort letter.
The question of the jurisdiction of the French court arose. In order to apply article 5.1° of the Brussels convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the court had to check whether or not the obligation in dispute was contractual or extracontractual.
The French court decided to resort to the law applicable to the alleged contract under the Rome convention, articles 4-1, 4-2, 4-5 and 8-1.
In the case of a party who promised to support financially one of its subsidiaries, the characteristic performance is the promisor's engagement. This should have led to the application of the Luxemburger law.
Nevertheless, the « Cour d'appel » did not apply this law, taking into account that the situation was most closely connected with France, in pursuance of article 4.5 of the Rome convention, according to which "(...) the presumption in paragraph 2 (...) shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."
The connecting factors were in particular the place of writing of the letter, the fact that the letter was intended to the auditors of the French subsidiary and that it was part of the economical and financial environment of the French subsidiary.
Subsequently, the judge applied the French law and concluded that the letter at dispute could not be considered as a contract between the creditor of the subsidiary and the parent company, so that French court could not use article 5-1° of the Brussels convention as a ground for its jurisdiction.

**Provisions** 4 4.1 4.2 4.5 8 8.1

**Held** For the purpose of deciding whether a comfort letter must be regarded as a contractual engagement from its author in favor of a company which suffered from contractual failure of the subsidiary which was the beneficiary of the letter, and inferring therefrom whether article 5-1° should apply or not, it is necessary to determine the law which would govern the engagement that may derive from this letter. In pursuance of articles 8.1, 4.1, 4.2 and 4.5 altogether of the Rome convention in force in France and in Luxembourg, the contract is governed, in the absence of choice by the parties and although its validity was in dispute, by the law of the country with which it has the most connected links. This country is presumed to be the country where the party who is to effect the performance which is characteristic of the contract has its regular place of business in the case of a company at the time of the conclusion of the contract. However, this presumption is set aside when it results from the circumstances as a whole that the contract has more connected links with another country. In the event of an obligation to do a particular thing and in which a party bound himself to provide a

specific result which can be analysed as a going bail from his part, the characteristic performance is the obligation to do contracted by the promisor, which would lead to the application of the Luxemburger law. However, insofar as the comfort letter in dispute had been written in France and was intended to the auditors of the French subsidiary and was part of the economical and financial environment of the French subsidiary and was appended to the auditors'situation report submitted to the company's shareholders' meeting that was to decide on the accounting period and for this reason was to be registered at the Trade Register, it could only spread out its effects in France ; subsequently, the issue regarding the contractual nature of the letter must be decided in pursuance of the French law.

**Keywords** companies. parentage. characteristic performance. closer connection with another

**Comment**

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# Cases - Details

## FRANCE • Cour de cassation, chambre sociale • 2000, October 17

**Parties** M. Gasalho c/ Tap Air Portugal

**Reference** 4092

**History** *No related case*

**Publications**

**Notes**

**Summary** A French employee (plaintiff) was taken on by an airline company (respondent) as employee working within the ground crew in Lisbon at the head office of the company under a contract providing the application of the Portuguese law relating to staff sent abroad.
He then exercised the function of manager of the French delegation under an additional term of the contract. Later on, the parties signed an agreement for breach of contract. An action was then brought by plaintiff, arguing he was victim of unfair dismissal.
The litigation focused on the law applicable to the contract in dispute. Plaintiff asserted the mere reference made by parties to the Portuguese status of employees sent abroad could not be regarded as a choice of law in pursuance of article 3 of the Rome Convention, but should be seen as a simple incorporation of the Portuguese law in the contract. As a consequence, the relevant article for the purpose of ascertaining the law governing the contract was article 6.1 of this convention.
However, the "Cour de cassation" dismissed the claim and upheld the judgment of the "Cour d'appel" which held that it was governed by the Portuguese law as the law chosen by the parties under article 3 of the Rome Convention.
Moreover, plaintiff's claim according to which the employee could not be deprived of the protection afforded to him by the law of the country where he usually carried out his performance (which was asserted to be France) was rejected by the judge who held the place of performance was Portugal.

**Provisions** 3 3.1 6 6.1 6.2

**Held** The judge who deduces from his interpretation of the common will of the parties and from the circumstances of the case that they had agreed with certainty to submit their contract to the Portuguese law and that the habitual place of performance of the employee was in Portugal, country with which the employment contract had most connected links can infer the application of the Portuguese law in pursuance of article 3 of the Rome Convention.

**Keywords** employment contracts choice of law circumstances of the case

**Comment**

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# Cases - Details

## FRANCE • Cour de cassation - chambre commerciale • 2000, November 28

**Parties** Allium v. Alfin Inc

**Reference** 2037 FS-P

**History** *No related case*

**Publications**

- La Semaine juridique (JCP), édition générale, 2001, II, 10527.

**Notes** L. BERNARDEAU, La Semaine juridique (JCP), édition générale, 2001, II, 10527.

**Summary**

**Provisions** 5 7 7.2

**Held** French Loi of 25 June 1991 (now Art. L. 134-1 ff. Code de commerce) is an internal mandatory provision and not a loi de police applicable in the international legal order.

**Keywords** agency agent applicable law clause choice of law Community law foreign law choi

**Comment** Contrast with ECJ-20001109-C-381-98-en

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# Cases - Details

## FRANCE • Cour d'appel de Douai, chambre sociale • 2001, April 13

**Parties** Triopon c/ Soc. Argenerias Schiavon SAS

**Reference** ...

**History** *No related case*

**Publications**

- Revue de jurisprudence sociale, juill. 2001, n° 843.

**Notes**

**Summary** Pursuant to a contract entered into in 1987 between a French representative (agent) and an Italian employer, the former was to carry out his work mainly in France. The parties had agreed to submit the contract to the Italian law. After a litigation arose between the parties, the "Cour d'appel" applied the Rome Convention to determine the law applicable to the employment contract.
The court held in pursuance of article 6.1 of the Rome Convention that notwithstanding the choice of the Italian law, the representative could not be deprived of the French mandatory rules regarding commercial agent insofar as they are more protective toward the employee than the Italian's.

**Provisions** 3 3.1 6 6.1

**Held** In pursuance of article 6.1 of the Rome Convention, the application of the law chosen by the parties cannot deprive the employee of the protection afforded to him by the mandatory rules of the law that would apply in the absence of choice, i. e. usually, the law of the country where the employee carries out his work.

**Keywords** employment contracts agent choice of law mandatory rules

**Comment** Once again, the Rome Convention was applied although it was not into force at the time of conclusion of the contract in dispute...

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# Cases - Details

## ITALY • Corte di cassazione (Cass.) • 2001, June 11

**Parties** Otto Kogler v. Eurogames S.r.l.

**Reference** S. U. 7860

**History** *No related case*

**Publications**

**Notes**

**Summary** Otto Kogler was ordered to pay a sum of money to its creditor (Eurogames) by an Italian judge (Tribunale di Forlì). He asked the judges to deny Italian jurisdiction, because the contract contained a clause of reference to the Austrian law. Even if it was written in art.8 (related to guaranty), it has to be referred to the whole contract. Besides this, the contract was a sale in exclusive. Following art. 4, n.1 Rome Convention (closer connection), it has to be applied Austrian law, because the characteristic performance, in general, is not the pecuniary one; so, in the commercial distribution, it is the distribution activity of the concessionary in exclusive (Kogler).
Cassazione reminds that this contract is a concession of sale in exclusive, it is atypical and it is subjected to Rome Convention, which is universal and applied even it is the law of a non-contracting state (art.2). Art.3 can't be applied, because in this contract the choice of the parties seems to be Austrian law only in the case of guaranty. So art.4 has to be applied, but in this case the performance which is characteristic of the contract is the furniture of the goods, because the distribution depended on it. The most part of this furniture happened in Italy, so Italian jurisdiction exists.

**Provisions** 2 3 4

**Held** In the case of concession of sale in exclusive, the performance which is characteristic is the furniture of goods, which the distribution is dependent on

**Keywords** choice of law sale characteristic performance closer connection

**Comment**

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# Cases - Details

## ITALY • Corte di cassazione (Cass.) • 2001, July 20

**Parties** Krauss Maffei Verfahrenstechnik GmbH, Kraus Maffei AG v. Bristol Myers Squibb S.p.A.

**Reference** S.U.9882

**History** Preceding cases

- ITALY • Corte di Cassazione (Cass.) • 2000, March 10

**Publications**

**Notes**

**Summary** Krauss Maffei asked for the revocation of the sentence n.58/2000 because of an error of fact of the judge (artt. 395, n.4 and 391-bis, c.c.). Cassazione applied art. 4.1 Rome Convention, but it didn't consider art.17 of the Convention. All the contracts in this case were concluded in the years 1988 and 1989, while Rome Convention came into force in Italy the 1st April of 1991. So art.25 pre-laws should have been applied, and the conclusion would have been different, because the contract was concluded in Germany, and German law establishes that the place of performance of the obligations is the seller's one, so the jurisdiction belongs to German judges. Cassazione couldn't decide on the question and turned down the claim. In fact, the party had affirmed that an error of fact exists, but in reality their motivation consisted in an error of law (the application of the rules of the convention). Besides this, in the appealed sentence the applicable law was chosen without considering the moment of conclusion of the contract. Cassazione excluded the application of art.25 pre-laws, and referred to the moment of the lack of the obligation (when the machines revealed the defects which made them unsuitable for the use).

**Provisions** 4.1 17

**Held** When a question of application of the rules of the Convention is concerned, it can be pleaded an error of law and not an error of fact.

**Keywords** sale performance negligence mistake

**Comment**

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# Cases - Details

## ITALY • Corte di cassazione (Cass.) • 2001, September 11

**Parties** Janus Film und Fernsehen Vertriebsgesell Schaft Mbh v. Rcs Editori S.p.A.+Filmauro S.r.l.

**Reference** 11580

**History** *No related case*

**Publications**

**Notes**

**Summary** Janus conveyed in front of Tribunale di Roma Rizzoli and Filmauro, saying that it had purchased the rights for some movies in Germany in 1980, but after that Rizzoli gave them to Filmauro. Italian judges decided that Filmauro had correctly acquired the rights, in application of art. 1155 c.c. (acquisition of property rights in good faith). Janus appealed to the Supreme Court. It says that art.22 and 25 pre-laws hadn't been correctly applied, and the applicable law is the German one, which is less favourable to the defense of the possession in good faith.
Cassazione agrees that the reformed international private law can't be applied, because it is successive (1995). So art.22 and 25 pre-laws have to be applied. According to art.25, the question has to be decided following Italian law, the one which rules the obligations of the contract, because that contract was concluded in Italy, even if between parties of different nationalities.

**Provisions** *n.a.*

**Held** When the contract is concluded before the coming into force of the Italian international private law, it can't be applied, but it is necessary to refer to artt.22 and 25 pre-laws.

**Keywords** good faith property foreign law conclusion

**Comment** This sentence it interesting because it seems to leave an alternative when it is has to be chosen the applicable law in a contract: pre-laws, before the coming into force of the reform, and the reformed law after 1995 (l.218/1995). This law refers to Rome Convention. The sentence doesn't consider (and it wouldn't have been necessary in this case, because the contract was concluded in 1980) that in the period between 1991 and 1995 Rome Convention could be applied, because it came into force and prevailed over the contrasting national law.

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