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(Information)

COUNCIL

Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

(Signed at Brussels, 27 September 1968)

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A committee of experts set up in 1960 by decision of the Committee of Permanent Representatives of the Member States, following a proposal by the Commission, prepared a draft Convention, in pursuance of Article 220 of the EEC Treaty, on jurisdiction and the enforcement of judgments in civil and commercial matters. The committee was composed of governmental experts from the six Member States, representatives of the Commission, and observers. Its rapporteur, Mr P. Jenard, Directeur d'Administration in the Belgian Ministry for Foreign Affairs and External Trade, wrote the explanatory report, which was submitted to the governments at the same time as the draft prepared by the committee of experts. The following is the text of that report. It takes the form of a commentary on the Convention, which was signed in Brussels on 27 September 1968.

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CHAPTER I

PRELIMINARY REMARKS

By Article 220 of the Treaty establishing the European Economic Community, the Member States agreed to enter into negotiations with each other, so far as necessary, with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The fact that the Treaty of Rome requires the Member States to resolve this problem shows that it is important. In a note sent to the Member States on 22 October 1959 inviting them to commence negotiations, the Commission of the European Economic Community pointed out that

> 'a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.'

On receiving this note the Committee of Permanent Representatives decided on 18 February 1960 to set up a committee of experts. The committee, consisting of delegates from the six Member countries, observers from the Benelux Committee on the unification of law and from the Hague Conference on private international law, and representatives from the EEC Commission departments concerned, met for the first time from 11 to 13 July 1960 and appointed as its chairman Professor Bülow then Ministerialdirigent and later Staatssekretär in the Federal Ministry of Justice in Bonn, and as its rapporteur Mr Jenard, directeur in the Belgian Ministry for Foreign Affairs.

At its 15th meeting, held in Brussels from 7 to 11 December 1964, the committee adopted a 'Preliminary Draft Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the enforcement of authentic instruments (document 14371/IV/64). This preliminary draft, with an explanatory report (document 2449/IV/65), was submitted to the Governments for comment.

The comments of the Governments, and those submitted by the Union of the Industries of the European Community, the Permanent Conference of Chambers of Commerce and Industry of the EEC, the Banking Federation of the EEC, the Consultative Committee of the Barristers' and Lawyers' Associations of the six EEC countries (a committee of the International Association of Lawyers), were studied by the Committee at its meeting of 5 to 15 July 1966. The draft Convention was finally adopted by the experts at that meeting.

The names of the governmental experts who took part in the work of the committee are set out in the annex to this report.

CHAPTER II

BACKGROUND TO THE CONVENTION

It is helpful to consider, first, the rules in each of the six countries governing the recognition and enforcement of foreign judgments.

A. THE LAW IN FORCE IN THE SIX STATES

In Belgium, until the entry into force of the Judicial Code (Code Judiciaire), the relevant provisions as

regards enforcement are to be found in Article 10 of the Law of 25 March 1876, which contains Title I of the Introductory Book of the Code of Civil Procedure (1).

Where there is no reciprocal convention, a court seised of an application for an order for enforcement 'has jurisdiction over a foreign judgment as to both form and substance, and can re-examine both the facts and the law. In other words, it has power to review the matter fully'. (2) (3)

(1) Article 10 of the Law of 1876 provides that: They (courts of first instance) shall also have jurisdiction in relation to judgments given by foreign courts in civil and commercial matters. Where there exists a treaty concluded on a basis of reciprocity between Belgium and the country in which the judgment was given, they shall review only the following five points:

1. whether the judgment contains anything contrary to public policy or to the principles of Belgian public law;
2. whether, under the law of the country in which the judgment was given, it has become *res judicata;*
3. whether, under that law, the certified copy of the judgment satisfies the conditions necessary to establish its authenticity;
4. whether the rights of the defendant have been observed;
5. whether the jurisdiction of the foreign court is based solely on the nationality of the plaintiff.

Article 570 of the Judicial Code contained in the Law of 10 October 1967 (supplement to the Moniteur belge of 31 October 1967) reads as follows:

'Courts of first instance shall adjudicate on applications for orders for the enforcement of judgments given by foreign courts in civil matters, regardless of the amount involved. Except where the provisions of a treaty between Belgium and the country in which judgment was given are to be applied, the court shall examine, in addition to the substance of the matter:

1. whether the judgment contains anything contrary to public policy or to the principles of Belgian public law;
2. whether the rights of the defendant have been observed;
3. whether the jurisdiction of the foreign court is based solely on the nationality of the plaintiff;
4. whether, under the law of the country in which the judgment was given, it has become *res judicata;*
5. whether, under that law, the certified copy of the judgment satisfies the conditions necessary to establish its authenticity.' These provisions will enter into force on 31 October 1970 at the latest. Before that date an *arrêté royal* (Royal Decree) will determine the date on which the provisions of the Judicial Code enter into force.

(2) GRAULICH, Principes de droit international privé, No 248 *et seq.*

(3) RIGAUX, L'efficacité des jugements étrangers en Belgique, Journal des tribunaux, 10. 4. 1960, p 287.

As regards recognition, text-book authorities and case-law draw a distinction between foreign judgments relating to status and legal capacity and those relating to other matters. The position at present is that foreign judgments not relating to the status and legal capacity of persons are not regarded by the courts as having the force of *res judicata.*

However, foreign judgments relating to a person's status or legal capacity may be taken as evidence of the status acquired by that person (4). Such a foreign judgment thus acts as a bar to any new proceedings for divorce or separation filed before a Belgian court if the five conditions listed in Article 10 of the Law of 1876 are fulfilled, as they 'constitute no more than the application to foreign judgments of rules which the legislature considers essential for any judgment to be valid'.

In the *Federal Republic of Germany,* foreign judgments are recognized and enforced on the basis of reciprocity (5). The conditions for recognition of foreign judgments are laid down in paragraph 328 of the Code of Civil Procedure (Zivilprozeßordnung):

'I. A judgment given by a foreign court may not be recognized:

1. where the courts of the State to which the foreign court belongs have no jurisdiction under German law;

2. where the unsuccessful defendant is German and has not entered an appearance, if the document instituting the proceedings was not served on him in person either in the State to which the court belongs, or by a German authority under the system of mutual assistance in judicial matters;

3. where, to the detriment of the German party, the judgment has not complied with the provisions of Article 13 (1) and (3) or of Articles 17, 18, and 22 of the Introductory Law to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch), or with the provisions of Article 27 of that Law which refer to Article 13 (1), nor where, in matters falling within the scope of Article 12 (3) of the Law of 4 July 1939 on disappearances, certifications of death, and establishment of the date of decease (RGBl. I, p. 1186), there has been a failure to comply with the provisions of Article 13 (2) of the Introductory Law to the Civil Code, to the

(4) Cass. 16. 1. 1953 — Pas. I. 335.

(5) Riezler, Internationales Zivilprozeßrecht, 1949, p. 509 *et seq.*

detriment of the wife of a foreigner who has been declared dead by judgment of the court (1);

4. where recognition of the judgment would be contrary to 'good morals' (gegen die guten Sitten) or the objectives of a German law;

5. where there is no guarantee of reciprocity.

II. The provision in (5) above shall not prevent recognition of a judgment given in a matter not relating to property rights where no court in Germany has jurisdiction under German law.'

The procedure for recognizing judgments delivered in actions relating to matrimonial matters is governed by a special Law (Familienrechtsänderungsgesetz) of 11 August 1961 (BGBl. I, p. 1221, Article 7).

Enforcement is governed by Articles 722 and 723 of the Code of Civil Procedure, which read as follows:

Article 722

'I. A foreign judgment may be enforced only where this is authorized by virtue of an order for enforcement.

II. An application for an order for enforcement shall be heard either by the Amtsgericht or the Landgericht having general jurisdiction in relation to the defendant, or otherwise by the Amtsgericht or the Landgericht before which the defendant may be summoned under Article 23.'

Article 723

'I. An order for enforcement shall be granted without re-examination of the substance of the judgment.

II. An order for enforcement shall be granted only if the foreign judgment has become *res judicata* under the law of the court in which it was given. No order for enforcement shall be granted where recognition of the judgment is excluded by Article 328.'

In France, Article 546 of the Code of Civil Procedure (Code de procédure civile) provides that judgments given by foreign courts and instruments recorded by foreign officials can be enforced only after being declared enforceable by a French court (Articles 2123 and 2128 of the Civil Code).

The courts have held that four conditions must be satisfied for an order for enforcement to be granted: the foreign court must have had jurisdiction; the procedure followed must have been in order; the law applied must have been that which is applicable under the French system of conflict of laws; and due regard must have been paid to public policy (2).

The Cour de cassation recently held (Cass. civ. 1er Section, 7 January 1964 — Munzer case) that the substance of the original action could not be reviewed by the court hearing the application for an order for enforcement. This judgment has since been followed.

In Italy, on the other hand, the Code of Civil Procedure (Codice di procedura civile) in principle allows foreign judgments to be recognized and enforced.

Under Article 796 of the Code of Civil Procedure, any foreign judgment may be declared enforceable in Italy by the Court of Appeal (Corte d'appello) for the place in which enforcement is to take place (Dichiarazione di efficacia).

Under Article 797 of the Code of Civil Procedure, the Court of Appeal examines whether the foreign judgment was given by a judicial authority having jurisdiction under the rules in force in Italy; whether in the proceedings abroad the document instituting the proceedings was properly served and whether sufficient notice was given; whether the parties properly entered an appearance in the proceedings or whether their default was duly recognized; whether the judgment has become *res judicata;* whether the judgment conflicts with a judgment given by an Italian judicial authority; whether proceedings between the same parties and concerning the same claim are pending before an Italian judicial authority; and whether the judgment contains anything contrary to Italian public policy.

However, if the defendant failed to appear in the foreign proceedings, he may request the Italian court to review the substance of the case (Article 798). In such a case, the Court may either order enforcement, or hear the substance of the case and give judgment.

(1) These Articles of the Introductory Law to the Civil Code provide for the application of German law in many cases: condition of validity of marriage, form of marriage, divorce, legitimate and illegitimate paternity, adoption, certification of death.

(2) Batiffol, Traité élémentaire de droit international privé, No 741 *et seq.*

There is also in Italian law the 'delibazione incidentale' (Article 799 of the Code of Civil Procedure) which, however, applies only to proceedings in which it is sought to invoke a foreign judgment.

Luxembourg. Under Article 546 of the Luxembourg Code of Civil Procedure (Code de procédure civile), judgments given by foreign courts and instruments recorded by foreign officials can be enforced in the Grand Duchy only after being declared enforceable by a Luxembourg court (see Articles 2123 and 2128 of the Civil Code).

Luxembourg law requires seven conditions to be satisfied before an order for enforcement can be granted: the judgment must be enforceable in the country in which it was given; the foreign court must have had jurisdiction; the law applied must have been that applicable under the Luxembourg rules of conflict of laws; the rules of procedure of the foreign law must have been observed; the rights of the defendant must have been observed; due regard must have been paid to public policy; the law must not have been contravened (Luxembourg, 5. 2. 64, Pasicrisie luxembourgeoise XIX, 285).

Luxembourg law no longer permits any review of a foreign judgment as to the merits.

In the *Netherlands,* the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) lays down the principle that judgments of foreign courts are not enforceable in the Kingdom. Matters settled by foreign courts may be reconsidered by Netherlands courts (see Article 431 of the Code of Civil Procedure).

The national laws of the Member States thus vary considerably.

B. EXISTING CONVENTIONS

Apart from conventions dealing with particular matters (see p. 10), various conventions on enforcement exist between the Six; they are listed in Article 55 of the Convention. However, relations between France and the Federal Republic of Germany, France and the Netherlands, France and Luxembourg, Germany and Luxembourg, and Luxembourg and Italy are hampered by the absence of such conventions (1).

There are also striking differences between the various conventions. Some, like those between France and Belgium, and between Belgium and the Netherlands, and the Benelux Treaty, are based on 'direct' jurisdiction; but all the others are based on 'indirect' jurisdiction. The Convention between France and Italy is based on indirect jurisdiction, but nevertheless contains some rules of direct jurisdiction. Some conventions allow only those judgments which have becom *res judicata* to be recognized and enforced, whilst others such as the Benelux Treaty and the Conventions between Belgium and the Netherlands, Germany and Belgium, Italy and Belgium and Germany and the Netherlands apply to judgments which are capable of enforcement (2). Some cover judgments given in civil matters by criminal courts, whilst others are silent on this point or expressly exclude such judgments from their scope (Conventions between Italy and the Netherlands, Article 10, and between Germany and Italy, Article 12).

There are various other differences between these treaties and conventions which need not be discussed in detail; they relate in particular to the determination of competent courts and to the conditions governing recognition and enforcement. It should moreover be stressed that these conventions either do not lay down the enforcement procedure or give only a summary outline of it.

The present unsatisfactory state of affairs as regards the recognition and enforcement of judgments could have been improved by the conclusion of new bilateral conventions between Member States not yet bound by such conventions.

(1) It should be noted that at the time of writing this report, the Benelux Treaty has not yet entered into force and there is no agreement existing between Luxembourg on the one hand and Belgium and the Netherlands on the other.

(2) The Franco-Belgian convention, in spite of the provisions of Article 11 (2) which impose the condition of *res judicata,* nevertheless applies to enforceable judgments even if there is still a right of appeal (see Niboyet, Droit international privé français, T. VII 2022).

However, the Committee has decided in favour of the conclusion of a multilateral convention between the countries of the European Economic Community, in accordance with the views expressed in the Commission's letter of 22 October 1959. The Committee felt that the differences between the bilateral conventions would hinder the 'free movement' of judgments and lead to unequal treatment of the various nationals of the Member States, such inequality being contrary to the fundamental EEC principle of non-discrimination, set out, in particular, in Article 7 of the Treaty of Rome.

In addition, the European Economic Community provided the conditions necessary for a modern, liberal law on the recognition and enforcement of judgments, which would satisfy both legal and commercial interests.

C. THE NATURE OF THE CONVENTION

Some of the bilateral conventions concluded between the Member States, such as the Convention between France and Belgium of 8 July 1899, the Convention between Belgium and the Netherlands of 28 March 1925, and the Benelux Treaty of 24 November 1961, are based on rules of direct jurisdiction, whilst in the others the rules of jurisdiction are indirect. Under conventions of the first type, known also as 'double treaties', the rules of jurisdiction laid down are applicable in the State of origin, i.e. the State in which the proceedings originally took place; they therefore apply independently of any proceedings for recognition and enforcement, and permit a defendant who is summoned before a court which under the convention in question would not have jurisdiction to refuse to accept its jurisdiction.

Rules of jurisdiction in a convention are said to be 'indirect' when they do not affect the courts of the State in which the judgment was originally given, and are to be considered only in relation to recognition and enforcement. They apply only in determining cases in which the court of the State in which recognition or enforcement of a judgment is sought (the State addressed) is obliged to recognize the jurisdiction of the court of the State of origin. They can therefore be taken as conditions governing the recognition and enforcement of foreign judgments and, more specifically, governing supervision of the jurisdiction of foreign courts.

The Committee spent a long time considering which of these types of convention the EEC should have. It eventually decided in favour of a new system based on direct jurisdiction but differing in several respects from existing bilateral conventions of that type.

Although the Committee of experts did not underestimate the value and importance of 'single' conventions, (i. e. conventions based on rules of indirect jurisdiction) it felt that within the EEC a convention based on rules of direct jurisdiction as a result of the adoption of common rules of jurisdiction would allow increased harmonization of laws, provide greater legal certainty, avoid discrimination and facilitate the 'free movement' of judgments, which is after all the ultimate objective.

Conventions based on direct jurisdiction lay down common rules of jursidiction, thus bringing about the harmonization of laws, whereas under those based on indirect jurisdiction, national provisions apply, without restriction, in determining international jurisdiction in each State.

Legal certainty is most effectively secured by conventions based on direct jurisdiction since, under them, judgments are given by courts deriving their jurisdiction from the conventions themselves; however, in the case of conventions based on indirect jurisdiction, certain judgments cannot be recognized and enforced abroad unless national rules of jurisdiction coincide with the rules of the convention (1).

Moreover, since it establishes, on the basis of mutual agreement, an autonomous system of international jurisdiction in relations between the Member States, the Convention makes it easier to abandon certain rules of jurisdiction which are generally regarded as exorbitant.

Finally, by setting out rules of jurisdiction which may be relied upon as soon as proceedings are begun in the State of origin, the Convention regulates the problem of *lis pendens* and also helps to minimize the conditions governing recognition and enforcement.

(1) WESER, Les conflits de juridictions dans le cadre du Marché Commun, Revue Critique de droit international privé 1960, pp. 161-172.

As already stated, the Convention is based on direct jurisdiction, but differs fundamentally from treaties and conventions of the same type previously concluded. This is not the place to undertake a detailed study of the differences, or to justify them; it will suffice merely to list them:

1. the criterion of domicile replaces that of nationality;
2. the principle of equality of treatment is extended to any person domiciled in the Community, whatever his nationality;
3. rules of exclusive jurisdiction are precisely defined;
4. the right of the defendant to defend himself in the original proceedings is safeguarded;
5. the number of grounds for refusal of recognition and enforcement is reduced.

In addition, the Convention is original in that:

1. the procedure for obtaining enforcement is standardized;
2. rules of procedure are laid down for cases in which recognition is at issue;
3. provision is made for cases of conflict with other conventions.

CHAPTER III

SCOPE OF THE CONVENTION

The scope of the Convention is determined by the preamble and Article 1.

It governs international legal relationships, applies automatically, and covers all civil and commercial matters, apart from certain exceptions which are exhaustively listed.

I. INTERNATIONAL LEGAL RELATIONSHIPS

As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States.

It alters the rules of jurisdiction in force in each Contracting State only where an international element is involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State which involves only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Article 21 to 23).

It is clear that at the recognition and enforcement stage, the Convention governs only international legal relationships, since *ex hypothesi* it concerns the recognition and enforcement in one Contracting State of judgments given in another Contracting State [1].

II. THE BINDING NATURE OF THE CONVENTION

It was decided by the committee of experts that the Convention should apply automatically. This principle is formally laid down in Articles 19 and 20 which deal with the matter of examination by the courts of the Contracting States of their international jurisdiction. The courts must apply the rules of the Convention whether or not they are pleaded by the parties. It follows from this, for example, that if a person domiciled in Belgium is sued in a French court on the basis of Article 14 of the French Civil Code, and contests the jurisdiction of that court but without pleading the provisions of the Convention, the court

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[1] A. BÜLOW, Vereinheitlichtes internationales Zivilprozeßrecht in der Europäischen Wirtschaftsgemeinschaft — Rabels Zeitschrift für ausländisches und internationales Privatrecht, 1965, p. 473 *et seq.*

must nevertheless apply Article 3 and declare that it has no jurisdiction (1).

III. CIVIL AND COMMERCIAL MATTERS

The Committee did not specify what is meant by 'civil and commercial matters', nor did it point to a solution of the problem of classification by determining the law according to which that expression should be interpreted.

In this respect it followed the practice of existing conventions (2).

However, it follows from the text of the Convention that civil and commercial matters are to be classified as such according to their nature, and irrespective of the character of the court or tribunal which is seised of the proceedings or which has given judgment. This emerges from Article 1, which provides that the Convention shall apply in civil and commercial matters 'whatever the nature of the court or tribunal'. The Convention also applies irrespective of whether the proceedings are contentious or non-contentious. It likewise applies to labour law in so far as this is regarded as a civil or commercial matter (see also under contracts of employment, page 24).

The Convention covers civil proceedings brought before criminal courts, both as regards decisions relating to jurisdiction, and also as regards the recognition and enforcement of judgments given by criminal courts in such proceedings. It thereby takes into account certain laws in force in the majority of the Contracting States (3), tends to rule out any differences of interpretation such as have arisen in applying the Convention between Belgium and the Netherlands (4) and, finally, meets current requirements arising from the increased number of road accidents.

The relevant provisions of the treaty and conventions already concluded between the Member States vary widely, as has already been pointed out in Chapter I (A).

The formula adopted by the Committee reflects the current trend in favour of inserting in conventions clauses specifying that they apply to judgments given in civil or commercial matters by criminal courts. This can in particular be seen in the Benelux Treaty of 24 November 1961 and in the work of the Hague Conference on private international law.

It should be noted that the provisions of Article 5 (4) of the Convention in no way alter the penal jurisdiction of criminal courts and tribunals as laid down in the various codes of criminal procedure.

As regards both jurisdiction and recognition and enforcement, the Convention affects only civil proceedings of which those courts are seised, and judgments given in such proceedings.

However, in order to counter the objection that a party against whom civil proceedings have been brought might be obstructed in conducting his defence if criminal sanctions could be imposed on him in the same proceedings, the Committee decided on a solution identical to that adopted in the Benelux Treaty. Article II of the Protocol provides that such persons may be defended or represented in criminal courts. Thus they will not be obliged to appear in person to defend their civil interests.

The Convention also applies to civil or commercial matters brought before administrative tribunals.

The formula adopted by the Committee is identical to that envisaged by the Commission which was given the task at the fourth session of the Hague Conference on private international law of examining the Convention of 14 November 1896 in order to draw up common rules on a number of aspects of private international law relating to civil procedure. It reported as follows:

> 'The expression "civil or commercial matters" is very wide and does not include only those matters which fall within the jurisdiction of civil tribunals and commercial tribunals in countries where administrative tribunals also exist. Otherwise there would be a wholly unjustifiable inequality between the Contracting States: service abroad of judicial

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(1) Tribunal civil de Lille, 9. 11. 1953, Revue critique de droit international privé, 1954, p. 832.

(2) This problem is not dealt with in any treaty on enforcement. See also the report by Professor Fragistas on the Preliminary Draft Convention adopted by the Special Commission of the Hague Conference on private international law, preliminary document No 4 for the tenth session, p. 11.

(3) In *Belgium,* see Article 4 of the Law of 17 April 1878 containing the Introductory Title of the Code of Criminal Procedure.
In the *Federal Republic of Germany,* see Article 403 *et seq.* of the Code of Criminal Procedure.
In *France,* see Article 4 of the Code of Criminal Procedure.
In *Luxembourg,* any person who claims to have suffered loss or injury as a result of a crime or other wrongful act may, under Article 63 of the Code of Criminal Procedure, be joined as a civil party.
In the *Netherlands,* see Articles 332 to 337 of the Code of Criminal Procedure, and Articles 44 and 56 of the Law of Judicial Procedure, which gives jurisdiction to the justices of the peace or to the courts up to Fl 200 and 500 respectively.

(4) In interpreting the 1925 Convention between Belgium and the Netherlands, the Netherlands Court of Cassation held in its judgment of 16. 3. 1931 (N.J. 1931, p. 689) that Articles 11 and 12 did not affect orders by criminal courts to pay compensation for injury or loss suffered by a party.

instruments could take place on a wider scale for countries which do not have administrative tribunals than for countries which have them. In brief, the Convention is applicable from the moment when private interests become involved ...' (1).

Thus, for example, decisions of the French Conseil d'État given on such matters may be recognized and enforced (2).

IV. MATTERS EXCLUDED FROM THE SCOPE OF THE CONVENTION

The ideal solution would certainly have been to apply the Convention to all civil and commercial matters. However, the Committee did not feel able to adopt this approach, and limited the scope of the Convention to matters relating to property rights for reasons similar to those which prevailed when the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters was drafted, the main reason being the difficulties resulting from the absence of any overall solution to the problem of conflict of laws.

The disparity between rules of conflict of laws is particularly apparent in respect of matters not relating to property rights, since in general the intention of the parties cannot regulate matters independently of considerations of public policy.

The Committee, like the Hague Conference on private international law, preferred a formula which excluded certain matters to one which would have involved giving a positive definition of the scope of the Convention. The solution adopted implies that all litigation and all judgments relating to contractual or non-contractual obligations which do not involve the status or legal capacity of natural persons, wills or succession, rights in property arising out of a matrimonial relationship, bankruptcy or social security must fall within the scope of the Convention, and that in this respect the Convention should be interpreted as widely as possible.

However, matters falling outside the scope of the Convention do so only if they constitute the principal subject-matter of the proceedings. They are thus not excluded when they come before the court as a subsidiary matter either in the main proceedings or in preliminary proceedings (3).

A. Status, legal capacity, rights in property arising out of a matrimonial relationship, wills, succession

Apart from the desirability of bringing the Convention into force as soon as possible, the Committee was influenced by the following considerations. Even assuming that the Committee managed to unify the rules of jurisdiction in this field, and whatever the nature of the rules selected, there was such disparity on these matters between the various systems of law, in particular regarding the rules of conflict of laws, that it would have been difficult not to re-examine the rules of jurisdiction at the enforcement stage. This in turn would have meant changing the nature of the Convention and making it much less effective. In addition, if the Committee had agreed to withdraw from the court of enforcement all powers of examination, even in matters not relating to property rights, that court would surely have been encouraged to abuse the notion of public policy, using it to refuse recognition to foreign judgments referred to it. The members of the Committee chose the lesser of the two evils, retaining the unity and effectiveness of their draft while restricting its scope. The most serious difficulty with regard to status and legal capacity is obviously that of divorce, a problem which is complicated by the extreme divergences between the various systems of law: Italian law prohibits divorce, while Belgian law not only provides for divorce by consent (Articles 223, 275 *et seq.* of the Civil Code), which is unknown under the other legal systems apart from that of Luxembourg, but also, by the Law of 27 June 1960 on the admissibility of divorce when at least one of the spouses is a foreign national, incorporates provisions governing divorces by foreign nationals who ordinarily reside in Belgium.

The wording used, 'status or legal capacity of natural persons', differs slightly from that adopted in the Hague Convention, which excludes from its scope judgments concerning 'the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses' (Article 1 (1)). The reason for this is twofold. Firstly, family law in the six Member States of the Community is not a concept distinct from questions of status or capacity; secondly, the EEC Convention, unlike the Hague Convention, applies to maintenance (Article 5 (2)) even where the obligation stems from the status of the persons and irrespective of whether rights

(1) See The Hague Conference on private international law — documents of the fourth session (May to June 1904), p. 84.

(2) WESER, Traité franco-belge du 8. 7. 1899, No 235.

(3) BELLET, 'L'élaboration d'une convention sur la reconnaissance des jugements dans le cadre du Marché commun', Clunet, 1965.

and duties between spouses or between parents and children are involved.

Moreover, in order to avoid differences of interpretation, Article 1 specificies that the Convention does not apply to the status or legal capacity of natural persons, thereby constituting a further distinction between this Convention and the Hague Convention, which specifies that it does not apply to judgments dealing principally with 'the existence or constitution of legal persons or the powers of their organs' (Article 1 (2) third indent).

With regard to matters relating to succession, the Committee concurred in the opinion of the International Union of Latin Notaries.

This body, when consulted by the Committee, considered that it was necessary, and would become increasingly so as the EEC developed in the future, to facilitate the recognition and enforcement of judgments given in matters relating to succession, and that it was therefore desirable for the six Member States to conclude a convention on the subject. However, the Union considered that it was essential first to unify the rules of conflict of laws.

As is pointed out in the Memorandum of the Permanent Bureau of the Hague Conference on private international law [1], from which this commentary has been taken, there are fairly marked differences between the various States on matters of succession and of rights in property arising out of a matrimonial relationship.

1. As regards succession, some systems of law make provision for a portion of the estate to devolve compulsorily upon the heirs, whereas others do not. The share allocated to the surviving spouse (a question which gives rise to the greatest number of proceedings in matters of succession because of the clash of interests involved) differs enormously from country to country. Some countries place the spouse on the same footing as a surviving child, or grant him or her a certain reserved portion (Italy), while others grant the spouse only a limited life interest (for example, Belgium).

   The disparities as regards rules of conflict of laws are equally marked. Some States (Germany, Italy and the Netherlands) apply to succession the national law of the *de cujus;* others (Belgium and France) refer succession to the law of the domicile as regards movable property and, as regards immovable property, to the law of the place where the property is situated; or (as in Luxembourg) refer to the law of the place where the property is situated in the case of immovable property, but subject movable property to national law.

2. As regards rights in property arising out of a matrimonial relationship, the divergences between the legal systems are even greater, ranging from joint ownership of all property (Netherlands) through joint ownership of movable property and all property acquired during wedlock (France, Belgium and Luxembourg) or joint ownership of the increase in capital value of assets (Federal Republic of Germany) to the complete separation of property (Italy).

There are also very marked divergences between the rules of conflict of laws, and this provokes positive conflicts between the systems. In some States the rules governing matrimonial property, whether laid down by law or agreed between the parties, are subject to the national law of the husband (Germany, Italy and the Netherlands); in the other States (Belgium, France, and Luxembourg) matrimonial property is subject to the rules impliedly chosen by the spouses at the time of their marriage.

Unlike the preliminary draft the Convention does not expressly exclude gifts from its scope. In this respect it follows the Hague Convention, though gifts will of course be excluded in so far as they relate to succession.

However, the Committee was of the opinion that there might possibly be grounds for resuming discussion of these problems after the Judgments Convention had entered into force, depending on the results of the work currently being done by the Hague Conference and by the International Commission on Civil Status.

It should be stressed that these matters will still be governed, temporarily at least, by existing bilateral conventions, in so far as these conventions apply (see Article 56).

B. Bankruptcy

Bankruptcy is also excluded from the scope of this Convention.

A separate Convention is currently being drafted, since the peculiarities of this branch of law require special rules.

Article 1 (2) excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, i.e. those proceedings which,

[1] The Hague Conference on private international law, recognition and enforcement of foreign judgments in matters relating to property rights. Memorandum, with Annexes, by the Permanent Bureau. Preliminary document No 1 of January 1962 for the Special Committee, p. 10.

depending on the system of law involved, are based on the suspension of payments, the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either of compulsory and collective liquidation of the assets or simply of supervision.

Thus the Convention will cover proceedings arising from schemes of arrangement out of court, since the latter depend on the intention of the parties and are of a purely contractual nature. The insolvency of a non-trader (déconfiture civile) under French law, which does not involve organized and collective proceedings, cannot be regarded as falling within the category of 'analogous proceedings' within the meaning of Article 1 (2).

Proceedings relating to a bankruptcy are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy (1) and hence falling within the scope of the Bankruptcy Convention of the European Economic Community are excluded from the scope of the Convention (2).

Pending the conclusion of the separate Convention covering bankruptcy, proceedings arising directly from bankruptcy will be governed by the legal rules currently in force, or by the conventions which already exist between certain Contracting States, as provided in Article 56 (3).

C. Social Security

The Committee decided, like the Hague Conference (4), to exclude social security from the scope of the Convention. The reasons were as follows.

In some countries, such as the Federal Republic of Germany, social security is a matter of public law, and in others it falls in the borderline area between private law and public law.

In some States, litigation on social security matters falls within the jurisdiction of the ordinary courts, but in others it falls within the jurisdiction of administrative tribunals; sometimes it lies within the jurisdiction of both (5).

The Committee was moreover anxious to allow current work within the EEC pursuant to Articles 51, 117 and 118 of the Treaty of Rome to develop independently, and to prevent any overlapping on matters of social security between the Convention and agreements already concluded, whether bilaterally or under the auspices of other international organizations such as the International Labour Organization or the Council of Europe.

Social security has not in fact hitherto given rise to conflicts of jurisdiction, since judicial jurisdiction has been taken as coinciding with legislative jurisdiction, which is determined by Community regulations adopted pursuant to Article 51 of the Treaty of Rome; however, the recovery of contributions due to social security bodies still raises problems of enforcement. This matter should therefore be the subject of a special agreement between the Six.

What is meant by social security?

Since this is a field which is in a state of constant development, it did not seem desirable to define it expressly in the Convention, nor even to indicate in an annex what this concept covers, especially as Article 117 of the Treaty of Rome states that one of the Community's objectives is the harmonization of social security systems.

Nevertheless, it should be pointed out that in the six countries benefits are paid in the circumstances listed in Convention No 102 of the International Labour Organization on minimum standards of social security, namely: medical care, sickness benefits, maternity allowances, invalidity benefits, old age and survivors' pensions, benefits for accidents at work and occupational diseases, family allowances and unemployment benefits (6). It may also be useful to refer

(1) Benelux Treaty, Article 22 (4), and the report annexed thereto. The Convention between France and Belgium is interpreted in the same way. See WESER, Convention franco-belge 1899, in the Jurisclasseur de droit international, Vol. 591, Nos 146 to 148.

(2) A complete list of the proceedings involved will be given in the Bankruptcy Convention of the European Economic Community.

(3) These are the Conventions between Belgium and France, between France and Italy, and between Belgium and the Netherlands, unless the latter convention has been abrogated by the Benelux Treaty on its entry into force.

(4) The Hague Conference on private international law, extraordinary session. Final Act, see Article 1 of the Convention.

(5) Étude de la physionomie actuelle de la sécurité sociale dans les pays de la CEE. Série politique sociale 3 — 1962, Services des publications des Communautés européennes. 8058/1/IX/1962/5.

(6) Tableaux comparatifs des régimes de sécurité sociale applicables dans les États membres des Communautés européennes. Third edition, Services des publications des Communautés européennes 8122/1/VII/1964/5.

to the definition given in Articles 1 (c) and 2 of Council Regulation No 3 on social security for migrant workers which, moreover, corresponds to that laid down in Convention No 102 of the ILO.

However, the litigation on social security which is excluded from the scope of the Convention is confined to disputes arising from relationships between the administrative authorities concerned and employers or employees. On the other hand, the Convention is applicable when the authority concerned relies on a right of direct recourse against a third party responsible for injury or damage, or is subrogated as against a third party to the rights of an injured party insured by it, since, in doing so, it is acting in accordance with the ordinary legal rules [1].

D. Arbitration

There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration. The Brussels Convention does not apply to the recognition and enforcement of arbitral awards (see the definition in Article 25); it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration — for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings.

CHAPTER IV

JURISDICTION

A. GENERAL CONSIDERATIONS

1. Preliminary remarks

Underlying the Convention is the idea that the Member States of the European Economic Community wanted to set up a common market with characteristics similar to those of a vast internal market. Everything possible must therefore be done not only to eliminate any obstacles to the functioning of this market, but also to promote its development. From this point of view, the territory of the Contracting States may be regarded as forming a single entity: it follows, for the purpose of laying down rules on jurisdiction, that a very clear distinction can be drawn between litigants who are domiciled within the Community and those who are not.

Starting from this basic concept, Title II of the Convention makes a fundamental distinction, in particular in Section 1, between defendants who are domiciled in a Contracting State and those who are domiciled elsewhere.

1. If a person is domiciled in a Contracting State, he must in general be sued in the courts of that State in accordance with the rules of jurisdiction in force in that State (Article 2).

2. If a person is domiciled in a Contracting State, he may be sued in the courts of another Contracting State only if the courts of that State are competent by virtue of the Convention (Article 3).

3. If a person is not domiciled in a Contracting State, that is, if he is domiciled outside the Community, the rules of jurisdiction in force in each Contracting State, including those regarded as exorbitant, are applicable (Article 4).

The instances in which a person domiciled in a Contracting State may be sued in the courts of another Contracting State — or must be so sued, in cases of exclusive jurisdiction or prorogation of jurisdiction — are set out in Sections 2 to 6. Section 7, entitled 'Examination as to jurisdiction ... and admissibility', is mainly concerned with safeguarding the rights of the defendant.

Section 8 concerns *lis pendens* and related actions. The very precise rules of this Section are intended to prevent as far as possible conflicting judgments being given in relation to the same dispute in different States.

[1] See Michel Voirin, note under Cass. 16. 2. 1965, Recueil Dalloz 1965, p. 723.

Section 9 relates to provisional and protective measures and provides that application for these may be made to any competent court of a Contracting State, even if, under the Convention, that court does not have jurisdiction over the substance of the matter.

2. Rationale of the basic principles of Title II

The far-reaching nature of the Convention may at first seem surprising. The rules of jurisdiction which it lays down differ fundamentally from those of bilateral conventions which are based on direct jurisdiction (the Conventions between France and Belgium, and between Belgium and the Netherlands, the Benelux Treaty, the Convention between France and Switzerland) and apply not only to nationals of the Contracting States but also to any person, whatever his nationality, who is domiciled in one of those States.

The radical nature of the Convention may not only evoke surprise but also give rise to the objection that the Committee has gone beyond its terms of reference, since Article 220 of the Treaty of Rome provides that States should enter into negotiations with a view to securing 'for the benefit of their nationals' the simplification of formalities governing the recognition and enforcement of judgments. The obvious answer to this is that the extension of the scope of the Convention certainly does not represent a departure from the Treaty of Rome provided the Convention ensures, for the benefit of nationals, the simplification of formalities governing the recognition and enforcement of judgments. Too strict an interpretation of the Treaty of Rome would, moreover, have led to the Convention providing for the recognition and enforcement only of those judgments given in favour of nationals of the Contracting States. Such a limitation would have considerably reduced the scope of the Convention, which would in this regard have been less effective than existing bilateral conventions.

There are several reasons for widening the scope of the Convention by extending in particular the rules of jurisdiction under Title II to all persons, whatever their nationality, who are domiciled in a Contracting State.

First, it would be a retrograde step if common rules of jurisdiction were to be dependent on the nationality of the parties; the connecting factor in international procedure is usually the domicile or residence of the parties (see, for example, Article 3 (1) and (2) of the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; the Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods; Article 11 of the Benelux Treaty; and Article 10 (1) of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters).

Next, the adoption of common rules based on nationality would have caused numerous difficulties in applying the Convention. This method would have necessitated the introduction of different rules of jurisdiction depending on whether the litigation involved nationals of Contracting States, a national of a Contracting State and a foreign national, or two foreign nationals.

In some situations the rules of jurisdiction of the Convention would have had to be applied; in others, national rules of jurisdiction. Under this system the court would, at the commencement of proceedings, automatically have had to carry out an examination of the nationality of the parties, and it is not difficult to imagine the practical problems involved in, for example, establishing the nationality of a defendant who has failed to enter an appearance.

If the Convention had adopted the nationality of the parties as a connecting factor, it might well have been necessary to introduce a special provision to deal with the relatively frequent cases of dual nationality.

The Convention would thus have had to solve many problems which do not strictly speaking fall within its scope. Using nationality as a criterion would inevitably have led to a considerable increase in the effect of those rules of jurisdiction which may be termed exorbitant. Thus, for example, a judgment given in France or Luxembourg on the basis of Article 14 of the Civil Code in an action between a national of France or Luxembourg and a national of a non-Member State of the Community would have had to be recognized and enforced in Germany even if the foreign national was domiciled in Germany and a generally recognized jurisdiction, that of the defendant's domicile, thus existed.

By ruling out the criterion of nationality, the Committee is anxious not only to simplify the application of the Convention by giving it a unity which allows a uniform interpretation, but also, in fairness, to allow foreign nationals domiciled in the Community, who are established there and who thereby contribute to its

economic activity and prosperity, to benefit from the provisions of the Convention.

Moreover, the purpose of the Convention is also, by establishing common rules of jurisdiction, to achieve, in relations between the Six and in the field which it was required to cover, a genuine legal systematization which will ensure the greatest possible degree of legal certainty. To this end, the rules of jurisdiction codified in Title II determine which State's courts are most appropriate to assume jurisdiction, taking into account all relevant matters; the approach here adopted means that the nationality of the parties is no longer of importance.

3. Determination of domicile

As already shown, the rules of jurisdiction are based on the defendant's domicile. Determining that domicile is therefore a matter of the greatest importance.

The Committee was faced with numerous questions which proved difficult to resolve. Should the Convention include a common definition of domicile? Should domicile possibly be replaced by the concept of habitual residence? Should both domicile and habitual residence be used? Should the term domicile be qualified?

1. Should the Convention include a common definition of domicile?

   The first point to note is that the concept of domicile is not defined in the Conventions between France and Belgium, Belgium and the Netherlands, Germany and Belgium, and Italy and Belgium, nor in the Benelux Treaty.

   It is, however, defined in the Conventions between France and Italy (Article 28), between Italy and the Netherlands (Article 11), and between Germany and Italy (Article 13); but these Conventions are all based on indirect jurisdiction.

   At first, the Committee thought of defining domicile in the Convention itself, but it finally rejected this course of action. Such a definition would have fallen outside the scope of the Convention, and properly belongs in a uniform law [1]. To define the concept of domicile in international conventions might even be dangerous, as this could lead to a multiplicity of definitions and so to inconsistency.

   Moreover, such definitions run the risk of being superseded by developments in national law.

2. Should domicile be replaced by habitual residence?

   This course was similarly rejected. It was pointed out that the term 'habitual' was open to conflicting interpretations, since the laws of some of the Member States provide that an entry in the population registers is conclusive proof of habitual residence.

   The adoption of this course would, moreover, represent a divergence from that followed under the laws of the Contracting States, the majority of which use domicile as a basis of jurisdiction [2].

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[1] The concept of domicile has been specified by the European Committee for Legal Cooperation, set up by the Council of Europe, as one of the basic legal concepts which should be defined.

[2] *Belgium*
Law of 25 March 1876 containing Title I of the Introductory Book of the Code of Civil Procedure.

Article 39: Except in the case of amendments and exceptions provided for under the law, the court of the defendant's domicile shall be the only court having jurisdiction.

Judicial Code:
Article 624: Except in cases where the law expressly determines the court having jurisdiction a plaintiff may institute proceedings:

1. in the court of the domicile of the defendant or of one of the defendants.

Federal Republic of Germany
Code of Civil Procedure, Article 13: A person shall in general be subject to the jurisdiction of the courts of his domicile.

France
Code of Civil Procedure, Article 59 (1): In actions *in personam,* the defendant shall be sued in the court of his domicile or, where he has no domicile or, in the court of his place of residence.

Italy
Code of Civil Procedure, Article 18: Except where the law otherwise provides, the competent court shall be the court for the place where the defendant has his habitual residence or his domicile or, where these are not known, the court for the place where the defendant is resident.

Luxembourg
Article 59 of the Code of Civil Procedure corresponds to Article 59 of the French Code of Civil Procedure.

Netherlands
Code of Civil Procedure, Article 126:
1. In actions *in personam* or actions relating to movable property, the defendant shall be sued in the court of his domicile.

Adopting habitual residence as the sole criterion would have raised new problems as regards jurisdiction over persons whose domicile depends or may depend on that of another person or on the location of an authority (e.g. minors or married women).

Finally, in a treaty based on direct jurisdiction, it is particularly important that jurisdiction should have a secure legal basis for the court seised of the matter. The concept of domicile, while not without drawbacks, does however introduce the idea of a more fixed and stable place of establishment on the part of the defendant than does the concept of habitual residence.

3. Should both domicile and habitual residence be adopted?

In a treaty based on direct jurisdiction, the inclusion of both criteria would result in the major disadvantage that the number of competent courts would be increased. If the domicile and the place of habitual residence happened to be in different States, national rules of jurisdiction of both the States concerned would be applicable by virtue of Article 2 of the Convention, thus defeating the object of the Convention. Moreover, the inclusion of both criteria could increase the number of cases of *lis pendens* and related actions. For these reasons, the Committee preferred finally to adopt only the concept of domicile.

4. Should the concept of domicile be qualified?

In view of the varied interpretations of the concept of domicile, the Committee considered that the implementation of the Convention would be facilitated by the inclusion of a provision specifying the law to be applied in determining domicile. The absence of such a provision might give rise to claims and disclaimers of jurisdiction; the purpose of Article 52 is to avoid this.

Article 52 deals with three different situations:

(i) where the court of a Contracting State must determine whether a person is domiciled in that State;

(ii) where the court must determine whether a person is domiciled in another Contracting State; and finally,

(iii) where the court must determine whether a person's domicile depends on that of another person or on the seat of an authority.

Article 52 does not deal with the case of a person domiciled outside the Community. In this case the court seised of the matter must apply its rules of private international law.

Nor does Article 52 attempt to resolve the conflicts which might arise if a court seised of a matter ruled that a defendant were to be considered as having his domicile in two other Contracting States, or in one Contracting State and a third country. According to the basic principles of Title II the court, having found that a person is domiciled in some other Contracting State, must, in order to determine its own jurisdiction, apply the rules set out in Article 3 and in Sections 2 to 6 of the Convention.

In most disputed cases it will be necessary to determine where the defendant is domiciled.

However, when applying certain provisions of the Convention, in particular Article 5 (2) and the first paragraph of Article 8, the rules set out will be used to determine the plaintiff's domicile. For this reason Article 52 does not specify either the defendant or the plaintiff since, in the opinion of the Committee, the same provisions for determining domicile must apply to both parties.

Under the first paragraph of Article 52, only the internal law of the court seised of the matter can determine whether a domicile exists in that State. It follows that, if there is a conflict between the *lex fori* and the law of another Contracting State when determining the domicile of a party, the *lex fori* prevails. For example, if a defendant sued in a French court is domiciled both in France, because he has his principal place of business there, and in Belgium, because his name is entered there in the official population registers, where the laws conflict the French court must apply only French law. If it is established under that law that the defendant is in fact domiciled in France, the court need take no other law into consideration. This is justified on various grounds. First, to take the example given, a defendant, by establishing his domicile in a given country, subjects himself to the law of that country. Next, only if the *lex fori* prevails can the court examine whether it has jurisdiction; as the Convention requires it to do, in cases where the defendant fails to enter an appearance (Article 20).

Where the courts of different Contracting States are properly seised of a matter — for example, the Belgian court because it is the court for the place where the defendant's name is entered in the population registers, and the French court because it

is the court for the place where he has his principal place of business — the conflict may be resolved by applying the rules governing *lis pendens* or related actions.

The second paragraph covers the case of a defendant who is not domiciled in the State whose courts are seised of the matter. The court must then determine whether he is domiciled in another Contracting State, and to do this the internal law of that other State must be applied.

This rule will be applied in particular where a defendant is sued in the courts of a Contracting State in which he is not domiciled. If the jurisdiction of the court is contested, then, following the basic principles of Title II, whether or not the court has jurisdiction will vary according to whether the defendant is domiciled in another Contracting State or outside the Community. Thus, for example, a person domiciled outside the Community may properly be sued in Belgium in the court for the place where the contract was concluded (1) while a person domiciled in another Contracting State and sued in the same court may refuse to accept its jurisdiction, since Article 5 (1) of the Convention provides that only the courts for the place of performance of the obligation in question have jurisdiction. Thus if a defendant wishes to contest the jurisdiction of the Belgian court, he must establish that he is domiciled in a Contracting State.

Under the second paragraph of Article 52 the Belgian court must, in order to determine whether the defendant is domiciled in another Contracting State, apply the internal law of that State.

The Committee considered it both more equitable and more logical to apply the law of the State of the purported domicile rather than the *lex fori.*

If a court, seised of a matter in which the defendant was domiciled in another Contracting State, applied its own law to determine the defendant's domicile, the defendant might under that law not be regarded as being domiciled in the other Contracting State even though under the law of that other State he was in fact domiciled there. This solution becomes all the more untenable when one realises that a person establishing his domicile in a Contracting State can obviously not be expected to consider whether this domicile is regarded as such under a foreign law (2).

On the other hand, where the law of the State of the purported domicile has two definitions of domicile (3), that of the Civil Code and that of the Code of Civil Procedure, the latter should obviously be used since the problem is one of jurisdiction.

The third principle laid down by Article 52 concerns persons such as minors or married women whose domicile depends on that of another person or on the seat of an authority.

Under this provision national law is applied twice. For example, the national law of a minor first determines whether his domicile is dependent on that of another person. If it is, the national law of the minor similarly determines where that domicile is situated (e.g. where his guardian is domiciled). If, however, the domicile of the dependent person is under his national law not dependent on that of another person or on the seat of an authority, the first or second paragraph of Article 52 may be applied to determine the domicile of the dependent person. These two paragraphs also apply for the purpose of determining the domicile from which that of the dependent person derives.

The members of the Committee were alive to the difficulties which may arise in the event of dual nationality, and more especially in determining the domicile of a married woman. For example, where a German woman marries a Frenchman an acquires French nationality while retaining her German

(1) See Article 634 of the Judicial Code and Article 4 of the Convention.

(2) NIBOYET, Traité de droit international privé français, Vol. VI, No 1723: 'It is submitted that domicile is not systematically determined according to the *lex fori,* but according to the law of the country where the domicile is alleged to be. French law alone can therefore determine whether a person is domiciled in France; but whether a person is domiciled in any particular foreign country is a matter, not for French law, but for the law of the country concerned.'

(3) Such might for example be the case in Belgium, where Article 102 of the Civil Code provides that the domicile of a Belgian in so far as the exercise of his civil rights is concerned is where he has his principal establishment, while Article 36 of the Judicial Code provides that, for the purpose of that Code, a person is deemed to be domiciled in the place where his name is entered in the official population registers.

nationality, her domicile under French law (1) is that of her husband, whereas under German law she can have a separate domicile, since German law no longer provides that a married woman has the domicile of her husband (2). In cases of this kind, the Committee considered that the usual rules relating to dual nationality should be applied. Thus, even if she has a separate domicile in Germany, that person may be sued in France in the court for the husband's domicile, since the French court must apply French law. If, however, she is sued in Germany in the court for the place of her own domicile, the German court will apply German law and declare that it has jurisdiction.

Finally, it should be made clear that the concept of domicile within the meaning of the Convention does not extend to the legal fiction of an address for service of process.

B. COMMENTARY ON THE SECTIONS OF TITLE II

Section 1

General provisions

Section 1 sets out the main principles on which the rules of jurisdicition laid down by the Convention are founded:

1. the rule that a defendant domiciled in a Contracting State is in general to be sued in the courts of that State (Article 2);

2. the rule that a person domiciled in a Contracting State may in certain circumstances be sued in the courts of another Contracting State (Article 3);

3. the rule that a person domiciled outside the Community is subject to all applicable national rules of jurisdiction (Article 4).

This Section also embodies the widely applied principle of equality of treatment (3), which is already enshrined in Article 1 of the Convention between France and Belgium of 8 July 1899, Article 1 of the Convention between Belgium and the Netherlands of 28 March 1925 and Article 1 of the Benelux Treaty of 24 November 1961. Whilst this principle thus forms an integral part of treaties based on direct jurisdiction, in this Convention it also ensures implementation of the mandatory rules of the Treaty of Rome. Article 7 of that Treaty lays down the principle of non-discrimination between nationals of Member States of the Community.

Specific provisions applying the general principle set out in Article 7 of the Treaty of Rome to the right of establishment are laid down in Article 52 *et seq.* of that Treaty.

During the preparation of the General Programme on establishment, the Economic and Social Committee of the European Communities drew particular attention to this aspect of the problem by requesting that equality of treatment as regards legal protection be achieved in full as quickly as possible.

Article 2

The maxim *'actor sequitur forum rei'*, which expresses the fact that law leans in favour of the defendant, is even more relevant in the international sphere than it is in national law (4). It is more difficult, generally speaking, to defend oneself in the courts of a foreign country than in those of another town in the country where one is domiciled.

A defendant domiciled in a Contracting State need not necessarily be sued in the court for the place where he is domiciled or has his seat. He may be sued in any court of the State where he is domiciled which has jurisdiction under the law of that State.

As a result, if a defendant is sued in one of the courts of the State in which he is domiciled, the internal rules of jurisdiction of that State are fully applicable. Here the Convention requires the application of the national law of the court seised of the matter; the Convention determines whether the courts of the State in question have jurisdiction, and the law of that State in turn determines whether a particular court in that State has jurisdiction. This solution seems equitable since it is usual for a defendant domiciled in a State to be subject to the internal law of that State without it being

(1) French Civil Code, Article 108: 'A married woman has no domicile other than that of her husband.'

(2) BGB, Article 10, repealed by the Gleichberechtigungsgesetz (Law on equal rights of men and women in the field of civil law) of 18 June 1957.

(3) WESER, Revue critique de droit international privé, 1960, pp. 29-35.

(4) See report by Professor FRAGISTAS — Hague Conference on private international law — preliminary doc. No 4, May 1964, for the tenth session.

necessary for the Convention to provide special rules for his protection. It is, moreover, an extremely practical solution because it means that in most cases the court will not have to take the Convention any further into consideration.

Defendants are usually sued in the courts of the State in which they are domiciled. This is true of proceedings in which there is no international element. It is also true of proceedings with an international element in which, by application of the traditionally accepted maxim *'actor sequitur forum rei'*, the defendant is sued in the courts of the State of his domicile. The Convention does not therefore involve a general reversal of national rules of jurisdiction nor of the practice of judges and lawyers. In fact, judges and lawyers will need to take account of the changes effected by the Convention only in cases where a defendant is sued in a court of a State where he is not domiciled, or in one of the few cases in which the Convention has laid down common rules of exclusive jurisdiction.

The second paragraph of Article 2 embodies the principle of equality of treatment where a foreigner is domiciled in the State of the forum. Such foreigner, whether he is defendant or plaintiff, is governed in that State by the same rules of jurisdiction as its nationals, or more precisely, as its nationals who are domiciled in that State, where, as in Italy, the law of that State determines the jurisdiction of its courts according to whether the national concerned is domiciled in its territory.

As a result, Article 52 of the Belgian Law of 25 March 1876 will no longer be applicable as such to foreigners domiciled in Belgium (1).

The positive aspect of equality of treatment is set out in the second paragraph of Article 4.

Article 3

Article 3 deals with those cases in which a defendant domiciled in a Contracting State may be sued in another Contracting State. This Article lays down the principle that a defendant may be sued otherwise than in the courts of the State where he is domiciled only in the cases expressly provided for in the Convention. The rule sets aside the rules of exorbitant jurisdiction in force in each of the Contracting States. However, these rules of jurisdiction are not totally excluded; they are excluded only in respect of persons who are domiciled in another Contracting State. Thus they remain in force with respect to persons who are not domiciled within the Community.

The second paragraph of Article 3 prohibits the application of the most important and best known of the rules of exorbitant jurisdiction. While this paragraph is not absolutely essential it will nevertheless facilitate the application of certain provisions of the Convention (see, in particular, Article 59).

The following are the rules of exorbitant jurisdiction in question in each of the States concerned.

In Belgium

Articles 52, 52bis and 53 of the Law of 25 March 1876, which govern territorial jurisdiction in actions brought by Belgians (2) or by foreigners against foreigners before Belgian courts, and Article 15 of the Civil Code which corresponds to Article 15 of the French Civil Code.

In Germany

The nationality of the parties does not in general affect the rules of jurisdiction. Article 23 of the Code of Civil Procedure lays down that, where no other German court has jurisdiction, actions relating to property instituted against a person who is not domiciled in the national territory come under the jurisdiction of the court for the place where the property or subject of the dispute is situated.

German courts have in a number of cases given a very liberal interpretation to this provision, thereby leading some authors to state that Article 23 'can be likened to Article 14 of the French Civil Code' (3).

In France

1. Article 14 of the Civil Code provides that any French plaintiff may sue a foreigner or another Frenchman in the French courts, even if there is no

(1) This Article provides, in particular, that foreigners who are domiciled or resident in Belgium may be sued before a court of the Kingdom either by a Belgian or by a foreigner.

(2) Répertoire pratique du droit belge, under 'compétence' — No 17518 *et seq.* — (see Judicial Code, Articles 635, 637 and 638).

(3) WESER, Revue critique de droit international privé, 1959, p. 636; ROSENBERG, Lehrbuch des deutschen Zivilprozeßrechts, ninth edition, paragraph 35 I 3.

connection between the cause of action and those courts.

2. Article 15 of the Civil Code provides that a Frenchman may always be sued in the French courts by a Frenchman or by a foreigner, and can even insist on this.

Despite the fact that Articles 14 and 15 in terms refer only to contractual obligations, case law has extended their scope beyond contractual obligations to all actions whether or not relating to property rights. There are thus only two limitations to the general application of Articles 14 and 15: French courts are never competent to hear either actions *in rem* concerning immovable property situated abroad, or actions concerning proceedings for enforcement which is to take place abroad (1).

In Italy

1. Article 2 of the Code of Civil Procedure provides that an agreement to substitute for the jurisdiction of Italian courts the jurisdiction of a foreign court or arbitral tribunal will be valid only in the case of litigation between foreigners, or between a foreigner and an Italian citizen who is neither resident nor domiciled in Italy, and only if the agreement is evidenced in writing.

2. (a) Under Article 4 (1) of the Code of Civil Procedure, a foreigner may be sued in an Italian court if he is resident or domiciled in Italy, or if he has an address for service there or has a representative who is authorized to bring legal proceedings in his name, or if he has accepted Italian jurisdiction, unless the proceedings concern immovable property situated abroad.

   (b) Under Article 4 (2) of the Code of Civil Procedure, a foreigner may be sued in the courts of the Italian Republic if the proceedings concern property situated in Italy, or succession to the estate of an Italian national, or an application for probate made in Italy, or obligations which arose in Italy or which must be performed there.

3. The interpretation given to Article 4 by Italian case law means that an Italian defendant may always be sued in the Italian courts (2).

In Luxembourg

Articles 14 and 15 of the Civil Code correspond to Articles 14 and 15 of the French Civil Code.

Luxembourg case law applies the same principles of interpretation as French case law.

In the Netherlands

Article 126 (3) of the Code of Civil Procedure provides that, in personal matters or matters concerning movable property, a defendant who has no known domicile or residence in the Kingdom shall be sued in the court for the domicile of the plaintiff. This provision applies whether or not the plaintiff is a Netherlands national (3).

Article 127 provides that a foreigner, even if he does not reside in the Netherlands, may be sued in a Netherlands court for the performance of obligations contracted towards a Netherlander either in the Netherlands or abroad.

Article 4

Article 4 applies to all proceedings in which the defendant is not domiciled in a Contracting State, and provides that the rules of internal law remain in force.

This is justified on two grounds:

First, in order to ensure the free movement of judgments, this Article prevents refusal of recognition or enforcement of a judgment given on the basis of rules of internal law relating to jurisdiction. In the absence of such a provision, a judgment debtor would be able to prevent execution being levied on his property simply by transferring it to a Community country other than that in which judgment was given.

Secondly, this Article may perform a function in the case of *lis pendens*. Thus, for example, if a French court is seised of an action between a Frenchman and a defendant domiciled in America, and a German court is

(1) BATIFFOL, *op. cit.*, No 684 *et seq.*

(2) MORELLI, Diritto processuale civile internazionale, pp. 108-112.

(3) WESER, Revue critique de droit international privé, 1959, p. 632.

seised of the same matter on the basis of Article 23 of the Code of Civil Procedure, one of the two courts must in the interests of the proper administration of justice decline jurisdiction in favour of the other. This issue cannot be settled unless the jurisdiction of these courts derives from the Convention.

In the absence of an article such as Article 4, there would be no rule in the Convention expressly recognizing the jurisdiction of the French and German courts in a case of this kind.

The only exception to the application of the rules of jurisdiction of internal law is the field of exclusive jurisdiction (Article 16) (1). The rules which grant exclusive jurisdiction to the courts of a State are applicable whatever the domicile of the defendant.

However, the question arises why the Committee did not extend the scope of the provision limiting the application of rules of exorbitant jurisdiction to include in particular nationals of Member States regardless of their place of domicile.

In other words, and to take another example based on Article 14 of the French Civil Code, why will it still be possible for a French plaintiff to sue in the French courts a foreigner, or even a national of a Member State of the Community, who is domiciled outside the Community?

The Committee thought that it would have been unreasonable to prevent the rules of exorbitant jurisdiction from applying to persons, including Community nationals, domiciled outside the Community. Thus, for example, a Belgian national domiciled outside the Community might own assets in the Netherlands. The Netherlands courts have no jurisdiction in the matter since the Convention does not recognize jurisdiction based on the presence of assets within a State. If Article 14 of the French Civil Code could not be applied, a French plaintiff would have to sue the Belgian defendant in a court outside the Community, and the judgment could not be enforced in the Netherlands if there were no enforcement treaty between the Netherlands and the non-member State in which judgment was given.

This, moreover, was the solution adopted in the Conventions between France and Belgium, and between Belgium and the Netherlands, and in the Benelux Treaty, which, however, take nationality as their criterion (2).

The second paragraph of Article 4 of the Convention constitutes a positive statement of the principle of equality of treatment already laid down in the second paragraph of Article 2. An express provision was considered necessary in order to avoid any uncertainty (3). Under this provision, any person domiciled in a Contracting State has the right, as plaintiff, to avail himself in that State of the same rules of jurisdiction as a national of that State.

This principle had already been expressly laid down in the Convention between France and Belgium of 8 July 1899 (Article 1 (2)).

This positive aspect of the principle of equality of treatment was regarded as complementing the right of establishment (Article 52 *et seq.* of the Treaty of Rome), the existence of which implies, as was stated in the General Programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (4), that any natural or legal person established in a Member State should enjoy the same legal protection as a national of that State.

The provision is also justified on economic grounds. Since rules of exorbitant jurisdiction can still be invoked against foreigners domiciled outside the European Economic Community, persons who are domiciled in the Member State concerned and who thus contribute to the economic life of the Community should be able to invoke such rules in the same way as the nationals of that State.

It may be thought surprising that the Convention extends the 'privileges of jurisdiction' in this way, since equality of treatment is granted in each of the States to all persons, whatever their nationality, who are domiciled in that State.

(1) The third paragraph of Article 8, which concerns jurisdiction in respect of insurers who are not domiciled in the Community but have a branch or agency there, may also be regarded as an exception.

(2) The Convention between France and Belgium is interpreted to mean that a Frenchman may not rely on Article 14 of the Civil Code to sue in France a Belgian domiciled in Belgium, but may do so to sue a Belgian domiciled abroad. BATIFFOL, Traité élémentaire de droit international privé, No 714.

(3) According to French case law on the Treaty of 9 February 1842 between France and Denmark, a Danish national may not rely on Article 14 of the French Civil Code.

(4) *Official Journal of the European Communities*, 15. 1. 1962, p. 36 *et seq.*

It should first be noted that such treatment is already granted to foreigners in Belgium, the Federal Republic of Germany, Italy and the Netherlands, where the rules of exorbitant jurisdiction may be invoked by foreigners as well as by nationals. The second paragraph of Article 4 therefore merely brings into line with these laws the French and Luxembourg concepts, according to which Article 14 of the Civil Code constitutes a privilege of nationality.

Secondly, the solution adopted in the Convention follows quite naturally from the fact that, for the reasons already given, the Convention uses domicile as the criterion for determining jurisdiction. In this context it must not be forgotten that it will no longer be possible to invoke the privileges of jurisdiction against persons domiciled in the Community, although it will be possible to invoke them against nationals of the Community countries who have established their domicile outside the territory of the Six.

Section 2

Special jurisdiction

Articles 5 and 6

Articles 5 and 6 list the situations in which a defendant may be sued in a Contracting State other than that of his domicile. The forums provided for in these Articles supplement those which apply under Article 2. In the case of proceedings for which a court is specifically recognized as having jurisdiction under these Articles, the plaintiff may, at his option, bring the proceedings either in that court or in the competent courts of the State in which the defendant is domiciled.

One problem which arose here was whether it should always be possible to sue the defendant in one of the courts provided for in these Articles, or whether this should be allowed only if the jurisdiction of that court was also recognized by the internal law of the State concerned.

In other words, in the first case, jurisdiction would derive directly from the Convention and in the second there would need to be dual jurisdiction: that of the Convention and that of the internal law on local jurisdiction. Thus, for example, where Netherlands law on jurisdiction does not recognize the court for the place of performance of the obligation, can the plaintiff nevertheless sue the defendant before that court in the Netherlands? In addition, would there be any obligation on the Netherlands to adapt its national laws in order to give that court jurisdiction?

By adopting 'special' rules of jurisdiction, that is by directly designating the competent court without referring to the rules of jurisdiction in force in the State where such a court might be situated, the Committee decided that a plaintiff should always be able to sue a defendant in one of the forums provided for without having to take the internal law of the State concerned into consideration. Further, in laying down these rules, the Committee intended to facilitate implementation of the Convention. By ratifying the Convention, the Contracting States will avoid having to take any other measures to adapt their internal legislation to the criteria laid down in Articles 5 and 6. The Convention itself determines which court has jurisdiction.

Adoption of the 'special' rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it. Thus, to take the example of the *forum delicti commissi,* a person domiciled in a Contracting State other than the Netherlands who has caused an accident in The Hague may, under the Convention, be sued in a court in The Hague. This accident cannot give other Netherlands courts jurisdiction over the defendant. On this point there is thus a distinct difference between Article 2 and Articles 5 and 6, due to the fact that in Article 2 domicile is the connecting factor.

Forum contractus (Article 5 (1)) including contracts of employment

There are great differences between the laws of the Six in their attitude to the jurisdiction of the *forum contractus*; in some countries this jurisdiction is not recognized (the Netherlands, Luxembourg), while in others it exists in varying degrees. Belgian law recognizes the jurisdiction of the courts for the place where the obligation arose, and also that of the courts for the place where the obligation has been or is to be performed (1); Italian law recognizes only the jurisdiction of the courts for the place where the obligation arose and where it has been performed (2); German law in general recognizes only the jurisdiction of the courts for the place where the obligation has been

(1) Articles 41 and 52 of the Law of 25 March 1876, Article 624 of the Judicial Code.
(2) Articles 4 and 20 of the Code of Civil Procedure.

performed (1); and, finally. French law recognizes the jurisdiction of the *forum contractus* only to a limited extent and subject to certain conditions (2).

Some of the conventions concluded between the Six reject this forum, while others accept it in varying degrees. Article 2 (1) of the Convention between *France and Belgium* provides that, where a defendant is neither domiciled nor resident in France or Belgium, a Belgian or French plaintiff may institute proceedings in the courts for the place where the obligation arose or where it has been or is to be performed (3).

Article 4 of the Convention between *Belgium and the Netherlands* provides that in civil or commercial matters a plaintiff may bring a personal action concerning movable property in the courts for the place where the obligation arose or where it has been or is to be performed.

In Article 3 (5) of the Convention between *Belgium and Germany,* jurisdiction is recognized where, in matters relating to a contract, proceedings are instituted in a court of the State where the obligation has been or is to be performed.

Article 14 of the Convention between *France and Italy* provides that if the action concerns a contract which is considered as a commercial matter by the law of the country in which the action is brought, a French or Italian plaintiff may seise the courts of either of the two countries in which the contract was concluded or is to be performed.

The Convention between *Belgium and Italy* (Article 2 (5)) recognizes jurisdiction where, in matters relating to a contract, an action is brought before the courts of the State where the obligation arose, or where it has been or should have been performed.

There are no provisions on this subject in the Conventions between *Italy and the Netherlands, Germany and Italy,* and *Germany and the Netherlands.*

Finally, the Benelux Treaty adopts Article 4 of the Convention between Belgium and the Netherlands, but includes a Protocol which in Article 1 lays down that Article 4 shall not apply where Luxembourg is concerned if the defendant is domiciled or resident in the country of which he is a national (4).

Article 5 (1) provides a compromise between the various national laws.

The jurisdiction of the forum is, as in German law, limited to matters relating to contract. It could have been restricted to commercial matters, but account must be taken of the fact that European integration will mean an increase in the number of contractual relationships entered into. To have confined it to commercial matters would moreover have raised the problem of classification.

Only the jurisdiction of the *forum solutionis* has been retained, that is to say the jurisdiction of the courts for the place of performance of the obligation on which the claim is based. The reasons for this are as follows.

The Committee considered that it would be unwise to give jurisdiction to a number of courts, and thus possibly create conflicts of jurisdiction. A plaintiff already has a choice, in matters relating to a contract, between the competent courts of the State where the defendant is domiciled, or, where there is more than one defendant, the courts for the place where any one of them is domiciled, or finally, the courts for the place of performance of the obligation in question.

If the Committee had adopted as wide-ranging a provision as that of the Benelux Treaty, which recognizes also the jurisdiction of the courts for the place where the obligation arose, this would have involved very considerable changes for those States whose laws do not recognize that forum, or do so only with certain restrictions.

There was also concern that acceptance of the jurisdiction of the courts for the place where the obligation arose might sanction, by indirect means, the jurisdiction of the forum of the plaintiff. To have accepted this forum would have created tremendous problems of classification, in particular in the case of contracts concluded by parties who are absent.

The court for the place of performance of the obligation will be useful in proceedings for the recovery of fees: the creditor will have a choice between the courts of the State where the defendant is domiciled and the courts of another State within whose jurisdiction the services

(1) Article 29 of the Code of Civil Procedure.
(2) Articles 59 (3) and 420 of the Code of Civil Procedure.
(3) On the serious controversy to which this Article has given rise, see WESER, Traité franco-belge du 8 juillet 1899. Étude critique, p. 63 *et seq.;* also Jurisclasseur de droit international, vol. 591, Nos 42 and 45.

(4) For the reasons for this limitation, see the report on the negotiations.

were provided, particularly where, according to the appropriate law, the obligation to pay must be performed where the services were provided. This forum can also be used where expert evidence or inquiries are required. The special position of Luxembourg justified, as in the Benelux Treaty, the inclusion of a special provision in the Protocol (Article I).

Contracts of employment

In matters relating to contracts of employment in the broadest sense of the term, the preliminary draft of the Convention contained a provision attributing exclusive jurisdiction to the courts of the Contracting State either in which the undertaking concerned was situated, or in which the work was to have been or had been performed. After prolonged consideration, the Committee decided not to insert in the Convention any special provisions on jurisdiction in this field. Its reasoning was as follows.

First, work is at present in progress within the Commission of the EEC to harmonize the provisions of labour law in the Member States. It is desirable that disputes over contracts of employment should as far as possible be brought before the courts of the State whose law governs the contract. The Committee therefore did not think that rules of jurisdiction should be laid down which might not coincide with those which may later be adopted for determining the applicable law.

In order to lay down such rules of jurisdiction, the Committee would have had to take into account not only the different ways in which work can be carried out abroad, but also the various categories of worker: wage-earning or salaried workers recruited abroad to work permanently for an undertaking, or those temporarily transferred abroad by an undertaking to work for it there; commercial agents, management, etc. Any attempt by the Committee to draw such distinctions might have provided a further hindrance to the Commission's work.

Next, in most Member States of the Community the principle of freedom of contract still plays an important part; a rule of exclusive jurisdiction such as that previously provided for in Article 16 would have nullified any agreements conferring jurisdiction.

The general rules of the Convention will therefore apply to contracts of employment. Thus, in litigation between employers and employees, the following courts have jurisdiction: the courts of the State where the defendant is domiciled (Article 2); the courts for the place of performance of the obligation, if that place is in a State other than that of the domicile of the defendant (Article 5 (1)); and any court on which the parties have expressly or impliedly agreed (Articles 17 and 18). In the case of proceedings based on a tort committed at work (Article 2, Nos 2 and 3 of the Arbeitsgerichtsgesetz), Article 5 (3), which provides for the jurisdiction of the courts for the place where the harmful event occurred, could also apply. It seems that these rules will, for the time being, prove of greater value to the persons concerned than a provision similar to that of the former Article 16 (2), which could not be derogated from because it prohibited any agreement conferring jurisdiction.

The rules on the recognition and enforcement of judgments will probably ensure additional protection for employees. If the law of the State addressed had to be applied to a contract of employment, the courts of that State, upon being seised of an application for recognition or enforcement of a foreign judgment, would, on the basis of Article 27 (1), which permits refusal of recognition (or enforcement) on grounds of public policy in the State addressed, be able to refuse the application if the court of the State of origin had failed to apply, or had misapplied, an essential provision of the law of the State addressed.

Once the work of the Commission in this field has been completed, it will always be possible to amend the provisions of the Convention, either by means of an additional Protocol, or by the drafting of a convention governing the whole range of problems relating to contracts of employment, which would, under Article 57, prevail over the Convention.

Maintenance obligations (Article 5 (2))

Matters relating to maintenance are governed by the Convention.

The Convention is in a sense an extension of the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children [1], since

[1] In force on 1. 9. 1966 between Belgium, France, Germany, Italy and the Netherlands.

it ensures the recognition and enforcement of judgments granting maintenance to creditors other than children, and also of the New York Convention of 20 June 1956 on the recovery abroad of maintenance (1).

The Committee decided that jurisdiction should be conferred on the forum of the creditior, for the same reasons as the draftsmen of the Hague Convention (2). For one thing, a convention which did not recognize the forum of the maintenance creditor would be of only limited value, since the creditor would be obliged to bring the claim before the court having jurisdiction over the defendant.

If the Convention did not confer jurisdiction on the forum of the maintenance creditor, it would apply only in those situations where the defendant against whom an order had been made subsequently changed residence, or where the defendant possessed property in a country other than that in which the order was made.

Moreover the court for the place of domicile of the maintenance creditor is in the best position to know whether the creditor is in need and to determine the extent of such need.

However, in order to align the Convention with the Hague Convention, Article 5 (2) also confers jurisdiction on the courts for the place of habitual residence of the maintenance creditor. This alternative is justified in relation to maintenance obligations since it enables in particular a wife deserted by her husband to sue him for payment of maintenance in the courts for the place where she herself is habitually resident, rather than the place of her legal domicile.

The Convention also supplements the New York Convention of 20 June 1956 on the recovery abroad of maintenance. The latter is limited to providing that a forwarding authority will transmit to an intermediate body any judgment already given in favour of a maintenance creditor, and that body will then have to begin proceedings for enforcement or registration of the judgment, or institute new proceedings altogether.

This Convention, by simplifying the formalities governing enforcement, will thus facilitate implementation of the New York Convention.

As regards maintenance payments, the Committee did not overlook the problems which might be raised by preliminary issues (for example, the question of affiliation). However, it considered that these were not properly problems of jurisdiction, and that any difficulties should be considered in the chapter on recognition and enforcement of judgments.

It was suggested that, in order to avoid conflicting judgments, it might be desirable to provide that the court which had fixed the amount of a maintenance payment should be the only court to have jurisdiction to vary it. The Committee did not think it necessary to adopt such a solution. This would have obliged parties, neither of whom had any further connection with the original court, to bring proceedings before courts which could be very far away. Moreover, any judgment by a second court, in order to vary that of the first court, would have to be based on changed facts, and in those circumstances it could not be maintained that the judgments were in conflict (3).

Forum delicti commissi (Article 5 (3) and (4))

This jurisdiction is recognized by the national laws of the Member States with the exception of Luxembourg and the Netherlands, where it exists only in respect of collisions of ships and of road accidents.

The following are applicable in Belgium, Articles 41, and 52 (3) of the Law of 1876 (4); in Germany, Article 32 of the Code of Civil Procedure; in France, Article 59 (12) of the Code of Civil Procedure and Article 21 of the Decree of 22 December 1958; and in Italy, Article 20 of the Code of Civil Procedure.

This jurisdiction is incorporated in the bilateral conventions by the following provisions: Article 4 of the Convention between Belgium and the Netherlands and Article 4 of the Benelux Treaty, which cover all obligations concerning movable property, whether statutory, contractual or non-contractual (5); Article 2 (b) of the Convention between Belgium and Italy; Article 3 (1) (6) of the Convention between Germany

(1) In force on 1. 9. 1966 between Belgium, France, Germany, Italy and the Netherlands.

(2) Hague Conference on private international law, documents for the eighth session, p. 315.

(3) For a similar view, see the Hague Conference on private international law, documents for the ninth session. Report on the draft Convention concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, p. 321.

(4) Article 626 of the Judicial Code.

(5) Report on the negotiations, p. 17.

and Belgium; Article 15 of the Convention between France and Italy; Article 2 (4) of the Convention between Germany and Italy; and Article 4 (1) (e) of the Convention between Germany and the Netherlands.

The fact that this jurisdiction is recognized under most of the legal systems, and incorporated in the majority of the bilateral conventions, was a ground for including it in the Convention, especially in view of the high number of road accidents.

Article 5 (3) uses the expression 'the place where the harmful event occurred'. The Committee did not think it should specify whether that place is the place where the event which resulted in damage or injury occurred, or whether it is the place where the damage or injury was sustained. The Committee preferred to keep to a formula which has already been adopted by number of legal systems (Germany, France).

Article 5 (4) provides that a civil claim may be brought before a court seised of criminal proceedings; this is in order to take into account the rules of jurisdiction laid down by the various codes of criminal procedure. A civil claim can thus always be brought, whatever the domicile of the defendant, in the criminal court having jurisdiction to entertain the criminal proceedings even if the place where the court sits (place of arrest, for example) is not the same as that where the harmful event occurred.

Jurisdiction based on a dispute arising out of the operations of a branch, agency or other establishment (Article 5 (5))

This jurisdiction exists in the bilateral conventions already concluded between the Contracting States: the Conventions between Italy and Belgium (Article 2 (3)), between Belgium and Germany (Article 2 (1) (4)), between France and Belgium (Article 3 (2)), between France and Italy (Article 13), between Italy and the Netherlands (Article 2 (3)), and between Belgium and the Netherlands (Article 5 (3)); the Benelux Treaty (Article 5 (4)); and the Conventions between Germany and the Netherlands (Article 4 (1) (d)), and between Germany and Italy (Article 2 (3)).

This provision concerns only defendants domiciled in a Contracting State (Article 5), that is, companies or firms having their seat in one Contracting State and having a branch, agency or other establishment in another Contracting State. Companies or firms which have their seat outside the Community but have a branch, etc. in a Contracting State are governed by Article 4, even as regards disputes relating to the activities of their branches, but without prejudice to the provisions of Article 8 relating to insurance.

More than one defendant (Article 6 (1))

Where there is more than one defendant, the courts for the place where any one of the defendants is domiciled are recognized as having jurisdiction. This jurisdiction is provided for in the internal law of Belgium (1), France (2), Italy (3), Luxembourg (4) and the Netherlands (5).

It is not in general provided for in German law. Where an action must be brought in Germany against a number of defendants and there is no jurisdiction to which they are all subject, the court having jurisdiction may, subject to certain conditions, be designated by the superior court which is next above it (Article 36 (3) of the German Code of Civil Procedure).

This jurisdiction is also provided for in the Conventions between Italy and the Netherlands (Article 2 (1)), between Italy and Belgium (Article 2 (1)), between France and Italy (Article 11 (2)), and between Germany and Italy (Article 2 (1)). However, under the latter Convention, jurisdiction depends on the existence of a procedural requirement that the various defendants be joined.

It follows from the text of the Convention that, where there are several defendants domiciled in different Contracting States, the plaintiff can at his option sue them all in the courts for the place where any one of them is domiciled.

In order for this rule to be applicable there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors (6). It follows that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled (7).

(1) Articles 39 and 52 (10) of the Law of 25 March 1876, and Article 624 of the Judicial Code.
(2) Article 59 (4) of the Code of Civil Procedure.
(3) Article 33 of the Code of Civil Procedure.
(4) Article 59 (2) of the Code of Civil Procedure.
(5) Article 126 (7) of the Code of Civil Procedure.
(6) MOREL, Traité élémentaire de procédure civile, No 264.
(7) Cass. française 1924, D.P. 1925, Vol. 13.

Jurisdiction derived from the domicile of one of the defendants was adopted by the Committee because it makes it possible to obviate the handing down in the Contracting States of judgments which are irreconcilable with one another.

Actions on a warranty or guarantee, third party proceedings, counterclaims.

(a) Actions on a warranty or guarantee (Article 6 (2))

An action on a warranty or guarantee brought against a third party by the defendant in an action for the purpose of being indemnified against the consequences of that action, is available in Belgian (1), French (2), Italian (3), Luxembourg (4) and Netherlands (5) law.

The proceeding which corresponds to an action on a warranty or guarantee in Germany is governed by Articles 72, 73 and 74 and Article 68 of the Code of Civil Procedure.

A party who in any proceedings considers that, if he is unsuccessful, he has a right of recourse on a warranty or guarantee against a third party, may join that third party in the proceedings (Article 72) (Streitverkündung — *litis denunciatio*).

The notice joining the third party must be served on that party and a copy must be sent to the other party (Article 73). No judgment can be given as regards the third party, but the judgment given in the original proceedings is binding in the sense that the substance of the judgment cannot be contested in the subsequent action which the defendant may bring against the third party (Article 68). Under the German Code of Civil Procedure the defendant can exercise his right of recourse against the third party only in separate proceedings.

Actions on a warranty or guarantee are governed by the bilateral Conventions between Belgium and Germany (Article 3 (10)), between France and Belgium (Article 4 (2)), between Belgium and the Netherlands (Article 6 (2)), between Italy and the Netherlands (Article 2 (4)), between Belgium and Italy (Article 2 (10)), and between Germany and the Netherlands (Article 4 (1) (c)), and also by the Benelux Treaty (Article 6 (3)).

This jurisdiction is, in the opinion of the Committee, of considerable importance in commercial dealings, as can be seen from the following example: A German exporter delivers goods to Belgium and the Belgian importer resells them. The purchaser sues the importer for damages in the court for the place of his domicile, for example in Brussels. The Belgian importer has a right of recourse against the German exporter and consequently brings an action for breach of warranty against that exporter in the court in Brussels, since it has jurisdiction over the original action. The jurisdiction over the action on the warranty is allowed by the Convention although the warrantor is domiciled in Germany, since this is in the interests of the proper administration of justice.

However, under Article 17, the court seised of the original action will not have jurisdiction over the action on the warranty where the warrantor and the beneficiary of the warranty have agreed to confer jurisdiction on another court, provided that the agreement covers actions on the warranty.

Moreover, the court seised of the original action will not have jurisdiction over an action on the warranty if the original proceedings were instituted solely with the object of ousting the jurisdiction of the courts of the State in which the warrantor is domiciled (6).

The special position of German law is covered by Article V of the Protocol.

Under this provision, the jurisdiction specified in Article 6 (2) in actions on a warranty or guarantee may not be resorted to in the Federal Republic of Germany, but any person domiciled in another Contracting State may be summoned before the German courts on the basis of Articles 72 to 74 of the Code of Civil Procedure.

Judgments given against a guarantor or warrantor in the other Contracting States will be recognized and enforced in Germany.

Judgments given in Germany pursuant to Articles 72 to 74 will have the same effect in the other Contracting States as in Germany.

Thus, for example, a guarantor or warrantor domiciled in France can be sued in the German court having jurisdiction over the original action. The German law

(1) Articles 50 and 52 of the Law of 25 March 1876, Article 181 of the Code of Civil Procedure.
(2) Articles 59 (10) and 181 to 185 of the Code of Civil Procedure.
(3) Articles 32 and 36 of the Code of Civil Procedure.
(4) Articles 59 (8) and 181 to 185 of the Code of Civil Procedure.
(5) Article 126 (14) of the Code of Civil Procedure.

(6) See Article 181 of the Belgian, French and Luxembourg Code of Civil Procedure, and Article 74 of the Netherlands Code of Civil Procedure.

judgment given in Germany affects only the parties to the action, but it can be invoked against the guarantor or warrantor. Where the beneficiary of the guarantee or warranty proceeds agaist the guarantor or warrantor in the competent French courts, he will be able to apply for recognition of the German judgment, and it will no longer be possible to re-examine that judgment as to the merits.

It is clear that, following the principles which apply to enforcement, a judgment given in an action on a guarantee or warranty will have no effects in the State in which enforcement is sought other than those which it had in the country of origin.

This principle, which already applied under the Conventions between Germany and Belgium (Article 3 (10)) and between Germany and the Netherlands (Article 4 (1) (i)), is thus incorporated in the provision governing relations between the Federal Republic of Germany and the other Member States of the Community.

(b) Third party proceedings

While a third party warranty or guarantee necessarily involves the intervention of an outsider, it seemed preferable to make separate provision for guarantors or warrantors and for other third parties. The simplest definition of third party proceedings is to be found in Articles 15 and 16 of the Belgian Judicial Code, which provides that:

> 'Third party proceedings are those in which a third party is joined as a party to the action.
>
> They are intended either to safeguard the interests of the third party or of one of the parties to the action, or to enable judgment to be entered against a party, or to allow an order to be made for the purpose of giving effect to a guarantee or warranty (Article 15).
>
> The third party's intervention is voluntary where he appears in order to defend his interests.
>
> It is not voluntary where the third party is sued in the course of the proceedings by one or more of the parties (Article 16).'

(c) Counterclaims (Article 6 (3))

The bilateral conventions on enforcement all recognize jurisdiction over counterclaims: see the Convention between Belgium and Germany (Article 3 (1) (10)) (counterclaims); the Convention between Italy and Belgium (Article 2 (1) (10)) (dependent counterclaims); the Convention between France and Belgium (Article 4 (2)) (counterclaims); the Convention between Belgium and the Netherlands (Article 6) (counterclaims, third party proceedings and interlocutory proceedings); the Convention between France and Italy (Article 18) (claims for compensation, interlocutory or dependent proceedings, counterclaims); the Convention between Italy and the Netherlands (Article 2 (4)) dependent proceedings, counterclaims); the Convention between Germany and Italy (Article 2 (5)) (counterclaims); the Benelux Treaty (Article 6) (counterclaims, third party proceedings and interlocutory proceedings); and the Convention between Germany and the Netherlands (Article 4 (1) (i)) (counterclaims and actions on a warranty or guarantee).

It has been made clear that in order to establish this jurisdiction the counterclaim must be related to the original claim. Since the concept of related actions is not recognized in all the legal systems, the provision in question, following the draft Belgian Judicial Code, states that the counterclaim must arise from the contract or from the facts on which the original claim was based.

Sections 3 to 5

Insurance, instalment sales, exclusive jurisdiction

General remarks

In each of the six Contracting States, the rules of territorial jurisdiction are not as a rule part of public policy and it is therefore permissible for the parties to agree on a different jurisdiction.

There are, however, exceptions to this principle: certain rules of jurisdiction are mandatory or form part of public policy, either in order to further the efficient administration of justice by reducing the number of jurisdictions and concentrating certain forms of litigation in a single forum, or else out of social considerations for the protection of certain categories of persons, such as insured persons or buyers of goods on instalment credit terms.

In view of the Convention's structure and objectives, it was necessary to deal with this matter under the Convention. Failure to take account of the problem raised by these rules of jurisdiction might not only have caused recognition and enforcement to be refused in certain cases on grounds of public policy, which would be contrary to the principle of free movement of judgments, but also result, indirectly, in a general re-examination of the jurisdiction of the court of the State of origin.

Serveral solutions were open to the Committee.

The first is found in many bilateral Conventions, and enables the court of the State in which recognition or enforcement is sought to refuse to recognize the jurisdiction of the court of the State of origin where, in the former State, there are 'rules attributing exclusive jurisdiction to the courts of that State in the proceedings which led to the judgment' (1).

This system would have been unsatisfactory not only because it gives rise to the objections already set out above, but because it would have introduced into the Convention an element of insecurity incompatible with its basic principles. It is no solution to the problem, and only postpones the difficulties, deferring them until the recognition and enforcement stage.

Another possible solution would have been a general clause like that contained in the Convention between Belgium and the Netherlands or the Benelux Treaty (Article 5 (1)), which takes into consideration the internal law of the Contracting States (2). Such a clause could however, lead to difficulties of interpretation, since the court of the State of origin must, where its jurisdiction is contested, apply the internal law of the State which claims to have exclusive jurisdiction.

Moreover, while such a solution might be acceptable in a Treaty between three States, it would be much more difficult to incorporate it in a Convention between six States where it is not always possible to determine in advance the State or States in which recognition or enforcement may be sought.

A third solution would have been to draw up a list of the individual jurisdictions which would be exclusive and which would thus be binding on all the Contracting States. Such a list would answer the need of the parties for information regarding the legal position, allow the court to give judgment on the basis of a definite common rule, remove any element of uncertainty and ensure a balance between the parties to contractual arrangements.

The considerations underlying the various provisions of the Convention are complex. Sections 3 and 4, for example, concerning insurance and instalment sales and loans, are dictated by social considerations and are aimed in particular at preventing abuses which could result from the terms of contracts in standard form.

Section 5 (Article 16) contains a list of situations in which the courts of a Contracting State are acknowledged as having exclusive jurisdiction, since the proper administration of justice requires that actions should be brought before the courts of a single State.

The Convention deals with the two categories differently. The first category has been placed in an intermediate position between the general rules of jurisdiction and the rules which are wholly exclusive.

The following system adopted:

1. For matters falling within Section 3 and 4 there is no single jurisdiction. A choice, albeit a limited one, exists between the courts of different Contracting States where the plantiff is a protected person, that is, a policy-holder, a buyer or a borrower. In matters falling under exclusive jurisdictions pursuant to Section 5, the parties have no choice between the courts of serveral Contracting States.

2. The parties may, in certain circumstances, derogate from the provisions of Sections 3 and 4 (Articles 12, 15, and 18). The provisions of Section 5 may not, however, be derogated from, either by an agreement conferring jurisdiction (second paragraph of Article 17) or by an implied submission to the jurisdiction (Article 18).

3. The rules in Section 3 and 4 are applicable only where the defendant is domiciled in a Contracting State, whereas those in Section 5 apply regardless of domicile.

However, contravention of the provisions of Sections 3 and 4, as well as of those of Section 5, constitutes a ground for refusing recognition and enforcement (Articles 28 and 34).

(1) Convention between Germany and Belgium, Article 3 (2); Convention between Italy and the Netherlands (end of Article 2); Convention between Italy and Belgium (end of Article 2).

(2) Article 5 (1) of the Convention between Belgium and the Netherlands reads as follows: 'Where a domicile conferring jurisdiction has been chosen in one of the two countries for the enforcement of an instrument, the courts for the place of domicile chosen shall have exclusive jurisdiction over litigation relating to that instrument, save for exceptions and modifications enacted or to be enacted under the national law of one of the two States or by international agreement.'

Section 3

Jurisdiction in matters relating to insurance

Rules of exclusive or special jurisdiction relating to insurance exist in France (Article 3 of the Law of 13 July 1930 concerning contracts of insurance), in Belgium (Law of 20 May 1920, added as Article 43 bis to the Law of 25 March 1876 on jurisdiction), in Germany (§ 48 of the Gesetz über den Versicherungsvertrag (Law on contracts of insurance)), and in Italy (Article 1903 (2) of the Civil Code, Article 124 of the Consolidated Law on private insurance). In Luxembourg, the Law of 16 May 1891 on contracts of insurance does not include any provision on jurisdiction. This is due to the small size of the Grand Duchy, which comprises only two judicial arrondissements. However, the Law of 16 May 1891 concerning the supervision of insurance matters governs jurisdiction in regard to foreign insurance companies. This Law requires an insurer resident abroad who is transacting insurance business in the Grand Duchy to appoint a general representative domiciled in Luxembourg who will represent him there judicially and extrajudicially. This representative must give an address for service of process in the judicial arrondissement in which he is not domiciled. Either the domicile of the general representative or his address for service founds jurisdiction in respect of actions arising from contracts of insurance. In the Netherlands, there are no special provisions concerning the jurisdiction of the courts in insurance matters. As regards foreign life-assurance companies, the Netherlands Law of 22 December 1922 recognizes rules analogous to those of the Luxembourg Law of 16 May 1891. The rules are approximately the same in Germany.

Section 3 was drawn up in cooperation with the European Insurance Committee.

The provisions of this Section may be summarized as follows: in matters relating to insurance, actions against an insurer domiciled in a Contracting State may be brought in the following courts, i.e. either:

(i) In the courts of the State where he is domiciled (Article 8), or, subject to certain conditions, in the courts for the place where he has a branch (Articles 7 and 8); or

(ii) (a) in the courts for the place where the policy-holder is domiciled (Article 8);

(b) in the courts of the State where one of the insurers is domiciled, if two or more insurers are the defendants (Article 8);

(c) in the courts for the place where the agent who acted as intermediary in the making of the contract of insurance has his domicile, if there is provision for such jurisdiction under the law of the court seised of the matter (Article 8);

(d) 1. in respect of liability insurance, the insurer may in addition be sued:

(1) in the courts for the place where the harmful event occurred (Articles 9 and 10),

(2) as a third party, in the court seised of the action brought by the injured party against the insured if, under its own law, that court has jurisdiction in the third party proceedings (Article 10);

2. in respect of insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency (Article 9).

Where an insurer is the plaintiff, he may in general bring an action only in the courts of the State in which the defendant is domiciled, irrespective of whether the latter is the policy-holder, the insured or a beneficiary.

Agreements conferring jurisdiction which depart from these rules have no legal force if they were entered into before the dispute arose (Article 12).

Article 7

Article 7 specifies that jurisdiction in matters relating to insurance is governed solely by Section 3 of Title II.

Specific exceptions are made by the references to Articles 4 and 5 (5), which concern respectively defendants domiciled outside the Community and disputes arising out of the operations of a branch, agency or other establishment.

It follows from the first of these exceptions that jurisdiction is determined by the law of the court seised of the matter, including the rules of exorbitant jurisdiction, where the defendant, whether he is the insurer or the policy-holder, is domiciled outside the Community. However, as an exception to the general rules of the Convention, an insurer domiciled outside the Community who has a branch or an agency in a

Contracting State is, in disputes relating to the operations of the branch or agency, deemed to be domiciled in that State. This exception, which is contained in the last paragraph of Article 8, was adopted because foreign insurance companies can establish branches or agencies in other States only by putting up guarantees which in practice place them in the same position as national companies. However, the exception applies only to branches or agencies, i.e. when the foreign company is represented by a person able to conclude contracts with third parties on behalf of the company.

The second exception again relates to branches or agencies, and also to other establishments, which, as appears from the reference back to Article 5 (5), depend from a company whose seat is in a Contracting State. The result is that such a company may be sued in the courts for the place in which the branch, agency or establishment is situated, in all disputes arising out of their operations.

Article 8

Article 8 lays down general rules of jurisdiction in proceedings instituted against an insurer in matters relating to insurance.

First, the courts of the State where the insurer is domiciled have jurisdiction. This provision determines only general jurisdiction, namely the jurisdiction of the courts of the State where the insurer is domiciled. Each State must then apply its internal law to determine which court has jurisdiction. However, if the insurer is sued outside the State in which he is domiciled, the proceedings must be instituted in a specifically determined court, in accordance with the principles already adopted in Article 5.

Secondly, an action may be brought in a State other than that in which the insurer is domiciled, in the courts for the place where the policy-holder is domiciled. 'Policy-holder' is to be taken to mean the other party to the contract of insurance. Where the insured or the beneficiary is not the same person as the policy-holder, their place of domicile is not taken into consideration. As was noted in particular by the European Insurance Committee, the insurer, as a supplier of services, enters into a business relationship with the other contracting party (the policy-holder). Because of their direct contact it is right and proper that the insurer can be sued in the courts for the place where the policy-holder is domiciled. But it would be unreasonable to expect the insurer to appear in the court of the insured or of a beneficiary, since he will not necessarily know their exact domicile at the time when the cause of action arises.

The domicile of the policy-holder which is relevant here is the domicile existing at the time when the proceedings are instituted.

Thirdly, if two or more insurers are defendants in the same action, they may be sued in the courts of the State where any one of them is domiciled. This provision is identical to that in Article 6 (1), which does not apply here since the Section relating to insurance applies independently of the rest of the Convention.

Furthermore, an insurer may be sued in a State other than that in which he is domiciled, in the courts for the place where the agent who acted as intermediary in the making of the contract of insurance is domiciled, but subject to two conditions: first, that the domicile of the agent who acted as intermediary is mentioned in the insurance policy or proposal, and, secondly, that the law of the court seised of the matter recognizes this jurisdiction. It is not recognized in Belgium or in France, although it is in Germany [1] and in Italy (Article 1903 of the Civil Code). The reference to the insurance proposal takes account of the usual practice in Germany. Insurance companies there in general use data-processing systems, so that the place of the agency often appears in the policy only in the form of a number referring back to the insurance proposal. The insurance proposal, within the meaning of the Convention, means, of course, the final proposal which forms the basis of the contract.

The expression 'the agent, who acted as intermediary in the making of the contract of insurance' includes both an agent through whom the contract was directly concluded between the company and the policy-holder, and also an agent who negotiated the contract to conclusion on behalf of the company. The significance

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[1] § 48 of the Gesetz über den Versicherungsvertrag:
1. If an insurance agent has acted as intermediary in the making of the contract, or has concluded the contract, then in actions against the insurer arising out of the insurance contract the court for the place where, at the time when the contract was negotiated through the agent or concluded, the agent had his agency or, in the absence of an agency, has domicile, shall have jurisdiction.
2. The jurisdiction defined in paragraph 1 may not be excluded by agreement.'

of the last paragraph of Article 8 is made clear in the commentary on Article 7.

Article 9

Article 9 allows an insurer to be sued in a State other than that in which he is domiciled in the courts for the place where the harmful event occurred, but without prejudice to the application of Article 12 (3). This jurisdiction applies only in respect of liability insurance and insurance of immovable property. It extends to movable property in cases where a building and the movable property it contains are covered by the same insurance policy. This also applies if the movables are covered by an endorsement to the policy covering the immovable property.

Article 10

Article 10 contains rules of special jurisdiction for liability insurance cases. This provision is of particular importance in relation to road accidents.

Under the first paragraph of Article 10, in an action brought by the injured party against the insured, the latter may join the insurer as a third party if the court seised of the matter has jurisdiction in such a case under its own law. This is not possible in the Federal Republic of Germany (1).

The problem arose whether consolidation of the two actions should be allowed even where the insurer and the insured are both domiciled in the same State, which, it must be assumed for the purposes of this argument, is different from the State of the court seised of the matter. For example, where an accident is caused in France by a German domiciled in Germany who is insured with a German company, should third party proceedings, which are recognized under French law, be possible even though the litigation concerns a contract of insurance between a German insured person and a German insurer? As it is subject to German law, should this contract not be litigated in a German court? The contractual relationship between the insurer and the policy-holder would then fall outside the scope of the proceedings relating to personal liability.

While acknowledging the relevance of this question, the Committee was of the opinion that it would be unwise to introduce rules of jurisdiction which would depart from national laws and which could also jeopardize the system in force following the introduction of the green card (2).

The compromise solution adopted by the Committee is to reduce the scope of the first paragraph of Article 10 by inserting, under Article 12 (3), a provision that, if the policy-holder and the insurer are both domiciled in the same Contracting State, when the contract is concluded, they may agree to confer jurisdiction on the courts of that State. Such an agreement must not, however, be contrary to the law of that State.

Under the second paragraph of Article 10 the insurer may also, in respect of liability insurance, be sued directly by the injured party (3) outside the State in which he is domiciled in any court which, under Articles 7 to 9, has jurisdiction over actions brought by the policy-holder against the insurer.

Where, however, under the first paragraph of Article 8, the court for the place where the policy-holder is domiciled has jurisdiction, there is no provision giving jurisdiction to the court for the place where the injured party is domiciled. The phrase 'where such direct actions are permitted' has been used specifically to include the conflict of laws rules of the court seised of the matter (4).

Under the last paragraph of Article 10, the insurer may join the policy-holder or the insured as parties to the action brought against him by the injured party. In the interests of the proper administration of justice, it must be possible for the actions to be brought in the same court in order to prevent different courts from giving judgments which are irreconcilable. This procedure will in addition protect the insurer against fraud (5).

(1) See Article V of the Protocol.

(2) Insurance against civil liability in respect of motor vehicles is compulsory in all Community countries except Italy.
Belgium: Law of 1 July 1956.
France: Law of 27 February 1958, Decree of 7 January 1959.
Germany: Law of 7 November 1939.
Luxembourg: Law of 10 June 1932, Implementing Regulations of 28 October 1932 and 24 December 1932.
Netherlands: Law of 30 May 1963, Decree of 23 June 1964.

(3) Direct actions are recognized under Belgian, French and Luxembourg law. Under German and Netherlands law they are recognized only with regard to compulsory insurance against civil liability in respect of motor vehicles.

(4) The rules of conflict must be used to decide whether the law to be applied is the law of the place where the harmful event occurred, the law governing the contract of insurance or the *lex fori*.

(5) J. WAUTIER, L'assurance automobile obligatoire, Brussels 1947.

Article 11

Article 11 relates to actions brought by the insurer against the policy-holder, the insured or a beneficiary.

The courts of the State in which the defendant is domiciled when the proceedings are instituted have exclusive jurisdiction.

Again, this is a provision dealing with international jurisdiction; local jurisdiction within each State will be determined by the internal law of that State.

Article 11 does not apply where the defendant is domiciled outside a Contracting State, that is to say, outside the Community. In such cases Article 4 applies.

The second paragraph corresponds to the provisions of Article 6 (3).

Article 12

Article 12 relates to agreements conferring jurisdiction. Agreements concluded before a dispute arises will have no legal force if they are contrary to the rules of jurisdiction laid down in the Convention.

The purpose of this Article is to prevent the parties from limiting the choice offered by this Convention to the policy-holder, and to prevent the insurer from avoiding the restrictions imposed under Article 11.

A number of exceptions are, however, permitted. After a dispute has arisen, that is to say 'as soon as the parties disagree on a specific point and legal proceedings are imminent or contemplated' [1], the parties completely regain their freedom.

Certain agreements conferring jurisdiction which were concluded before the dispute arose are also permissible. First, there are those made to the advantage of the policy-holder, the insured or a beneficiary, which allow them to bring proceedings in courts other than those specified in the preceding Articles.

Certain other agreements conferring jurisdiction are allowed under Article 12 (3), but only in the strictly defined circumstances therein specified which have been explained in the commentary on Article 10.

[1] BRAAS, Précis de procédure civile, Vol. I, No 795.

Section 4

Jurisdiction in matters relating to instalment sales and loans

This Section relates to the sale of goods where the price is payable in a series of instalments, and to the sale of goods where the sale is contractually linked to a loan (Abzahlungsgeschäfte). The rules here adopted are similar to those applicable in the national law of several of the Member States and, like them, stem from a desire to protect certain categories of persons. Article 13 provides that this Section applies independently of the rest of the Convention and, like Article 7, without prejudice to the provisions of Articles 4 and 5 (5).

Article 14 determines the rules of jurisdiction.

In actions against a seller or a lender, proceedings may be instituted by the buyer or borrower either in the courts of the State in which the defendant is domiciled, or in the courts of the State in which the buyer or borrower is domiciled.

Actions by a seller or a lender may in general be brought only in the courts for the place where the buyer or borrower is domiciled when the proceedings are instituted.

The third paragraph, relating to counterclaims, corresponds to Article 6 (3).

Article 15, which relates to agreements conferring jurisdiction, contains under (3) a provision analogous to that of Article 12 (3), but for different reasons. In actions brought by a seller or a lender, it is rather difficult to determine jurisdiction where the buyer or borrower establishes himself abroad after the contract has been concluded. To protect these persons, they should ideally be sued only in the courts of the State where they have established their new domicile. For reasons of equity the Committee has however provided that where a seller and a buyer, or a lender and a borrower, are both domiciled or at least habitually resident in the same State when the contract is concluded, they may confer on the courts of that State jurisdiction over all disputes arising out of the contract, on condition that such agreements are not contrary to the law of that State.

The criterion of habitual residence allows agreements conferring jurisdiction to be concluded even where a buyer or borrower remains domiciled in a Contracting

State other than that in which he is resident. It follows, for example, that a seller or lender need not sue the defendant abroad in the courts of the State in which the defendant is domiciled, if, when the proceedings are instituted, the defendant is still resident in the State in which the contract was concluded.

Section 5

Exclusive jurisdiction

Article 16

Article 16 lists the circumstances in which the six States recognize that the courts of one of them have exclusive jurisdiction. The matters referred to in this Article will normally be the subject of exclusive jurisdiction only if they constitute the principal subject-matter of the proceedings of which the court is to be seised.

The provisions of Article 16 on jurisdiction may not be departed from either by an agreement purporting to confer jurisdiction on the courts of another Contracting State, or by an implied submission to the jurisdiction (Articles 17 and 18). Any court of a State other than the State whose courts have exclusive jurisdiction must declare of its own motion that it has no jurisdiction (Article 19). Failure to observe these rules constitutes a ground for refusal of recognition or enforcement (Articles 28 and 34).

These rules, which take as their criterion the subject-matter of the action, are applicable regardless of the domicile or nationality of the parties. In view of the reasons for laying down rules of exclusive jurisdiction, it was necessary to provide for their general application, even in respect of defendants domiciled outside the Community. Thus, for example, a Belgian court will not, on the basis of Article 53 of the Law of 1876 or of Article 637 of the draft Judicial Code, which in actions against foreigners recognize the jurisdiction of the courts of the plaintiff, have jurisdiction in proceedings between a Belgian and a person domiciled, for example, in Argentina, if the proceedings concern immovable property situated in Germany. Only the German courts will have jurisdiction.

Immovable property

Under Article 16 (1), only the courts of the Contracting State in which the immovable property is situated have jurisdiction in proceedings concerning rights *in rem* in, or tenancies of, immovable property.

The importance of matters relating to immovable property had already been taken into consideration by the authors of the Treaty of Rome since, under Article 54 (3) (c) of that Treaty, the Commission and the Council must enable 'a national of one Member State to acquire and use land and buildings situated in the territory of another Member State', in so far as this does not conflict with the principles laid down in Article 39 (2) relating to agricultural policy.

The problems which the Committee faced in this connection did not in fact relate to the recognition and enforcement of judgments, since these questions are governed by the provisions of the conventions already concluded between Member States, all of which apply in civil and commercial matters, including immovable property, but rather to the choice of rules of jurisdiction.

The laws of all the Member States include in this respect special rules of jurisdiction [1] which, generally speaking, have been incorporated in the bilateral conventions, whether they are based on direct [2] or indirect [3] jurisdiction.

However, the rules laid down in the Convention differ from those in the bilateral agreements in that the Convention lays down rules of exclusive jurisdiction. The Convention follows in this respect the Treaty between France and Germany settling the question of the Saar, Article 49 of which provides that the courts 'of the country in which the immovable property is situated shall have exclusive jurisdiction in all disputes regarding the possession or ownership of such property and in all disputes regarding rights *in rem* in such property'.

As in that Treaty, the exclusive jurisdiction established by Article 16 (1) applies only in international relations; the internal rules of jurisdiction in force in each of the States are thus not affected.

In other words, the Convention prohibits the courts of one Contracting State from assuming jurisdiction in

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[1] Belgium: Article 8 of the Law of 25 March 1876, amended by the Arrêté royal of 3 January 1935; Article 52 of the Law of 1876; Federal Republic of Germany, Article 24 of the Code of Civil Procedure; France, Article 59 (5) of the Code of Civil Procedure; Italy, Articles 4 and 21 of the Code of Civil Procedure; Luxembourg, Article 59 (3) and (4) of the Code of Civil Procedure; Netherlands, Article 126 (8) of the Code of Civil Procedure.

[2] Convention between Belgium and the Netherlands (Article 10).

[3] Conventions between Germany and Belgium (Article 10); between France and Italy (Article 16); between Italy and the Netherlands (Article 2 (6)); between Germany and Italy (Article 2 (7)); between Belgium and Italy (Article 2 (8)); and between Germany and the Netherlands (Article 4 (1) (f)).

disputes relating to immovable property situated in another Contracting State; it does not, in the State in which the immovable property is situated, prevent courts other than that for the place where the property is situated from having jurisdiction in such disputes if the jurisdiction of those other courts is recognized by the law of that State.

A number of considerations led the Committee to provide a rule of exclusive jurisdiction in this matter. In the Federal Republic of Germany and in Italy, the court for the place where the immovable property is situated has exclusive jurisdiction, this being considered a matter of public policy. It follows that, in the absence of a rule of exclusive jurisdiction, judgments given in other States by courts whose jurisdiction might have been derived from other provisions of the Convention (the court of the defendant's domicile, or an agreed forum) could have been neither recognized nor enforced in Germany or Italy.

Such a system would have been contrary to the principle of 'free movement of judgments'.

The Committee was all the more inclined to extend to international relations the rules of jurisdiction in force in the Federal Republic of Germany and in Italy, since it considered that to do so was in the interests of the proper administration of justice. This type of dispute often entails checks, enquiries and expert examinations which have to be made on the spot. Moreover, the matter is often governed in part by customary practices which are not generally known except in the courts of the place, or possibly of the country, where the immovable property is situated. Finally, the system adopted also takes into account the need to make entries in land registers located where the property is situated.

The wording adopted covers not only all disputes concerning rights *in rem* in immovable property, but also those relating to tenancies of such property. This will include tenancies of dwellings and of premises for professional or commercial use, and agricultural holdings. In providing for the courts of the State in which the property is situated to have jurisdiction as regards tenancies in immovable property, the Committee intended to cover disputes between landlord and tenant over the existence or interpretation of tenancy agreements, compensation for damage caused by the tenant, eviction, etc. The rule was not intended by the Committee to apply to proceedings concerned only with the recovery of rent, since such proceedings can be considered to relate to a subject-matter which is quite distinct from the rented property itself.

The adoption of this provision was dictated by the fact that tenancies of immovable property are usually governed by special legislation which, in view of its complexity, should preferably be applied only by the courts of the country in which it is in force. Moreover, several States provide for exclusive jurisdiction in such proceedings, which is usually conferred on special tribunals.

Companies and associations of natural or legal persons

Article 16 (2) provides that the courts of the State in which a company or other legal person, or an association of natural or legal persons, has its seat, have exclusive jurisdiction in proceedings which are in substance concerned either with the validity of the constitution, the nullity or the dissolution of the company, legal person or association, or with the decisions of its organs.

It is important, in the interests of legal certainty, to avoid conflicting judgments being given as regards the existence of a company or association or as regards the validity of the decisions of its organs. For this reason, it is obviously preferable that all proceedings should take place in the courts of the State in which the company or association has its seat. It is in that State that information about the company or association will have been notified and made public. Moreover, the rule adopted will more often than not result in the application of the traditional maxim *'actor sequitur forum rei'*. Such jurisdiction is recognized in particular in German law and, as regards non-profit making organizations, in Luxembourg law.

Public registers

Article 16 (3) lays down that the courts of the State in which a public register is kept have exclusive jurisdiction in proceedings relating to the validity or effects of entries in that register.

This provision does not require a lengthy commentary. It correspond to the provisions which appear in the internal laws of most of the Contracting States; it covers in particular entries in land registers, land charges registers and commercial registers.

Patents

Article 16 (4) applies to proceedings concerned with the registration or validity of patents, trade marks, designs or other similar rights, such as those which protect fruit and vegetable varieties, and which are required to be deposited or registered.

A draft convention has been drawn up by the EEC countries relating to patent law. The draft includes rules of jurisdiction for the Community patent, but it will not apply to national patents, which thus fall within the scope of the Judgments Convention.

Since the grant of a national patent is an exercise of national sovereignty, Article 16 (4) of the Judgments Convention provides for exclusive jurisdiction in proceedings concerned with the validity of patents.

Other actions, including those for infringement of patents, are governed by the general rules of the Convention.

The expression 'the deposit or registration has been applied for' takes into account internal laws which, like German law, make the grant of a patent subject to the results of an examination. Thus, for example, German courts will have exclusive jurisdiction in the case of an application to the competent authorities for a patent to be granted where, during the examination of the application, a dispute arises over the rights relating to the grant of that patent.

The phrase 'is under the terms of an international convention deemed to have taken place' refers to the system introduced by the Madrid Agreement of 14 April 1891 concerning international registration of trade marks, revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925 and at London on 2 June 1934, and also to the Hague Arrangement of 6 November 1925 for the international registration of industrial designs, revised at London on 2 June 1934. Under this system, the deposit of a trade mark, design or model at the International Office in Berne through the registry of the country of origin has the same effect in the other Contracting States as if that trade mark, design or model had been directly registered there. Thus where a trade mark is deposited at the International Office at the request of the German authorities, the French courts will have exclusive jurisdiction in disputes relating, for example, to whether the mark should be deemed to have been registered in France.

Enforcement of judgments

Article 16 (5) provides that the courts of the State in which a judgment has been or is to be enforced have exclusive jurisdiction in proceedings concerned with the enforcement of that judgment.

What meaning is to be given to the expression 'proceedings concerned with the enforcement of judgments'?

It means those proceedings which can arise from 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments' (1).

Problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement.

Provisions of this kind appear in the internal law of many Member States (2).

Section 6

Prorogation of jurisdiction

This section includes Article 17, on jurisdiction by consent, and Article 18, which concerns jurisdiction implied from submission.

Article 17

Jurisdiction deriving from agreements conferring jurisdiction is already a feature of all the Conventions concluded between Member States of the Community, whether the rules of jurisdiction are direct or indirect: see the Convention between France and Belgium (Article 3), and between Belgium and the Netherlands (Article 5); the Benelux Treaty (Article 5); the

(1) BRAAS, Précis de procédure civile, Vol. I, No 808.

(2) See LEREBOURS-PIGEONNIÈRE, Droit international privé, seventh edition, p. 9; LOUSSOUARN, No 411: French courts have exclusive jurisdiction over measures for enforcement which is to take place in France (preventive measures, distress levied on a tenant's chattels, writs of attachment and applications for enforcement of a foreign judgment); over distraint levied on immovable or movable property, and over proceedings concerned with the validity of measures for enforcement.'

Convention between France and Italy (Article 12), between Germany and Italy (Article 2 (2)), between Italy and the Netherlands (Article 2 (2)), between Italy and Belgium (Article 2 (1) (2)), between Germany and Belgium (Article 3 (2)), and between Germany and the Netherlands (Article 4 (1) (b)).

This jurisdiction is also the subject of international conventions, namely the Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods, and the Hague Convention of 25 November 1965 on the choice of court (1).

It is unnecessary to stress the importance of this jurisdiction, particularly in commercial relations.

However, although agreement was readily reached on the basic principle of including such a jurisdiction in the Convention, the Committee spent much time in drafting Article 17.

Like the draftsmen of the Convention between Germany and Belgium, the report of which may usefully be quoted, the Committee's first concern was 'not to impede commercial practice, yet at the same time to cancel out the effects of clauses in contracts which might go unread. Such clauses will therefore be taken into consideration only if they are the subject of an agreement, and this implies the consent of all the parties. Thus, clauses in printed forms for business correspondence or in invoices will have no legal force if they are not agreed to by the party against whom they operate.'

The Committee was further of the opinion that, in order to ensure legal certainty, the formal requirements applicable to agreements conferring jurisdiction should be expressly prescribed, but that 'excessive formality which is incompatible with commercial practice' (2) should be avoided.

In this respect, the version adopted is similar to that of the Convention between Germany and Belgium, which was itself based on the rules of the Hague Convention of 15 April 1958, in that a clause conferring jurisdiction is valid only if it is in writing, or if at least one of the parties has confirmed in writing an oral agreement (3).

Since there must be true agreement between the parties to confer jurisdiction, the court cannot necessarily deduce from a document in writing adduced by the party seeking to rely on it that there was an oral agreement. The special position of the Grandy Duchy of Luxembourg in this matter necessitated an additional restriction which is contained in the second paragraph of Article I of the Protocol.

The question of how much weight is to be attached to the written document was left open by the Committee. In certain countries, a document in writing will be required only as evidence of the existence of the agreement; in others, however, it will go to the validity of the agreement.

Like the Conventions between Belgium and the Netherlands and between France and Belgium, and also the Benelux Treaty and the Hague Convention, the first paragraph of Article 17 provides that the court agreed on by the parties shall have exclusive jurisdiction. This solution is essential to avoid different courts from being properly seised of the matter and giving conflicting or at least differing judgments. In order to meet practical realities, the first paragraph of Article 17 also covers specifically cases of agreement that a particular court in a Contracting State or the courts of a Contracting State are to have jurisdiction, and is similar in this to the 1958 Hague Convention. As Professor Batiffol pointed out in his report on that Convention, an agreement conferring jurisdiction generally on the courts of a Contracting State 'may have no legal effect if, in the absence of any connecting factor between the contractual situation and the State whose courts have been agreed on as having jurisdiction, the law of that State provides no way of determining which court can or should be seised of the matter' (4). But as Batiffol remarks, this is a matter which the parties should consider at the appropriate time.

The first paragraph of Article 17 applies only if at least one of the parties is domiciled in a Contracting State. It does not apply where two parties who are domiciled in the same Contracting State have agreed that a court of that State shall have jurisdiction, since the Convention,

(1) By 1 September 1966 neither of these Conventions had entered into force.

(2) Hague Conference on private international law, documents of the eighth session. FRÉDERICQ, Report on the work of the Second Committee, p. 303.

(3) Hague Conference on private international law, Final Act of the tenth session. Convention on the choice of court, Article 4.

(4) Hague Conference on private international law, documents of the eighth session, p. 305.

under the general principle laid down in the preamble, determines only the international jurisdiction of courts (see Commentary, Chapter III, Section 1, International legal relationships).

Article 17 applies where the agreement conferring jurisdiction was made either between a person domiciled in one Contracting State and a person domiciled in another Contracting State, or between a person domiciled in a Contracting State and a person domiciled outside the Community, if the agreement confers jurisdiction on the courts of a Contracting State; it also applies where two persons domiciled in one Contracting State agree that a particular court of another Contracting State shall have jurisdiction.

The second paragraph of Article 17 provides that agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 (insurance) or Article 15 (instalment sales), or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

The intention behind the Convention is to obviate cases of refusal of recognition and enforcement on the basis of Articles 28 and 34, and so, as already stated, to promote the free movement of judgments.

The third paragraph of Article 17 provides that if the agreement conferring jurisdiction was concluded for the benefit of only one of the contracting parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction [1]. Agreements conferring jurisdiction cannot of course affect the substantive jurisdiction of the courts.

Article 18

Article 18 governs jurisdiction implied from submission. If a defendant domiciled in a Contracting State is sued in a court of another Contracting State which does not have jurisdiction under the Convention, two situations may arise: the defendant may either, as he is entitled to do, plead that the court has no jurisdiction under the Convention, in which case the court must declare that it does not have jurisdiction; or he may elect not to raise this plea, and enter an appearance. In the latter case, the court will have jurisdiction.

Unlike the case of conventions based on indirect jurisdiction, the defendant may, by virtue of the Convention, rely on its provisions in the court seised of the proceedings and plead lack of jurisdiction. It will be necessary to refer to the rules of procedure in force in the State of the court seised of the proceedings in order to determine the point in time up to which the defendant will be allowed to raise this plea, and to determine the legal meaning of the term 'appearance'.

Moreover, by conferring jurisdiction on a court in circumstances where the defendant does not contest that court's jurisdiction, the Convention extends the scope of Title II and avoids any uncertainty. The main consequence of this rule is that if a defendant domiciled in a Contracting State is, notwithstanding the provisions of the second paragraph of Article 3, sued in another Contracting State on the basis of a rule of exorbitant jurisdiction, for example in France on the basis of Article 14 of the Civil Code, the court will have jurisdiction if this is not contested. The only cases in which a court must declare that it has no jurisdiction and where jurisdiction by submission will not be allowed are those in which the courts of another State have exclusive jurisdiction by virtue of Article 16.

Section 7

Examination as to jurisdiction and admissibility

Article 19

As has already been stated (page 8), a court must of its own motion examine whether it has jurisdiction. Article 19 emphasizes that the court must of its own motion declare that it has no jurisdiction if it is seised of a matter in which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16.

This rule is essential since the exclusive jurisdictions are conceived to be matters of public policy which cannot be departed from by the free choice of the parties. Moreover, it corresponds to Article 171 of the French Code of Civil Procedure, by virtue of which territorial jurisdiction is automatically examined where the parties are not permitted to reach a settlement [2].

If this Article deserves particular attention, it is mainly because, in order that the general rules of jurisdiction

[1] See also the Conventions between France and Belgium, Article 3, between France and Italy, Article 2, and between Belgium and the Netherlands, Article 5 and the Benelux Treaty, Article 5.

[2] The same is true in the Federal Republic of Germany: see ROSENBERG, *op. cit.* paragraph 38 (I) (3).

are observed, it grants wide powers to the court seised of the proceedings, since that court will of its own motion have to examine whether it has jurisdiction.

The words 'principally concerned' have the effect that the court is not obliged to declare of its own motion that it has no jurisdiction if an issue which comes within the exclusive jurisdiction of another court is raised only as a preliminary or incidental matter.

Article 20

Article 20 is one of the most important Articles in the Convention: it applies where the defendant does not enter an appearance; here the court must of its own motion examine whether it has jurisdiction under the Convention. If it finds no basis for jurisdiction, the court must declare that it has no jurisdiction. It is obvious that the court is under the same obligation even where there is no basis for exclusive jurisdiction. Failure on the part of the defendant to enter an appearance is not equivalent to a submission to the jurisdiction. It is not sufficient for the court to accept the submissions of the plaintiff as regards jurisdiction; the court must itself ensure that the plaintiff proves that it has international jurisdiction (1).

The object of this provision is to ensure that in cases of failure to enter an appearance the court giving judgment does so only if it has jurisdiction, and so to safeguard the defendant as fully as possible in the original proceedings. The rule adopted is derived from Article 37 (2) of the Italian Code of Civil Procedure, by virtue of which the court must of its own motion examine whether it has jurisdiction where the defendant is a foreigner and does not enter an appearance.

The second paragraph of Article 20 is also designed to safeguard the rights of the defendant, by recognizing the international importance of the service of judicial documents. The service of judicial documents abroad, although governed differently in each of the Member States, can broadly be separated into two main systems. The German system is based on the cooperation of the public authorities of the place of residence of the addressee which have jurisdiction to deliver to him a copy of the instrument. A German court cannot in general give judgment in default of appearance unless it receives conclusive evidence that the instrument has been delivered to the addressee (2) (3). The system contrasts with those in force in Belgium, France, Italy, Luxembourg and the Netherlands (4), all of which are characterized by the 'desire to localize in the territory of the State of the forum all the formalities connected with the judicial document whose addressee resides abroad' (5).

Under the laws of these countries, service is properly effected, and causes time to begin to run, without there being any need to establish that the document instituting the proceedings has actually been served on its addressee. It is not impossible in these circumstances that, in some cases, a defendant may have judgment entered against him in default of appearance without having any knowledge of the action.

The Hague Convention of 1 March 1954 on civil procedure, to which the six Member States are party, does not solve the difficulties which arise under such legislation.

The Committee also tried to solve the problems arising when service is effected late, bearing in mind that the aim of the Convention is to promote, so far as possible, the free movement of judgments.

The search for a solution was obviously helped by the drafting at the tenth session of the Hague Conference on private international law of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, which was opened for signature on 15 November 1965. This is the reason why the solution adopted in the second paragraph of Article 20 is only transitional.

This provision summarizes Article 15 of the Hague Convention, which is in fact derived from Article 20 of this present Convention, since the work of the Committee served as a basis for discussion at the meetings of the Special Commission which was established by the Hague Conference and which drew up the preliminary draft which was submitted for discussion at the tenth session.

(1) BÜLOW, *op. cit.*

(2) RIGAUX, La signification des actes judiciaires à l'étranger. Revue critique de droit international privé, p. 448 *et seq.*

(3) See German Code of Civil Procedure, Article 335 (1) (2) and Article 202.

(4) Belgium: Code of Civil Procedure, Article 69bis, and Judgment of the Cour de cassation of 4 March 1954. Revue des huissiers de Belgique, May-June 1954, p. 15.
France: Code of Civil Procedure, Article 69 (10), as interpreted by the French Cour de cassation. See Revue critique de droit international privé, No 1, January-March 1961, p. 174 *et seq.*
Italy: Code of Civil Procedure, Articles 142 and 143.
Luxembourg: Arrêté-loi of 1 April 1814.
Netherlands: Code of Civil Procedure, Article 4 (8).

(5) RIGAUX, id., p. 454.

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

This provision is based on the old Article 8 of the Netherlands Law of 12 June 1909, Stb No 141 (1).

The second paragraph of Article 20 requires first that notification of the proceedings has been given to the party who has not entered an appearance, that is either to him in person or at his domicile, and secondly that it has been delivered in sufficient time to enable the defendant to arrange for his defence. It does not require that the defendant should actually have been notified in sufficient time. The defendant must be responsible for any delay caused by his own negligence or by that of his relations or servants. The critical time is thus the time at which service was properly effected, and not the time at which the defendant received actual knowledge of the institution of proceedings.

The question of 'sufficient time' is obviously a question of fact for the discretion of the court seised of the matter.

The court may give judgment in default against a defendant if it is shown that 'all necessary steps have been taken' for him actually to have received in sufficient time the document instituting the proceedings.

This means that a court will be able to give judgment in default against a defendant even if no affidavit can be produced to confirm service on the defendant of the document instituting the proceedings, provided it is shown that all the necessary approaches have been made to the competent authorities of the State in which the defendant is domiciled in order to reach him in sufficient time. Where necessary, it must also be shown that 'all the investigations required by good conscience and good faith have been undertaken to discover the defendant' (2).

As already stated, the second paragraph of Article 20 is only a transitional provision. Under the third paragraph of that Article, where the State of the forum and the State in which the document had to be transmitted have both ratified the new Hague Convention, the court seised of the matter will no longer apply the second paragraph of Article 20 but will be exclusively bound by Article 15 of the Hague Convention. Thus any possibility of conflict between Article 15 of the Hague Convention and the second paragraph of Article 20 of the EEC Judgments Convention is resolved in favour of the Hague Convention.

The Committee also considered it important to ensure certainty and speed in the transmission of judicial documents. In order to achieve this, it considered as a possible solution the transmission of such documents by registered post. However, it did not adopt this system for, although it meets the requirement of speed, it does not offer all the necessary safeguards from the point of view of certainty. In the end the Committee adopted the system which is set out in Article IV of the Protocol.

This Article simply adds a new method of transmission to those already provided for by the Hague Convention of 1 March 1954 on civil procedure, or by the agreements concluded between the Contracting States in application of that Convention. It corresponds, moreover, to the facility provided for by Article 10 (b) of the new Hague Convention.

Under the system adopted in the Protocol, documents can be transmitted by public officers in one Contracting State directly to their colleagues in another Contracting State, who will deliver them to the addressee in person or to his domicile.

According to the assurances which were given to the Committee by a representative of the 'Union internationale des huissiers de justice et d'officiers judiciaires', it will be easy for a public officer in one country to correspond with the appropriate public officer in another country. In case of difficulty it would moreover be possible for the officer in the State in which judgment was given to invoke the assistance of the national associations of public officers, or on the central office of the 'Union' which has its headquarters in Paris.

(1) This Article reads as follows: 'Where the defendant does not enter an appearance, the court may not give judgment in default if the plaintiff does not show that the defendant received the writ of summons. The plaintiff may ask for a new date to be fixed for the hearing.'

(2) Cour d'appel de POITIERS, 9. 7. 1959 (Gazette du Palais, 1959.II.183); cf. GAVALDA, Revue critique de droit international privé, 1960, No 1, p. 174.

In the opinion of the Committee these arrangements meet the requirements of speed and certainty. Direct communication between public officers allows a considerable gain in time by avoiding any recourse to intermediary bodies such as Ministries for Foreign Affairs, Ministries of Justice or prosecutors' offices.

Certainty is further guaranteed since if, for example, the address is incomplete or inaccurate, the officer in the State in which service is to be effected may well be able to undertake investigations in order to find the addressee.

As for the linguistic difficulties which could arise in the context of a grouping of the six countries, these could be overcome by attaching to the instrument a summary in the language of the addressee.

Like Article 10 (b) of the Hague Convention, Article IV of the Protocol allows a Contracting State to object to this method of transmission.

Section 8

Lis pendens — related actions

Article 21

As there may be several concurrent international jurisdictions, and the courts of different States may properly be seised of a matter (see in particular Articles 2 and 5), it appeared to be necessary to regulate the question of *lis pendens*. By virtue of Article 21, the courts of a Contracting State must decline jurisdiction, if necessary of their own motion, where proceedings involving the same cause of action and between the same parties are already pending in a court of another State. In cases of *lis pendens* the court is therefore obliged to decline jurisdiction, either on the application of one of the parties, or of its own motion, since this will facilitate the proper administration of justice within the Community. A court will not always have to examine of its own motion whether the same proceedings are pending in the courts of another country, but only when the circumstances are such as to lead the court to belive that this may be the case.

Instead of declining jurisdiction, the court which is subsequently seised of a matter may, however, stay its proceedings if the jurisdiction of the court first seised is contested. This rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction. The risk of unnecessary disclaimers of jurisdiction is thereby avoided.

Jurisdiction is declined in favour of the court first seised of the matter. The Committee decided that there was no need to specify in the text the point in time from which the proceedings should be considered to be pending, and left this question to be settled by the internal law of each Contracting State.

Article 22

The solution offered by this Article to the problem of related actions differs in several respects from that adopted to regulate the question of *lis pendens*, although it also serves to avoid the risk of conflicting judgments and thus to facilitate the proper administration of justice in the Community.

Where actions are related, the first duty of the court is to stay its proceedings. The proceedings must, however, be pending at the same level of adjudication, for otherwise the object of the proceedings would be different and one of the parties might be deprived of a step in the heirarchy of the courts.

Furthermore, to avoid disclaimers of jurisdiction, the court may decline jurisdiction only if it appears that the court first seised has jurisdiction over both actions, that is to say, in addition, only if that court has not jurisdiction over the second action. The court may decline jurisdiction only on the application of one of the parties, and only if the law of the court first seised permits the consolidation of related actions which are pending in different courts. This last condition takes into account the specific problems of German and Italian law. In German law, consolidation is in general permitted only if both actions are pending in the same court. In Italian law, the constitution does not permit a court to decide whether it will hear an action itself or refer it to another court. It will, however, always be possible for a German or Italian court which is subsequently seised of a matter to stay its proceedings.

Finally, since the expression 'related actions' does not have the same meaning in all the Member States, the third paragraph of Article 22 provides a definition. This is based on the new Belgian Judicial Code (Article 30).

The Convention does not regulate the procedure for the consolidation of related actions. This is a question which is left to the internal laws of the individual States.

Article 23

This Article deals with a situation which will occur only very rarely, namely where an action comes within the exclusive jurisdiction of several courts. To avoid conflicts of jurisdiction, any court other than the court first seised of the action is required under Article 21 or Article 22 to decline jurisdiction in favour of that court.

Section 9

Provisional and protective measures

Article 24

Article 24 provides that application may be made to the courts of a Contracting State for such provisional measures, including protective measures, as may be available under the internal law of that State, irrespective of which court has jurisdiction as to the substance of the case. A corresponding provision will be found in nearly all the enforcement conventions (1).

In each State, application may therefore be made to the competent courts for provisional or protective measures to be imposed or suspended, or for rulings on the validity of such measures, without regard to the rules of jurisdiction laid down in the Convention.

As regards the measures which may be taken, reference should be made to the internal law of the country concerned.

CHAPTER V

RECOGNITION AND ENFORCEMENT

A. GENERAL CONSIDERATIONS

As a result of the safeguards granted to the defendant in the original proceedings, Title III of the Convention is very liberal on the question of recognition and enforcement. As already stated, it seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit. This liberal approach is evidenced in Title III first by a reduction in the number of grounds which can operate to prevent the recognition and enforcement of judgments and, secondly, by the simplification of the enforcement procedure which will be common to the six countries.

It will be recalled that Article 1, which governs the whole of the Convention, provides that the Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It follows that judgments given in a Contracting State in civil or commercial matters by criminal courts or by administrative tribunals must be recognized and enforced in the other Contracting States. Under Article 25, the Convention applies to any judgment, whatever the judgment may be called. It also applies to writs of execution (Vollstreckungsbefehl, Article 699 of the German Code of Civil Procedure) (2) and to the determination of costs (Kostenfestsetzungsbeschluß des Urkundsbeamten, Article 104 of the German Code of Civil Procedure) which, in the Federal Republic, are decisions of the registrar acting as an officer of the court. In decisions based on Article 104 of the German Code of Civil Procedure, the costs are determined in accordance with a schedule laid down by law and on the basis of the judgment of the court deciding on the substance of the matter (3). In the event of a dispute as to the registrar's decision, a fully constituted court decides the issue.

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(1) Benelux Treaty and Convention between Belgium and the Netherlands (Article 8); Convention between Germany and Belgium (Article 15 (2)); between France and Belgium (Article 9); between Italy and Belgium (Article 14); between Italy and the Netherlands (Article 10); between France and Italy (Article 32); and between Germany and the Netherlands (Article 18 (2)).

(2) The Vollstreckungsbefehl is issued by the court registrar.

(3) See also Article 18 (2) of the Hague Convention of 1 March 1954 on Civil Procedure.

It follows from Article 1 that Title III cannot be invoked for the recognition and enforcement of judgments given on matters excluded from the scope of the Convention (status and legal capacity of persons, rules governing rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy and other similar proceedings, social security, and arbitration, including arbitral awards).

On the other hand, Title III applies to any judgment given by a court or tribunal of a Contracting State in those civil and commercial matters which fall within the scope of the Convention, whether or not the parties are domiciled within the Community and whatever their nationality.

B. COMMENTARY ON THE SECTIONS

Section 1

Recognition

Article 26

Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given.

The words *'res judicata'* which appear in a number of conventions have expressly been omitted, since judgments given in interlocutory proceedings and *ex parte* may be recognized, and these do not always have the force of *res judicata*. Under the rules laid down in Article 26:

1. judgments are to be recognized automatically;

2. in the event of a dispute, if recognition is itself the principal issue, the procedure for enforcement provided for in the Convention may be applied;

3. if the outcome of proceedings depends on the determination of an incidental question of recognition, the court entertaining those proceedings has jurisdiction on the question of recognition.

The first of these rules lays down the principle that judgments are to be recognized; recognition is to be accorded without the need for recourse to any prior special procedure. It is thus automatic, and does not require a judicial decision in the State in which recognition is sought to enable the party in whose favour judgment has been given to invoke that judgment against any party concerned, for example an administrative authority, in the same way as a judgment given in that State. This provision means that certain legal provisions which in some countries, such as Italy, make the recognition of a foreign judgment subject to a special procedure (dichiarazione di efficacia) will be abolished. The Italian delegation stated that it was able to concur in this solution since the scope of the Convention was limited to matters relating to property rights.

Furthermore, this system is the opposite of that adopted in numerous conventions, according to which foreign judgments are recognized only if they fulfil a certain number of conditions. Under Article 26 there is a presumption in favour of recognition, which can be rebutted only if one of the grounds for refusal listed in Article 27 is present.

The second rule concerns the case where the recognition of a judgment is itself the point at issue, there being no other proceedings involved and no question of enforcement. For example, a negotiable instrument is declared invalid in Italy by reason of fraud. The negotiable instrument is presented to a bank in Belgium. Reliance is placed on the Italian judgment. The bank is faced with two contradictory instruments. The Italian judgment would normally have to be recognized, but it may be that one of the grounds for refusal set out in Article 27 applies. In the event of a dispute it is hardly the task of the bank to decide on the grounds for refusal, and in particular on the scope of Belgian 'international public policy'. The second rule of Article 26 offers a solution in cases of this kind. It allows the party seeking recognition to make use of the simplified procedure provided by the Convention for enforcement of the judgment. There is thus unification at the stage of recognition not only of the legal or administrative procedures which govern this matter in a number of States, but also in those countries which, like Belgium, do not allow actions for a declaration that a judgment is not to be recognized. Only the party seeking recognition may make use of this simplified procedure, which was evolved solely to promote the enforcement of judgments, and hence their recognition. It would moreover be difficult to apply the procedure laid down if the party opposing recognition could also avail himself of it; the latter will have to submit his claims in accordance with the ordinary rules of the internal law of the State in which recognition is sought.

The third rule concerns the case where recognition of a judgment is raised as an incidental question in the course of other proceedings. To simplify matters, the Committee provided that the court entertaining the principal proceedings shall also have jurisdiction on the question of recognition.

It will immediately be noticed that two conditions which are frequently inserted in enforcement treaties are not referred to in the Convention: it is not necessary that the foreign judgment should have become *res judicata* (1), and the jurisdiction of the court which gave the original judgment does not have to be verified by the court of the State in which the recognition is sought unless the matter in question falls within the scope of Sections 3, 4 or 5 of Title II.

Article 27

Public policy

Recognition may be refused if it is contrary to public policy in the State in which the recognition is sought. In the opinion of the Committee this clause ought to operate only in exceptional cases. As has already been shown in the commentary on Article 4, public policy is not to be invoked as a ground for refusing to recognize a judgment given by a court of a Contracting State which has based its jurisdiction over a defendant domiciled outside the Community on a provision of its internal law, such as the provisions listed in the second paragraph of Article 3 (Article 14 of the French Civil Code, etc.).

Furthermore, it follows from the last paragraph of Article 27 that public policy is not to be used as a means of justifying refusal of recognition on the grounds that the foreign court applied a law other than that laid down by the rules of private international law of the court in which the recognition is sought.

The wording of the public policy provision is similar to that adopted in the most recent conventions (2), in that it is made clear that there are grounds for refusal, not of the foreign judgment itself, but if recognition of it is contrary to public policy in the State in which the recognition is sought. It is no part of the duty of the court seised of the matter to give an opinion as to whether the foreign judgment is, or is not, compatible with the public policy of its country. Indeed, this might be taken as criticism of the judgment. Its duty is rather to verify whether recognition of the judgment would be contrary to public policy.

Safeguarding the rights of the defendant

Where judgment is given in default of appearance, recognition must be refused if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence. Where judgment is given abroad in default of appearance, the Convention affords the defendant double protection.

First, the document must have been duly served. In this connection reference must be made to the internal law of the State in which the judgment was given, and to the international conventions on the service abroad of judicial instruments. Thus, for example, a German court in which recognition of a Belgian judgment given in default of appearance against a person who is in Germany is sought could, on the basis of the Agreement between Belgium and Germany of 25 April 1959, which was entered into to simplify application of the Hague Convention of 1 March 1954 on civil procedure, refuse recognition if the document instituting the proceedings was sent from Belgium to Germany by registered post, since the Federal Republic of Germany does not permit this method of transmitting documents.

Secondly, even where service has been duly effected, recognition can be refused if the court in which recognition is sought considers that the document was not served in sufficient time to enable the defendant to arrange for his defence.

Looking at the second paragraph of Article 20, which lays down that the court of the State in which judgment is given must stay the proceedings if the document instituting the proceedings was not served on the defendant in sufficient time, it might be assumed that Article 27 (2) would apply only in exceptional cases. It must not be forgotten, however, that the second

(1) The condition of *res judicata* is required by the Conventions between Germany and Italy, France and Italy, and Italy and the Netherlands. It is not required in the Conventions between Belgium and the Netherlands, Belgium and Italy, Germany and Belgium and Germany and the Netherlands, in the Benelux Treaty, or in the application of the Convention between France and Belgium, in spite of the wording of this last Convention (Article 11 (2)).

(2) Conventions between Germany and Belgium, Italy and Belgium; Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters.

paragraph of Article 20 requires the court of the State in which judgment is given to stay proceedings only where the defendant is domiciled in another Contracting State.

Incompatibility with a judgment already given in the State in which recognition is sought

There can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments (1).

The case where a foreign judgment is irreconcilable with a judgment given by a national court is, in the existing conventions, either treated as a matter of public policy (2), as in the Convention between France and Belgium, the Benelux Treaty and the Convention between Belgium and Germany, or is regulated by a special provision.

In the opinion of the Committee, to treat this as a matter of public policy would involve the danger that the concept of public policy would be interpreted too widely. Furthermore, the Italian courts have consistently held that foreign judgments whose recognition is sought in Italy and which conflict with an Italian judgment do not fall within the scope of public policy. This is why the enforcement conventions concluded by Italy always contain two provisions, one referring to public policy, which serves the purpose of providing a safeguard in exceptional cases, and the other whereby the judgment must not conflict with an Italian judgment already given, or be prejudicial to proceedings pending in an Italian court (3).

There are also several other conventions which contain a clause providing for refusal of recognition of a judgment which conflicts with another judgment already given by the courts of the State in which recognition is sought.

In certain conventions, the judgment given in the State in which recognition is sought has to have become *res judicata* (4), in others it is sufficient for the judgment to be final and conclusive at that stage of procedure (5), and finally there are some which do not regulate the point (6).

The Committee preferred a form of wording which does not decide whether the judgment should have become *res judicata* or should merely be final and conclusive, and left this question to the discretion of the court in which recognition is sought.

The Committee also considered that, for refusal of recognition, it would be sufficient if the judgment whose recognition was sought were irreconcilable with a judgment given between the same parties in the State in which recognition was sought. It is therefore not necessary for the same cause of action to be involved. Thus, for example, a French court in which recognition of a Belgian judgment awarding damages for failure to perform a contract is sought will be able to refuse recognition if a French court has already given judgment in a dispute between the same parties declaring that the contract was invalid.

The form of words used also covers the situation referred to in Article 5 (3) (c) of the Hague Convention on the recognition and enforcement of foreign judgments, under which recognition may be refused if the proceedings which gave rise to the judgment whose recognition is sought have already resulted in a judgment which was given in a third State and which would be entitled to recognition and enforcement under the law of the State in which recognition is sought.

It is to be anticipated that the application of the provisions of Title II regarding *lis pendens* and related actions will greatly reduce the number of irreconcilable judgments.

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(1) NIBOYET, Traité de droit international privé français, Paris 1949, Vol. VI, No 2028.

(2) BATIFFOL, Traité élémentaire de droit international privé, Paris 1959, No 761: '... any judgment which is irreconcilable with a French judgment previously given is contrary to public policy. This rule holds good even if the judgment is not final' (Civ. 23 March 1936, Sirey 1936.1.175, R.1937–198); Riezler, *op. cit.* pp. 521 and 547.

(3) Conventions between Germany and Italy, Article 4; between France and Italy, Article 1 (5); between Belgium and Italy, Article 1 (4); and between the Netherlands and Italy, Article 1 (3).

(4) Hague Convention on the jurisdiction of the contractual forum in matters relating to the international sales of goods, Article 5 (3).

(5) Conventions between France and the United Kingdom, Article 3 (1) (a); between the United Kingdom and Belgium, Article 3 (1) (a); between France and Germany on the Saar, Article 30 (I) (d); between Austria and Belgium on maintenance, Article 2 (2) (b); between Austria and Belgium (general), Article 2 (2) (b).

(6) Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, Article 2 (4), and the Conventions concluded by Italy. Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (Article 5).

PRELIMINARY QUESTIONS

Recognition is not to be refused on the sole ground that the court which gave the original judgment applied a law other than that which would have been applicable under the rules of private international law of the State in which recognition is sought. However, the Convention makes an exception for preliminary questions regarding the status or legal capacity of natural persons, rules governing rights in property arising out of a matrimonial relationship, wills and succession, unless the same result would have been reached by the application of the rules of private international law of the State in which recognition is sought.

The Convention between Belgium and Germany contains a rule which is similar, but confined to cases where the judgment concerns a national of the State in which it is sought to give effect to that judgment. It is pointed out in the report of the negotiators of that Convention that this exception is justified by the fact that States reserve to themselves the right to regulate the status of their nationals. The wording used is similar to that of Article 7 of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters.

Article 28

The very strict rules of jurisdiction laid down in Title II, and the safeguards granted in Article 20 to defendants who do not enter an appearance, make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given.

The absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed that that court correctly applied the rules of jurisdiction of the Convention. The absence of any review as to whether the court in which the judgment was given had jurisdiction avoids the possibility that an alleged failure to comply with those rules might again be raised as an issue at the enforcement stage. The only exceptions concern, first, the matters for which Title II lays down special rules of jurisdiction (insurance, instalment sales and loans) or exclusive rules, and which, as has been shown, are in the six countries either of a binding character or matters of public policy, and, secondly, the case provided for in Article 59; reference should be made to the commentary on that Article.

The second paragraph contains a provision which is already included in a number of conventions (Convention between Germany and Belgium; Hague Convention, Article 9) and avoids recourse to time-wasting duplication in the exceptional cases where re-examination of the jurisdiction of the court of origin is permitted.

The last paragraph of Article 28 specifies that the rules of jurisdiction are not matters of public policy within the meaning of Article 27; in other words, public policy is not to be used as a means of justifying a review of the jurisdiction of the court of origin (1). This again reflects the Committee's desire to limit so far as possible the concept of public policy.

REVIEW AS TO SUBSTANCE

Article 29

It is obviously an essential provision of enforcement conventions that foreign judgments must not be reviewed.

The court of a State in which recognition of a foreign judgment is sought is not to examine the correctness of that judgment; 'it may not substitute its own discretion for that of the foreign court (2) nor refuse recognition' if it considers that a point of fact or of law has been wrongly decided (3).

STAY OF PROCEEDINGS

Article 30

Article 30 postulates the following situation: a party may, in the course of litigation, wish to plead a judgment which has been given in another Contracting State but has not yet become *res judicata*. In order to remedy the inconvenience which would result if such judgment were reversed, Article 30 allows the court to stay the proceedings upon the principal issue of which it

(1) For a similar provision, see Article 13 (2) of the Benelux Treaty.

(2) P. GRAULICH, Principes de droit international privé. Conflits de lois. Conflits de juridictions. No 254.

(3) BATIFFOL, Traité élémentaire de droit international privé, No 763.

is seised, until the foreign judgment whose recognition is sought has become *res judicata* in the State in which it was given.

This power does not prevent the court from examining, before staying the proceedings, whether the foreign judgment fulfils the conditions for recognition laid down in Article 27.

Section 2

Enforcement

(a) **Preliminary remarks**

As has already been shown, the Committee endeavoured to give the Convention a progressive and pragmatic character by means of rules of jurisdiction which break new ground as compared with the enforcement conventions concluded hitherto.

This means, of course, that at the enforcement stage solutions must be found which follow from the rules of jurisdiction.

The progress achieved by Title II of the Convention would be rendered nugatory if a party seeking enforcement in a Contracting State of a judgment given in his favour were impeded by procedural obstacles.

The aim of Title II of the Convention is to strengthen the role of the court of the State in which the judgment was given. It must not be forgotten that that court must declare that it does not have jurisdiction if there are rules of exclusive jurisdiction which give jurisdiction to the courts of another State (Article 19); the court must also declare that it does not have jurisdiction, in cases where the defendant does not enter an appearance, if its jurisdiction is not derived from the Convention (first paragraph of Article 20).

Moreover, the court must stay the proceedings in the absence of proof that the defendant has been able to arrange for his defence (second paragraph of Article 20).

This role, as set out in Title II, is thus of prime importance.

If follows that the intervention of the court in which enforcement is sought is more limited than is usual under enforcement conventions. That court has in practice only two points to examine: public policy and whether the defendant has had the opportunity of defending himself. The other reasons for refusal — conflicting judgments, preliminary questions, review of jurisdiction in relation to certain specific topics — can, in fact, be regarded as akin to public policy. Since, moreover, the Convention is confined to matters relating to property rights, public policy will only very seldom have any part to perfom.

This limitation on the powers of the court in which enforcement is sought led to a simplification of the enforcement procedure. Furthermore, as the position of the defendant in the original proceedings is well protected, it is proper that the applicant for enforcement be enabled to proceed rapidly with all the necessary formalities in the State in which enforcement is sought, that he be free to act without prior warning and that enforcement be obtained without unnecessary complications.

The Committee discussed the enforcement procedure at length before adopting it. There were several possibilities open to it: reference back to national laws but subject to certain rules of the Convention, ordinary contentious procedure, summary contentious procedure or *ex parte* application.

Each of these solutions had its advantages and disadvantages. The Committee finally adopted a system for the whole Community based on *ex parte* application. This rapid and simple procedure will apply in all six States.

This uniform solution has the advantage of creating a proper balance as between the various provisions of the Convention: uniform rules of jurisdiction in the six countries and identical procedures for enforcement.

(b) **Conditions for enforcement**

As has been shown, the Convention is based on the principle that a foreign judgment is presumed to be in order. It must, in principle, be possible to enforce it in the State in which enforcement is sought. Enforcement can be refused only if there is a ground for refusing recognition [1]. The foreign judgment must, however, be enforceable in the State in which it was given in order to be enforceable in the State in which enforcement is sought.

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[1] On the disadvantages resulting from a difference between the conditions for recognition and for enforcement, see RIGAUX, *op. cit.*, p. 207, No 39.

If a judgment from which an appeal still lies or against which an appeal has been lodged in the State in which it was given cannot be provisionally enforced in that State, it cannot be enforced in the State in which enforcement is sought. It is an essential requirement of the instrument whose enforcement is sought that it should be enforceable in the State in which it originates. As Niboyet points out, there is no reason for granting to a foreign judgment rights which it does not have in the country in which it was given (1).

Under no circumstances may a foreign judgment be reviewed as to its substance (Article 34).

(c) **Enforcement procedure**

Before examining the Articles of the section on enforcement it seems appropriate to give on outline of the procedure which will be applicable in the six States.

1. The application, accompanied by the documents required under Articles 46 and 47, must be submitted to the authority specified in Article 32. The procedure for making the application is governed by the law of the State in which enforcement is sought.

   The applicant must give an address for service of process or appoint a representative *ad litem* in the jurisdiction of the court applied to.

2. The court applied to must give its decision without delay, and is not able to summon the other party. At this stage no contentious proceedings are allowed.

The application may be refused only for one of the reasons specified in Articles 27 and 28.

3. If enforcement is authorized:

   (a) the party against whom enforcement is sought may appeal against the decision within one month of service of the decision (Article 36);

   (b) the appeal must be lodged, in accordance with the rules governing procedure in contentious matters, with the court specified in Article 37;

   (c) if an appeal has been lodged against the foreign judgment in the State in which it was given, or if the time for such an appeal has not yet expired, the court seised of the appeal against the decision authorizing enforcement may stay the proceedings or make enforcement conditional on the provision of security (Article 38);

   (d) the judgment given on the appeal against the decision authorizing enforcement may not be contested by an ordinary appeal. It may be contested only by an appeal in cassation (2) (Article 37);

   (e) during the time specified for an appeal against the decision authorizing enforcement, the applicant may take only protective measures; the decision authorizing enforcement carries with it the power to proceed to such measures (Article 39).

4. If enforcement is refused:

   (a) the applicant may appeal to the court specified in Article 40;

   (b) the procedure before that court is contentious, the other party being summoned to appear (Article 40);

   (c) the judgment given on this appeal may be contested only by an appeal in cassation (2) (Article 41).

Article 31

Under this Article 'a judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there'.

As can be seen, this provision is almost identical with that contained in the European Convention providing a uniform law on arbitration (3). The Committee did, in fact, take the view that judgments given in one

(1) NIBOYET, Droit international privé français. Vol VI, No 1974.

(2) In the Federal Republic of Germany by a 'Rechtsbeschwerde'.

(3) European Convention providing a uniform law on arbitration, Strasbourg, 20 January 1966. Article 29 of Annex I: 'An arbitral award may be enforced only when it can no longer be contested before arbitrators and when an enforcement formula has been apposed to it by the competent authority on the application of the interested party.'

Contracting State should be enforceable in any other Contracting State as easily as arbitral awards.

The legal systems of the Member States are already familiar with authorization of enforcement by means of an enforcement order. This is so, for example, in the case of judgments and decisions given by the European Community institutions (Article 92 of the ECSC Treaty, Article 192 of the EEC Treaty, Article 164 of the Euratom Treaty). It is also true of judgments and decisions falling within the scope of the Mannheim Convention [1].

The Convention of 30 August 1962 between Germany and the Netherlands also provides that judgments given in one of the two States are to be enforced in the other if enforcement is authorized by means of an enforcement order.

A rule similar to that in Article 31, that is to say an *ex parte* procedure, was contained in the Franco-German Treaty on the Saar of 27 October 1956. Business circles in the Saar have said that the rule has proved entirely satisfactory.

About 80% of enforcement proceedings have been successfully completed by means of the first *ex parte* written phase of the procedure. In the majority of cases, judgment debtors have refrained from contesting the proceedings by means of an appeal. This is easily explained by the fact that cases of refusal of enforcement are exceptional, and the risk of having to bear the costs of the proceedings restrains the judgment debtor, unless he feels certain of winning his case.

Article 31 does not purport to determine whether it is the judgment given in the State of origin, or the decision authorizing the issue of the enforcement order, which is enforceable in the State in which enforcement is sought.

The expression 'on the application of any interested party' implies that any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order for its enforcement.

Article 32

Article 32 specifies the authority in each of the Contracting States to which the application must be submitted and which will have jurisdiction. It was considered to be in the interests of the parties that each relevant authority be indicated in the Convention itself.

The court to which local jurisdiction is given is that for the place of domicile of the party against whom enforcement is sought, or, if that party is not domiciled in the State in which enforcement is sought, the court for the place of enforcement, that is, where the judgment debtor has assets. The jurisdiction of the court for the place of enforcement is thus of minor importance.

The provision requiring applications to be submitted to the court for the place where the judgment debtor is domiciled was included for the following reason. It is quite possible that in the State in which enforcement is sought the judgment debtor may possess property situated in the jurisdiction of different courts. If jurisdiction had been given only to the court for the place of enforcement, a choice between several courts would have been open to the applicant. Thus an applicant who was unsuccessful in one court could, instead of availing himself of the methods of appeal provided for in the Convention, have applied to another court which would not necessarily have come to the same decision as the first court, and this without the knowledge of the other party, since the procedure is *ex parte*.

Article 33

Under Article 33, the procedure and formalities for making the application are to be governed by the law of the State in which enforcement is sought.

Reference must therefore be made to the national laws for the particulars which the application must contain, the number of copies which must be submitted to the court, the authority to which the application must be submitted, also, where necessary, the language in which it must be drawn up, and whether a lawyer should be instructed to appear.

The provisions to which reference must be made are the following:

Belgium:
The matter will be governed by the Judicial Code (see Articles 1025 and 1027);

Federal Republic of Germany, Netherlands and Italy:
The question will be governed by the law implementing the Convention;

France:
Code of Civil Procedure, Article 1040;

[1] Revised Convention for the Navigation of the Rhine signed at Mannheim on 17 October 1868.

Luxembourg:
A lawyer must be instructed in accordance with the general law under which no one can officially address the court except through an *avoué*. Article 856 or Article 512 of the Code of Civil Procedure is generally invoked in support of this proposition.

The application must be accompanied by the documents required to be produced under Articles 46 and 47.

In the view of the Committee, if the applicant does not produce the required documents, enforcement should not be refused, but the court may stay the proceedings and allow the applicant time to produce the documents. If the documents produced are not sufficient and the court cannot obtain sufficient information, it may refuse to entertain the application.

Finally, the applicant must, in accordance with the law of the State in which enforcement is sought, either give an address for service of process or appoint a representative *ad litem* within the area of jurisdiction of the court applied to. This provision is important in two respects: first for communicating to the applicant the decision given on the application (Article 35), and secondly in case the party against whom enforcement is sought wishes to appeal, since such an appeal must be lodged 'in accordance with the rules governing procedure in contentious matters' (Article 37).

The respondent must therefore summon the applicant to appear; the furnishing of an address for service or the appointment of a representative enables the summons to be served rapidly, in accordance with the law of the country in which enforcement is sought, without risk of error and without all the hazards connected with the service of legal documents abroad. It will in fact usually happen that the applicant is domiciled outside the State in which enforcement is sought.

The appointment of a representative *ad litem* has been provided for because the furnishing of an address for service is unknown in German law.

The two methods will, of course, produce the same result.

Article 34

Article 34 provides that the court applied to shall give its decision without delay; 'the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.'

The Committee considered but rejected the idea of imposing on the court to which application is made a fixed period for giving its decision. Such a time limit is unknown in judicial practice, and there would in any case be no way of enforcing it.

The Convention does not allow the court to which application is made to ask the respondent to make submissions, even in exceptional cases. Such a possibility would have meant that the proceedings were not fully *ex parte*. Certain courts might be inclined to hear the respondent, which would in fact result in the *ex parte* procedure systematically becoming *inter partes*. Moreover, there would be a reduction in the element of surprise which is necessary in an enforcement procedure if the respondent is not to have the opportunity of withdrawing his assets from any measure of enforcement.

The rights of the respondent are safeguarded, since he can institute contentious proceedings by appealing against the decision authorizing enforcement.

As has been shown above, the application may be refused only for one of the reasons specified in Articles 27 and 28, and the foreign judgment may not be reviewed as to its substance. Consequently, fresh claims which have not been submitted to the foreign court are inadmissible; the court seised of the application may authorize or refuse enforcement, but it cannot alter the foreign judgment.

The court may, however, refuse the application if it does not satisfy the requirements of Articles 32 and 33.

Article 35

Article 35 provides that the appropriate officer of the court shall without delay bring the decision given on the application to the notice of the applicant in accordance with the procedure laid down by the law of the State in which enforcement is sought. It is important that the applicant be informed of the decision taken. This demonstrates the value of an address for service or of the appointment of a representative *ad litem*, particularly where the applicant is domiciled abroad.

The manner in which the decision is communicated to the applicant will be a matter for the national law of the State in which enforcement is sought, irrespective of whether enforcement is authorized or refused.

Article 36

If enforcement is authorized, the decision must be notified to the party against whom enforcement has been granted. That party may appeal against the decision from the time it is served on him. As regards the period within which an appeal may be lodged and the moment from which it begins to run, Article 36 makes a distinction between the following situations:

(a) if the party is domiciled in the State in which the decision was given, the period is one month; the moment from which time begins to run is determined by the law of that State, from which there is no reason to derogate;

(b) if the party is domiciled in another Contracting State, the period is two months, and runs from the date when the decision was served, either on him in person or at his residence (1).

In France and the Netherlands, the day of delivery to the prosecutor's office is not counted for purposes of computation of time. In Belgium, the day of delivery to the postal authorities is not counted (Article 40 of the Judicial Code), nor is the day on which an instrument is dispatched by a Belgian Consul to a foreign authority (2).

The purpose of this rule, which derogates from some national laws, is to protect the respondent and to prevent his being deprived of a remedy because he had not been informed of the decision in sufficient time to contest it.

No extension of time may be granted on account of distance, as the time allowed is sufficient to enable the party concerned to contest the decision, if he is so minded;

(c) if the party is domiciled outside the Community, the period within which an appeal may be lodged runs from the date when the decision is served or is deemed to have been served according to the law of the State in which the decision was given. In this case the period of one month may be extended on account of distance in accordance with the law of that State.

Computation of time is governed by the internal law of the State in which the decision was given.

(1) Service on a party at his residence means delivering the instrument to a person who is present and empowered by law to receive a copy of the instrument or, if there is no such person, to a competent authority.

(2) Belgian Court of Cassation, 4 March 1954; Revue des huissiers de Belgique, May to June 1954, p. 15.

Article 37

Article 37 specifies for each country the court with which an appeal can be lodged.

In that court the proceedings are contentious. Accordingly it is incumbent upon the person against whom enforcement has been authorized to summon the other party to appear.

The court seised of the appeal will have to examine whether it was properly lodged and will have to decide upon the merits of the appeal, taking account of the additional information supplied by the appellant. It will therefore be open to the appellant to establish, in the case of a judgment originally given in default of appearance, that the rights of the defendant were disregarded, or that a judgment has already been given in a dispute between the same parties in the State in which enforcement is sought which is irreconcilable with the foreign judgment. The appellant may also plead Article 38 if he has lodged an appeal against the judgment whose enforcement is sought in the State in which it was given.

It is no part of the duty of the court with which the appeal against the decision authorizing enforcement is lodged to review the foreign judgment as to its substance. This would be contrary to the spirit of the Convention. The appellant could, however, effectively adduce grounds which arose after the foreign judgment was given. For example, he may establish that he has since discharged the debt. As Batiffol points out, such grounds are admissible in enforcement proceedings (3) (4).

The second paragraph of Article 37 provides that the judgment given on the appeal may be contested only by an appeal in cassation and not by any other form of appeal or review.

This rule was requisite for the following reasons. First, the grounds for refusing enforcement are very limited and involve public policy in the State in which enforcement is sought. No useful purpose is served by further argument on this concept. Next, the situation is different from that in which purely national proceedings are involved. The proceedings on the merits of the case itself have already taken place in the State in which the judgment was given, and the Convention in no way

(3) BATIFFOL, *op. cit.*, p. 863, note 57.

(4) For the Federal Republic of Germany, see Article 767 of the Code of Civil Procedure; see also BAUMBACH-LAUTERBACH, Zivilprozeßordnung, paragraph 723, note 1.

interferes with the rights of appeal. It is true that the Convention applies to judgments which are enforceable only provisionally, but in this case the court with which the appeal is lodged may, as provided in Article 38, stay the proceedings. An excessive number of avenues of appeal might be used by the losing party purely as delaying tactics, and this would constitute an obstacle to the free movement of judgments which is the object of the Convention.

Since appeals in cassation are unknown in the Federal Republic of Germany, it has been provided, in order to establish a certain parity amongst the Contracting States, that an appeal on a point of law (Rechtsbeschwerde) shall lie against a judgment of the Court of Appeal (Oberlandesgericht).

Article 38

Article 38 covers cases where an ordinary appeal has been lodged against the judgment in the State in which that judgment was given, and also cases where the period within which such an appeal may be lodged has not yet expired. The court with which the appeal against enforcement under the first paragraph of Article 37 is lodged may either stay the proceedings, authorize enforcement, make enforcement conditional on the provision of such security as it thinks fit, or specify the time within which the defendant must lodge his appeal.

This provision originates in the Convention between Germany and Belgium (Article 10), and its 'object is to protect the judgment debtor against any loss which could result from the enforcement of a judgment which has not yet become *res judicata* and may be amended' (1).

Article 38 deals only with judgments which, notwithstanding that they may be appealed against, are enforceable in the State in which they were given.

Only the court seised of the appeal has the power to stay the proceedings, and such a stay can be granted only on the application of the party against whom enforcement is sought. This is because that party does not appear at the first stage of the proceedings and cannot be required to do so.

(1) Convention between Germany and Belgium. See Report of the negotiators.

Article 39

Article 39 contains two very important rules. First it provides that during the time specified for the lodging of an appeal the applicant for enforcement may take no enforcement measures other than protective measures — namely those available under the law of the State in which enforcement is sought. Similarly, if an appeal has actually been lodged, this rule applies until the appeal has been determined. Secondly it provides that the decision authorizing enforcement carries with it the power to proceed to any such protective measures. Article 39 also allows the judgment creditor in certain States, for example in the Federal Republic of Germany, to initiate the first phase of the enforcement of the foreign instrument. The object of this provision is to ensure at the enforcement stage a balance between the rights and interests of the parties concerned, in order to avoid either of them suffering any loss as a result of the operation of the rules of procedure.

On the one hand, an applicant who, in consequence of a foreign judgment, is in possession of an enforceable instrument, must be able to take quickly all measures necessary to prevent the judgment debtor from removing the assets on which execution is to be levied. This is made possible by the *ex parte* procedure and by the provision in Article 39 that the decision authorizing enforcement carries with it the power to proceed to such protective measures. The power arises automatically. Even in those States whose law requires proof that the case calls for prompt action or that there is any risk in delay the applicant will not have to establish that either of those elements is present; power to proceed to protective measures is not a matter for the discretion of the court.

On the other hand, the fact that the enforcement procedure is *ex parte* makes it essential that no irreversible measures of execution can be taken against the defendant. The latter may be in a position to establish that there are grounds for refusal of enforcement; he may, for example, be able to show that the question of public policy was not examined in sufficient detail. To safeguard his rights it accordingly appeared to be necessary to delay enforcement, which is usually carried out by sequestration of the movable and immovable property of the defendant, until the end of the time specified for appeal (see Article 36) or, if an appeal is actually lodged, until it has been determined. In other words, this is a counterbalance to the *ex parte* procedure; the effect of the decision authorizing enforcement given pursuant to Article 31 is limited in that during the time specified for an appeal, or if an appeal has been lodged, no enforcement measures can be taken on the basis of that decision against the assets of the judgment debtor.

Articles 40 and 41

These Articles relate to the case where an application for enforcement is refused.

Article 40 provides that the applicant may appeal to the appeal court which has jurisdiction in the State in which enforcement is sought.

The Committee did not think it necessary that the Convention should fix the period within which appeals would have to be lodged. If the applicant has had his application refused, it is for him to give notice of appeal within such time as he considers suitable. He will have regard, no doubt, to the length of time it will take him to assemble all the relevant documents.

Upon appeal the proceedings are contentious, since the party against whom enforcement is sought is summoned to appear. The *inter partes* procedure is necessary in order to avoid numerous appeals. If the procedure on appeal had remained *ex parte*, it would have been essential to provide for additional proceedings to enable the defendant to make his submissions if the appellate court were to reverse the decision at first instance and authorize enforcement. The Committee wished to avoid a plethora of appeals. Moreover, the dismissal of the application reverses the presumption of validity of the foreign judgment.

The summoning of the party against whom enforcement is sought is to be effected in manner prescribed by the national laws.

The appellate court can give judgment only if the judgment debtor has in fact been given an opportunity to make his submissions. The object of this provision is to protect the rights of the defendant and to mitigate the disadvantages which result from certain systems of serving instruments abroad. These disadvantages are all the more serious in that a party against whom enforcement is sought and who is not notified in time to arrange for his defence no longer has any judicial remedy against the judgment given on the appeal other than by way of an appeal in cassation, and then only to the extent that this is allowed by the law of the State in which enforcement is sought (Article 41).

Because of the safeguards contained in Article 40, Article 41 provides that the judgment given on the appeal may not be contested by an ordinary appeal, but only by an appeal in cassation. The reason why a special form of appeal (Rechtsbeschwerde) is provided for in the Federal Republic of Germany has already been explained (Article 37).

The procedure for the forms of appeal provided for in Articles 40 and 41 is to be determined by the national laws which may, where necessary, prescribe time limits.

Article 42

Article 42 covers two different situations.

The first paragraph of Article 42 empowers the court of the State in which enforcement is sought to authorize enforcement in respect of certain matters dealt with in a judgment and to refuse it in respect of others (1). As explained in the report annexed to the Benelux Treaty, which contains a similar provision, 'this discretion exists in all cases where a judgment deals with separate and independent heads of claim, and the decision on some of these is contrary to the public policy of the country in which enforcement is sought, while the decision on others is not.'

The second paragraph of Article 42 allows an applicant to request the partial enforcement of a judgment, and *ex hypothesi* allows the court addressed to grant such a request. As mentioned in the report on the Benelux Treaty, 'it is possible that the applicant for enforcement himself wants only partial enforcement, e. g. where the judgment whose enforcement is sought orders the payment of a sum of money, part of which has been paid since the judgment was given.' (2).

As is made clear in the Conventions between Germany and Belgium, and between Belgium and Italy, which contain similar provisions, the applicant may exercise this option whether the judgment covers one or several heads of claim.

Article 43

Article 43 relates to judgments which order a periodic payment by way of a penalty. Some enforcement conventions contain a clause on this subject (see Benelux Treaty, Article 14; Convention between Germany and the Netherlands, Article 7).

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(1) See Benelux Treaty (Articles 14 (4)); the Conventions between France and Italy (Article 3); between Italy and the Netherlands (Article 3); between Germany and Belgium (Article 11); between Belgium and Italy (Article 10) and between Germany and the Netherlands (Article 12).

(2) See also the Conventions between Germany and Belgium (Article 11) and between Belgium and Italy (Article 10).

It follows from the wording adopted that judgments given in a Contracting State which order the payment of a sum of money for each day of delay, with the intention of getting the judgment debtor to fulfil his obligations, will be enforced in another Contracting State only if the amount of the payment has been finally determined by the courts of the State in which judgment was given.

Article 44

Article 44 deals with legal aid.

A number of enforcement conventions deal with this matter (1).

The provisions adopted by the Committee supplements the Hague Convention of 1 March 1954 on civil procedure, which has been ratified by the six States, so that a party who has been granted legal aid in the State in which judgment was given also qualifies automatically for legal aid in the State in which enforcement is sought, but only as regards the issuing of the order for enforcement. Thus the automatic extension of legal aid achieved by the Convention does not apply in relation to enforcement measures or to proceedings arising from the exercise of rights of appeal.

The reasoning underlying Article 44 is as follows.

First, as maintenance obligations fall within the scope of the Convention, consideration was given to the humanitarian issues which were the basis for a similar provision in the 1958 Hague Convention.

Above all it must not be forgotten that if a needy applicant were obliged, before making his application for enforcement, to institute in the State in which enforcement is sought proceedings for recognition of the decision granting him legal aid in the State in which the judgment was given, he would be in a less favourable position than other applicants. He would in particular not have the advantage of the rapidity of the procedure and the element of surprise which Title III is designed to afford to any party seeking the enforcement of a foreign judgment.

It is moreover because of this consideration that the automatic extension of legal aid has been limited to the procedure for issuing the order for enforcement, and has not been extended to the proceedings on appeal. Once these proceedings have been set in motion, the applicant for enforcement, or, in case of appeal, the respondent, may, in accordance with the 1954 Hague Convention, take the necessary steps, in the State in which enforcement is sought, to obtain legal aid, in the same way as nationals of that State.

Under Article 47 (2) an applicant must, on making his application, produce documents showing that he is in receipt of legal aid in the State in which judgment was given.

Article 45

This Article deals with security for costs. A similar rule is included in the Hague Convention of 1 March 1954 but as regards the obligation to provide security it exempts only nationals of the Contracting States who are also domiciled in one of those States (Article 17). Under Article 45, any party, irrespective of nationality or domicile, who seeks enforcement in one Contracting State of a judgment given in another Contracting State, may do so without providing security. The two conditions — nationality and domicile — prescribed by the 1954 Convention do not apply.

The Committee considered that the provision of security in relation to proceedings for the issuing of an order for enforcement was unnecessary.

As regards the proceedings which take place in the State in which judgment was given, the Committee did not consider it necessary to depart from the rules of the 1954 Convention.

Section 3

Common provisions

This Section deals with the documents which must be produced when application is made for the recognition or enforcement of a judgment.

Article 46 applies to both recognition and enforcement. Article 47 applies only to applications for enforcement. It should be noted that at the recognition stage there is no reason to require production of the documents referred to in Article 47.

(1) Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (Article 9); Conventions between Italy and the Netherlands (Article 6) and between Germany and the Netherlands (Article 15).

Article 47 (1) provides for the production of documents which establish that the judgment is enforceable in the State in which it was given. The requirement that the judgment be, in law, enforceable in that State applies only in relation to its enforcement (not to its recognition) abroad. (Article 31).

Article 47 (2), which relates to documents showing that the applicant is receiving legal aid in the State in which judgment was given, is also relevant only in enforcement proceedings. The documents are in fact intended to enable a party receiving legal aid in the State in which judgment was given to qualify for it automatically in the proceedings relating to the issue of the order for enforcement (Article 44). However, recognition requires no special procedure (Article 26). If recognition were itself the principal issue in an action, Article 44 and, consequently, Article 47 (2) would apply, since Article 26 refers to Sections 2 and 3 of Title III.

Under Article 46 (1), a copy of the judgment which satisfies the conditions necessary to establish its authenticity must be produced, whether it is recognition or enforcement which is sought.

This provision is found in all enforcement treaties and does not require any special comment. The authenticity of a judgment will be established in accordance with the maxim *locus regit actum;* it is therefore the law of the place where the judgment was given which prescribes the conditions which the copy of the judgment must satisfy in order to be valid [1].

Under Article 46 (2), if the judgment was given in default, a document which establishes that the party in default was served with the document instituting the proceedings must also be produced.

The court in which recognition or enforcement is sought must, if the foreign judgment was given in default, be in a position to verify that the defendant's right to defend himself was safeguarded.

Article 47 provides that the following documents must be produced:

(a) documents which establish that the judgment is enforceable according to the law of the State in which it was given. This does not mean that a separate document certifying that the judgment has become enforceable in that State is necessarily required. Thus, in France, 'provisional enforceability' would be deduced from an express reference to it in judgments given pursuant to Article 135a of the Code of Civil Procedure. Decisions given in summary proceedings will be provisionally enforceable (Article 809 of the Code of Civil Procedure); and so will decisions in *ex parte* proceedings (Article 54 of the Decree of 30 March 1808). But whether other judgments are enforceable can be determined only when the date on which they were given has been considered in relation to the date on which they were served and the time allowed for lodging an appeal [2].

Documents which establish that the judgment has been served will also have to be produced, since some judgments may be enforceable and consequently fall within the scope of the Convention even if they have not been served on the other party. However, before enforcement can be applied for, that party must at least have been informed of the judgment given against him and also have had the opportunity to satisfy the judgment voluntarily;

(b) where appropriate, a document showing, in accordance with the law of the State in which the judgment was given, that the applicant is in receipt of legal aid in that State.

Article 48

In order to avoid unnecessary formalities, this Article authorizes the court to allow time for the applicant to produce the documentary evidence proving service of the document instituting the proceedings, required under Article 46 (2), and the documentary evidence showing that the applicant was in receipt of legal aid in the State in which judgment was given (Article 47 (2)).

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[1] WESER: Traité franco-belge du 8 juillet 1899. Étude critique No 247.

[2] *Belgium:* Judicial Code: see Article 1029 for decisions in *ex parte* proceedings, Article 1039 for decisions in summary proceedings, and Articles 1398 and 1496 for judgments.

Federal Republic of Germany: 'Vollstreckungsklausel' — Under Article 725 of the Code of Civil Procedure, the order for enforcement is worded as follows:
'This copy of the judgment shall be given to ... (name of the party) for the purpose of enforcement.' This order must be added at the end of the copy of the judgment and must be signed by the appropriate officer of the court and sealed with the seal of the court.

Luxembourg: see Articles 135, 136 and 137 of the Code of Civil Procedure, Article 164 for judgments in default, Article 439 for Commercial Courts (tribunaux de commerce) and Article 5 of the Law of 23 March 1893 on summary jurisdiction.

Netherlands: see Articles 339, 350, 430 and 433 of the Code of Civil Procedure, also Articles 82 and 85 of that Code.

The court may dispense with the production of these documents by the applicant (the Committee had in mind the case where the documents had been destroyed) if it considers that it has sufficient information before it from other evidence.

The second paragraph relates to the translation of the documents to be produced. Again with the object of simplifying the procedure, it is here provided that the translation may be certified by a person qualified to do so in any one of the Contracting States.

Article 49

This Article provides that legalization or other like formality is not necessary as regards the documents to be produced and, in particular, that the certificate provided for in the Hague Convention of 5 October 1961 abolishing the requirement of legalization for foreign public documents is not required. The same applies to the document whereby an applicant appoints a representative, perhaps a lawyer, to act for him in proceedings for the issue of an order for enforcement.

CHAPTER VI

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 50

In drawing up rules for the enforcement of authentic instruments, the Committee has broken no new ground. Similar provisions are, in fact, contained in the Conventions already concluded by the six States [1], with the sole exception of the Convention between Germany and Italy.

Since Article 1 governs the whole Convention, Article 50 applies only to authentic instruments which have been drawn up or registered in matters falling within the scope of the Convention.

In order that an authentic instrument which has been drawn up or registered in one Contracting State may be the subject of an order for enforcement issued in another Contracting State, three conditions must be satisfied:

(a) the instrument must be enforceable in the State in which it was drawn up or registered;

(b) it must satisfy the conditions necessary to establish its authenticity in that State;

(c) its enforcement must not be contrary to public policy in the State in which enforcement is sought.

The provisions of Section 3 of Title III are applicable as appropriate. It follows in particular that no legalization or similar formality is required.

Article 51

A provision covering court settlements was considered necessary on account of the German and Netherlands legal systems [2], under German and Netherlands law, settlements approved by a court in the course of proceedings are enforceable without further formality (Article 794 (1) of the German Code of Civil Procedure, and Article 19 of the Netherlands Code of Civil Procedure).

The Convention, like the Convention between Germany and Belgium, makes court settlements subject to the same rules as authentic instruments, since both are contractual in nature. Enforcement can therefore be refused only if it is contrary to public policy in the State in which it is sought.

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[1] Conventions between France and Belgium (Article 16); between Belgium and the Netherlands (Article 16); Benelux Treaty (Article 18); Conventions between Germany and Belgium (Article 14); between Italy and Belgium (Article 13); between Germany and the Netherlands (Article 16); between Italy and the Netherlands (Article 8); and between France and Italy (Article 6).

[2] See the Conventions between Germany and Belgium (Article 14 (1)); between Germany and the Netherlands (Article 16); between Germany and Italy (Article 9); and the Hague Convention on the choice of court (Article 10).

CHAPTER VII

GENERAL PROVISIONS

Article 52

As regards the determination of domicile (Article 52), reference should be made to Chapter IV (A) (3) which deals with the matter.

Article 53

Article 53 provides that, for the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile.

The Convention does not define what is meant by the seat of a legal person or of a company or association of natural or legal persons any more than it defines domicile.

In determining the location of the seat, the court will apply its rules of private international law. The Committee did not think it possible to particularize the concept of seat in any other way, and considered that it could not be achieved by making a reference to Article 52, in view of the different approaches which the various Member States of the Community adopt in this matter. Moreover, the Committee did not wish to encroach upon the work on company law which is now being carried out within the Community.

It did not excape the attention of the Committee that the application of Article 16 (2) of the Convention could raise certain difficulties. This would be the case, for example, where a court in one State ordered the dissolution of a company whose seat was in that State and application was then made for recognition of that order in another State under whose law the location of the company's seat was determined by its statutes, if, when so determined, it was in that other State. In the opinion of the Committee, the court of the State in which recognition were sought would be entitled, under the first paragraph of Article 28, to refuse recognition on the ground that the courts of that State had exclusive jurisdiction.

Article 53 does not deal with the preliminary question of the recognition of companies or other legal persons or associations of natural or legal persons; this must be resolved either by national law or by the Hague Convention of 1 June 1956 on the recognition of the legal personality of companies, firms, associations and foundations (1), pending the entry into force of the Convention which is at present being prepared within the EEC on the basis of Article 220 of the Treaty of Rome.

Article 53 refers to companies or other legal persons and to associations of natural or legal persons; to speak only of legal persons would have been insufficient, since this expression would not have covered certain types of company, such as the 'offene Handelsgesellschaft' under German law, which are not legal persons. Similarly, it would not have been sufficient to speak only of companies, since certain bodies, such as associations and foundations, would then not have been covered by this Convention.

(1) Ratified on 20 April 1966 by Belgium, France and the Netherlands.

CHAPTER VIII

TRANSITIONAL PROVISIONS

Article 54

As a general rule, enforcement treaties have no retroactive effect (1), in order 'not to alter a state of affairs which has been reached on the basis of legal relations other than those created between the two States as a result of the introduction of the Convention' (2).

So far as the author is aware only the Benelux Treaty applies to judgments given before its entry into force.

(1) Conventions between France and Belgium (Article 19); between Belgium and the Netherlands (Article 27); between Germany and Belgium (Article 17); between Germany and Italy (Article 18); between Germany and the Netherlands (Article 20); between Italy and Belgium (Article 17); and between Italy and the Netherlands (Article 16).

(2) See Report of the negotiators of the Convention between Germany and Belgium.

A solution as radical as that of the Benelux Treaty did not seem acceptable. In the first place, the conditions which a judgment must fulfil in order to be recognized and enforced are much stricter under the Benelux Treaty (Article 13) than under the EEC Convention. Secondly, the ease with which recognition and enforcement can be granted under the EEC Convention is balanced by the provisions of Title II which safeguard the interests of the defendant. In particular, those provisions have made it possible, at the stage of recognition or enforcement, to dispense with any review of the jurisdiction of the court of origin (Article 28). But, of course, a defendant in the State in which judgment was originally given will be able to rely on these protective provisions only when the Convention has entered into force. Only then will he be able to invoke the Convention to plead lack of jurisdiction.

Although Article 54 was not modelled on the Benelux Treaty, its effect is not very different.

The rules adopted are as follows:

1. The Convention applies to proceedings which are instituted — and in which, therefore, judgment is given — after the entry into force of the Convention.

2. The Convention does not apply if the proceedings were instituted and judgment given before the entry into force of the Convention.

3. The Convention does apply, but subject to certain reservations, to judgments given after its entry into force in proceedings instituted before its entry into force.

In this case, the court of the State addressed may review the jurisdiction of the court of origin, since the defendant originally had no opportunity to contest that jurisdiction in that court on the basis of the Convention.

Enforcement will be authorized if the jurisdiction of the court of origin:

(i) either was based on a rule which accords with one of the rules of jurisdiction in the Convention; for example, if the defendant was domiciled in the State in which the judgment was given;

(ii) or was based on a multilateral or bilateral convention in force between the State of origin and the State addressed. Thus if, for example, an action relating to a contract were brought in a German court, the judgment given could be recognized and enforced in Belgium if the obligation had been or was to be performed in the Federal Republic since the jurisdiction of the German court would be founded on Article 3 (1) (5) of the Convention between Germany and Belgium.

If the jurisdiction of the court of origin is founded on one of those bases, the judgment must be recognized and enforced, provided of course that there is no ground for refusal under Article 27 or 28. Recognition will be accorded without any special procedure being required (Article 26); enforcement will be authorized in accordance with the rules of Section 2 of Title III, that is to say, on *ex parte* application.

It follows from Article 54, which provides that the Convention applies only to legal proceedings instituted after its entry into force, that the Convention will have no effect on proceedings in progress at the time of its entry into force. If, for example, before the entry into force of the Convention, proceedings were instituted in France in accordance with Article 14 of the Civil Code against a person domiciled in another Contracting State, that person could not plead the Convention for the purpose of contesting the jurisdiction of the French court.

CHAPTER IX

RELATIONSHIP TO OTHER INTERNATIONAL CONVENTIONS

Title VII deals with the relationship between the Convention and other international instruments governing jurisdiction, recognition and the enforcement of judgments. It covers the following matters:

1. the relationship between the Convention and the bilateral agreements already in force between certain Member States of the Community (Article 55 and 56) (1):

2. the relationship between the Convention and those international agreements which, in relation to particlar matters, govern — or will govern — jurisdiction and the recognition or enforcement of judgments (Article 57);

3. the relationship between the Convention and the Convention of 15 June 1869 between France and Switzerland, which is the only enforcement convention concluded between a Member State of the EEC and a non-member State to contain rules of direct jurisdiction (Article 58);

4. the relationship between the Convention and any other instruments, whether bilateral or multilateral, which may in the future govern the recognition and enforcement of judgments (Article 59).

It was not thought necessary to regulate the relationship between the Convention and the bilateral conventions already concluded between Member States of the EEC and non-member States since, with the exception of the Convention between France and Switzerland, such conventions all contain rules of indirect jurisdiction. There is, therefore, no conflict between those conventions and the rules of jurisdiction laid down in Title II of the Convention. Recognition and enforcement would seem to raise no problem, since judgments given in those non-member States must be recognized in accordance with the provisions of the bilateral conventions.

Articles 55 and 56

Article 55 contains a list of the Conventions which will be superseded on the entry into force of the EEC Convention. This will, however, be subject to:

1. the provisions of the second paragraph of Article 54, as explained in the commentary on that Article;

2. the provisions of the first paragraph of Article 56, the consequence of which is that these conventions will continue to have effect in relation to matters to which the EEC Convention does not apply (status, legal capacity etc.);

3. the provisions of the second paragraph of Article 56 concerning the recognition and enforcement of judgments given before the EEC Convention enters into force. Thus a judgment given in France before the EEC Convention enters into force and to which by virtue of Article 54 this Convention would therefore not apply, could be recognized and enforced in Italy after the entry into force of the EEC Convention under the terms of the Convention of 3 June 1930 between France and Italy. Without such a rule, judgments given before the Convention enters into force could be recognized and enforced only in accordance with the general law, and this would in several Contracting States involve the possibility of a review of the substance of the judgment, which would unquestionably be a retrograde step.

Article 57

The Member States of the Community, or some of them, are already parties to numerous international agreements which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Those agreements include the following:

1. The revised Convention for the navigation of the Rhine signed at Mannheim on 17 October 1868 (2);

2. The International Convention for the unification of certain rules relating to international carriage by air, and Additional Protocol, signed at Warsaw on 12 October 1929 (3);

3. The International Convention on certain rules concerning civil jurisdiction in matters of collision, signed at Brussels on 10 May 1952 (4);

4. The International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952 (5);

5. The Convention on damage caused by foreign aircraft to third parties on the surface, signed at Rome on 7 October 1952 (6);

(1) Mention has been made of the Benelux Treaty although, as it has not been ratified by Luxembourg, it has not yet entered into force; this is to avoid any conflict between the Convention and that Treaty should it enter into force.

(2) These Conventions have been ratified by the following Member States of the European Economic Community (list drawn up on 15 September 1966): Belgium, the Federal Republic of Germany, France and the Netherlands.

(3) Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

(4) Belgium and France.

(5) Belgium and France.

(6) Belgium and Luxembourg.

6. The International Convention concerning the carriage of goods by rail (CIM), and Annexes, signed at Berne on 25 October 1952 (1);

7. The International Convention concerning the carriage of passengers and luggage by rail (CIV) and Annexes, signed at Berne on 25 October 1952 (2);

8. The Agreement on German external debts, signed at London on 27 February 1953 (2);

9. The Convention on civil procedure concluded at The Hague on 1 March 1954 (3);

10. The Convention on the contract for the International carriage of goods by road (CMR) and Protocol of Signature, signed at Geneva on 19 May 1956 (3);

11. The Convention concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, concluded at The Hague on 15 April 1958 (4);

12. The Convention on the jurisdiction of the contractual forum in matters relating to the international sale of goods, concluded at The Hague on 15 April 1958 (5);

13. The Convention on third party liability in the field of nuclear energy, signed at Paris on 29 July 1960 (6a), and the Additional Protocol, signed at Paris on 28 January 1964 (6b), the Supplementary Convention to the Paris Convention of 29 July 1960, and Annex, signed at Brussels on 31 January 1963 (6c), and Additional Protocol to the Supplementary Convention signed at Paris on 28 January 1964 (6d).

14. The Convention on the liability of operators of nuclear ships, and Additional Protocol, signed at Brussels on 25 May 1962 (7);

15. The Convention of 27 October 1956 between the Grand Duchy of Luxembourg, the Federal Republic of Germany and the French Republic on the canalization of the Moselle (8).

(1) Belgium, the Federal Republic of Germany, France, Luxembourg and the Netherlands.
(2) Belgium, the Federal Republic of Germany, France, Luxembourg and the Netherlands.
(3) The six States.
(4) Belgium, the Federal Republic of Germany, France, Italy and the Netherlands.
(5) Italy.
(6) (a) and (b) France and Belgium; (c) and (d) France.
(7) Not ratified.
(8) Ratified by the three States concerned.

The structure of these agreements varies considerably. Some of them govern only jurisdiction, like the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air, or are based on indirect jurisdiction, like the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, or contain rules of direct or even exclusive jurisdiction, such as the International Convention of 25 October 1952 concerning the carriage of goods by rail (CIM), which lays down in Article 43 (5) that actions arising from the contract of carriage may be brought only in the courts of the State to which the defendant railway belongs.

The approach adopted by the Committee means that agreements relating to particular matters prevail over the Convention. It follows that, where those agreements lay down rules of direct or exclusive jurisdiction, the court of the State of origin will have to apply those rules to the exclusion of any others; where they contain provisions concerning the conditions governing the recognition and enforcement of judgments given in matters to which the agreements apply, only those conditions need be satisfied, so that the enforcement procedure set up by the EEC Convention will not apply to those judgments.

The Committee adopted this approach in view of the fact that the Member States of the Community, when they entered into these agreements, had for the most part contracted obligations towards non-Member States which should not be modified without the consent of those States.

Moreover, the following points must be borne in mind:

1. The rules of jurisdiction laid down in these agreements have been dictated by particular considerations relating to the matters of which they treat, e. g. the flag or port of registration of a vessel in the maritime conventions; the criterion of domicile is not often used to establish jurisdiction in such agreements.

2. The EEC Convention lays down that judgments are in principle to be recognized, whereas agreements relating to particular matters usually subject the recognition and enforcement of judgments to a certain number of conditions. These conditions may well differ from the grounds for refusal set out in Articles 27 and 28; moreover they usually include a

requirement, which the Convention has dropped, that the court of origin had jurisdiction.

3. The simplified enforcement procedure laid down by the Convention is the counterpart of Title II, the provisions of which will not necessarily have to be observed where the court of the State of origin has to apply another convention. Consequently, where agreements relating to particular matters refer for the enforcement procedure back to the ordinary law of the State in which enforcement is sought, it is that law which must be applied. There is, however, nothing to prevent a national legislature from substituting the Convention procedure for its ordinary civil procedure for the enforcement of judgments given in application of agreements governing particular matters.

Article 58

This Article deals only with certain problems of jurisdiction raised by the Convention of 15 June 1869 between France and Switzerland.

Under Article 1 of that Convention, a Swiss national domiciled in France may sue in the French courts a French national domiciled in a third State.

This option, granted by that Convention to Swiss nationals domiciled in France, might, in the absence of Article 58, conflict with the EEC Convention, according to which a defendant domiciled in a Contracting State may be sued in the courts of another Contracting State only in certain defined situations, and in any case not on the basis of rules of exorbitant jurisdiction such as those of Article 14 of the French Civil Code.

Under Article 58, a Swiss national domiciled in France can exercise the option which the Convention between France and Switzerland grants him to sue in France a Frenchman domiciled in another Contracting State, without there being any conflict with the EEC Convention, since the jurisdiction of the French Court will be recognized under the terms of Article 58. As a result of this provision, the rights secured by Swiss nationals domiciled in France are safeguarded, and France can continue to honour the obligations which it has entered into with respect to Switzerland. This is, of course, only an option which is granted to Swiss nationals, and there is nothing to prevent them from making use of the other provisions of the EEC Convention.

Article 59

It will be recalled that under Article 3 of the Convention, what are known as the rules of 'exorbitant' jurisdiction are no longer to be applied in cases where the defendant is domiciled in the Community, but that under Article 4 they are still fully applicable where the defendant is domiciled outside the Community, and that, in such cases, judgments given by a court whose jurisdiction derives from those rules are to be recognized and enforced in the other Contracting States.

It must first be stressed that Article 59 does not reduce the effect of Article 4 of the Convention, for the latter Article does not prevent a State, in an agreement with a third State, from renouncing its rules of exorbitant jurisdiction either in whole or only in certain cases, for example, if the defendant is a national of that third State or if he is domiciled in that State. Each State party to the EEC Convention remains quite free to conclude agreements of this type with third States, just as it is free to amend the provisions of its legislation which contain rules of exorbitant jurisdiction; Article 4 of the Convention imposes no common rule, but merely refers back to the internal law of each State.

The only objective of Article 59 is to lessen the effects, within the Community, of judgments given on the basis of rules of exorbitant jurisdiction. Under the combined effect of Articles 59 and 28, recognition or enforcement of a judgment given in a State party to the Convention can be refused in any other Contracting State:

1. where the jurisdiction of the court of origin could only be based on one of the rules of exorbitant jurisdiction specified in the second paragraph of Article 3. It would therefore be no ground for refusal that the court of origin founded its jurisdiction on one of those rules, if it could equally well have founded its jurisdiction on other provisions of its law. For example, a judgment given in France on the basis of Article 14 of the Civil Code could be recognized and enforced if the litigation related to a contract which was to be performed in France;

2. where a convention on the recognition and enforcement of judgments exists between the State addressed and a third State, under the terms of which judgments given in any other State on the basis of a rule of exorbitant jurisdiction will be neither recognized nor enforced where the defendant was domiciled or habitually resident in the third State. Belgium would thus not be obliged to recognize or enforce a judgment given in France against a person domiciled or habitually resident in Norway where the jurisdiction of the French courts over that person could be based only on Article 14 of the Civil Code since a convention between Belgium and Norway exists under which those two countries undertook not to recognize or enforce such judgments. Article 59 includes a reference not only to the defendant's domicile but also to his habitual residence, since in many non-member States this criterion is in practice equivalent to the concept of domicile as this is understood in the Member States of the Community (see also Article 10 (1)) of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters).

As regards the recognition and enforcement of judgments. Article 59 thus opens the way towards regulating the relations between the Member States of the EEC and other States, in particular the increasing number which are members of the Hague Conference. This seemed to justify a slight encroachment on the principle of free movement of judgments.

CHAPTER X

FINAL PROVISIONS

Articles 60 to 62 and 64 to 68

These Articles give rise to no particular comment.

Article 63

Article 63 deals with the accession of new Member States to the European Economic Community.

It is desirable, in the opinion of the Committee, that, in order to be able to fulfil the obligations laid down in Article 220 of the Treaty establishing the European Economic Community, such States should accede to the Convention. The legal systems of such States might, however, prevent the acceptance of the Convention as it stands, and negotiations might be necessary. If such were the case, any agreement concluded between the Six and a new Member State should not depart from the basic principles of the Convention. That is why Article 63 provides that the Convention must be taken as a basis for the negotiations, which should be concerned only with such adjustments as are essential for the new Member State to be able to accede to the Convention.

The negotiations with that State would not necessarily have to precede its admission to the Community.

Since the adjustments would be the subject of a special agreement between the Six and the new Member State, it follows from the second paragraph of Article 63 that these negotiations could not be used as an opportunity for the Six to reopen debate on the Convention.

CHAPTER XI

PROTOCOL

Article I

Article I of the Protocol takes account of the special position of the Grand Duchy of Luxembourg. It provides that any person domiciled in Luxembourg who is sued in a court of another Contracting State pursuant to Article 5 (1) (which provides, in matters relating to a contract, that the courts for the place of performance of

the obligation shall have jurisdiction), may refuse the jurisdiction of those courts. A similar reservation is included in the Benelux Treaty (Protocol, Article I), and it is justified by the particular nature of the economic relations between Belgium and Luxembourg, in consequence of which the greater part of the contractual obligations between persons resident in the two countries are performed or are to be performed in Belgium. It follows from Article 5 (1) that a plaintiff domiciled in Belgium could in most cases bring an action in the Belgian courts.

Another characteristic of Luxembourg economic relations is that a large number of the contracts concluded by persons resident in Luxembourg are international contracts. In view of this, it was clearly necessary that agreements conferring jurisdiction which could be invoked against persons domiciled in Luxembourg should be subject to stricter conditions than those of Article 17. The text adopted is based on that of the Benelux Treaty (Article 5 (3)).

Article II

Article II of the Protocol also has its origin in the Benelux Treaty. The latter applies *inter alia* to judgments given in civil matters by criminal courts, and thus puts an end to a controversy between Belgium and the Netherlands on the interpretation of the 1925 Convention between Belgium and the Netherlands. As the report annexed to the Treaty explains [1], the reluctance of the Netherlands authorities to enforce judgments given by foreign criminal courts in civil claims is due to the fact that a Netherlander charged with a punishable offence committed in a foreign country may be obliged to appear in person before the foreign criminal court in order to defend himself even in relation to the civil claim, although the Netherlands does not extradite its nationals. This objection is less pertinent than would appear at first sight under certain systems of law, and in particular in France, Belgium and Luxembourg, the judgment in a criminal case has the force of *res judicata* in any subsequent civil action.

In view of this, the subsequent civil action brought against a Netherlander convicted of a criminal offence will inevitably go against him. It is therefore essential that he should be able to conduct his defence during the criminal stage of the proceedings.

For this reason the Convention, like the Benelux Treaty, provides (see the Protocol) that a person domiciled in a Contracting State may arrange for his defence in the criminal courts of any other Contracting State.

Under Article II of the Protocol, that person will enjoy this right even if he does not appear in person and even if the code of criminal procedure of the State in question does not allow him to be represented. However, if the court seised of the matter should specifically order appearance in person, the judgment given without the person concerned having had the opportunity to arrange for his defence, because he did not appear in person, need not be recognized or enforced in the other Contracting States.

This right is, however, accorded by Article II of the Protocol only to persons who are prosecuted for an offence which was not intentionally committed; this includes road accidents.

Article III

This Article is also based on the Benelux Treaty (Article III of the Protocol).

It abolishes the levying, in the State in which enforcement is sought, of any charge, duty or fee which is calculated by reference to the value of the matter in issue, and seeks to remedy the distortion resulting from the fact that enforcement gives rise to the levying of fixed fees in certain countries and proportional fees in others.

This Article is not concerned with lawyers' fees.

In the opinion of the Committee, while it was desirable to abolish proportional fees on enforcement, there was no reason to suppress the fixed charges, duties and fees which are payable, even under the internal laws of the Contracting States, whenever certain procedural acts are performed, and which in some respects can be regarded as fees charged for services rendered to the parties.

Article IV

(See the commentary on Article 20 (2) page 66 *et seq.*)

[1] Benelux Treaty: see the commentary on Article 13 and Article II of the Protocol.

Article V

(See the commentary on Article 6 (2), page 27 *et seq.)*

Article VI

This Article relates to the case where legislative amendments to national laws affect either the provisions of the laws mentioned in the Convention — as might happen in the case of the provisions specified in the second paragraph of Article 3 — or affect the courts listed in Section 2 of Title III. Information on these matters must be passed to the Secretary General of the Council of the European Communities to enable him, in accordance with Article 64 (e), to notify the other Contracting States.

ANNEX

Committee of experts who drafted the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

CHAIRMAN	
Professor A. Bülow	Staatssekretär a. D. im Bundesministerium der Justiz der Bundesrepublik Deutschland
Belgium	
Mr P. Jenard, *Chairman of the Working Party*	Directeur au ministère des affaires étrangères et du commerce extérieur
Mr H. Meuleman	Directeur général au ministère de la justice
Mr M. Rouserez	Magistrat délégué au ministère de la justice
Mr Ch. van Reepinghen (†)	Commissaire royal à la réforme judiciaire
Mr E. Krings	Commissaire royal à la réforme judiciaire
Professor R. van der Elst	Avocat, professeur à l'université libre de Bruxelles
Germany	
Mr H. Arnold	Ministerialrat im Bundesministerium der Justiz
France	
Mr J. Baudoin	Sous-directeur des affaires civiles et du sceau — Ministère de la justice
Mr P. Bellet	Premier vice-président du tribunal de grande instance de la Seine
Mr Y. Cotte	Chef de bureau 'Droit européen et international' — Ministère de la justice
Italy	
Professor L. Marmo (†)	Consigliere di Corte di cassazione — Ministero di grazia e giustizia
Mr Caldarera	Consigliere di Corte di cassazione addetto al servizio del contenzioso diplomatico del ministero degli affari esteri
Mr G. di Blasi	Magistrato, ministero degli affari esteri
Professor R. Miccio	Consigliere di Corte d'appello, ministero di grazia e giustizia

Luxembourg

Mr A. Huss	Procureur général d'État
Mr F. Goerens	Avocat général

Netherlands

Mr Th. van Sasse van Ysselt	Directeur, Afdelingschef bij het ministerie van justitie
Mr C. W. Dubbink	Raadsheer in de Hoge raad der Nederlanden

Observers

Benelux Committee on the unification of law

Mrs M. Weser	Member of the Committee

Hague Conference on private international law

Mr M. H. van Hoogstraten	Secretary-General to the Conference
Mr G. Droz	First Secretary to the Permanent Bureau of the Conference

Commission of the European Economic Community

— Directorate-General for Competition

Mr W. Hauschild	*Head of Division*
Miss M. Van Es	*Member of Division*