CONVENTION

on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988

(90/C 189/07)

REPORT

by Mr P. JENARD

Honorary Director of Administration at the Belgian Ministry of Foreign Affairs,

and Mr. G. MÖLLER

President of the Court of First Instance in Toijala

In addition to the draft Convention and the other instruments drawn up by the government experts, the draft explanatory report was submitted to the Governments of the Member States of the European Communities and of the European Free Trade Association before the Diplomatic Conference held in Lugano from 12 to 16 September 1988.

This report takes account of the comments made by certain Governments and of the amendments made by the Diplomatic Conference to the drafts before it. It takes the form of a commentary on the Convention signed in Lugano on 16 September 1988.

LIST OF CONTENTS

CHAPTER I

GENERAL CONSIDERATIONS

1. INTRODUCTORY REMARKS

1. The Lugano Convention, opened for signature on 16 September 1988, is concluded between the Member States of the European Communities and the Member States of the European Free Trade Association (EFTA).

It will be referred to in this report as the 'Lugano Convention' although during the preparatory proceedings it was known as the 'Parallel Convention'. It was given that name because it corresponds very closely to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, which was concluded between the six original Community Member States ([1]) and adopted consequent upon the accession of new Member States to the Communities ([2]). For convenience, that Convention, in its adopted form, will be referred to as the 'Brussels Convention'.

Although the Lugano Convention takes not only its structure but also numerous provisions from the Brussels Convention, it is nevertheless a separate instrument.

2. This report does not contain a detailed commentary on all the provisions of the Lugano Convention.

Where provisions are identical to those of the Brussels Convention, the reader should refer to the existing reports by Mr P. Jenard on the 1968 Convention, by Mr P. Schlosser on the 1978 Convention on the accession of Denmark, Ireland and the United Kingdom and by Messrs Evrigenis and Kerameus on the 1982 Convention on the accession of Greece ([3]).

The provisions in force in each of the EFTA Member States on the recognition and enforcement of foreign judgments and an account of the relevant conventions concluded by those States with one another or with Member States of the Communities are not included in the body of this report but are given in Annexes I and II. This different layout from previous reports has been adopted so as not to complicate the text.

2. JUSTIFICATION FOR AND BACKGROUND TO THE LUGANO CONVENTION

3. The European Communities and EFTA are at present made up of a great many European countries who share very similar conceptions of constitutional (separation of powers between the legislature, the executive and the judiciary), legal (primacy of the rule of law and the rights of the individual) and economic matters (market economy).

The two organizations differ however with regard to their objectives and institutions. That is why we felt it useful to give a brief outline.

A. THE EUROPEAN COMMUNITIES

4. The European Communities differ substantially from the other international or European organizations on account of their particular aims and the originality of their institutional machinery.

They pursue the specific objectives assigned to them by the three Treaties establishing them (ECSC, EEC and Euratom) but their ultimate objective is to establish a real European union.

The economic dimension of this union in the making is complemented by a political discussion which is expressed through the medium of European Political Cooperation, by means of which the Twelve endeavour to harmonize their foreign policies.

The construction of Europe initiated by the six founding States (Belgium, the Federal Republic of Germany, France, Italy, the Grand Duchy of Luxembourg and the Netherlands) took a step forward with the signing first of all of the Treaty of Paris (18 April 1951) which established the European Coal and Steel Community (ECSC) and subsequently (on 25 March 1957) of the two Treaties of Rome which laid the foundations of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).

Denmark, Ireland and the United Kingdom acceded to those three Treaties on 1 January 1973 (the Nine), Greece on 1 January 1981 (the Ten), Spain and Portugal on 1 January 1986 (the Twelve).

The European Communities therefore currently comprise twelve European countries which are bound together by jointly undertaken commitments.

5. With the Single European Act, which entered into force on 1 July 1987, a new stage was reached on the path towards a European union. This new Community legal instrument aims in particular at the progressive establishment, over a period expir-

ing on 31 December 1992, of a real internal market providing for the free movement of goods, persons, services and capital. It also aims at promoting significant progress in both the monetary field and new policy sectors (in particular the environment and new technologies). It makes Community decision-making machinery more flexible in a number of fields and, by means of treaty provisions, institutionalizes European Political Cooperation.

6. The institutional architecture of the Communities rests on four pillars:

1. **The Council of Ministers**

The Council consists of the representatives of the Member States and each Government delegates one of its members to it, depending on the field of competence and the nature of the subjects under discussion.

The Ministers of Foreign Affairs coordinate general Community policy.

The Council of Ministers is the Communities' decision-making body. It participates in legislative power and as such is empowered to take binding measures in the form of Regulations or Directives which are directly binding on the Member States and/or their nationals. The Regulations are directly applicable in the Member States, whereas Directives have to be incorporated into national legislation.

The Council's decisions are prepared by the Permanent Representatives Committee (Coreper), composed of the Permanent Representatives of the Member States to the European Communities.

The Council's decisions are taken unanimously, by a simple majority or by a qualified majority, depending on the legal provisions on which they are based.

The Single Act aims at multiplying the cases in which a majority vote becomes standard practice, so as to expedite the proceedings of an enlarged Community.

Twice a year the European Council brings together the Heads of State or of Government of the Member States. This body, set up at the highest level on a political basis in 1975, was given Treaty recognition following the adoption of the Single Act.

Its main task is to work out guidelines and give the necessary impetus to the development of the Community process.

2. **The Commission**

The Commission currently consists of 17 members chosen by common agreement by the Governments.

The Commission is the most original institution in the Community's institutional machinery. It cannot be likened to a secretariat because the authors of the Treaties chose to make it the prime mover of European integration. It participates actively in the preparation and formulation of the acts of the Council by virtue of its power of initiative.

3. **The Court of Justice**

The role of the Court of Justice is to ensure that Community law is obeyed in the implementation of the three Treaties establishing the European Communities. Its powers are manifold and it has *inter alia* the power to give rulings in the form of judgments on the validity of the acts of Community authorities and on the interpretation of the Treaties and Community acts.

In its decisions, the Court has affirmed the precedence of Community law over Member States' constitutional and legislative provisions.

Under the Luxembourg Protocol of 3 June 1971, the Member States of the Communities conferred jurisdiction upon the Court of Justice for giving judgment on the interpretation of the 1968 Brussels Convention, which is of particular concern to us.

4. **The European Parliament**

Since 1979 the Members of the European Parliament have been elected by direct universal suffrage for a five-year term of office.

Although the European Parliament has quite extensive powers of political supervision in respect of the action of the Council and the Commission and in the budgetary field, it does not however have legislative powers similar to those of national Parliaments.

The Single Act contains new cooperation arrangements designed to involve the Parliament more closely in the exercise of the legislative power conferred jointly upon the Council and the Commission.

7. In conclusion, in the field under review, it should be noted that:

1. the Lugano Convention is linked to the 1968 Brussels Convention which is based on Article 220 of the Treaty establishing the European Economic Community;
2. with regard to Community acts, legislative power is mainly conferred upon the Council;

3. the European Communities have created a very dense network of relations with the outside world which are embodied in agreements of various kinds, either with States or with organizations.

B. EFTA

8. The European Free Trade Association is a group of six European countries which share with the European Communities the aim of creating a dynamic, homogeneous European economic area embracing the Member States of the EEC and EFTA. That aim was laid down in the Luxembourg Declaration adopted on 9 April 1984 by the Ministers of all EEC and EFTA Member States.

EFTA's goal is the removal of import duties, quotas and other obstacles to trade in Western Europe and the upholding of liberal, non-discriminatory practices in international trade. Set up in 1960, the Association now has six member countries: Austria, Finland, Iceland, Norway, Sweden and Switzerland.

EFTA's establishment and evolution form part of the story of economic integration in Western Europe. Its founder members, which included Denmark, Portugal and the United Kingdom, adopted as their *first objective* the introduction of free trade between themselves in industrial goods. This objective was realized three years ahead of schedule at the end of 1966.

9. The trade between the EFTA countries accounts for only 13 to 14 % of their overall trade. Much more important is their trade with the EEC which is the source of more than half of their imports and the destination of more than half of their exports. The EFTA countries are also important trading partners for the EEC, providing markets for between a fifth and a quarter of EEC exports (excluding trade between the EEC countries).

The closeness of the commercial links between the EFTA and the EEC countries was one of the reasons for the attempt in the 1950s to negotiate a free trade area embracing the original six-nation EEC and the other Western European countries. The attempt failed. But when seven of these countries resolved to strengthen their own links by founding EFTA they saw the Association as, among other things, a means of preparing the way for the eventual fulfilment of their hopes of a single European market. Thus EFTA was born with the ambition of bringing about a larger market including all the countries of Western Europe. This was the *second objective* of EFTA's founder members.

This second goal was in effect achieved in the 1970s through negotiations which brought each of the present EFTA countries into a new relationship with the EEC, and at the same time the EEC was enlarged by the entry of two former EFTA countries, Denmark and the United Kingdom, and of Ireland. Free trade agreements came into force between the enlarged EEC and Austria, Portugal, Sweden and Switzerland on 1 January 1973, and the EEC and Iceland on 1 April 1973. Similar agreements came into force between Norway and the EEC on 1 July 1973 and between Finland and the EEC on 1 January 1974. Under these agreements the import duties on almost all industrial products were abolished from July 1977. These free trade agreements also apply to trade between the EFTA countries and three countries which joined the EEC at later dates: Greece from 1 January 1981, Portugal and Spain from 1 January 1986.

As mentioned above, the extension and intensification of EEC-EFTA cooperation have given rise since 1984 to talks between the two groups of States in many areas connected, directly or indirectly, with the EEC's ambitious programme for the creation of a genuine internal market in 1992. They concern matters such as technical barriers to trade, competition rules, intellectual property rights, product liability, etc.

The negotiations for the Lugano Convention came within that context.

C. JUSTIFICATION FOR THE CONVENTION

10. According to a report produced by Mr Johnsen for the Parliamentary Assembly of the Council of Europe (document 5774 of 9 September 1987 — FDO C5774), 'the Member States of EFTA and the EEC now make up a vast market of 350 million European consumers. With a few exceptions, industrial products circulate within this area without being subject to custom duties or quantitative restrictions. It is the largest market in the world, surpassing the United States market (240 million) and the Japanese market (120 million).'

It thus became apparent that this economic cooperation between the two groupings of European States ought to be strengthened through a convention on jurisdiction and the recognition and enforcement of judgments.

In this connection, the Brussels Convention was considered to embody a number of principles which could serve to strengthen judicial and economic cooperation between the States involved.

The aim of the Brussels Convention is to simplify the formalities needed for mutual recognition and enforcement of court decisions. For this reason the Convention begins by specifying the rules of jurisdiction regarding the courts before which proceedings are to be brought in civil and commercial matters relating to property. The Convention goes on to lay down a procedure for the enforcement of judgments given in another Member State which is simpler than traditional arrangements and swift because the initial stages are non-adversarial.

The Brussels Convention and the 1971 Protocol on its interpretation by the Court of Justice have both assumed considerable practical importance: hundreds of decisions based on the Convention have been given in the Member States and there is a series of interpretative judgments of the Court (see Chapter VI).

Because of the magnitude of trade between the EEC Member States and EFTA, it was to be expected that the need would arise for a judgment given in a Community Member State to be enforced in an EFTA country, or for a judgment given in an EFTA member country to be enforced in a Member State of the European Communities.

D. BACKGROUND TO THE CONVENTION

11. In 1973, when discussions over the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention were under way, the Swedish Government indicated its interest in the creation of contractual links between the Community Member States on the one hand, and Sweden plus other countries which might be interested on the other hand, with a view to facilitating the recognition and enforcement of judgments in civil and commercial matters.

In 1981, the Swiss Mission to the European Communities took up the Swedish Government's initiative and inquired of the competent authorities of the Commission whether and on what terms the recognition and enforcement of judgments in civil and commercial matters between the Member States of the Communities and Switzerland could be facilitated along the lines of the Brussels Convention of 27 September 1968. The inquiry was renewed in April 1982 to Mr Thorn, President of the Commission, by Mr Furgler, Member of the Swiss Federal Council.

In January 1985, acting on the instructions of the Council of the European Communities, an *ad hoc* working party met to examine, on the basis of a paper submitted by the Commission, the possibility of organizing negotiations with the EFTA countries with a view to extending the Brussels Convention.

With the assistance of the Council Secretariat and the Commission departments, preliminary talks were entered into with the Member States of EFTA in order to establish whether an extension of the Brussels Convention could be envisaged.

It emerged that Norway, Sweden, Switzerland, Finland, and subsequently Iceland, were in favour of opening negotiations on the drafting of a parallel Convention to the Brussels Convention.

At the end of this exploratory stage, the representatives of the Governments of the EEC Member States, meeting in the Permanent Representatives Committee in May 1985, noted that all the conditions obtained for negotiations to be initiated. They therefore agreed to issue an invitation to the EFTA Member States to take part in such negotiations.

A working party made up of governmental experts from the Member States of the European Communities and experts appointed by the EFTA Member States was set up to this end. The working party met for the first time on 8 and 9 October 1985 under the alternating chairmanship of Mr Voyame, Director at the Ministry of Justice of the Swiss Confederation, and Mr Saggio, Counsellor at the Italian Court of Appeal. A delegation sent by the Austrian Government attended the negotiations in an observer capacity, as did representatives of The Hague Conference. The working party also appointed two rapporteurs, Mr P. Jenard, at the time Director of Administration at the Belgian Ministry of Foreign Affairs, for the Member States of the European Communities and Mr Möller, at that time Counsellor on Legislation to the Finnish Ministry of Justice and now President of the Court of First Instance in Toijala, for the EFTA Member States.

The working party's discussions lasted two years, during which a preliminary draft Convention was prepared for use as the basic document for a diplomatic conference.

An overall assessment of the results achieved by the working party can be nothing if not positive, since wide consensus was reached with regard to the draft Convention, to the Protocols which supplement it and are an integral part thereof, and to three Declarations.

At all events, the conclusion of a multilateral Convention between a number of States offers better prospects of legal certainty and practical convenience than a series of bilateral, and inescapably divergent, agreements. The Convention also opens the way towards implementation of a common sys-

tem of interpretation, a point which is specifically mentioned in Protocol 2.

Another possibility might have been for the EFTA Member States to accede to the Brussels Convention. This possibility was not followed up because, being based on Article 220 of the Treaty of Rome and being the subject of the Protocol of 3 June 1971 which entrusted the Court of Justice of the European Communities with the power to interpret the Convention, the Brussels Convention is a Community instrument and it would have been difficult to ask non-Member States to become signatories.

12. The draft Convention and the other instruments drawn up by the working party were submitted to a diplomatic conference held, at the invitation of the Swiss Federal Government, in Lugano from 12 to 16 September 1988. All the Member States of the European Communities and of the European Free Trade Association were represented at this conference. Certain amendments were made to the drafts prepared by the working party. In accordance with the Final Act of the conference (see Annex III), the representatives of all the States concerned adopted the final texts of the Convention, the three Protocols and the three Declarations.

On 16 September 1988, the date of opening for signature, the required signatures were appended by the representatives of 10 States, that is, for the Member States of the European Communities, Belgium, Denmark, Greece, Italy, Luxembourg and Portugal, and for the Member States of EFTA, Iceland, Norway, Sweden and Switzerland. The Convention was signed by Finland on 30 November 1988 and by the Netherlands on 7 February 1989.

3. IDENTITY OF STRUCTURE BETWEEN THE BRUSSELS CONVENTION AND THE LUGANO CONVENTION — FUNDAMENTAL PRINCIPLES

13. The two Conventions are based on identical fundamental principles which can be summarized as follows:

First principle:

The scope of the two Conventions as determined *ratione materiae* is confined to civil and commercial matters relating to property. The two Conventions have the same Article 1.

Second principle:

Both Conventions fall into the 'double treaty' category, that is to say they contain rules of direct jurisdiction. These rules are applicable in the State in which the initial proceedings are brought and serve to determine the court vested with jurisdiction, whereas 'simple treaties' merely contain rules of indirect jurisdiction which do not apply until the stage of recognition and enforcement has been reached.

Third principle:

A defendant's domicile is the point on which the rules on jurisdiction hinge. For the purposes of the 1978 Accession Convention, the United Kingdom and Ireland adjusted their legislation to align their concept of domicile on that of many continental countries (4). Proceedings against any person domiciled in the territory of a Contracting State must, save where the Conventions provide otherwise, be brought before the courts of that State. Under no circumstances may rules of exorbitant jurisdiction be invoked as arguments (Articles 2 and 3).

However, where a defendant is not domiciled in the territory of a Contracting State jurisdiction continues to be determined in each State by the law of that State. Furthermore, persons domiciled in the territory of a Contracting State may, regardless of their nationality, avail themselves of the rules of jurisdiction which apply in that State, including exorbitant jurisdiction (Article 4), in the same way as nationals of that State.

Fourth principle:

Both Conventions contain precise and detailed rules of jurisdiction specifying the instances in which a person domiciled in a Contracting State may be sued in the courts of another Contracting State.

In this respect, the structures of the two Conventions are again identical, these rules being contained in the following sections.

(a) *Additional rules of jurisdiction*

Title II, Section 2 (Articles 5 and 6) contains additional rules of jurisdiction in that the courts therein specified are not mentioned in Article 2. The section relates to proceedings which can be considered as having a particularly close link with the court before which proceedings are brought.

The rules of jurisdiction set out in this section are special because, in general, both Conventions directly specify which court has jurisdiction.

As will be seen below, there are certain differences between the Brussels Convention and the Lugano

Convention with regard to the provisions contained in this section (see Article 5 (1) and Article 6 (4), points 36 to 44, 46 and 47).

(b) *Mandatory rules*

Both Conventions contain mandatory rules on jurisdiction in matters relating to insurance (Section 3) and consumer contracts (Section 4), the primary objective of which is to protect the weaker party. The rules are mandatory in that the parties are not permitted to depart from them before a dispute has arisen. These sections are the same in both Conventions.

(c) *Exclusive jurisdiction*

Both Conventions contain rules of exclusive jurisdiction (Section 5, Article 16):

(a) in some cases, disputes must be brought before the courts of a given State (rights *in rem* in, or tenancies of, immovable property; validity, nullity or dissolution of companies; validity of entries in public registers; registration or validity of patents, trade marks and designs; proceedings concerned with the enforcement of judgments);

(b) the parties are not permitted to waive the jurisdiction of the competent courts, either by an agreement conferring jurisdiction even if entered into after a dispute has arisen (Article 17), or by submission to the jurisdiction (Article 18);

(c) a court of a State other than the State whose courts have exclusive jurisdiction must declare, of its own motion, that it has no jurisdiction (Article 19);

(d) breach of the rules constitutes grounds for refusing recognition and enforcement (Articles 28 and 34);

(e) the rules apply whether or not the defendant is domiciled in a Contracting State.

The only difference between the two Conventions relates to tenancies of immovable property (see points 49 to 54).

(d) *Prorogation of jurisdiction*

The two Conventions also contain rules of prorogation of jurisdiction by agreement or tacitly (Title II, Section 6, Articles 17 and 18). The Conventions differ in the case of Article 17 (prorogation by agreement — see points 55 to 61) but not in the case of Article 18 (submission to jurisdiction).

(e) *Lis pendens and related actions*

Both Conventions contain provisions on the case of a *lis pendens* (Article 21) and related actions (Article 22) in Section 8, the aim of which is to avoid conflicting judgments. The wordings differ slightly here with regard to a *lis pendens* (see point 62).

Fifth principle:

The defendant's rights must have been respected in the State of origin.

Both Conventions provide in the first paragraph of Article 20, the importance of which should be emphasized, that if a defendant does not enter an appearance the court must declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.

The second and third paragraphs of Article 20 cover the problem of notification of legal documents to the defendant, the court being obliged to stay its proceedings so long as it has not been shown that the defendant was able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence. This Article has not been amended.

Sixth principle:

Grounds for refusing recognition and enforcement are limited.

Pursuant to the first paragraph of Article 26 of both Conventions, judgments given in a Contracting State must be recognized in the other Contracting States without any special procedure being required. In other words, judgments are entitled to automatic recognition: the Conventions establish the presumption in favour of recognition and the only grounds for refusal are those listed in Articles 27 and 28.

There are two conditions which agreements such as this usually contain but which these two Conventions omit: recognition does not require that the foreign judgment should have become *res judicata*, and the jurisdiction of the court in the State of origin is no longer examined by the court of the State in which enforcement is being sought. In this respect there are some differences between the two Conventions with regard to Article 28 (see points 16 and 82).

Seventh principle:

The enforcement procedure is unified and simplified.

It is unified in that, in every Contracting State, the procedure is initiated by submission of an application.

It is simplified in particular with reference to the appeals procedure.

The Lugano Convention makes a number of technical adjustments as against the 1968 Convention (see points 68 to 70).

Eighth principle:

The Conventions govern relations with other international Conventions. On this point, and with regard to Conventions concluded on particular matters, there are a few differences between the two Conventions (see points 79 to 82).

Ninth principle:

Steps are taken to ensure that interpretation of the two Conventions is uniform.

Interpretation of the 1968 Convention is entrusted to the Court of Justice by the Luxembourg Protocol of 3 June 1971.

Interpretation of the Lugano Convention is governed by Protocol 2 to that Convention (see points 110 to 119).

CHAPTER II

RESPECTIVE SCOPE OF THE BRUSSELS CONVENTION AND THE LUGANO CONVENTION

(Article 54b)

14. As shown above, although the structure of the two Conventions is identical and they contain a great number of comparable provisions, they remain separate Conventions.

15. The respective application of the two Conventions is governed by Article 54b. The first point to note is that this Article primarily concerns the courts of member countries of the European Communities, these being the only courts which may be required to deliver judgments pursuant to either Convention. Courts in EFTA Member States are not bound by the Brussels Convention since the EFTA States are not parties to that Convention.

However, Article 54b is relevant for the courts of EFTA countries since it was felt advantageous that Article 54b should, for reasons of clarity, contain details relating to the case of a *lis pendens*, related actions and recognition and enforcement of judgments.

The philosophy of Article 54b is as follows:

According to paragraph 1, the Brussels Convention continues to apply in relations between Member States of the European Communities.

This applies in particular where:

(a) a person, of whatever nationality, domiciled in one Community State, e.g. France, is summoned to appear before a court in another such State, e.g. Italy. The plaintiff's nationality and domicile are immaterial;

(b) a judgment has been delivered in one European Community Member State, e.g. France, and must be recognized or enforced in another such State, e.g. Italy.

The Brussels Convention also applies where a person domiciled outside the territory of a European Community Member State and outside the territory of any other State party to the Lugano Convention, e.g. in the United States, is summoned to appear before a court in a European Community Member State (Article 4 of the Brussels Convention).

In each of these three instances, the Court of Justice of the European Communities has jurisdiction under the 1971 Protocol to rule on problems which may arise with regard to the interpretation of the Brussels Convention.

16. However, under paragraph 2, the court of a European Community Member State must apply the Lugano Convention where:

(1) a defendant is domiciled in the territory of a State which is party to the Lugano Convention and an EFTA member or is deemed to be so domiciled under Articles 8 or 13 of the Convention. For instance, if a person domiciled in Norway is summoned before a French court, jurisdiction will be vested in that court only in the cases for which the Lugano Convention