

I

(Information)

COUNCIL**Report on the Convention**

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

(Signed at Brussels, 27 September 1968)

by Mr P. Jenard

Director in the Belgian Ministry of Foreign Affairs and External Trade.

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

CONTENTS

	Pages
CHAPTER I Preliminary remarks	3
CHAPTER II Background to the Convention	3
A. The law in force in the six States	3
B. Existing conventions	6
C. The nature of the Convention	7
CHAPTER III Scope of the Convention	8
CHAPTER IV Jurisdiction	13
A. General considerations	13
1. Preliminary remarks	13
2. Rationale of the basic principles of Title II	14
3. Determination of domicile	15
B. Commentary on the Sections of Title II	18
Section 1.	
General provisions	18
Section 2.	
Special jurisdictions	22
Sections 3 to 5.	
Insurance, instalment sales, exclusive jurisdictions, general remarks	28
Section 3.	
Jurisdiction in matters relating to insurance	30
Section 4.	
Jurisdiction in matters relating to instalment sales and loans	33
Section 5.	
Exclusive jurisdictions	34
Section 6.	
Prorogation of jurisdiction	36
Section 7.	
Examination as to jurisdiction and admissibility	38
Section 8.	
<i>Lis pendens</i> — related actions	41
Section 9.	
Provisional and protective measures	42
CHAPTER V Recognition and enforcement	42
A. General considerations	42
B. Commentary on the Sections	43
Section 1. Recognition	43
Section 2. Enforcement	47
(a) Preliminary remarks	47
(b) Conditions for enforcement	47
(c) Enforcement procedure	48
Section 3.	
Common provisions	54
CHAPTER VI Authentic instruments and court settlements	56
CHAPTER VII General provisions	57
CHAPTER VIII Transitional provisions	57
CHAPTER IX Relationship to other international conventions	58
CHAPTER X Final provisions	62
CHAPTER XI Protocol	62
ANNEX	64

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. 1^{er} 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.*

