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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.