

REPORT ON THE CONVENTION

on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice

(Signed at Luxembourg, 9 October 1978)

by Professor Dr Peter SCHLOSSER,

of the Chair of German, international and foreign civil procedure, of the general theory of procedure and of civil law at the University of Munich

Pursuant to Article 3 (2) of the Act of Accession of 22 January 1972 a Council working party, convened as a result of a decision taken by the Committee of Permanent Representatives of the Member States, prepared a draft Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol of 3 June 1971 on its interpretation by the Court of Justice. This working party was composed of government experts from the nine Member States and representatives from the Commission. The rapporteur, Mr P. Schlosser, Professor of Law at the University of Munich, drafted the explanatory report which was submitted to the governments at the same time as the draft prepared by the experts. The text of this report, which is a commentary on the Convention of Accession signed at Luxembourg on 9 October 1978, is now being published in this issue of the Official Journal.

INDEX

CHAPTER 1

	Para.	Page
Preliminary remarks	1	77

CHAPTER 2

Reasons for the Convention	4	78
A. The law in force in the new Member States		
1. The United Kingdom	5	78
2. Ireland	12	79
3. Denmark	13	79
B. Existing Conventions	14	79
C. General arrangement of the proposed adjustments	15	80
1. Special structural features of the legal systems of the new Member States	16	80
2. Ambiguities in the existing text	17	80
3. Further developments in the law of the original Member States of the EEC ..	18	80
4. Specific economic effects	19	81

CHAPTER 3

Scope of the Convention	20	81
I. Matters involving international legal relationships	21	81
II. Binding nature of the Convention	22	81
III. Civil and commercial matters	23	82
A. Administrative law in Ireland and the United Kingdom	24	82
B. Administrative law in the Continental Member States	25	83
1. The varying extent of public law	26	83
2. Choice of type of law	27	84
3. Relationship of public authorities to one another	28	84
C. Civil and criminal law	29	84
IV. Matters expressly excluded	30	84
A. Status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession	31	84
1. Maintenance judgments ancillary to status proceedings (Ancillary maintenance judgments)	32	84
2. Rights in property arising out of a matrimonial relationship	43	87
3. The remaining contents of Article 1, second paragraph, point (1) of the Convention	51	89

	Para.	Page
B. Bankruptcy and similar proceedings	53	89
1. General and individual types of proceedings excluded from the scope of the 1968 Convention	54	90
2. Bankruptcy law and the dissolution of companies	55	90
C. Social security	60	92
D. Arbitration	61	92
1. Decisions of national courts on the subject matter of a dispute despite the existence of an arbitration agreement	62	92
2. Other proceedings connected with arbitration before national courts	63	93
V. Judicial nature of proceedings and judgments	66	93
1. The legal position in Denmark	67	94
2. Article V of the Protocol and its effect	68	94
 CHAPTER 4		
Jurisdiction		
A. General remarks	69	94
1. First instance jurisdiction of the Superior Courts	70	94
2. The concept of 'domicile' and the application of the Convention	71	95
3. Discretionary powers regarding jurisdiction and transfer of proceedings	76	97
B. Comments on the Sections of Title II		
Section 1 General provisions	82	99
I. Detailed comments		
1. Belgium	83	99
2. Denmark	84	99
3. Ireland	85	99
4. United Kingdom	86	100
II. The relevance of the second paragraph of Article 3 to the whole structure of the 1968 Convention		
1. The special significance of the second paragraph of Article 3	87	100
2. Impossibility of founding jurisdiction on the location of property	88	100
Section 2 Special jurisdictions	89	101
I. Maintenance claims	90	101
1. The term 'maintenance'	91	101
2. Adjustment of maintenance orders	98	103
II. Trusts		
1. Problems which the Convention in its present form would create with regard to trusts	109	105
2. The solution proposed	114	106

	Para.	Page
III. Admiralty jurisdiction	121	108
1. Jurisdiction in connection with the arrest of salvaged cargo or freight ...	122	108
2. Jurisdiction to order a limitation of liability	124	109
3. Transitional provisions	131	111
4. Disputes between a shipmaster and crew members	132	111
IV. Other special matters		
1. Jurisdiction based on the place of performance	133	111
2. Jurisdiction in matters relating to tort	134	111
3. Third party proceedings and claims for redress	135	111
Section 3 Jurisdiction in insurance matters	136	112
I. Insurance contracts taken out by policy-holders domiciled outside the Community	137	112
1. Compulsory insurance	138	113
2. Insurance of immovable property	139	114
II. Insurance of large risks, in particular marine and aviation insurance	140	114
1. Article 12a (1) (a)	141	115
2. Article 12a (1) (b)	142	115
3. Article 12a (2) (a)	144	115
4. Article 12a (2) (b)	145	115
5. Article 12a (3)	146	115
6. Article 12a (4)	147	115
III. The remaining scope of Articles 9 and 10	148	116
IV. Other problems of adjustment and clarification in insurance law		
1. Co-insurance	149	116
2. Insurance agents, the setting up of branches	150	116
3. Re-insurance	151	117
4. The term 'policy-holder'	152	117
5. Agreements on jurisdiction between parties to a contract from the same State	152a	117
Section 4 Jurisdiction over consumer contracts		
I. Principles	153	117
II. The scope of the new Section	154	118
1. Persons covered	155	118
2. Subject matter covered	156	118
3. Only a branch, agency or other establishment within the Community ...	159	119
4. Contracts of transport	160	119
III. The substance of the provisions of Section 4		
1. Subsequent change of domicile by the consumer	161	119
2. Agreements on jurisdiction	161a	119

	Para.	Page
Section 5 Exclusive jurisdiction	162	120
1. Rights <i>in rem</i> in immovable property in the Member States of the Community	166	120
2. Actions in connection with obligations to transfer immovable property ..	169	121
3. Jurisdiction in connection with patent disputes	173	123
Section 6 Jurisdiction by consent	174	123
1. Choice-of-law clause and international jurisdiction	175	124
2. Agreements conferring jurisdiction on courts outside the Community ...	176	124
3. Jurisdiction clauses in trusts	178	124
4. The form of agreements on jurisdiction in international trade	179	124
Section 7 Examination of own motion		
Section 8 <i>Lis pendens</i> and inter-related actions	180	125
1. Discretion of the court	181	125
2. Moment at which proceedings become pending	182	125
Section 9 Provisional measures	183	126

CHAPTER 5

Recognition and enforcement

A. General remarks — interlocutory court decisions	184	126
1. Relationship of the Continental States with each other	185	126
2. Relationship of the United Kingdom and Ireland with the other Member States	186	126
3. Precise scope of Title III of the 1968 Convention	187	127
B. Comments on the individual sections		
Section 1 Recognition	188	127
1. Article 26	189	127
2. Article 27 (1) — public policy	192	128
3. Right to a hearing (Article 27 (2))	194	128
4. Ordinary and extraordinary appeals	195	128
5. Conflicts with judgments given in non-contracting States which qualify for recognition	205	130
Section 2 Enforcement		
1. Preliminary remarks	206	131
2. Formal adjustments as regards courts having jurisdiction and authorized appeals	214	133
3. Other adjustment problems	219	134
Section 3 Common provisions	225	136

	Para.	Page
CHAPTER 6		
Authentic instruments and court settlements	226	136
CHAPTER 7		
General provisions	227	136
CHAPTER 8		
Transitional provisions	228	136
I. Jurisdiction	229	137
II. Recognition and enforcement	231	137
1. End of the transitional period	231	137
2. Among the original Member States of the Community	232	137
3. Where new Member States are involved	233	138
CHAPTER 9		
Relationship to other conventions		
I. Articles 55 and 56	237	139
II. Article 57		
1. The basic structure of the proposed provision	238	139
2. Examples	241	140
3. Undertakings in conventions between States not recognize judgments	246	141
4. Precedence of secondary Community law	247	142
5. Consultations before future accession by Member States of the Community to further agreements	248	142
III. Article 59	249	142
CHAPTER 10		
Final provisions		
(1) Ireland	251	143
(2) United Kingdom	252	143
(3) Denmark	253	143
(4) Changes in a State's territory	254	143
CHAPTER 11		
Adjustment to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the European Communities of the 1968 Convention		
(1) Formal adjustments	255	143
(2) The special nature of implementing legislation in the United Kingdom and Ireland	256	144

CHAPTER 1

PRELIMINARY REMARKS

Under Article 3 (2) of the Act of Accession, the new Member States undertook 'to accede to the Conventions provided for in Article 220 of the EEC Treaty, and to the Protocols on the interpretation of those Conventions by the Court of Justice, signed by the original Member States and to this end to enter into negotiations with the original Member States in order to make the necessary adjustments thereto'. As a first step the Commission of the European Communities made preparations for the impending discussions on the contemplated adjustments. On 29 November 1971, it submitted to the Council an interim report on the additions considered necessary to the two Conventions signed in 1968, namely the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as 'the 1968 Convention') and the Convention on the mutual recognition of companies and legal persons. Following consultations with the new Member States, the Commission on 15 September 1972 drew up a comprehensive report to the Council on the main problems arising from adjusting both Conventions to the legal institutions and systems of the new Member States. On the basis of this report, the Committee of Permanent Representatives decided on 11 October 1972 to set up a Working Party which was to be composed of delegates of the original and the new Member States of the Community and of a representative of the Commission. The Working Party held its inaugural meeting on 16 November 1972 under the chairmanship of the Netherlands delegate in accordance with the rota. On this occasion, it decided to focus its attention initially on negotiations concerning adjustments to the 1968 Convention which had already been ratified by the original Member States of the EEC and to the Protocol of 3 June 1971 on its interpretation ('the Interpretation Protocol of 1971'), and to postpone the work entrusted to it regarding the Convention on the mutual recognition of companies and legal persons. At its second meeting, the Working Party elected the author of this report as its rapporteur. On the basis of a request made by the Working Party at its third meeting in June 1973, the Committee of Permanent Representatives appointed Mr Jenard, the 'Directeur d'administration auprès du ministère belge des Affaires Étrangères', as its permanent chairman.

2. The Working Party initially considered proposing the legal form of a Protocol for the accession of

the new Member States to the 1968 Convention, and that the adjustments contemplated should be annexed thereto. However, this method would have introduced some confusion into the subject. A distinction would then have had to be made between three different Protocols, i.e. the Protocol referred to in Article 65 of the 1968 Convention, the Interpretation Protocol of 1971 and the new Protocol on accession. Furthermore, there were no grounds for dividing the new provisions required in consequence of the accession of the new Member States to the 1968 Convention by putting some into a protocol and others into an act of accession annexed to it. The Working Party therefore presented the outcome of its discussions in the form of a draft Convention between the original Member States and the new Member States of the EEC. This draft Convention makes provision for accession both to the 1968 Convention and to the Interpretation Protocol of 1971 (Title I) as well as for the necessary changes to them (Titles II and IV). The accession of Denmark, Ireland and the United Kingdom to the 1968 Convention extends also to the Protocol referred to in Article 65 which is an integral part of the 1968 Convention. The Working Party also proposed adjustments to this Protocol (Title III).

The decision of the Working Party to adopt the legal form of a Convention incorporating adjustments instead of replacing the 1968 Convention by a new Convention has the advantage that the unchanged provisions of the 1968 Convention do not require renewed ratification.

Accordingly three different 'Conventions' will in future have to be distinguished:

The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in its original form will be referred to as 'the 1968 Convention' ⁽¹⁾.

The expression 'Accession Convention' refers to the draft Convention proposed by the Working Party.

After ratification of the Accession Convention certain provisions of the 1968 Convention will exist in an amended form. References in this

report to the amended form will be indicated by the addition of that word, e.g. 'Article 5 (2) as amended'.

3. The structure of this report does not closely follow the structure of the proposed new Accession Convention. In many places, this report can only be understood, or at any rate is

easier to understand, if it is read in conjunction with the corresponding parts of the reports on the 1968 Convention and on the Interpretation Protocol of 1971 which were drawn up by the present permanent chairman and erstwhile rapporteur of the Working Party (hereinafter referred to as 'the Jenard report'). The structure of this report is based on that of these earlier reports.

CHAPTER 2

REASONS FOR THE CONVENTION

4. The second chapter of the Jenard report sets out the reasons for concluding a Convention. They apply with at least as much force to the new Member States as they did to the relationships between the original Member States of the EEC, but they do not call for further close examination here. The obligation on the new Member States to accede to the 1968 Convention is laid down in Article 3 (2) of the Act of Accession to the EEC Treaty. However, in order to give a clear view of the legal position, it may be helpful to supplement the references in the Jenard report to the laws in force in the original Member States of the EEC and to the existing Conventions between these States with details concerning the new Member States.

A.

THE LAW IN FORCE IN THE NEW MEMBER STATES

1. UNITED KINGDOM

5. The legal position in the United Kingdom is characterized by six significant features.
6. (a) In the first place, there is a distinction between recognition and enforcement at common law on the one hand and under the Foreign judgments (reciprocal enforcement) Act 1933 on the other.

At common law, a judgment given in a foreign State may serve as a basis for proceedings before courts in the United Kingdom, if the adjudicating court was competent to assume jurisdiction. This

legal consequence follows irrespective of whether or not there is reciprocity. In this connection, recognition and enforceability are not limited to the use of the foreign judgment as evidence. The United Kingdom court dealing with the case may not in general review the substance of the foreign judgment. There are, of course, a limited number of grounds for refusing recognition.

For recognition and enforcement under the Foreign judgments (reciprocal enforcement) Act 1933 on the other hand the successful party does not have to institute fresh proceedings before courts in the United Kingdom on the basis of the foreign judgment. The successful party merely has to have the judgment registered with the appropriate court. However, this simplified recognition and enforcement procedure is available only where the judgment to be recognized was given by a Superior Court, and, more important, where a convention on the reciprocal recognition and enforcement of judgments is in force between the State of origin and the United Kingdom. Once the foreign judgment is registered, it has the same legal force and effect as a judgment given by the court of registration.

7. (b) Both these methods are available in the United Kingdom only for the enforcement of judgments which order payment of a specific sum of money. Consequently maintenance orders made by foreign courts which stipulate periodic payments are not generally enforceable in the United Kingdom. However, the Maintenance orders (reciprocal enforcement) Act which came into force in 1972 makes it possible for international treaty obligations to be concluded in this field.

