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)

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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.

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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.

8. (c) Both at common law and under the 1933 Act, it is a requirement for recognition and enforcement that the judgment should be 'final and conclusive between the parties'. This requirement is clearly satisfied where the adjudicating court can no longer alter its judgment or can only do so in very exceptional circumstances. Similarly, neither the fact that the period during which an appeal may be made is still running nor even a pending appeal prevent this requirement from being satisfied. However, maintenance orders which stipulate periodic payments are excluded from recognition since they may be varied to take account of changed circumstances unless they are covered by the abovementioned Maintenance orders (reciprocal enforcement) Act 1972.

9. (d) It is possible to institute proceedings on the basis of a foreign judgment or to make an application for its registration under the 1933 Act during a period of six years from the date on which the judgment was given.

10. (e) United Kingdom law distinguishes between the recognition and enforcement of foreign judgments in the same way as the other States of the Community. If a foreign judgment fulfils the common law requirements for its recognition or if it is registered with a United Kingdom court, it becomes effective also in fields other than enforcement. A clear distinction is made between recognition and enforcement of foreign judgments in, for example, the bilateral Conventions with France and Germany.

The requirements mentioned in paragraphs 7 and 9 are not set out in those Conventions as requirements for recognition.

11. (f) Finally, it should be noted that the United Kingdom although not a federal State, is not a single legal and judicial area. It consists of three areas with different legal systems: England and Wales, Scotland and Northern Ireland. Whilst the common law rules described in paragraph 6 apply uniformly to the whole of the United Kingdom, the different judicial systems in each of the three legal areas of this State have to be taken into consideration when the 1933 Act is applied. Applications for registration have to be made in England and Wales to the High Court of Justice, in Scotland to the Court of Session, and in Northern Ireland to the High Court of Justice of Northern Ireland. If registration is granted, the judgment can be enforced only in the area in which the relevant courts have jurisdiction, which extends to the whole of England and Wales, of Scotland or of Northern Ireland respectively (see paragraph 209; for maintenance orders, see paragraphs 210 and 218). Recognition of a judgment is, nevertheless, independent of its registration.

2. *IRELAND*

12. The common law provisions of Irish law are similar to those which apply in the United Kingdom. The only statutory provisions of Irish law on the recognition and enforcement of foreign judgments are contained in the Maintenance orders (reciprocal enforcement) Act 1974. This Act gives effect to an international agreement between Ireland and the United Kingdom for the reciprocal recognition of maintenance orders made by courts in those States. The agreement is expressed to terminate on the coming into force of the 1968 Convention for both States.

3. *DENMARK*

13. Under paragraph 223a of the Law of 11 April 1916, foreign judgments can be recognized only if a treaty providing reciprocity has been concluded with the State of origin, or if binding effect has been given to judgments of a foreign State by Royal Decree. Denmark has concluded no bilateral conventions on recognition and enforcement. There is only one Royal Decree of the type referred to and it concerns judgments given by German courts (2).

B.

EXISTING CONVENTIONS

14. Apart from Conventions relating to particular matters (see paragraph 238 *et seq.*), the United Kingdom is the only new Member State to be bound to other Member States of the EEC by bilateral Conventions on the recognition and enforcement of judgments. These are the Conventions with France, Belgium, the Federal Republic of Germany, Italy and the Netherlands listed in the new version of Article 55 (see

paragraph 237). These bilateral Conventions serve to implement the Foreign judgments (reciprocal enforcement) Act for the United Kingdom (see paragraph 6) and therefore contain provisions which more or less follow the same pattern. The requirements for recognition and enforcement correspond to the criteria mentioned in paragraphs 6 to 11 above. Rules providing for 'direct' jurisdiction [3] are not included.

C.

GENERAL ARRANGEMENT OF THE PROPOSED ADJUSTMENTS

15. Neither Article 3 (2) of the Act of Accession nor the terms of reference given to the Working Party provide any clear guide of what is meant by 'necessary adjustments'.

The term could be given a very narrow interpretation. The emphasis would then have to be laid above all on the requirement of necessity, in the sense of indispensability. At the beginning of the Working Party's discussions it became clear, however, that such a narrow view of the contemplated adjustments was bound to make it more difficult for the 1968 Convention to take root in the legal systems of the new Member States. There are a variety of reasons for this.

1. *SPECIAL STRUCTURAL FEATURES OF THE LEGAL SYSTEMS OF THE NEW MEMBER STATES*

16. The 1968 Convention implicitly proceeded from a legal background common to the original Member States of the EEC. By contrast the legal systems of the new Member States unmistakably contain certain special structural features. It would hardly have been reasonable to expect these States to adjust their national law to the legal position on which the 1968 Convention is based.

On the contrary, adjustment of the Convention seemed the more obvious course on occasion. This applies, for example, to the distinction made in Articles 30 and 38 between ordinary and extraordinary appeals (see paragraph 195 *et seq.)*, which does not exist in United Kingdom and Irish law, to the system of registering judgments in the United Kingdom instead of the system of granting enforcement orders (see paragraph 208) and to the concept of the trust which is a characteristic feature of the common law [4] (see paragraph 109 *et seq.)*. The same also applies to the inter-relation existing in Denmark between judicial and administrative competence in maintenance cases (see paragraph 66 *et seq.)*.

2. *AMBIGUITIES IN THE EXISTING TEXT*

17. In certain cases, enquiries about the precise meaning of some provisions of the 1968 Convention by the States obliged to accede to it clearly showed that their interpretation was often uncertain and controversial. The Working Party decided therefore to propose that certain provisions of the 1968 Convention should be given a more precise wording or an authoritative interpretation. This applies, for example, to the provisions about granting legal aid in enforcement proceedings (see paragraph 223). The Working Party also dealt in this way with the provisions of Article 57 on the relation between the 1968 Convention and other Conventions, (see paragraph 238 *et seq.*). In most cases, however, the information requested could be given in a sufficiently clear and uniform way, so that this report need do no more than refer to it.

3. *FURTHER DEVELOPMENTS IN THE LAW OF THE ORIGINAL MEMBER STATES OF THE EEC*

18. In yet other cases, enquiries by the new Member States about the content of some provisions of the 1968 Convention revealed that in the original Member States of the EEC too the law had in the meantime evolved in such a way that general adjustments ratner than adjustments restricted to relations with the new Member States seemed advisable. This applies particularly to proceedings in matters of family law in which ancillary relief, and especially maintenance claims, are now often combined with the main proceedings concerning status. In family and matrimonial matters, such combined proceedings have replaced the traditional system of separating status proceedings from subsequent proceedings in many countries during the years following the signing of the 1968 Convention. This is the reason for the revised Article 5 (2) proposed by the Working Party (see paragraphs 32 and 90). The development of consumer protection law in the Member States led to a completely new version of Section 4 of Title II, and in one case the 1968 Convention was amended as a result of judgments of the Court of Justice of the European Communities (see paragraph 179).

4. *SPECIFIC ECONOMIC EFFECTS*

19. Finally, it became apparent that certain provisions of the 1968 Convention in their application to the new Member States would have economic repercussions unequalled in the original Member States. Thus, the worldwide significance of the British insurance market prompted the Working Party to recommend amendments concerning jurisdiction in insurance matters (see paragraph 136). The new paragraph (7) of Article 5 (see paragraph 122) is justified by the special position occupied by British maritime jurisdiction.

CHAPTER 3

SCOPE OF THE CONVENTION

20. As already discussed in the Jenard report, the provisions governing the scope of the 1968 Convention contain four significant elements. These required some further explanation in the context of the relationship of the original Member States to each other. They are:

1. Limitation to proceedings and judgments on matters involving international legal relationships (I).

2. Duty of the national courts to observe the provisions governing the scope of the 1968 Convention of their own motion (II).

3. Limitation of the Convention to civil and commercial matters (III).

4. A list (Article 1, second paragraph) of matters excluded from the scope of the Convention (IV).

In the relationship of the original Member States to each other there was no problem about a fifth criterion which is much more clearly brought out in the title of the 1968 Convention than in Article 1 which defines its scope. The 1968 Convention only applies where court proceedings and court decisions are involved. Proceedings and decisions of administrative authorities do not come within the scope of the 1968 Convention. This gave rise to a particular problem of adjustment in relation to Denmark (V).

I. MATTERS INVOLVING INTERNATIONAL LEGAL RELATIONSHIPS

21. The accession of the new Member States to the 1968 Convention in no way affects the application of the principle that only proceedings and judgments about matters involving international legal relationships are affected, so that reference need only be made to Section I of Chapter III of the Jenard report.

II. BINDING NATURE OF THE CONVENTION

22. Under Articles 19 and 20 of the 1968 Convention the provisions concerning 'direct jurisdiction' are to be observed by the court of its own motion: in some cases, i.e. where exclusive jurisdiction exists, irrespective of whether the defendant takes any steps; in other cases only where the defendant challenges the jurisdiction. Similarly, a court must also of its own motion consider whether there exists an agreement on jurisdiction which excludes the court's jurisdiction and which is valid in accordance with Article 17.

An obligation to observe the rules of jurisdiction of its own motion is by no means an unusual duty for a court in the original Member States. However, the United Kingdom delegation pointed out that such a provision would mean a fundamental change for its courts. Hitherto United Kingdom courts had been able to reach a decision only on the basis of submissions of fact or law made by the parties. Without infringing this principle, no possibility existed of examining their jurisdiction of their own motion.

However, Article 3 (2) of the Act of Accession cannot be interpreted as requiring the amendment of any provisions of the Conventions referred to on the ground that introduction of those provisions into the legal system of a new Member State would necessitate certain changes in its long-established legal practices and procedures.

It does not necessarily follow from Articles 19 and 20 of the 1968 Convention that the courts must, of their own motion, investigate the facts relevant to deciding the question of jurisdiction, that they must for example inquire where the defendant is domiciled. The only essential factor is that uncontested assertions by the parties should not bind the court. For this reason the following rule is reconcilable with the 1968 Convention: a court may assume jurisdiction only if it is completely satisfied of all the facts on which such jurisdiction is based; if it is not so satisfied it can and must request the parties to provide the necessary evidence, in default of which the action will be dismissed as inadmissible. In such circumstances the lack of jurisdiction would be declared by the court of its own motion, and not as a result of a challenge by one of the parties. Whether a court is itself obliged to investigate the facts relevant to jurisdiction, or whether it can, or must, place the burden of proof in this respect on the party interested in the jurisdiction of the court concerned, is determined solely by national law. Indeed some of the legal systems of the original Member States, for example Germany, do not require the court itself to undertake factual investigations in a case of exclusive jurisdiction, even though lack of such jurisdiction has to be considered by the court of its own motion.

III. CIVIL AND COMMERCIAL MATTERS

23. The scope of the 1968 Convention is limited to legal proceedings and judgments which relate to civil and commercial matters. All such proceedings not expressly excluded fall within its scope.

In particular, it is irrelevant whether an action is brought 'against' a named defendant (see paragraphs 124 *et seq.*). It is true that in such a case Article 2 *et seq.* cannot operate; but otherwise the 1968 Convention remains applicable.

The distinction between civil and commercial matters on the one hand and matters of public law on the other is well recognized in the legal systems of the original Member States and is, in spite of some important differences, on the whole arrived at on the basis of similar criteria. Thus the term 'civil law' also includes certain important special subjects which are not public law, especially, for example, parts of labour law.

For this reason the draftsmen of the original text of the 1968 Convention, and the Jenard report, did not include a definition of civil and commercial matters and merely stated that the 1968 Convention also applies to decisions of criminal and administrative courts, provided they are given in a civil or commercial matter, which occasionally happens. In this last respect, the accession of the three new Member States presents no additional problems. But as regards the main distinction referred to earlier considerable difficulties arise.

In the United Kingdom and Ireland the distinction commonly made in the original EEC States between private law and public law is hardly known. This meant that the problems of adjustment could not be solved simply by a reference to these classifications. In view of the Judgment of the Court of Justice of the European Communities of 14 October 1976 ([5]), which was delivered during the final stages of the discussions and which decided in favour of an interpretation which made no reference to the 'applicable' national law, the Working Party restricted itself to declaring, in Article 1, paragraph 1, that revenue, customs or administrative matters are not civil or commercial matters within the meaning of the Convention. Moreover, the legal practice in the Member States of the Community, including the new Member States, must take account of the above judgment which states that, in interpreting the concept of civil and commercial matters, reference must be made 'first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems'.

As a result of this all that this report can do is to throw light on the Court's instructions by setting out some details of comparative law.

A.

ADMINISTRATIVE LAW IN IRELAND AND THE UNITED KINGDOM

24. In the United Kingdom and in Ireland the expression 'civil law' is not a technical term and has more than one meaning. It is used mainly as

the opposite of criminal law. Except in this limited sense, no distinction is made between 'private' and 'public' law which is in any way comparable to that made in the legal systems of the original Member States, where it is of fundamental importance. Constitutional law, administrative law and tax law are all included in 'civil law'. Admittedly the United Kingdom is already a party to several Conventions which expressly apply only to 'civil and commercial matters'. These include all the bilateral Conventions on the enforcement of foreign judgments concluded by the United Kingdom. None of these, however, contains any rules which decide the circumstances under which an original court before which an issue is brought may assume jurisdiction. They govern only the recognition and enforcement of judgments and deal with questions of jurisdiction only indirectly as a condition of recognition. Moreover, these Conventions generally only apply to judgments ordering the payment of a specific sum of money (see paragraph 7). In drafting them, a pragmatic approach dispensing with a definition of 'civil and commercial matters' proved, therefore, quite adequate.

B.

ADMINISTRATIVE LAW IN THE CONTINENTAL MEMBER STATES

25. In the legal systems of the original Member States, the State itself and corporations exercising public functions such as local authorities may become involved in legal transactions in two ways. Having regard to their special functions and the fact that they are formally part of public law they may act outside private law in a 'sovereign' capacity. If they do this, their administrative ac ('Verwaltungsakt', 'décision exécutoire') is of a special nature. The State and some other public corporations may, however, also engage in legal transactions in the same way as private individuals. They can conclude contracts subject to private law, for example with transport undertakings for the carriage of goods or persons in accordance with tariffs generally in force or with a property owner for the lease of premises. The State and public corporations can also incur tortious liability in the same way as private individuals, for example as a result of a traffic accident in which an official car is involved. The real difficulty arises from distinguishing between instances in which the State and its independent organs act in a private law capacity and those in which they act in a public law capacity. A few guidelines on how this difficulty may be overcome are set out below.

The difficulties of finding a dividing line are of three kinds. The field of activities governed by public law differs in the various continental Member States (1). Public authorities frequently have a choice of the form in which they wish to act (2). The position is relatively clear only regarding the legal relations between the State and its independent organs (3).

1. *THE VARYING EXTENT OF PUBLIC LAW*

26. The most important difference between national administrative laws on the continent consists in the legal rules governing the duties of public authorities to provide supplies for themselves and for public tasks. For this purpose the French legal system has established the separate concept of administrative contracts which are governed independently of the 'Code civil' by a special law, the 'Code des marchés publics'. The administrative contract is used both when public authorities wish to cover their own requirements and when public works, such as surface or underground construction, land development, etc., have to be undertaken. In such situations the French State and public corporations do not act in the capacity of private persons. The characteristic result of this is that, if the other parties to the contract do not perform their obligations, the State and public corporations do not have to bring an action before the courts, but may impose unilaterally enforceable sanctions by an administrative act ('décision exécutoire'). The legal situation in Germany is quite different. There the administrative contract plays a completely subordinate role. Supplies to the administrative agencies, and in particular the placing of contracts for public works, are carried out solely on the basis of private law. Even where the State undertakes large projects like the construction of a dam or the channelling of a river, it concludes its contracts with the firms concerned like a private individual.

2. *CHOICE OF TYPE OF LAW*

27. However, the borderline between the public law and the private law activities of public agencies is not rigidly prescribed in some of the legal systems. Public authorities have, within certain limits, a right to choose whether in carrying out their functions they wish to use the method of a 'sovereign act', i.e. an administrative contract, or merely to conclude a private transaction.

In respect of those areas where public authorities may act either under private or public law, it is not always easy to decide whether or not they have acted as private individuals. In practice a clear indication is often lacking.

3. *RELATIONSHIP OF PUBLIC AUTHORITIES TO ONE ANOTHER*

28. Relations between public authorities may also be governed either by private or by public law. If governed by public law, such relations are not subject to the 1968 Convention, even if, as in Italy, they are not considered part of administrative law. However, relations of States and public corporations with each other would fall almost without exception within the sphere of private law, if they contain international aspects (and are not subject to public international law). It is hard to imagine how, for example, it would be possible for relations under public law to exist between two local authorities in different States. However, such relations could, of course, be established in future by treaties.

C.

CIVIL AND CRIMINAL LAW

29. The Working Party considered it obvious that criminal proceedings and criminal judgments of all kinds are excluded from the scope of the 1968 Convention, and that this matter needed, therefore, no clarification in the revised text (see paragraph 17). This applies not only to criminal proceedings *stricto sensu*. Other proceedings imposing sanctions for breaches of orders or prohibitions intended to safeguard the public interest also fall outside the scope of civil law. Certain difficulties may arise in some cases in classifying private penalties known to some legal systems like contractual penalty clauses, penalties imposed by associations, etc. Since in many legal systems criminal proceedings may be brought by a private plaintiff, a distinction cannot be made by reference to the party which instituted the proceedings. The decisive factor is whether the penalty is for the benefit of the private plaintiff or some other private individual. Thus the decisions of the Danish industrial courts imposing fines, which are for the benefit of the plaintiff or some other aggrieved party, certainly fall within the scope of the 1968 Convention.

IV. MATTERS EXPRESSLY EXCLUDED

30. The second paragraph of Article 1 sets out under four points the civil matters excluded from the scope of the 1968 Convention. The accession of the new Member States raises problems in respect of all four points.

A.

STATUS OR LEGAL CAPACITY OF NATURAL PERSONS, RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP, WILLS AND SUCCESSION

31. The Working Party encountered considerable difficulties when dealing with two problems relating to point (1) of the second paragraph of Article 1. The first problem was that of maintenance proceedings ancillary to status proceedings (1) and the second problem was the meaning of the term 'régimes matrimoniaux' (rights in property arising out of a matrimonial relationship) (2). Apart from these two problems, the enquiries directed to the Working Party by the new Member States in respect of point (1) of the second paragraph of Article 1 were relatively easy to answer (3).

1. *MAINTENANCE JUDGMENTS ANCILLARY TO STATUS PROCEEDINGS (ANCILLARY MAINTENANCE JUDGMENTS)*

32. When the 1968 Convention was drawn up, the principle still applied in the original Member States that disputes relating to property could not be combined with status proceedings, nor could

maintenance proceedings be combined with proceedings for the dissolution of a marriage or paternity proceedings. It was therefore possible, without running the risk of creating disadvantages caused by artificially separating proceedings which in reality belonged together, to exclude status matters, but not maintenance proceedings, from the scope of the 1968 Convention. Once this rule comes up against national legislation which allows combined proceedings comprising maintenance claims and status matters, it will perforce give rise to great difficulties. These difficulties had already become serious in the original Member States, as soon as the widespread reform of family law had led to an increasing number of combined proceedings in those countries. Accordingly a mere adjustment of the 1968 Convention as between the original and new Member States would have provided only a piecemeal solution. Time and opportunity were ripe for an adjustment of the 1968 Convention, even as regards the relationships between the original Member States, to take account of the developments in the law which had taken place (see paragraph 18).

33. (a) The solution proposed by the Working Party is the outcome of a lengthy and intensive study of the possible alternatives. A distinctive feature of the 1968 Convention is the inter-relation of the application of its rules of jurisdiction at the adjudicating stage and the prohibition against reopening the question of jurisdiction at the recognition stage. Consequently, on the basis of the original text of the Convention only two completely clear-cut solutions present themselves as regards the treatment of ancillary maintenance judgments. The first is that the adjudicating court dealing with a status matter may give an ancillary maintenance judgment only when it has jurisdiction under the 1968 Convention; the maintenance judgment must then be recognized by the foreign court which may not re-examine whether the original adjudicating court had jurisdiction. The second possible solution is that ancillary maintenance judgments should also be excluded from the scope of the 1968 Convention under point (1) of the second paragraph of Article 1 as being ancillary to status judgments. However, both solutions have practical drawbacks. The second would result in ancillary maintenance judgments being generally excluded from recognition and enforcement under the 1968 Convention, even though the great majority of cases are decided by courts which would have had jurisdiction under its provisions. In an unacceptably high number of cases established maintenance claims would then no longer be able to move freely. The first solution would constitute a retrograde step from the progressive and widely acclaimed achievement of combined proceedings and judgments in status and maintenance matters.

34. In view of the above, the simplest solution would have been to include rules of jurisdiction covering status proceedings in the 1968 Convention. However, the reasons given earlier against taking that course are still valid. Therefore, the only way out is to opt for one of the two alternatives outlined above, whilst mitigating its drawbacks as far as possible. In the view of the Working Party, to deprive maintenance judgments ancillary to status proceedings of the guarantee of their enforceability abroad, or to recognize them only to a severely limited extent, would be the greater evil.

35. The Working Party therefore tried first of all to find a solution along the following lines. National courts dealing with status matters should have unrestricted power to decide also on maintenance claims, even when they cannot use their jurisdiction in respect of the maintenance claim on any provision of the 1968 Convention; ancillary maintenance judgments should in principle be recognized and enforced, but the court addressed may, contrary to the principles of the 1968 Convention which would otherwise apply, re-examine whether the court which gave judgment on the maintenance claims had jurisdiction under the provisions of Title II. However, the principle that the jurisdiction of the court of origin should not be re-examined during the recognition and enforcement stages was one of the really decisive achievements of the 1968 Convention. Any further restriction of this principle, even if limited to one area, would be justifiable only if all other conceivable alternatives were even more unacceptable.

36. The proposed addition to Article 5 would on the whole have most advantages. It prevents maintenance judgments which are ancillary to status judgments being given on the basis of the rule of exorbitant jurisdiction which generally applies in family law matters, namely the rule which declares the nationality of only one of the two parties as sufficient. One can accept that maintenance proceedings may not be combined with status proceedings where the competence of the court concerned is based solely on such

exorbitant jurisdiction. For status proceedings, jurisdiction will continue to depend on the nationality of one of the two parties. The maintenance proceedings will have to be brought before another court with jurisdiction under the 1968 Convention.

(b) The significance of the new approach is as follows:

37. It applies uniformly to the original and to the new Member States alike.

38. The jurisdiction of the court of origin may not be re-examined during the recognition and enforcement stages. This still follows from the third paragraph of Article 28 even after the addition made to Article 5. The court of origin has a duty to examine very carefully whether it has jurisdiction under the 1968 Convention, because a wrong decision on the question of jurisdiction cannot be corrected later on.

39. Similar rules apply in respect of *lis pendens*. It was not necessary to amend Articles 21 and 23. As long as the maintenance claim is pending before the court seised of the status proceedings it may not validly be brought before the courts of another State.

40. The question whether the court seised of the status proceedings has indeed jurisdiction also in respect of the maintenance proceedings, without having to rely solely on the nationality of one of the parties to the proceedings, is to be determined solely by the *lex fori,* including of course its private international law and procedural law. Even where the courts of a State may not as a rule combine a status matter with a maintenance claim, but can do so if a foreign legal system applicable under the provisions of their private international law so provides, they have jurisdiction in respect of the maintenance claim under the provisions of Article 5 (2) of the 1968 Convention as amended. This is subject to the proviso that the court concerned in fact had jurisdiction in respect of both the status proceedings and the maintenance claim under the current provisions of its own national law.

41. The 1968 Convention prohibits the assumption of a combined jurisdiction which may be provided for under the national law to cover both status and maintenance proceedings only where the court's jurisdiction would be based solely on the nationality of one of the two parties. This concerns principally the exorbitant jurisdictions which are referred to in the second paragraph of Article 3, and provided for in Article 15 of the Belgian Civil Code (Code civil), and Articles 14 and 15 of the French and Luxembourg Civil Code (Code civil), governing proceedings which do not relate only to status and are therefore not excluded pursuant to point (1) of the second paragraph of Article 1. Maintenance actions combined with status proceedings continue to be permitted, even if the jurisdiction of the court is based on grounds other than those which are normally excluded by the 1968 Convention as being exorbitant. Jurisdiction on the basis of both parties having the same nationality is excluded by the 1968 Convention in respect of ordinary civil and commercial matters, (Article 3, second paragraph), but in respect of combined status and maintenance proceedings, it cannot be considered as exorbitant, and consequently should not be inadmissible. The plaintiff's domicile is recognized in any case as a basis for jurisdiction in maintenance actions.

Finally, the proposed addition to Article 5 (2) deprives courts of jurisdiction to entertain maintenance claims in combined family law proceedings only where their jurisdiction in respect of the status proceedings is based solely on the nationality of one of the two parties. Where the jurisdiction of a court depends on the fulfilment of several conditions, only one of which is that one of the parties should possess the nationality of the country concerned, jurisdiction does not depend solely on the nationality of the two parties.

Article 606 (3) of the German Code of Civil Procedure is intended to ensure, in conjunction with Article 606a, that in matrimonial matters a German court always has jurisdiction, even when only one of the spouses is German. The fact that this provision is only supplementary to other provisions governing jurisdiction does not change the fact that jurisdiction may be based solely on the nationality of one of the parties. Once Article 5 (2) of the 1968 Convention comes into force in its amended form maintenance claims can no longer be brought and decided under that particular jurisdiction.

42. Article 5 (2) does not apply where the defendant is not domiciled in a Contracting State, or where maintenance questions can be decided without the

procedural requirement of a claim or petition by one spouse against the other (see paragraph 66).

2. *RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP*

43. The exclusion of 'rights in property arising out of a matrimonial relationship' from the scope of the Convention (Article 1 second paragraph, point (1)) raises a problem for the United Kingdom and Ireland.

Neither of these countries has an equivalent legal concept, although the expression 'matrimonial property' is used in legal literature. In principle, property rights as between spouses are governed by general law. Agreements between spouses regulating their property rights are no different in law from agreements with third parties. Occasionally, however, there are special statutory provisions affecting the rights of spouses. Under English law (Matrimonial homes Act 1967) and Irish law (Family home protection Act 1976), a spouse is entitled to certain rights of occupation of the matrimonial home. Moreover, divorce courts in the United Kingdom have, under the Matrimonial causes Act 1973, considerable powers, though varying in extent in the different parts of the country, to order the payment of capital sums by one former spouse to the other. In England even a general redistribution of property as between former spouses and their children is possible.

The concept of 'rights in property arising out of a matrimonial relationship' can also give rise to problems in the legal systems of the original Member States. It does not cover the same legal relations in all the systems concerned.

For a better understanding of the problems involved, they are set out more fully below (a), before the solution proposed by the Working Party is discussed (b).

44. (a) Three observations may give an indication of what is meant by 'matrimonial regimes' (rights in property arising out of a matrimonial relationship) in the legal systems of the seven continental Member States. They will deal with the character of the concept which is confined exclusively to relationships between spouses (paragraph 45), with the relationship with the provisions which apply to all marriages irrespective of the particular 'matrimonial regime' between the spouses (paragraph 46), and finally with the possibility of third parties becoming involved (paragraph 47).

45. For the purpose of governing the relations between spouses in respect of property, these legal systems do not, or at least not predominantly, employ the legal concepts and institutions otherwise used in their civil law. Instead, they have developed exclusive legal institutions the application of which is limited to relations between spouses, and whose most important feature is a comprehensive set of rules governing property. However, there is not merely one such set of rules in each legal system. Instead, spouses have a choice between several, ranging from general 'community of property' to strict 'separation of property'. Even the latter, when chosen by the spouses, is a special form of 'property regime', although special features arising from marriage can then hardly be said to exist any longer. The choice of a 'property regime' must take the form of a 'marriage contract' which is a special legal concept and should not be confused with the conclusion of the marriage itself. If the spouses do not make a choice, one of the sets of rules governing property rights applies to them by law (known as the 'statutory matrimonial regime').

In some legal systems (France and Belgium) the 'matrimonial regime' existing at the beginning of a marriage can subsequently be changed only in exceptional circumstances. In others (Germany) the spouses are free to alter their 'matrimonial regime' at any time.

Disputes concerning 'matrimonial regimes' can arise in various forms. There may be a dispute about the existence and interpretation of a marriage contract. In certain circumstances, a spouse may apply to the court for conversion of one 'matrimonial regime' into a different one. Some 'matrimonial regimes' provide for different rules in respect of different types of property. A dispute may then arise as to the type of property to which a particular object belongs. Where the 'matrimonial regime' in question differentiates between the management of different types of property, there may be disagreement as to which spouse may manage which items of property. The most frequent type of dispute relating to 'matrimonial regimes' concerns the winding up of the 'matrimonial regime' after termination of the marriage, particularly after divorce. The 'statutory matrimonial regime' under German

law ('Zugewinngemeinschaft' or community of acquisitions) then results in an equalization claim by the spouse whose property has not increased in value to the same extent as that of his partner.

46. Some provisions apply to all marriages, irrespective of the particular 'matrimonial régime' under which spouses live, especially in Germany and France. Significantly the German and French texts of the 1968 Convention use the term in the plural ('die Güterstände', 'les régimes matrimoniaux').

This can be explained as follows: the Code civil, for instance, deals with property aspects of marriage in two different parts of the code. Title V of the third book (on the acquisition of property) refers in detail to the 'contrat de mariage' and then 'régimes matrimoniaux', while property aspects of the relations between spouses are also covered by Articles 212 to 226 in Title V of the first book. The new French divorce law of 11 July 1975 (6) introduced into the new version of Article 270 *et seq.* of the Code civil equalization payments normally in the form of lump sum compensation (Article 274) which are independent of the particular 'regime' applicable between the spouses. German law in the fourth book of the Bürgerliches Gesetzbuch makes a similar distinction between the legal consequences in respect of property rights which generally follow from marriage (Title V, Article 1353 *et seq.)* and those which follow from 'matrimonial property law', which varies according to the various 'matrimonial regimes'. Under both systems (Article 1357 (2) of the Bürgerliches Gesetzbuch, Article 220 (2) of the French Code civil) it is possible, for example, to prevent a spouse from engaging in certain legal transactions which he is normally entitled to engage in his capacity as spouse. According to Article 285 of the Code civil (7) the court can, after divorce, make orders concerning the matrimonial home irrespective of the 'matrimonial regime' previously applicable. Similar possibilities exist in other States.

French legal literature refers to provisions concerning property rights which apply to all marriages as 'régime matrimonial primaire'. Other legal systems have no such special expression. It is within the spirit of Article 1, second paragraph, point (1) of the 1968 Convention to exclude those provisions concerning property rights affecting all marriages from its scope of application, in so far as they are not covered by the term 'maintenance claims' (see paragraph 91 *et seq.*)

In all legal systems of the Community it is possible to conceive of relations affecting rights between spouses which are governed by the general law of contract, law of tort or property law. Some laws contain provisions specifically intended to govern cases where such relations exist between spouses. For example, Article 1595 of the French Code civil contains restrictions on the admissibility of contracts of sale between spouses. Case law has sometimes developed special rules in this field which are designed to take account of the fact that such transactions commonly occur in relations between spouses. All this does not alter the position that legal relations governed by the general law of contract or tort remain subject to the provisions of the 1968 Convention, even if they are between spouses.

47. Finally, legal provisions comprised in the term 'matrimonial regimes' are not limited to relations between the spouses themselves. For example, in Italian law, in connection with the liquidation of a 'fondo patrimoniale' disputes may arise between parents and children (Article 171 (3) of the Codice civile), which under Italian law unequivocally concern relations arising out of 'matrimonial property law' ('il regime patrimoniale della famiglia'). German law contains the regime of 'continued community of property' ('fortgesetzte Gütergemeinschaft'), which forms a link between a surviving spouse and the issue of the marriage.

48. (b) These findings raise problems similar to those with which the Working Pary was faced in connection with the concept 'civil and commercial matters'. It was, however, possible to define the concept of 'matrimonial regimes' not only in a negative manner (paragraph 49), but also positively, albeit rather broadly. This should enable implementing legislation in the United Kingdom and Ireland, in reliance on these statements, to indicate to the courts which legal relations form part of 'matrimonial regimes' within the meaning of the 1968 Convention (paragraph 50). Consequently no formal adjustment of the 1968 Convention became necessary.

49. As a negative definition, it can be said with certainty that in no legal system do maintenance claims between spouses derive from rules governing 'matrimonial regimes'; nor are

maintenance claims confined to claims for periodic payments (see paragraph 93).

50. The mutual rights of spouses arising from 'matrimonial régimes' correspond largely with what are best described in English as 'rights in property arising out of a matrimonial relationship'. Apart from maintenance matters property relations between spouses which are governed by the differing legal systems of the original Member States otherwise than as 'matrimonial regimes' only seldom give rise to court proceedings with international aspects.

Thus the following can be said in respect of the scope of point (1) of the second paragraph of Article 1 as far as 'matrimonial regimes' are concerned:

The Convention does not apply to the assumption of jurisdiction by United Kingdom and Irish courts, nor to the recognition and enforcement of foreign judgments by those courts, if the subject matter of the proceedings concerns issues which have arisen between spouses, or exceptionally between a spouse and a third party, during or after dissolution of their marriage, and which affect rights in property arising out of the matrimonial relationship. The expression 'rights in property' includes all rights of administration and disposal — whether by marriage contract or by statute — of property belonging to the spouses.

3. *THE REMAINING CONTENTS OF ARTICLE 1, SECOND PARAGRAPH, POINT (1) OF THE 1968 CONVENTION*

51. (a) The non-applicability of the 1968 Convention in respect of the status or legal capacity of natural persons concerns in particular proceedings and judgments relating to:

— the voidability and nullity of marriages, and judicial separation,

— the dissolution of marriages,

— the death of a person,

— the status and legal capacity of a minor and the legal representation of a person who is mentally ill; the status and legal capacity of a minor also includes judgments on the right to custody after the divorce or legal separation of the parents; this was the Working Party's unanimous reply to the express question put by the Irish delegation,

— the nationality or domicile (see paragraph 71 *et seq.*) of a person,

— the care, custody and control of children, irrespective of whether these are in issue in divorce, guardianship, or other proceedings,

— the adoption of children.

However, the 1968 Convention is only inapplicable when the proceedings are concerned directly with legal consequences arising from these matters. It is not sufficient if the issues raised are merely of a preliminary nature, even if their preliminary nature is, or has been, of some importance in the main proceedings.

52. (b) The expression 'wills and succession' covers all claims to testate or intestate succession to an estate. It includes disputes as to the validity or interpretation of the terms of a will setting up a trust, even where the trust takes effect on a date subsequent to the death of the testator. The same applies to proceedings in respect of the application and interpretation of statutory provisions establishing trusts in favour of persons or institutions as a result of a person dying intestate. The 1968 Convention does not, therefore, apply to any disputes concerning the creation, interpretation and administration of trusts arising under the law of succession including wills. On the other hand, disputes concerning the relations of the trustee with persons other than beneficiaries, in other words the 'external relations' of the trust, come within the scope of the 1968 Convention (see paragraph 109 *et seq.*)

B.

BANKRUPTCY AND SIMILAR PROCEEDINGS

53. Article 1, second paragraph, point (2), occupies a special position among the provisions concerning the legal matters excluded from the 1968 Convention. It was drafted with reference to a special Convention on bankruptcy which was being discussed at the same time as the 1968 Convention.

Leaving aside special bankruptcy rules for very special types of business undertakings, the two Conventions were intended to dovetail almost completely with each other. Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975 ([8]), deliberately adopted the principal terms 'bankruptcy', 'compositions' and 'analogous proceedings' ([9]) in the provisons concerning its scope in the same way ([10]) as they were used in the 1968 Convention. To avoid, as far as possible, leaving lacunae between the scope of the two Conventions, efforts are being made in the discussions on the proposed Convention on bankruptcy to enumerate in detail all the principal and secondary proceedings involved ([11]) and so to eliminate any problems of interpretation. As long as the proposed Convention on bankruptcy has not yet come into force, the application of Article 1, second paragraph, point (2) of the 1968 Convention remains difficult. The problems, including the matters arising from the accession of the new Member States, are of two kinds. First, it is necessary to define what proceedings are meant by bankruptcy, compositions or analogous proceedings as well as their constituent parts (1). Secondly, the legal position in the United Kingdom poses a special problem as the bankruptcy of 'incorporated companies' is not a recognized concept in that country (2).

1. *GENERAL AND INDIVIDUAL TYPES OF PROCEEDINGS EXCLUDED FROM THE SCOPE OF THE 1968 CONVENTION*

54. It is relatively easy to define the basic types of proceedings that are subject to bankruptcy law and therefore fall outside the scope of the 1968 Convention. Such proceedings are defined in almost identical terms in both the Jenard and the Noël-Lemontey reports ([12]) as those

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

In the legal systems of the original States of the EEC there are only a very few examples of proceedings of this kind, ranging from two (in Germany) to four (Italy and Luxembourg). In its 1975 version ([8]) the Protocol to the preliminary draft Convention on bankruptcy enumerates the proceedings according to types of proceedings and States concerned. A list is reproduced in Annex I to this report. Naturally, the 1968 Convention does not, *a fortiori,* cover global insolvency proceedings which do not take place before a court as, for example, can be the case in France when authorization can be withdrawn from an insurance undertaking for reasons of insolvency.

The enumeration in Article 17 of the preliminary draft Convention on bankruptcy cannot, before that Convention has come into force, be used for the interpretation of Article 1, second paragraph, point (2) of the 1968 Convention. Article 17 mentions the kind of proceedings especially closely connected with bankruptcy where the courts of the State where the bankruptcy proceedings are opened are to have exclusive jurisdiction.

It is not desirable at this stage to prescribe this list, or even an amended list, as binding. Further amendments may well have to be made during the discussions on the Convention on bankruptcy. To prescribe a binding list would cause confusion, even though the list to be included in the Protocol to the Convention on bankruptcy will, after the latter's entry into force, prevail over the 1968 Convention pursuant to Article 57, since it is part of a special Convention. Moreover, the list, as already mentioned, does not include all bankruptcies, compositions and analogous proceedings. For instance, it has become clear during the discussions on the Convention on bankruptcy that the list will not cover insurance undertakings which only undertake direct insurance ([13]), without thereby bringing the bankruptcy of such undertakings within the scope of the 1968 Convention. Finally the Working Party was not sure whether all the proceedings included in the list as it stood at the beginning of 1976 could properly be regarded as bankruptcies, compositions or analogous proceedings, before the list formally comes into force. This applied particularly to the proceedings mentioned in connection with the liquidation of companies (see paragraph 57).

2. *BANKRUPTCY LAW AND THE DISSOLUTION OF COMPANIES*

55. As far as dissolution, whether or not by decision of a court, and the capacity to be made bankrupt are concerned, the legal treatment of a

partnership (14) established under United Kingdom or Irish law is comparable in every respect to the treatment of companies established under continental legal systems. Companies (15) within the meaning of United Kingdom or Irish law, however, are dealt with in a fundamentally different way. The Bankruptcy Acts do not apply to them (16), but instead they are subject to the winding-up procedure of the Companies Acts (17); even if they are not registered companies. Winding-up is not a special bankruptcy procedure, but a legal concept which can take different forms and serves different purposes. A common feature of all winding-up proceedings is a disposal of assets and the distribution of their proceeds amongst the persons entitled thereto with a view of bringing the company to an end. The start of winding-up proceedings corresponds, therefore, to what is understood by 'dissolution' on the continent. The dissolution of a company on the other hand is identical with the final result of a liquidation under continental legal systems.

A distinction is made between winding-up by the court, voluntary winding-up and winding-up subject to the supervision of the court. The second kind of winding-up takes place basically without the intervention of the court, either at the instance of the members alone or of the members together with the creditors. Only as a subsidiary measure and exceptionally can the court appoint a liquidator. The third kind of winding-up is only a variation on the second. The court has certain supervisory powers. A winding-up of a company by the court requires an application either by the company or by a creditor which is possible in a number of circumstances of which insolvency is only one. Other grounds for a winding-up include: the number of members falling below the required minimum, failure to commence, or a lengthy suspension of, business and the general ground 'that the court is of the opinion that it is just and equitable that the company should be wound up'.

56. The legal position outlined has the following consequences for the application of Article 1, second paragraph, point (2), and Article 16 (2) of the 1968 Convention in the Continental (b) and other (a) Member States:

57. (a) A voluntary winding-up under United Kingdom or Irish law cannot be equated with court proceedings. The same applies to the non-judicial proceedings under Danish law for the dissolution of a company. Legal disputes incidental to or consequent upon such proceedings are therefore normal civil or commercial disputes and as such are not excluded from the scope of the 1968 Convention. This also applies in the case of a winding-up subject to the supervision of the court. The powers of the court in such a case are not sufficiently clearly defined for the proceedings to be classed as judicial.

A winding-up by the court cannot, of course, be automatically excluded from the scope of the 1968 Convention. For although most proceedings of this kind serve the purpose of the liquidation of an insolvent company, this is not always the case. The Working Party decided to exclude from the scope of the 1968 Convention only those proceedings which are or were based on Section 222 (e) of the British Companies Act (18) or the equivalent provisions in the legislation of Ireland and Northern Ireland. This would, however, involve too narrow a definition of the proceedings to be excluded, as the liquidation of an insolvent company is frequently based on one of the other grounds referred to in Section 222 of the British Companies Act, notably in (a), which states that a special resolution of the members is sufficient to set proceedings in motion. There is no alternative therefore to ascertaining the determining factor in the dissolution in each particular case. The English version of Article 1, second paragraph, point (2), of the 1968 Convention has been worded accordingly. It was not, however, necessary to alter the text of the Convention in the other languages. If a winding-up in the United Kingdom or Ireland is based on a ground other than the insolvency of the company, the court concerned with recognition and enforcement in another Contracting State will have to examine whether the company was not in fact insolvent. Only if it is of the opinion that the company was solvent will the 1968 Convention apply.

58. Only in that event does the problem arise of whether exclusive jurisdiction exists for the courts at the seat of the company pursuant to Article 16 (2) of the 1968 Convention. In the United Kingdom and Ireland this is the case for proceedings which involve or have involved a solvent company.

The term 'dissolution' in Article 16 (2) of the 1968 Convention is not to be understood in the narrow technical sense in which it is used in legal systems on the Continent. It also covers

proceedings concerning the liquidation of a company after 'dissolution'. These include disputes about the amount to be paid out to a member; such proceedings are nothing more than stages on the way towards terminating the legal existence of a company.

59. (b) If a company established under a Continental legal system is dissolved, i.e. enters the stage of liquidation, because it has become insolvent, court proceedings relating to the 'dissolution of the company' are only conceivable as disputes concerning the admissibility of, or the mode and manner of conducting, winding-up proceedings. All this is outside the scope of the 1968 Convention. On the other hand, all other proceedings intended to declare or to bring about the dissolution of a company are not the concern of the law of winding-up. It is unnecessary to examine whether the company concerned is solvent or insolvent. It also makes no difference, if bankruptcy law questions arise as a preliminary issue. For instance, when litigation ensues as to whether a company should be dissolved, because a person who allegedly belongs to it has gone bankrupt, the dispute is not about a matter of bankruptcy law, but of a type which falls within the scope of the 1968 Convention. The Convention also applies if, in connection with the dissolution of a company not involving the courts, third parties contend in legal proceedings that they are creditors of the company and consequently entitled to satisfaction out of assets of the company.

C.

SOCIAL SECURITY

60. Matters relating to social security were expressly excluded from the scope of the 1968 Convention. This was intended to avoid the difficulties which would arise from the fact that in some Member States this area of law comes under public law, whereas in others it is on the border-line between public and private law. Legal proceedings by social security authorities against third parties, for example against wrongdoers, in exercise of rights of action which they have acquired by subrogation or by operation of law, do come within the scope of the 1968 Convention.

D.

ARBITRATION

61. The United Kingdom requested information on matters regarding the effect of the exclusion of 'arbitration' from the scope of the 1968 Convention, which were not dealt with in the Jenard report. Two divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph, point (4). The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of 'arbitration' if they refer to arbitration proceedings, whether concluded, in progress or to be started. It was nevertheless agreed that no amendment should be made to the text. The new Member States can deal with this problem of interpretation in their implementing legislation. The Working Party was prepared to accept this conclusion, because all the Member States of the Community, with the exception of Luxembourg and Ireland, had in the meantime become parties to the United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards, and Ireland is willing to give sympathetic consideration to the question of her acceding to it. In any event, the differing basic positions lead to a different result in practice only in one particular instance (see paragraph 62).

1. *DECISIONS OF NATIONAL COURTS ON THE SUBJECT MATTER OF A DISPUTE DESPITE THE EXISTENCE OF AN ARBITRATION AGREEMENT.*

62. If a national court adjudicates on the subject matter of a dispute, because it overlooked an arbitration agreement or considered it inapplicable, can recognition and enforcement of that judgment be refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore, pursuant to Article 1, second paragraph, point (4), the judgment falls outside the scope of the 1968 Convention? Only if the first interpretation (see paragraph 61) is accepted can an affirmative answer be given to this question.

In support of the view that this would be the correct course, it is argued that since a court in the State addressed is free, contrary to the view of the court in the State of origin, to regard a dispute as affecting the status of an individual, or the law of succession, or as falling outside the scope of civil law, and therefore as being outside the scope of the 1968 Convention, it must in the same way be free to take the opposite view to that taken by the court of origin and to reject the applicability of the 1968 Convention because arbitration is involved.

Against this, it is contended that the literal meaning of the word 'arbitration' itself implies that it cannot extend to every dispute affected by an arbitration agreement; that 'arbitration' refers only to arbitration proceedings. Proceedings before national courts would therefore be affected by Article 1, second paragraph, point (4) of the 1968 Convention only if they dealt with arbitration as a main issue and did not have to consider the validity of an arbitration agreement merely as a matter incidental to an examination of the competence of the court of origin to assume jurisdiction. It has been contended that the court in the State addressed can no longer re-open the issue of classification; if the court of the State of origin, in assuming jurisdiction, has taken a certain view as to the applicability of the 1968 Convention, this becomes binding on the court in the State addressed.

2. *OTHER PROCEEDINGS CONNECTED WITH ARBITRATION BEFORE NATIONAL COURTS*

63. (a) The 1968 Convention as such in no way restricts the freedom of the parties to submit disputes to arbitration. This applies even to proceedings for which the 1968 Convention has established exclusive jurisdiction. Nor, of course, does the Convention prevent national legislation from invalidating arbitration agreements affecting disputes for which exclusive jurisdiction exists under national law or pursuant to the 1968 Convention.

64. (b) The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as 'statement of a special case' (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention.

65. (c) Nor does the 1968 Convention cover proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards — a common method of recognition under United Kingdom law. If an arbitration award is revoked and the revoking court or another national court itself decides the subject matter in dispute, the 1968 Convention is applicable.

V. JUDICIAL NATURE OF PROCEEDINGS AND JUDGMENTS

66. As between the original Member States, and also as between those States and the United Kingdom and Ireland, the 1968 Convention could and can in one particular respect be based on a surprisingly uniform legal tradition. Almost everywhere the same tasks pertaining to the field of private law are assigned to the courts. The authorities which constitute 'courts' can everywhere be recognized easily and with certainty. This is also true in cases where proceedings are being conducted in 'court' which are not the result of an action by one party 'against' another party (see paragraphs 23 and 124 *et seq.*). The accession of Denmark raised new problems.

Although the Working Party had no difficulty in confirming that the Industrial Court under the Danish Industrial Court Act of 21 April 1964 (Bulletin No 124) was, in spite of its unusual structure, clearly to be considered a court within the meaning of the 1968 Convention, it was more difficult to decide how to classify proceedings in maintenance matters, which, in Denmark, failing an amicable settlement, are almost always held before administrative authorities and terminate with a decision by the latter.

1. *THE LEGAL POSITION IN DENMARK*

67. The legal position may be summed up as follows. Maintenance matters are determined as regards the obligation to pay either by agreement or by a court judgment. The amount of the payment and the scale of any necessary modifications are, however, determined by an authority known as the 'Amtmand', which under Danish law is clearly not a court but an administrative authority which in this case plays a judicial role. It is true that decisions given in such proceedings come under The Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations, but this is only because under that Convention the matter does not specifically require a court judgment.

2. *ARTICLE Va OF THE PROTOCOL AND ITS EFFECT*

68. There would, however, be an imbalance in the scope of the 1968 Convention, if it excluded maintenance proceedings of the type found in Denmark on the sole ground that they do not take place before courts.

The amendment to the 1968 Convention thus made necessary is contained in the proposal for the adoption of a new Article Va in the Protocol. This method appeared simpler than attempting to amend a large number of separate provisions of the 1968 Convention.

Wherever the 1968 Convention refers to 'court' or 'judge' it must in the future be taken to include Danish administrative authorities when dealing with maintenance matters (as in Article 2, first paragraph, Article 3, first paragraph, Article 4, first paragraph, Article 5 (2), Article 17, Article 18, Articles 20 to 22, Article 27 (4), Article 28, third paragraph and Article 52). This applies in particular to Article 4, first paragraph, even though in the French, Italian and Dutch texts, unlike the German version, the word 'court' does not appear.

Similarly, wherever the 1968 Convention refers to 'judgments', the decisions arrived at by the Danish administrative authorities in maintenance matters will in future be included in the legal definition of the term 'judgment' contained in Article 25. Its content is extended in this respect by the addition of Article Va to the Protocol, so that it is now to be understood as reading:

> 'For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State — including in matters relating to maintenance, the Danish administrative authorities — whatever the judgment may be called . . .'.

CHAPTER 4

JURISDICTION

A.

GENERAL REMARKS

69. In section A of Chapter 4 of his report, Mr. Jenard sets out the main ideas underlying the rules of jurisdiction of the 1968 Convention. None of this is affected by the accession of the new Member States. The extent to which three features of the law in the United Kingdom and in Ireland are consistent with the application of the 1968 Convention must, however, be clarified. These features are: the far-reaching jurisdiction of the Superior Courts (1), the concept of domicile (2) and, lastly, the discretionary powers enjoyed by the courts to determine territorial jurisdiction (3).

1. *FIRST INSTANCE JURISDICTION OF THE SUPERIOR COURTS*

70. The Continental Member States of the Community have geographically defined jurisdictions where courts of first instance are competent to give judgments even in the most important civil disputes. There are many courts of equal status: approximately 50 'Landgerichte' in Germany, and an equal number of 'tribunaux de grande instance' in France and 'Tribunali' in Italy. Where the 1968 Convention itself lays down both the international and local jurisdiction of the courts, as for example in Articles 5 and 6, jurisdiction is given to only one of the many courts with equal status in a State. There is little room for such a distinction in the judicial systems

of Ireland and the United Kingdom in so far as a Superior Court has jurisdiction as a court of first instance.

In Ireland, the High Court is the only court of first instance with unlimited jurisdiction. It can, exceptionally, sit outside Dublin. Nothing in the 1968 Convention precludes this. In addition to the High Court, there is a Circuit Court and a District Court. In respect of these courts too, the expression 'the Court' is used in the singular and there is only one Court for the whole country, but each of its judges is permanently assigned to a specific circuit or district. The local jurisdiction laid down in the 1968 Convention means, in the case of Ireland, the judge assigned to a certain 'circuit' or 'district'.

In the United Kingdom three Superior Courts have jurisdiction at first instance: the High Court of Justice for England and Wales, the Outer House of the Court of Session for Scotland and the High Court for Northern Ireland. Each of these courts has, however, exclusive jurisdiction for the entire territory of the relevant part of the United Kingdom (see paragraph 11). Thus the same comments as those made in connection with the territorial jurisdiction of the Irish High Court apply also to each judicial area. The possibility of transferring a case from London to a district registry of the High Court does not mean transfer to another court. Bearing in mind that foreign judgments have to be registered separately in respect of each of the judicial areas of the United Kingdom in order to become enforceable therein (see paragraph 208), the distinction between international and local jurisdiction becomes largely irrelevant in the United Kingdom. The rules in the 1968 Convention governing local jurisdiction are relevant to the Superior Courts of first instance in the United Kingdom only in so far as a distinction has to be made between the courts of England and Wales, Scotland and Northern Ireland. The competence of the other courts (County Courts, Magistrates' Courts, and, in Scotland, the Sheriff Courts) presents no particular problems.

2. THE CONCEPT OF 'DOMICILE' AND THE APPLICATION OF THE CONVENTION

71. (a) The concept of domicile is of fundamental importance for the 1968 Convention in determining jurisdiction (e.g. Articles 2 to 6, 8, 11, 12 (3), 14, 17 and 32). In the legal systems of the original Member States of the EEC, its meaning differs to some extent. In the Federal Republic of Germany, it expresses a person's connection with a local community within the national territory. In France and Luxembourg, it denotes a person's exact address. In Belgium, for purposes of jurisdiction the term denotes the place where a person is entered in the register of population as having his principal residence (Article 36 of the Code judiciaire). These differences explain why, in determining a person's domicile, e.g. German law places greater emphasis on the stability of the connection with a specific place than do some of the other legal systems.

Notwithstanding these differences the basic concept of 'domicile' is the same in all the legal systems of the original Member States of the EEC, namely the connection of a person with a smaller local unit within the State. This made it possible in Article 52 of the 1968 Convention to leave a more precise definition of the term to the law of the State in which the 'domicile' of a person had to be ascertained. It did not lead to an uneven application of the provisions of the 1968 Convention. Clearly, for the purposes of applying them in the original Member States of the Community it is irrelevant whether the concept of domicile refers to a specific address or to a local community.

72. (b) The concept of domicile under the law in Ireland and the United Kingdom differs considerably in several respects from the Continental concept.

First, this concept does not refer to a person's connection with a particular place and even less with a particular residence within a place, but to his having his roots within a territory covered by a particular legal system (see paragraph 11). A person's domicile only indicates whether he comes under the legal system of England and Wales, Scotland, Northern Ireland, or possibly under a foreign legal system. A person's legal connection with a particular place is denoted by the word 'residence', not 'domicile'.

According to United Kingdom law, a person always has one 'domicile' and can never have more than one. At birth a legitimate child acquires the domicile of its father, an illegitimate child that of its mother. A child retains its domicile of its parents throughout its minority.

After it reaches its majority, it may acquire another domicile but for this there are very strict requirements: the usual place of residence must have been transferred to another country — with the intention of keeping it there permanently or at least for an unlimited period.

73. (c) Article 52 of the 1968 Convention does not expressly provide for the linking of the concept of domicile with a particular place or a particular residence, nor does it expressly prohibit it from being connected with a particular national territory. The United Kingdom and Ireland would, consequently, be free to retain their traditional concept of domicile when the jurisdiction of their courts is invoked. The Working Party came to the conclusion that this would lead to a certain imbalance in the application of the 1968 Convention. In certain cases, the courts of the United Kingdom or Ireland could assume jurisdiction on the basis of their rules on the retention of domicile, although by the law of all the other Member States of the Community, such a person would be domiciled at his actual place of residence within their territory.

The Working Party therefore requested the United Kingdom and Ireland to provide in their legislation implementing the 1968 Convention (see paragraph 256), at any rate for the purposes of that Convention, for a concept of domicile which would depart from their traditional rules and would tend to reflect more the concept of 'domicile' as understood in the original States of the EEC.

In Article 69 (5) of the Convention for the European patent for the common market which was drawn up concurrently with the Working Party's discussions, the concept of 'Wohnsitz' is translated as 'residence' and for the meaning of the expression reference is made to Articles 52 and 53 of the 1968 Convention. To prevent confusion, the proposed new Article Vc of the Protocol makes it clear that the concept of 'residence' within the meaning of the Community Patent Convention should be ascertained in the same way as the concept of 'domicile' in the 1968 Convention.

74. (d) It should be noted that the application of the third paragraph of Article 52 raises the problem of different concepts of domicile, when considering which system of law determines whether a person's domicile depends on that of another person. The relevant factor, in such a case, may be where the dependent person is domiciled. Under United Kingdom private international law, the question whether a person has a dependent domicile is not determined by that person's nationality, but by his domicile in the traditional sense of that concept. The re-definition of 'domicile' in connection with the first paragraph of Article 52 in no way affects this.

If a foreigner under age who has settled in England is sued in an English court, that court must take account of the different concepts of domicile. As a first step it must establish where the defendant had his 'domicile' before settling in England. This is decided in accordance with the traditional meaning of that concept. The law thus found to be applicable will then determine whether the minor was in a position to acquire a 'domicile' in England within the meaning of the 1968 Convention. The English court must then ascertain whether the requirements for a 'domicile' in the area covered by the English court concerned are satisfied.

75. (e) There is no equivalent in the law of the United Kingdom to the concept of the 'seat' of a company in Continental law. In order to achieve the results which under private international law are linked on the continent with the 'seat' of a company, the United Kingdom looks to the legal system where the company was incorporated ('law of incorporation', Section 406 of the Companies Act, 1948). The 'domicile' of a company in the traditional sense of the term (see paragraph 72) is taken to be the judicial area in which it was incorporated. The new Member States of the Community are not obliged to introduce a legal concept which corresponds to that of a company's 'seat' within the meaning of the continental legal systems, just as in general they are not obliged to adapt their concept of domicile. However, should the United Kingdom and Ireland not change their law on this point, the result would again be an imbalance in the application of the 1968 Convention. It would, therefore, be desirable for the United Kingdom to introduce for the purposes of the Convention an appropriate concept in its national legislation such as 'domicile of a company', which would correspond more closely to the Continental concept of the 'seat' of a company than the present United Kingdom concept of 'law of incorporation'.

Such a provision would not preclude a company from having a 'domicile' in the United Kingdom

in accordance with legislation in the United Kingdom and a 'seat' in a Continental State in accordance with the legislation of that State. As a result of the second sentence of Article 53, a company is enabled under the laws of several of the original States of the EEC to have a 'seat' in more than one State. The problems which might arise from such a situation can be overcome by the provisions in the 1968 Convention on *lis pendens* and related actions (see paragraph 162).

3. *DISCRETIONARY POWERS REGARDING JURISDICTION AND TRANSFER OF PROCEEDINGS*

76. The idea that a national court has discretion in the exercise of its jurisdiction either territorially or as regards the subject matter of a dispute does not generally exist in Continental legal systems. Even where, in the rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude. It is true that Continental legal systems recognize the power of a court to transfer proceedings from one court to another. Even then the court has no discretion in determining whether or not this power should be exercised. In contrast, the law in the United Kingdom and in Ireland has evolved judicial discretionary powers in certain fields. In some cases, these correspond in practice to legal provisions regarding jurisdiction which are more detailed in the Continental States, while in others they have no counterpart on the Continent. It is therefore difficult to evaluate such powers within the context of the 1968 Convention. A distinction has to be made between the international and national application of this legal concept.

77. (a) In relationships with the courts of other States and also, within the United Kingdom, as between the courts of different judicial areas (see paragraph 11) the doctrine of *forum conveniens* — in Scotland, *forum non conveniens* — is of relevance.

The courts are allowed, although only in very rare and exceptional cases, to disregard the fact that proceedings may already be pending before foreign courts, or courts of another judicial area.

Exceptionally, the courts may refuse to hear or decide a case, if they believe it would be better for the case to be heard before a court having equivalent jurisdiction in another State (or another judicial area) because this would increase the likelihood of an efficient and impartial hearing of the particular case.

There are several special reasons why in practice such discretionary powers are exercised: the strict requirements traditionally imposed by the laws of the United Kingdom and Ireland regarding changes of domicile (see paragraph 72); the rules allowing establishment of jurisdiction by merely serving a writ or originating summons in the territory of the State concerned (see paragraphs 85 and 86); the principles developed particularly strongly in the procedural law of these States requiring directness in the taking of evidence with the consequent restrictions on making use of evidence taken abroad or merely in another judicial area; and finally, the considerable difficulties arising in the application of foreign law by United Kingdom or Irish courts.

78. According to the views of the delegations from the Continental Member States of the Community such possibilities are not open to the courts of those States when, under the 1968 Convention, they have jurisdiction and are asked to adjudicate.

Article 21 expressly prohibits a court from disregarding the fact that proceedings are already pending abroad. For the rest the view was expressed that under the 1968 Convention the Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so. A plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another. In particular, in accordance with the general spirit of the 1968 Convention, the fact that foreign law has to be applied, either generally or in a particular case, should not constitute a sufficient reason for a court to decline jurisdiction. Where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of *forum conveniens*. The plaintiff may have chosen another apparently 'inappropriate' court from among the competent courts in order to obtain a judgment in the State in which he also wishes to enforce it. Furthermore, the risk of a negative conflict of jurisdiction should not be disregarded: despite the United Kingdom court's decision, the judge on the Continent could likewise decline jurisdiction. The practical

reasons in favour of the doctrine of *forum conveniens* will lose considerably in significance, as soon as the 1968 Convention becomes applicable in the United Kingdom and Ireland. The implementing legislation will necessitate not inconsiderable changes in the laws of those States, both in respect of the definition of the concept of domicile (see paragraph 73) and on account of the abolition of jurisdictional competence based merely on service of a writ within the area of the court (see paragraph 86). To correct rules of jurisdiction in a particular case by means of the concept of *forum conveniens* will then be largely unnecessary. After considering these arguments the United Kingdom and Irish delegations did not press for a formal adjustment of the 1968 Convention on this point.

79. (b) A concept similar to the doctrine of *forum conveniens* is also applied within the territory of the State, though the term itself is not used in that context. This may be due to the fact that the same result can be achieved by the device of transferring the case to another court having alternative jurisdiction within the same State or the same legal area (see paragraph 11). The Working Party had to examine to what extent the 1968 Convention restricted such powers of transfer. In this connection certain comments made earlier may be repeated: the powers of the Superior Courts in Ireland or in a judicial area of the United Kingdom (see paragraph 70) to decide as a court of first instance remain unchanged. For the rest, the following applies:

80. (aa) The previous legal position in Ireland and the United Kingdom remains essentially the same. Each court can transfer proceedings to another court, if that court has equivalent jurisdiction and can better deal with the matter. For example, if an action is brought before the High Court, the value of which is unlikely to exceed the amount which limits the jurisdiction of the lower court, the High Court has power to transfer the proceedings to such a court, but it is not obliged to do so. A Circuit Court in Ireland, a County Court or Magistrates' Court in England and a Sheriff Court in Scotland — but not an Irish District Court (see paragraph 70) — may transfer proceedings to another court of the same category or exceptionally to a court of another category, if the location of the evidence or the circumstances for a fair hearing should make such a course desirable in the interest of the parties.

Some Continental legal systems also provide for the possibility, albeit on a much smaller scale, of a judge having discretion to confer jurisdiction on a court which would not otherwise have it. This is the case under, for instance, Article 36 of the German Code of Civil Procedure, if proper proceedings are not possible before the court which originally had jurisdiction. Under Section 356 of the new French Code of Civil Procedure ([19]) proceedings may be transferred to another court of the same type, if a risk of lack of impartiality exists.

81. (bb) The 1968 Convention in no way affects the competence as regards subject matter of the courts of a State. The national legal systems are thus free to provide for the possibility of transfer of cases between courts of different categories.

For the most part, the 1968 Convention does not affect the territorial jurisdiction of the courts within a State, but only their international jurisdiction. This is clearly reflected by the basic rule on jurisdiction contained in Article 2. Unless the jurisdiction of a court where proceedings are instituted against a person domiciled in the United Kingdom or Ireland is derived from a provision of the 1968 Convention which at the same time determines local jurisdiction, as for example Article 5, the 1968 Convention does not prevent a transfer of the proceedings to another court in the same State. Even in respect of exclusive jurisdiction, Article 16 only lays down the international jurisdiction of the courts of a State, and does not prevent a transfer within that State.

Finally, the 1968 Convention does not of course prevent a transfer to the court which actually has local jurisdiction under the Convention. This would occur where both parties agree to the transfer and the requirements for jurisdiction by consent pursuant to Article 17 are satisfied.

The only type of case which remains problematic is where an action is brought before a court in circumstances where the 1968 Convention gives the plaintiff a choice of jurisdiction. An action in tort or a liability insurance claim is brought at the place where the harmful event occurred or a

maintenance claim at the domicile of the maintenance creditor. It appears obvious that in special exceptional cases a transfer to another court of the same State must be permitted, when proper proceedings are not possible before the court which would otherwise have jurisdiction. However, the Working Party did not feel justified in incorporating these matters expressly in the 1968 Conventation. They could be covered by a rule of interpretation to the effect that the court having local jurisdiction may, in exceptional cases, include the court which is designated as having local jurisdiction by the decision of another court. The courts for the place 'where the harmful event occurred' could thus be a neighbouring court designated by another court, if the courts for the place of the harmful event should be unable to hear the proceedings.

In so far as a court's discretionary powers to confer jurisdiction on other courts and in particular to transfer proceedings to another court are not defined in detail such discretionary powers should, of course, only be used in the spirit of the 1968 Convention, if the latter has determined, not only international but also local jurisdiction. A transfer merely on account of the cost of the proceedings or in order to facilitate the taking of evidence would be possible only with the consent of the plaintiff, who had the choice of jurisdiction.

B.

COMMENTS ON THE SECTIONS OF TITLE II

Section 1

General provisions

82. The proposed adjustments to Articles 2 ([20]) to 4 are confined to inserting certain exorbitant jurisdictions in the legal systems of the new Member States into the second paragraph of Article 3. The occasion has been taken to adjust the text of that Article to take account also of an amendment to the law which has been introduced in Belgium. Detailed comments on the proposed alterations (I) precede two more general remarks on the relevance of this provision to the whole structure of the 1968 Convention (II).

I. *Detailed comments*

83. 1. Belgium

In Belgium, Articles 52, 52 bis and 53 of the law of 25 March 1876 had already been superseded before the coming into force of the 1968 Convention by Articles 635, 637 and 638 of the Judicial Code. Nevertheless only Article 638 of the Judicial Code is mentioned in the second paragraph of Article 3 in its revised version. It corresponds to Article 53 of the law of 25 March 1876 and provides that where Belgian courts do not possess jurisdiction based on other provisions, a plaintiff resident in Belgium may sue any person before the court of his place of residence. The version of Article 3, valid hitherto, erroneously classed the jurisdiction based on Articles 52 and 52 bis of the abovementioned law as exorbitant.

84. 2. Denmark

The provisions of Danish law included in the second paragraph of Article 3 state that a foreigner may be sued before any Danish court in whose district he is resident or has property when the document instituting the proceedings is served. On this last point the provision corresponds to similar German provisions included in the list of exorbitant jurisdictions. On the first point reference may be made to what follows concerning Ireland (see paragraph 85). There is a separate Code of Civil Procedure for Greenland (see paragraph 253); special reference had therefore to be made to the corresponding provisions affecting that country.

85. 3. Ireland

According to the principles of common law which are unwritten and apply equally in the United Kingdom and Ireland, a court has jurisdiction in principle if the plaintiff has been properly served with the court process. The jurisdiction of Irish (and United Kingdom) courts is indirectly restricted to the extent of the limits imposed on the service of a writ of summons. Service is available without special leave only within the territory of Ireland (or the United Kingdom). However, every service validly effected there is sufficient to establish jurisdiction; even a short stay by the defendant in

the territory concerned will suffice. Service abroad will be authorized only where certain specified conditions are satisfied. As regards legal relations within the EEC — especially because of the possibility of free movement of judgments resulting from the 1968 Convention — there is no longer any justification for founding the jurisdiction of a court on the mere temporary presence of a person in the State of the court concerned. This common law jurisdiction, for which of course no statutory enactment can be cited, had therefore to be classed as exorbitant.

86. 4. United Kingdom

As regards the United Kingdom it will suffice for point (a) of Article 3, second paragraph, of the 1968 Convention as amended, to refer to what has been said above in the case of Ireland. Points (b) and (c) deal with some characteristic features of Scottish law. To establish jurisdiction merely by service of a writ of summons during the temporary presence of the defendant is a rare, though not totally unknown, practice in Scotland. Scottish courts usually base their jurisdiction in respect of a defendant not permanently resident there on other factors, namely that he has been in Scotland for at least 40 days, or that he owns immovable property in Scotland or that he owns movable property which has been impounded in Scotland. In such cases service on the defendant is also required, but this may be effected by post or, exceptionally, by posting it on the court notice board. In the case of Germany, the 1968 Convention has already classed jurisdiction based solely on the existence of property in Germany as exorbitant. Any jurisdiction based solely on the seizure of property within a country must be treated in the same way.

II. *The relevance of the second paragraph of Article 3 to the whole structure of the 1968 Convention*

87. 1. The special significance of the second paragraph of Article 3

The rejection as exorbitant of jurisdictional bases hitherto considered to be important in the new Member States should not, any more than the original version of the second paragraph of Article 3, mislead anyone into thinking that the scope of the first paragraph of Article 3 would thereby be more closely circumscribed. Only particularly extravagant claims to international jurisdiction by the courts of a Member State are expressly underlined. Other rules founding jurisdiction in the national laws of the new Member States are compatible with the 1968 Convention also only to the extent that they do not offend against Article 2 and Articles 4 to 18. Thus, for example, the jurisdiction of English courts in respect of persons domiciled in the Community can no longer be based on the ground that the claim concerns a contract which was concluded in England or is governed by English law. On the other hand, the rules on the jurisdiction of English courts in connection with breaches of contract in England or claims connected with the commission or omission of an act in England largely correspond to the provisions in Article 5 (1) to (3).

2. Impossibility of founding jurisdiction on the location of property

88. With regard to Germany, Denmark and the United Kingdom the list in the second paragraph of Article 3 contains provisions rejecting jurisdiction derived solely from the existence of property in the territory of the State in which the court is situated. Such jurisdiction cannot be asserted even if the proceedings concern a dispute over rights of ownership, or possession, or the capacity to dispose of the specific property in question. Persons domiciled on the Continent of Europe may not be sued in Scotland, even if the aim of the action is to recover movable property situated or seized there or to determine its ownership. Interpleader actions (England and Wales) and multiple poinding (Scotland) are no longer permissible in the United Kingdom in respect of persons domiciled in another Member State of the Community, in so far as the international jurisdiction of the English or Scottish courts does not result from other provisions of the 1968 Convention. This applies, for example, to actions brought by an auctioneer to establish whether ownership of an article sent to him for disposal belongs to his customer or a third party claiming the article.

There is, however, no reason why United Kingdom legislation should not introduce appropriate measures pursuant to Article 24, to provide protection to persons (such as auctioneers) faced with conflicting legal claims. This might, for instance, take the form of a court order authorizing an article to be temporarily withdrawn from auction.

As regards persons who are domiciled outside the Community, the provisions which hitherto governed the jurisdiction of courts in the new Member States remains unaffected. Even the rules of jurisdiction mentioned in the second paragraph of Article 3 may continue to apply to such persons. Judgments delivered by courts which thus have jurisdiction must also be recognized and enforced in other States of the Community unless one of the exceptions in the new paragraph 5 of Article 27 or in Article 59 as amended applies.

This latter provision is the only one concerning which the list in Article 3, second paragraph is not only of illustrative significance but has direct and restrictive importance. (see paragraph 249).

Section 2

Special jurisdictions [21]

89. In the sphere of special, non-exclusive jurisdictions the problems of adjustment were confined to judicial competence as regards maintenance claims (I), questions raised by trusts in United Kingdom and Irish law (II) and problems in connection with jurisdiction in maritime cases (III). In addition, the Working Party dealt with a few less important individual questions (IV).

Reference should be made here to the Judgments of the Court of Justice of the European Communities of 6 October 1976 (12/76; 14/76) and of 30 November 1976 (21/76) which were delivered shortly before or after the end of the negotiations [22].

I. *Maintenance claims*

90. The need for an adjustment of Article 5 (2) arose because the laws of the new Member States — as was also by then the case with the laws of many of the original States of the EEC — allow status proceedings to be combined with proceedings concerning maintenance claims (see paragraphs 32 to 42). As far as other problems were concerned no formal adjustment was required. However, certain special features of United Kingdom and Irish law give rise to questions of interpretation; the views of the Working Party as to their solutions should be recorded. They concern a more precise definition of the term 'maintenance' (1) and how maintenance entitlements are to be adjusted to changed circumstances in accordance with the system of jurisdiction and recognition established by the 1968 Convention (2).

1. The term 'maintenance'

91. (a) The 1968 Convention refers simply to 'maintenance' in Article 5 (2), the only Article which uses the expression. Several legal concepts used within one and the same national legal system can be covered by this term. For example, Italian law speaks of 'alimenti' (Article 433 *et seq.* of the codice civile) to indicate payments amongst relations and spouses, but payments after divorce are 'assegni' [23]. The new French divorce law [24], too, does not speak of 'aliments', but of 'devoir de secours'. In addition French legal terminology uses the expressions 'devoir d'entretien' and 'contribution aux charges du ménage'. All those are 'maintenance' within the meaning of Article 5 (2) of the 1968 Convention.

92. (b) The Article says nothing, however, about the legal basis from which maintenance claims can emanate. The wording differs markedly from that of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations. Article 1 of that Convention excludes from its scope maintenance claims arising from tort, contract and the law of succession. However, there is no significant difference regarding the concept of maintenance as used in the two Conventions. The 1968 Convention is in any case not applicable to maintenance claims under the law of succession (second paragraph, point (1) of Article 1). 'Maintenance' claims as the legal consequence of a tortious act are, in legal theory, claims for damages, even if the amount of compensation depends on the needs of the injured party. Contracts creating a 'maintenance' obligation

which previously did not exist are, according to the form employed, gifts, contracts of sale or other contracts for a consideration. Obligations arising therefrom, even where they consist in the payment of 'maintenance', are to be treated like other contractual obligations. In such cases Article 5 (1) rather than 5 (2) of the 1968 Convention applies as far as jurisdiction is concerned; the outcome hardly differs from an application of Article 5 (2). 'Maintenance' obligations created by contract are generally to be fulfilled at the domicile or habitual residence of the maintenance creditor. Thus actions may also be brought there. Article 5 (2) is applicable, however, where a maintenance contract merely crystallizes an existing maintenance obligation which originated from a family relationship.

Judicial proceedings concerning 'maintenance' claims are still civil and commercial matters even where Article 5 (2) is not applicable because the claim arises from a tortious act or a contract.

93. (c) The concept of maintenance does not stipulate that the claim must be for periodic payments. Under Article 1613 (2) of the German Civil Code, for example, the maintenance creditor may in addition to regular payments, claim payment of a lump sum on the ground of exceptional need. Under Article 1615 (e) of the Code a father may agree with his illegitimate child on the payment of a lump sum settlement. Article 5 (4), third sentence, of the Italian divorce law of 1 December 1970 allows divorced spouses to agree on the payment of maintenance in the form of a lump sum settlement. Finally, under Article 285 of the French Civil Code, as amended by the divorce law of 11 July 1975, the French courts can order maintenance in the form of a single capital payment even without the agreement of the spouses. The mere fact that the courts in the United Kingdom have power to order not only periodic payments by one spouse to the other after a divorce, but also the payment of a single lump sum of money, does not therefore prevent the proceedings or a judgment from being treated as a maintenance matter. Even the creation of charges on property and the transfer of property as provided on the Continent, for example in Article 8 of the Italian divorce law, can be in the nature of maintenance.

94. (d) It is difficult to distinguish between claims for maintenance on the one hand and claims for damages and the division of property on the other.

95. (aa) In Continental Europe a motivating factor in assessing the amount of maintenance due to a divorced spouse by his former partner is to compensate an innocent spouse for his loss of matrimonial status. A typical example is contained in Article 301 of the Civil Code in its original form, which still applies in Luxembourg. In its two paragraphs a sharp distinction is drawn in respect of post-matrimonial relations between a claim for maintenance and compensation for material and non-material damages. Yet material damages generally consist in the loss of the provision of maintenance which the divorced party would have enjoyed as a spouse. Thus the claims deriving from the two paragraphs of Article 301 of the Civil Code overlap in practice, especially since they can both take the form of a pension or a single capital payment. It remains to be seen whether the new French divorce law of 11 July 1975, which makes a clearer distinction between 'prestations compensatoires' and 'devoir de secours', will change this situation.

Under Section 23 (1) (c) and (f) and Section 27 (6) (c) of the English Matrimonial causes Act 1973, an English divorce court, too, may order a lump sum to be paid by one divorced spouse to the other or to a child. However, English law, which is characterized by judicial discretionary powers and which does not favour inflexible systematic rules, does not make a distinction as to whether the payments ordered by the Court are intended as damages or as maintenance.

96. (bb) The 1968 Convention is not applicable at all where the payments claimed or ordered are governed by matrimonial property law (see paragraph 45 *et seq)*. Where claims for damages are involved, Article 5 (2) is not relevant. Whether or not that provision applies depends, in the case of a lump sum payment, solely on whether a payment under family law is in the nature of maintenance.

The maintenance nature of the payment is likely to predominate in relation to children. As

between spouses, a division of property or damages may well be the underlying factor. Where both spouses are earning well, payment of a lump sum can only serve the purpose of a division of property or compensation for non-material damage. In that case the obligation to pay is not in the nature of maintenance. If payment is in pursuance of a division of property, the 1968 Convention does not apply at all. If it is to compensate for non-material damage, there is no scope for the application of Article 5 (2). A divorce court may not adjudicate in the matter in either case, unless it has jurisdiction under Article 2 or Article 5 (1).

97. (e) All legal systems have to deal with the problems of how the needs of a person requiring financial support are to be met when the maintenance debtor defaults. Others also liable to provide maintenance, if necessary a public authority, may have to step in temporarily. They, in turn, should be able to obtain a refund of their outlay from the (principal) maintenance debtor. Legal systems have therefore evolved various methods to overcome this problem. Some of them provide for the maintenance claim to be transferred to the payer, thereby giving it a new creditor, but not otherwise changing its nature. Others confer on the payer an independent right to compensation. United Kingdom law makes particular use of the latter method in cases where the Supplementary Benefits Commission has paid maintenance. As already mentioned in the Jenard report ([25]) claims of this type are covered by the 1968 Convention, even where claims for compensation are based on a payment made by a public authority in accordance with administrative law or under provisions of social security legislation. It is not, however, the purpose of the special rules of jurisdiction in Article 5 (2) to confer jurisdiction in respect of compensation claims on the courts of the domicile of the maintenance creditor or even those of the seat of the public authority — whichever of the two abovementioned methods a legal system may have opted for.

2. Adjustment of maintenance orders

98. Economic circumstances in general and the particular economic position of those obliged to pay and those entitled to receive maintenance are constantly changing. The need for periodical adjustments of maintenance orders arises particularly in times of creeping inflation. Jurisdiction to order adjustments depends on the general provisions of the 1968 Convention. Since this is a problem of great practical importance it may be appropriate to preface its discussion in detail with a brief comparative legal survey.

99. (a) Continental legal systems differ according to whether the emphasis of the relevant legal provisions is placed on the concept of an infringement of the principle of finality of a maintenance judgment or more on the concept of an adjustment of the question of the claim (aa). In this respect, as in many others, the provisions of United Kingdom (bb) and Irish (cc) law do not fit into this scheme.

100. (aa) The provisions of German law relating to adjustments of maintenance orders are based on the concept of a special procedural remedy in the nature of a review of the proceedings (Wiederaufnahmeklage).

Since there are no special provisions governing jurisdiction, the general provisions governing jurisdiction in maintenance claims are considered applicable. This means that the original court making the maintenance order may have lost its competence to adjust it. Enforcement authorities, even when they are courts, have no power, either in general or in maintenance cases, to adjust a judgment to changed circumstances. Provisions giving protection against enforcement of a judgment for social reasons apply irrespective of whether or not the amount ordered to be paid in the judgment is subject to variation. This is also true regarding the subsidiary provision of Article 765 (a) of the Zivilprozessordnung (Code of Civil Procedure) ([26]), which is of general application and states that enforcement measures may be rescinded or disallowed in very special circumstances, if they constitute an undue hardship for the debtor.

Accordingly legal theory and case law accept that a foreign maintenance order may be adjusted by a German court, if the latter has jurisdiction ([27]).

In the legal systems in the other original Member States of the EEC the problem has always been regarded as one of substantive law and not as a

remedy providing protection against enforcement of judicial decisions. Accordingly jurisdiction depends on the general principles applying to maintenance cases ([28]). Indirect adjustments cannot be obtained by invoking, as a defence against measures of enforcement, a change in the circumstances which were taken into account in determining the amount of the maintenance.

In general, the 1968 Convention is based on a similar legal position obtaining in all the original Member States: in the case of proceedings for adjustment of a maintenance order the jurisdiction of the court concerned has to be examined afresh.

101. (bb) In the United Kingdom, the most important legal basis for amendment of maintenance orders is Section 53 of the Magistrates' Courts Act of 1952 in conjunction with Sections 8 to 10 of the Matrimonial proceedings (Magistrates' Courts) Act 1960 which will be suspended in 1979 by the Domestic proceedings and Magistrates' Courts Act 1978. According to these Acts, the Court may revoke or vary maintenance orders, or revive them after they have been revoked or varied. In addition, the court in whose district the applicant is now resident also has jurisdiction in such matters ([29]). In principle, the court's discretion is unfettered in such cases, but an application for variation may not be based on facts or evidence which could have been relied on when the original order was made ([30]). The same applies under Section 31 of the Matrimonial causes Act 1973. A divorce court can vary or discharge an order it has made with regard to maintenance, irrespective of whether the original basis for its jurisdiction still exists or not.

102. To these possibilities must be added another characteristic aspect of the British judicial system. Enforcement of judgments is linked much more closely than on the Continent to the jurisdiction of the particular court which gave the judgment (see paragraph 208). Before a judgment can be enforced by the executive organs of another court, it must be registered with that other court. After registration, it is regarded as a judgment of that court. A further consequence is that, after such registration, the court with which it is registered is empowered to amend it. Hitherto, the United Kingdom has also applied this system in cases where foreign maintenance judgments have been registered with a British court to be enforced in the United Kingdom ([31]).

103. (cc) In Ireland the District Court has jurisdiction to make maintenance orders in respect of spouses and children of a marriage and also in respect of illegitimate children. The Court also has power to vary or revoke its maintenance orders. The jurisdiction of the Court is exercised by the judge for the district where either of the parties to the proceedings is ordinarily resident or carries on any profession or occupation or, in the case of illegitimate children, the judge for the district in which the mother of the child resides. A judge who makes a maintenance order loses jurisdiction to vary it if these requirements as to residence, etc., are no longer fulfilled. Apart from the possibility of having a maintenance order varied there is a right of appeal to the Circuit Court from such orders made by the District Court. The Circuit Court also has jurisdiction to make maintenance orders in proceedings relating to the guardianship of infants. It may also vary or revoke its maintenance orders. Its jurisdiction is exercised by the judge for the circuit in which the defendant is ordinarily resident at the date of application for maintenance or at the date of application for a variation of a maintenance order, as the case may be. An appeal lies to the High Court.

The High Court may order maintenance to be paid, including alimony pending suit and permanent alimony following the granting of divorce *a mensa et thoro*. It has jurisdiction to vary its own maintenance orders and appeals against its orders lie to the Supreme Court.

104. (b) Although it nowhere states this expressly, the 1968 Convention is based on the principle that all judgments given in a Member State can be contested in that State by all the legal remedies available under the law of that State, even when the basis on which the competence of the courts of that State was founded no longer exists. In France, a French judgment may be contested by an appeal, appeal in cassation and an application to set aside a conviction, even if the defendant has long since ceased to be domiciled in France. It follows from the obligation of recognition that no Contracting State can claim jurisdiction with regard to appeals against judgments given in another Contracting State. This also covers proceedings similar to an appeal, such as an

action of reduction in Scotland or a 'Wiederaufnahmeklage' in Germany. Conversely, every claim to jurisdiction which is not based on proceedings to pursue a remedy by way of appeal must satisfy the provisions of the 1968 Convention. This has three important consequences (see paragraphs 105 to 107) for decisions concerning jurisdiction for the adjustment of maintenance orders. A fourth concerns recognition and enforcement and is mentioned now as a connected matter. (See paragraph 108).

105. On no account may the court of the State addressed examine whether the amount awarded is still appropriate, without having regard to the jurisdiction provisions of the 1968 Convention. If the proceedings are an appeal, the courts of the State of origin will remain competent. Alternatively the new action may be quite distinct from the original proceedings, in which case the jurisdiction provisions of the 1978 Convention must be observed.

106. (bb) Under the legal systems of all six original EEC States, the adjustment of maintenance orders, at any rate as far as jurisdiction is concerned, is not regarded as a remedy by way of appeal (see paragraph 100). Accordingly the courts of the State of origin lose their competence to adjust maintenance orders within the original scope of the 1968 Convention, if the conditions on which their jurisdiction was based no longer exist. The 1968 Convention could not, however, be applied consistently, if the courts in the United Kingdom were to claim jurisdiction to adjust decisions irrespective of the continued existence of the facts on which jurisdiction was originally based.

107. Applications for the adjustment of maintenance claims can only be made in courts with jurisdiction under Article 2 or Article 5 (2), as amended, of the 1968 Convention. For example, if the maintenance creditor claims adjustment due to increases in the cost of living, he may choose between the international jurisdiction of the domicile of the maintenance debtor and the local jurisdiction of the place where he himself is domiciled or habitually resident. However, if the maintenance debtor seeks adjustment because of a deterioration in his financial circumstances, he can only apply under the international jurisdiction referred to in Article 2, i.e. the jurisdiction of the domicile of the maintenance creditor, even where the original judgment (pursuant to Article 2 where it is applicable) was given in the State of his own domicile and the parties have retained their places of residence.

108. If a maintenance debtor wishes effect to be given in another State to an adjusted order, account must be taken of the reversed roles of the parties. Adjustment at the instance of the maintenance debtor can only be aimed at a remission or reduction of the amount of maintenance. Reliance on such a decision in another Contracting State does not therefore involve 'enforcement' within the meaning of Sections 2 and 3 of Title III, but rather recognition as referred to in Section 1 of that Title. It is true that the second paragraph of Article 26 makes provision for a special application to obtain recognition of a judgment, and the provisions of Sections 2 and 3 of Title III concerning enforcement are applicable to such an application. If, in these circumstances, recognition is to be granted to a judgment which has been amended on the application of the maintenance debtor, the position is as follows: the applicant within the meaning of Articles 34 and 36 is not the creditor but the debtor, and therefore, according to Article 34, the creditor is the party who is not entitled to make any submissions. The right of appeal of the party against whom enforcement is sought, provided for in Article 36, lies with the creditor in this case. As applicant, the maintenance debtor has the right laid down in the second paragraph of Article 42, read together with the second paragraph of Article 26, to request recognition of part only of an adjusting order. For the application of Article 44 it has to be determined whether, as plaintiff, he was granted legal aid in the original proceedings.

II. *Trusts*

1. Problems which the Convention in its present form would create with regard to trusts

109. A distinguishing feature of United Kingdom and Irish law is the trust. In these two States it provides the solution to many problems which Continental legal systems overcome in an

altogether different way. The basic structure of a trust may be described as the relationship which arises when a person or persons (the trustees) hold rights of any kind for the benefit of one or more persons (the beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries (who may, however, include one or more of the trustees) or other object of the trust. Basically two kinds of legal relationships can be distinguished in a trust; they may be defined as the internal relationships and the external relationships.

110. (a) In his external relationships, i.e. in legal dealings with persons who are not beneficiaries of the trust, the trustee acts like any other owner of property. He can dispose of and acquire rights, enter into commitments binding on the trust and acquire rights for its benefit. As far as these acts are concerned no adjustments to the 1968 Convention are necessary. Its provisions on jurisdiction are applicable, as in legal dealings between persons who are not acting as trustees. If a Belgian lessee of property situated in Belgium, but belonging to an English trust, sues to be allowed into occupation, Article 16 (1) is applicable, irrespective of the fact that the property belongs to a trust.

111. (b) Problems arise in connection with the internal relationships of a trust, i.e. as between the trustees themselves, between persons claiming the status of trustees and, above all, between trustees on the one hand and the beneficiaries of a trust on the other. Disputes may occur among a number of persons as to who has been properly appointed as a trustee; among a number of trustees doubts may arise as to the extent of their respective rights to one another; there may be disputes between the trustees and the beneficiaries as to the rights of the latter to or in connection with the trust property, as to whether, for example, the trustee is obliged to hand over assets to a child beneficiary of the trust after the child has attained a certain age. Disputes may also arise between the settlor and other parties involved in the trust.

112. The internal relationships of a trust are not necessarily covered by the 1968 Convention. They are excluded from its scope when the trust deals with one of the matters referred to in the second paragraph of Article 1. Thus as a legal institution the trust plays a significant role in connection with the law of succession. If a trust has been established by a will, disputes arising from the internal relationships are outside the scope of the 1968 Convention (see paragraph 52). The same applies when a trustee is appointed in bankruptcy proceedings; he would correspond to a liquidator ('Konkursverwalter') in Continental legal systems.

113. Where the 1968 Convention is applicable to the internal relationships of a trust, its provisions on jurisdiction were in their original form not always well adapted to this legal institution. To base jurisdiction on the domicile of the defendant trustee would not be appropriate in trust matters. A trust has no legal personality as such. If, however, an action is brought against a defendant in his capacity as trustee, his domicile would not necessarily be a suitable basis for determining jurisdiction. If a person leaves the United Kingdom to go to Corsica, it is right and proper that, in the absence of any special jurisdiction, claims directed against him personally should be brought only before Corsican courts. If, however, he is a sole or joint trustee or co-trustee of trust property situated in the United Kingdom and hitherto administered there, the beneficiaries and the other trustees cannot be expected to seek redress in a Corsican court.

Moreover, the legal relationships between trustees *inter se,* and between the trustees and the beneficiaries, are not of a contractual nature; in most cases, the trustees are not even authorized to conclude agreements conferring jurisdiction by consent. Jurisdiction for actions arising from the internal relationships of a trust can be based, therefore, neither on Article 5 (1) nor — as a rule — on agreements conferring jurisdiction by consent pursuant to Article 17. To overcome this difficulty simply by amending the 1968 Convention so as to allow a settlor to stipulate which courts are to have jurisdiction would only partly solve the problem. Such an amendment would not include already existing trusts, and the most suitable jurisdiction for possible disputes cannot always be foreseen when creating a trust.

2. The solution proposed

114. (a)The solution proposed in the new paragraph(6) of Article 5 is based on the argument that trusts,

even though they have no legal personality, may be said to have a geographical centre of operation. This would fulfil functions similar to those fulfilled by the 'seat' of business associations without legal personality. It is true that United Kingdom and Irish law have so far provided only a tentative definition of such a central point of a trust. However, the concept of the domicile of a trust is not, at present, unknown in legal practice and theory ([32]). In his manual on Private International Law the Scottish Professor Anton gives the following definition ([33]):

> 'The domicile of a trust is thought to be basically a matter depending upon the wishes of a truster and his expressed intentions will usually be conclusive. In their absence the truster's intentions will be inferred from such circumstances as the administrative centre of the trust, the place of residence of the trustees, the situs of the assets of the trust, the nature of the trust purposes and the place where these are to be fulfilled.'

No doubt these notions about the domicile of a trust were developed mainly for the purpose of determining the legal system to be applied, usually either English or Scottish law. The principal characteristics of 'domicile' so defined and some of the factors on which it is based would also justify making it the basis for founding jurisdiction. The proposed new provision does not, strictly speaking, create a special jurisdiction. It covers only a very limited number of cases and is, therefore, added to Article 5 rather than to Article 2. For the non-exclusive character of the new provision see paragraph 118.

115. (b) The following are some detailed comments on the Working Party's proposal (see paragraph 181).

116. The concepts 'trust', 'trustee' and 'domicile' have not been translated into the other Community languages, since they relate to a distinctive feature of United Kingdom and Irish law. However, the Member States can give a more detailed definition of the concept of a trust in their national language in their legislation implementing the Accession Convention.

117. The phrase 'created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing' is intended to indicate clearly that the new rules on jurisdiction apply only to cases in which under United Kingdom or Irish law a trust has been expressly constituted, or for which provision is made by Statute. This is important, because these legal systems solve many problems with which Continental systems have to deal in a completely different way, by means of so-called 'constructive' or 'implied' trusts. Where the latter are involved, the new Article 5 (6) is not applicable, as for instance where, after conclusion of a contract of sale, but prior to the transfer of title, the vendor is treated as holding the property on trust for the purchaser (see paragraph 172). Trusts resulting from the operation of a statutory provision are unlikely to fall within the scope of the 1968 Convention. Since in the United Kingdom, for example, children cannot own real property, a trust in their favour arises by operation of statute, if the circumstances are such that adult persons would have acquired ownership.

118. It should be noted that the new provision is not exclusive. It merely establishes an additional jurisdiction.The trustee who has gone to Corsica (see paragraph 113) can also be sued in the courts there. However, a settlor would be free to stipulate an exclusive jurisdiction (see paragraph 174).

119. If proceedings are brought in a Contracting State, relating to a trust which is subject to a foreign legal system, the question arises as to which law determines the domicile of that trust. The new version of Article 53 proposes the same criterion as that adopted in the 1968 Convention for ascertaining the 'seat' of a company. As far as the legal systems of England and Wales, Scotland, Northern Ireland and Ireland are concerned, application of this provision should present no serious difficulty. There are at present no rules of private international law in the legal systems of the Continental Member States of the Community for determining the domicile of a trust. The courts of those States will have to evolve such rules to enable them to apply the trust provisions of the 1968 Convention. Two possibilities exist. It could be contended that the domicile of a trust should be determined by the

legal system to which the trust is subject. One could, however, also contend that the court concerned should decide the issue in accordance with its own *lex fori* which would have to evolve its own appropriate criteria.

120. In principle, the exclusive jurisdictions provided for by Article 16 take priority over the new Article 5 (6). However, it is not easy to establish the precise extent of that priority.

In legal disputes arising from internal trust relationships, the legal relations referred to in the provisions in question usually play only an incidental role, if any. The trustee requires court approval for certain acts of management. Even where the management of immovable property is concerned, any such applications to the court do not affect the proprietary rights of the trustee, but only his fiduciary obligations under the trust. Article 16 (1) does not apply. One could, however, envisage a dispute arising between two people as to which of them was trustee of certain property. If one of them instituted proceedings against the other in a German court claiming the cancellation of the entry in the land register showing the defendant as the owner of the property and the substitution of an entry showing the plaintiff as the true owner, there can be no doubt that, under Article 16 (1) or (3), the German court would have exclusive jurisdiction. However, if a declaration is sought that a particular person is a trustee of a particular trust which includes certain property, Article 16 (1) does not become applicable merely because that property includes immovable property.

III. *Admiralty jurisdiction*

121. The exercise of jurisdiction in maritime matters has traditionally played a far greater role in the United Kingdom than in the Continental States of the Community. The scope of the international competence of the courts, as it has been developed in the United Kingdom, has become of worldwide significance for admiralty jurisdiction. This factor is reflected not least in the Brussels Conventions of 1952 and 1957 (see paragraph 238 *et seq.*). It would have been inappropriate to limit the exercise of admiralty jurisdiction to the basis of jurisdiction included in the 1968 Convention in its original form. If a ship is arrested in a State because of an internationally recognized maritime claim, it would be unreasonable to expect the creditor to seek a decision on his claim before the courts of the shipowner's domicile. For this reason, the Working Party gave lengthy consideration to the possible inclusion of a special section on admiralty jurisdiction in Title II. Article 36 of the Accession Convention is derived from an earlier draft prepared for that purpose (see paragraph 131). Parallel negotiations on Article 57 of the 1968 Convention did, however, lead to a generally acceptable interpretation which will enable States party to a Convention on maritime law to assume jurisdiction on any particular matter dealt with in that Convention, even in respect of persons domiciled in a Community State which is not a party to that Convention (see paragraph 236 *et seq.*). Furthermore, all delegations are in support of a Joint Declaration urging the Community States to accede to the most important of all the Conventions on maritime law, namely the Brussels Convention of 10 May 1952 (see paragraph 238). The Working Party, confident that this Joint Declaration will be adopted and implemented, finally dropped its plans for a section dealing with admiralty jurisdiction. This would also avoid interfering with the general principles of the 1968 Convention, and maintain a clear dividing line between its scope and that of other Conventions.

Two issues remain outstanding, however, since they are not fully covered by the Brussels Conventions of 1952 and 1957: jurisdiction in the event of the arrest of salvaged cargo or freight (the new Article 5 (7)) (1) and actions for limitation of liability in maritime matters (the new Article 6a) (2). Moreover, until Denmark and Ireland accede to the Brussels Arrest Convention of 10 May 1952, transitional provisions had also to be introduced (3). Finally, a particularity affecting only Denmark and Ireland (4) still remained to be settled.

1. Jurisdiction in connection with the arrest of salvaged cargo or freight

122. (a) The Brussels Convention of 1952 allows a claimant, *inter alia*, to invoke the jurisdiction of a State in which a ship has been arrested on account of a salvage claim (Article 7 (1) (b)). Implicit in this provision is a rule of substantive law. A claim to remuneration for salvage entitles

the salvage firm to a maritime lien on the ship. A similar lien in favour of a salvage firm can also exist on the cargo; this can be of some economic importance, if it is the cargo rather than the ship which was salvaged, or if the salvaged ship is so badly damaged that its value is less than the cost of the salvage operation. The value of the cargo of a modern supertanker can amount to a considerable sum. Finally, prior rights can also arise in regard to freight. If freight is payable solely in the event of the safe arrival of the cargo at the place of destination, it is appropriate that the salvage firm should have a prior right to be satisfied out of the claim to freight which was preserved due to the salvage of the cargo.

Accordingly United Kingdom law provides that a salvage firm may apply for the arrest of the salvaged cargo or the freight claim preserved due to its intervention and may also apply to the court concerned for a final decision on its claims to remuneration for salvage. Jurisdiction of this kind is similar in scope to the provisions of Article 7 of the Brussels Convention of 1952. As there is no other Convention on the arrest of salvaged cargo and freight which would remain applicable under Article 57, the United Kingdom would, on acceding to the 1968 Convention, have suffered an unacceptable loss of jurisdiction if a special provision had not been introduced.

123. (b) The proposed solution applies the underlying principle of Article 7 of the Brussels Convention of 1952 to jurisdiction after the arrest of salvaged cargo or freight claims.

Under Article 24 of the 1968 Convention, there is no limitation on national laws with regard to the granting of provisional legal safeguards including arrest. However, they could not provide that arrest, whether authorized or effected, should suffice to found jurisdiction as to the substance of the matter. The exception introduced in Article 5 (7) (a) is confined to arrest to safeguard a salvage claim.

Article 5 (7) (b) introduces an extension of jurisdiction not expressly modelled on the Brussels Convention of 1952. It is a result of practical experience. After salvage operations — whether involving a ship, cargo or freight — arrest is sometimes ordered, but not actually carried into effect, because bail or other security has been provided. This must be sufficient to confer jurisdiction on the arresting court to decide also on the substance of the matter.

The object of the provision is to confer jurisdiction only with regard to those claims which are secured by a maritime lien. If the owner of a ship in difficulties has concluded a contract for its salvage, as his contract with the cargo owner frequently obliges him to do, any disputes arising from the former contract will not be governed by this provision.

2. Jurisdiction to order a limitation of liability

124. It is not easy to say precisely how the application of Article 57 of the 1968 Convention links up with that of the International Convention of 10 October 1957 relating to the limitation of the liability of owners of seagoing ships ([34]) (see end of paragraph 128) and with relevant national laws. The latter Convention contains no express provisions directly affecting international jurisdiction or the enforcement of judgments. The Working Party did not consider that it was its task to deal systematically with the issues raised by that Convention and to devise proposals for solving them. It would, however, be particularly unfortunate in certain respects if the jurisdictional lacunae of the 1957 Convention on the limitation of liability were carried over into the 1968 Convention and were supplemented in accordance with the general provisions on jurisdiction of that Convention.

A distinction needs to be drawn between three differing aspects arising in connection with the limitation of liability in matters of maritime law. First, a procedure exists for setting up and allocating the liability fund. Secondly, the entitlement to damages against the shipowner must be judicially determined. Finally, and distinct from both, there is the assessment of limitation of liability regarding a given claim.

The procedural details giving effect to these three aspects vary in the different legal systems of the Community.

125. Under one system, which is followed in particular in the United Kingdom, limitation of liability necessitates an action against one of the claimants — either by way of originating proceedings or, if an action has already been brought against the shipowner, as a counterclaim. The liability fund is set up at the court dealing with the limitation of liability issue, and other claimants must also lodge their claims with the same court.

126. Under the system obtaining in Germany, for example, proceedings for the limitation of liability are started not by means of an action brought against a claimant, but by a simple application which is not directed 'against' any person, and which leads to the setting up of the fund.

If the application is successful, all claimants must lodge their claims with that court. If any disputes arise about the validity of any of the claims lodged, they have to be dealt with by special proceedings taking the form of an action by the claimant against the fund administrator, creditor or shipowner contesting the claim. Under this system an independent action by the shipowner against the claimant in connection with limitation of liability is also possible. Such an action leads not to the setting up of a liability fund or to an immediately effective limitation of liability, but merely establishes whether liability is subject to potential limitation, in case of future proceedings to assess the extent of such liability.

127. The new Article 6a does not apply to an action by a claimant against the shipowner, fund administrator or other competing claimants, nor to the collective proceedings for creating and allocating the liability fund, but only to the independent action brought by a shipowner against a claimant (a). Otherwise the present provisions of the 1968 Convention which are relevant to limitation of maritime liability apply (b).

128. (a) The actual or potential limitation of the liability of a shipowner can, however, in all legal systems of the Community be used otherwise than as a defence. If a shipowner anticipates a liability claim, it may be in his interest to take the initiative by asking for a declaration that he has only limited or potentially limited liability for the claim. In that case he can choose from one of the jurisdictions which are competent by virtue of Articles 2 to 6. According to these provisions, he cannot bring an action in the courts of his domicile. Since, however, he could be sued in those courts, it would be desirable also to allow him to have recourse to this jurisdiction. It is the purpose of Article 6a to provide for this. Moreover, apart from the Brussels Convention of 1952, this is the only jurisdiction where the shipowner could reasonably concentrate all actions affecting limitation of his liability. The result for English law (see paragraph 125) is that the fund can be set up and allocated by that same court. In addition, Article 6a makes it clear that proceedings for limitation of liability can also be brought by the shipowner in any other court which has jurisdiction over the claim. It also enables national legislations to give jurisdiction to a court within their territory other than the court which would normally have jurisdiction.

129. (b) For proceedings concerning the validity as such of a claim against a shipowner, Articles 2 to 6 are exclusively applicable.

In addition, Article 22 is always applicable. If proceedings to limit liability have been brought in one State, a court in another State which has before it an application to establish or to limit liability may stay the proceedings or even decline jurisdiction.

130. (c) A clear distinction must be drawn between the question of jurisdiction and the question which substantive law on limitation of liability is to be applied. This need not be the law of the State whose courts have jurisdiction for assessing the limitation of liability. The law applicable for the limitation of liability also defines more precisely the type of case in which limitation of liability can be claimed at all.

131. 3. Transitional provisions

All the delegations hope that Denmark and Ireland will accede to the Brussels Convention of 10 May 1952 (see paragraph 121). This will, however, naturally take some time, and it is reasonable to allow a transitional period of three years after the entry into force of the Accession Convention. It would be harsh if, within that period, in the two States concerned jurisdiction in maritime matters were to be limited to what is authorized under the terms of Articles 2 to 6a. Article 36 of the Accession Convention therefore contains transitional provisions in favour of those States. These provisions correspond, apart from variations in the drafting, to the provisions which the Working Party originally proposed to recommend for the special section on maritime law as general rules of jurisdiction regarding the arrest of seagoing ships. In preparing these provisions the Working Party drew heavily, in fact almost exclusively, on the rules of the 1952 Brussels Convention relating to the arrest of seagoing ships (see paragraph 121).

Since they are temporary, the transitional provisions do not merit detailed comments on how they differ from the text of that Convention.

132. 4. Disputes between a shipmaster and crew members

The new Article Vb of the Protocol annexed to the 1968 Convention is based on a request by Denmark founded on Danish tradition. This has become part of the Danish Seamen's Law No 420 of 18 June 1973 which states that disputes between a crew member and a shipmaster of a Danish vessel may not be brought before foreign courts. The same principle is also embodied in some consular conventions between Denmark and other States. Following a specific request from the Irish delegation, the scope of this provision has also been extended to Irish ships.

IV. *Other special matters*

133. 1. Jurisdiction based on the place of performance

In the course of the negotiations it emerged that the French and Dutch texts of Article 5 (1) were less specific than the German and Italian texts on the question of the designation of the obligation. The former could be misinterpreted as including other contractual obligations than those which were the subject of the legal proceedings in question. The revised versions of the French and Dutch texts should clear up this misunderstanding ([35]).

134. 2. Jurisdiction in matters relating to tort

Article 5 (3) deals with the special tort jurisdiction. It presupposes that the wrongful act has already been committed and refers to the place where the harmful event has occurred. The legal systems of some States provide for preventive injunctions in matters relating to tort. This applies, for example, in cases where it is desired to prevent the publication of a libel or the sale of goods which have been manufactured or put on the market in breach of the law on patents or industrial property rights. In particular the laws of the United Kingdom and Germany provide for measures of this nature. No doubt Article 24 is applicable when courts have an application for provisional protective measures before them, even if their decision has, in practice, final effect. There is much to be said for the proposition that the courts specified in Article 5 (3) should also have jurisdiction in proceedings whose main object is to prevent the imminent commission of a tort.

135. 3. Third party proceedings and claims for redress

In Article 6 (2), the term 'third party proceedings' relates to a legal institution which is common to the legal systems of all the original Member States, with the exception of Germany. However, a jurisdictional basis which rests solely on the capacity of a third party to be joined as such in the proceedings cannot exist by itself. It must necessarily be supplemented by legal criteria which determine which parties may in which capacity and for what purpose be joined in legal proceedings. Thus the provisions already existing in, or which may in future be introduced into, the legal systems of the new Member States with reference to the joining of third parties in legal proceedings, remain unaffected by the 1968 Convention.

Section 3

Jurisdiction in insurance matters

136. The accession of the United Kingdom introduced a totally new dimension to the insurance business as it had been practised hitherto within the European Community. Lloyds of London has a substantial share of the market in the international insurance of large risks ([36]).

In view of this situation the United Kingdom requested a number of adjustments. Its main argument was that the protection afforded by Articles 7 to 12 was unnecessary for policy-holders domiciled outside the Community (I) or of great economic importance (II). The United Kingdom expressed concern that, without an adjustment of the 1968 Convention, insurers within the Community might be forced to demand higher premiums than their competitors in other States.

There were additional reasons for each particular request for an adjustment. As regards contracts of insurance with policy-holders domiciled outside the Community the United Kingdom sought the unrestricted admissibility of agreements conferring jurisdiction to be vouchsafed so that appropriate steps could be taken with regard to the binding provisions contained in the national laws of many policy-holders insuring with English insurers (I). Requests for adjustments also referred, in conjunction with the other requests for adjustments, to the scope of Articles 9 and 10 which seemed to require clarification (III). Finally there were requests for a few minor adjustments (IV).

The original request of the United Kingdom in respect of the first two problems, namely that the insurance matters in question should be excluded from the scope of Articles 7 to 12 was too far-reaching in view of the general objectives of the 1968 Convention. In particular a number of features of the mandatory rules of jurisdiction, which differ for the various types of insurance, had to be retained (see paragraphs 138, 139 and 143). However, the special structure of the British insurance market had to be taken into account — not least so that it would not be driven to resort systematically to arbitration. Although the 1968 Convention does not restrict the possibility of settling disputes by arbitration (see paragraph 63), national law should be careful not to encourage arbitration simply by making proceedings before national courts too complicated and uncertain for the parties. The Working Party therefore endeavoured to extend the possibilities of conferring jurisdiction by consent. For the form of such agreements see paragraph 176.

I. *Insurance contracts taken out by policy-holders domiciled outside the Community*

137. As already indicated earlier (see note 36), insurance contracts with policy-holders domiciled outside the Community account for a very large part of the British insurance business. The 1968 Convention does not expressly stipulate to what extent such contracts may provide for jurisdiction by consent. Article 4 applies only to the comparatively rare case where the policy-holder is the defendant in subsequent proceedings. In so far as the jurisdiction of courts outside the Community can be determined by agreement, the general question arises as to what restrictions should be imposed on such agreements having regard to the exclusive jurisdictions provided for by the 1968 Convention (see paragraphs 148, 162 *et seq.*). The main problem in this connection was the jurisdiction under Articles 9 and 10 which, it was thought, could not be excluded. However, this difficulty did not affect insurance contracts only with policy-holders domiciled outside the Community. It also affects, more generally, agreements on jurisdiction which are authorized by Article 12.

In view of the great importance for the United Kingdom of the question of agreements on jurisdiction with policy-holders domiciled outside the Community, it was necessary to incorporate the admissibility in principle of such agreements on jurisdiction expressly in the 1968 Convention. If, therefore, a policy-holder domiciled outside the Community insures a risk in England, exclusive jurisdiction may be conferred by agreement on English courts as well as on the courts of the policy-holder's domicile or others.

This basic rule had however to be limited again in two ways in the new paragraph (4) of Article 12.

138. 1. Compulsory insurance

Where a statutory obligation exists to take out insurance no departure from the provisions of Articles 8 to 11 on compulsory insurance can be permitted, even if the policy-holder is domiciled outside the Community. If a person domiciled in Switzerland owns a motor car which is normally based in Germany, then the car must, under German law, be insured against liability. Such an insurance contract may not contain provisions for jurisdiction by consent concerning accidents occurring in Germany.

The possibility of invoking the jurisdiction of German courts (Article 8) cannot be contractually excluded. This is so even although the relevant German law of 5 April 1965 on compulsory insurance (Bundesgesetzblatt I, page 213) does not expressly prohibit agreements on jurisdiction. However, in practice German law prevents the conclusion of agreements on jurisdiction in the area of compulsory insurance because approval of conditions of insurance containing such a provision would be withheld.

Compulsory insurance exists in the following Member States of the Community for the following articles, installations, activities and occupations, although this list does not claim to be complete:

FEDERAL REPUBLIC OF GERMANY (37)

1. Federal

Liability insurance compulsory for owners of motor vehicles, airline companies, hunters, owners of nuclear installations and handling of nuclear combustible materials and other radioactive materials, road haulage, accountants and tax advisers, security firms, those responsible for schools for nursing, infant and child care and midwifery, automobile experts, notaries' professional organizations, those responsible for development aid, exhibitors, pharamaceutical firms;

Life insurance for master chimney sweeps;

Accident insurance for airline companies and usufructuaries;

Fire insurance for owners of buildings which are subject to a charge, usufructuaries, warehouse occupiers, pawnbrokers;

Goods insurance for pawnbrokers;

Pension funds for theatres, cultural orchestras, district master chimney sweeps, supplementary pension funds for the public service.

2. Länder

There is no uniformity as between the Länder of the Federal Republic of Germany, but there is in particular compulsory fire insurance for buildings, compulsory pension funds for agricultural workers, the liberal professions (doctors, chemists, architects, notaries) and (in Bavaria, for example) members of the Honourable Company of Chimney Sweeps and, for example, a supplementary pension fund for workers in the Free and Hanseatic City of Bremen. In Bavaria there is compulsory insurance for livestock intended for slaughter.

BELGIUM:

Motor vehicles, hunting, nuclear installations, accidents at work, transport accidents (for paying transport by motor vehicles).

DENMARK:

Motor vehicles, dogs, nuclear installations, accountants.

FRANCE:

Operators of ships and nuclear installations, sand motor vehicles, operators of cable-cars, chair-lifts and other such mechanical units, hunting, estate agents, managers of property, syndics of co-owners, business managers, operators of sports centres, accountants, agricultural mutual assistance schemes, legal advisers, physical education establishments and pupils, operators of dance halls, managers of pharmacists' shops in the form of a private limited liability company (S.à.r.l.), blood transfusion centres, architects, motor vehicle experts, farmers.

LUXEMBOURG:

Motor vehicles, hunting and hunting organizations, hotel establishments, nuclear installations, fire and theft insurance for hotel establishments;

Insurance against the seizure of livestock in slaughterhouses.

NETHERLANDS:

Motor vehicles, nuclear installations, tankers.

UNITED KINGDOM:

Third party liability in respect of motor vehicles;

Employers' liability in respect of accidents at work;

Insurance of nuclear installations;

Insurance of British registered ships against oil pollution;

Compulsory insurance scheme for a number of professions, e. g. solicitors and insurance brokers.

139. 2. Insurance of immovable property

The second exception referred to at the end of paragraph 137 is particularly designed to ensure that Article 9 continues to apply even when the policy-holder is domiciled outside the Community. However, this exception has further implications. It prohibits jurisdiction agreements conferring exclusive jurisdiction on the courts mentioned in Article 9. This applies even where the national law of the State in which the immovable property is situated allows agreements conferring jurisdiction in such circumstances.

II. *Insurance of large risks, in particular marine and aviation insurance*

140. The United Kingdom's request for special rules for the insurance of large risks was probably the most difficult problem for the Working Party. The request was based on the realization that the concept of social protection underlying a restriction on the admissibility of provisions conferring jurisdiction in insurance matters is no longer justified where the policy-holders are powerful undertakings. The problem was one of finding a suitable demarcation line. Discussions on the second Directive on insurance had already revealed the impossibility of taking as criteria abstract, general factors like company capital or turnover. The only solution was to examine which types of insurance contracts were in general concluded only by policy-holders who did not require social protection. On this basis, special treatment could not be conceded to industrial insurance as a whole.

Accordingly, the Working Party directed its attention to the various classes of insurance connected with the transport industry. In this area there is an additional justification for special treatment for agreements on jurisdiction: the risks insured are highly mobile and insurance policies tend to change hands several times in quick succession. This leads to uncertainty as to which courts will have jurisdiction and the difficulties in calculating risks are thereby greatly increased. On the other hand, there are here, too, certain areas requiring social protection. Particular complications were caused by the fact that there is a well integrated insurance market for the transport industry. The various types of risk for different means of transport are usually covered under one single policy. The British insurance industry in particular has developed standard policies which only require for their completion a notification by the insured that the means of transport (which can be of many different types) have set off.

The result of a consideration of all these matters is the solution which figures in the new paragraph (5) of Article 12, as supplemented by Article 12a: agreements on jurisdiction are in principle to be given special treatment in marine insurance and in some sectors of aviation insurance. In the case of insurance of transport by land alone no exceptional rules of any kind appeared justified.

In order to avoid difficulties and differences of interpretation, a list had to be drawn up of the types of policy for which the admissibility of agreements on jurisdiction was to be extended. The idea of referring for this purpose to the list of classes of insurance appearing in the Annex to the First Council Directive of 24 July 1973 (73/239/EEC) proved inadequate. The classification used there took account of the requirements of State administration of insurance, and was not directed towards a fair balancing of private insurance interests. There was thus no alternative but to draw up a separate list for the purposes of the 1968 Convention. The following comments apply to the list and the classes of insurance not included in it.

141. 1. Article 12 a (1) (a)

This provision applies only to hull insurance and not to liability insurance. The term 'seagoing ships' means all vessels intended to travel on the sea. This includes not only ships in the traditional sense of the word but also hovercraft, hydrofoils, barges and lighters used at sea. It also covers floating apparatus which cannot move under its own power, e.g. oil exploration and extraction installations which are moved about on water. Installations firmly moored or to be moored on the seabed are in any event expressly included in the text of the provision. The provision also covers ships in the course of construction, but only in so far as the damage is the result of a maritime risk. This is damage caused by the fact that the ship is on the water and not therefore, damage which occurs in dry-dock or in the workshops of shipyards.

142. 2. Article 12a (1) (b)

In the same way as (1) (a) covers the value of the hull of a ship or of an aeroplane, (1) (b) covers the value of goods destroyed or lost in transit, but not liability insurance for any loss or damage caused by those goods. The most important single decision taken on the provision was the addition of the words 'consists of or includes'. The reason for this is that goods in transit are frequently not conveyed by the same means of transport right to their final destination. There may be a sequence of journeys by land, sea and air. There would be unwarranted complications for the insurance industry in drafting policies and settling claims, if a fine distinction had always to be drawn as to the section of transit in which loss or damage had occurred. Moreover it is often impossible to ascertain this. One has only to think of container transport to realize how easily a loss may be discovered only at the destination. Practical considerations therefore required that agreements on jurisdiction be permitted, even where goods are carried by sea or by air for only part of their journey. Even if it can be proved that the loss occurred in the course of transport on land, agreements on jurisdiction permitted by the new paragraph (5) of Article 12 remain effective. The provision applies even if the shipment does not cross any national border.

143. The exception in respect of injury to passengers and loss of or damage to their baggage, which is repeated in Article 12a (2) (a) and (b), is justified by the fact that such persons as a group tend to have a weaker economic position and less bargaining power.

144. 3. Article 12a (2) (a)

Whether these provisions also cover all liability arising in connection with the construction, modification and repair of a ship; whether therefore the provision includes all liability which the shipyard incurs towards third parties and which was caused by the ship; or whether the expression 'use or operation' has to be construed more narrowly as applying only to liability arising in the course of a trial voyage — all these are questions of interpretation which still await an answer. The exception for compulsory aircraft insurance is intended to leave the Member States free to provide for such protection as they consider necessary for the policy-holder and for the victim.

145. 4. Article 12a (2) (b)

As there is no reason to treat combined transport any differently for liability insurance than for hull insurance, it is equally irrelevant during which section of the transport the circumstances causing the liability occurred (see paragraphs 142 and 143).

146. 5. Article 12a (3)

The most important application of this provision is stated in the text itself. In the absence of a provision to the contrary in the charter party, an air crash would cause the carrier to lose his entitlement to freight and the owner his charter-fee from the charterer. Another example might be loss caused by the late arrival of a ship. For the rest the notion is the same as that used in Directive 73/239/EEC.

147. 6. Article 12a (4)

Insurance against ancillary risks is a familiar practice, especially in United Kingdom insurance

contracts. An example would be 'shipowner's disbursements' consisting of exceptional operational costs, e.g. harbour dues accruing whilst a ship remains disabled. Another example is insurance against 'increased value', providing protection against loss arising from the fact that a destroyed or damaged cargo had increased in value during transit.

The provision does not require an ancillary risk to be insured under the same policy as the main risk to which it relates. The Working Party therefore deliberately opted for a somewhat different wording from that in Directive 73/239/EEC for the 'ancillary risks' referred to in that Directive. The definition in that Directive could not be used since it is concerned with a different subject, the authorization of insurance undertakings.

148. III. *The remaining scope of Articles 9 and 10*

The revised text of Article 12, like the original text, does not expressly deal with the effect of agreements on jurisdiction or the special jurisdictions for insurance matters set out in Section 3. Nevertheless, the legal position is clear from the systematic construction of Section 3 of the 1968 Convention, as amended. Agreements on jurisdiction cover all legal proceedings between insurer and policy-holder, even where the latter wishes, pursuant to the first paragraph of Article 10, to join the insurer in the court in which he himself is sued by the injured party. However, jurisdiction clauses in insurance contracts cannot be binding upon third parties. The provisions of the second paragraph of Article 10 concerning a direct action by the injured party are thus not affected by such jurisdiction clauses. The same is true of the third paragraph of Article 10.

IV. *Other problems of adjustment and clarification in insurance law*

149. 1. Co-insurance

The substantive amendment in the first paragraph of Article 8 covers jurisdiction where several co-insurers are parties to a contract of insurance. What usually happens is that one insurer acts as leader for the other co-insurers and each of them underwrites a part of the risk, possibly a very small part. In such cases, however, there is no justification for permitting all the insurers, including the leader, to be sued in the courts of each State in which any one of the many co-insurers is domiciled. The only additional international jurisdiction which can be justified would be one which relates to the circumstances of the leading insurer. The Working Party considered at length whether to refer to the leading insurer's domicile, but the effect of this would have been that the remaining co-insurers could be sued there even if the leader was sued elsewhere. An additional jurisdiction based on the leading insurer's circumstances is justifiable only if it leads to a concentration of actions arising out of an insured event. The new version of the first paragraph of Article 8 therefore refers to the court where proceedings are brought against the leading insurer. Co-insurers can thus be sued for their share of the insurance in that court, at the same time as the leading insurer or subsequently. However, the provision does not impose an obligation for proceedings to be concentrated in one court; there is nothing to prevent a policy-holder from suing the various co-insurers in different courts. If the leading insurer has settled the claim out of court, the policy-holder must bring any action against the other co-insurers in one of the courts having jurisdiction under points (1) or (2) of the new version of the first paragraph of Article 8.

The remaining amendments to the first paragraph of Article 8 merely rephrase it for the sake of greater clarity.

150. 2. Insurance agents, the setting up of branches

There was discussion on the present text of the second paragraph of Article 8 of the 1968 Convention because its wording might give rise to the misunderstanding that jurisdiction could be founded not only on the intervention of an agent of the insurer, but also on that of an independent insurance broker of the type common in the United Kingdom. The discussion revealed that this provision was unnecessary in view of Article 5 (5). The Working Party therefore changed the present paragraph three into paragraph two. The addition of the words 'or other establishment' is intended merely to ensure consistency between Article 5 (5) and the third paragraph of the new Article 13. The latter provision is necessary in addition to the former in order to prevent Article 4 being applicable.

151. 3. Reinsurance

Reinsurance contracts cannot be equated with insurance contracts. Accordingly, Articles 7 to 12 do not apply to reinsurance contracts.

152. 4. The term 'policy-holder'

The previous authentic texts of the 1968 Convention use the term 'preneur d'assurance' and the equivalent in German, Italian and Dutch; the nearest English equivalent of the term proved to be 'the policy-holder'. However, this should not give rise to the misunderstanding that the problems arising from a transfer of legal rights are now any different from those existing before the accession of the new Member States to the Convention. The rightful possessor of the policy document is not always the 'preneur d'assurance'. It is of course conceivable that the whole legal status of the other party to the contract with the insurer might pass to another person by inheritance or some other means, in which case the new party to the contract would become the 'preneur d'assurance'. However, this case must be clearly distinguished from the transfer of individual rights arising out of the contract of insurance, especially in the form of assignment of the sum assured to a beneficiary. Such an assignment may be made in advance and may be contingent, for instance, upon the occurrence of a claim. In this event it is conceivable that the insurance policy might be passed on to the beneficiary at the same time as the assignment of the right to the sum assured so that he can claim his entitlement from the insurer, if the case arises. The beneficiary would not thereby become the 'preneur d'assurance'. Hence, where a court's jurisdiction is dependent on individual characteristics of the 'preneur d'assurance', the situation remains unchanged as a result of prior assignment of any claim to the sum assured which might arise, even if the policy document is transferred at the same time.

152. (a) 5. Agreements on jurisdiction between parties to a contract from the same State

For the amendment to Article 12 (3) ('at the time of conclusion of the contract'), see paragraph 161 (a).

Section 4

Jurisdiction over consumer contracts

153. I. *Principles*

Leaving aside insurance matters, the 1968 Convention pays heed to consumer protection considerations only in one small section, that dealing with instalment sales and loans. This was consistent with the law as it then stood in the original Member States of the Community since it was in fact at first only in the field of instalment sales and loans that awareness of the need to protect the consumer against unfairly worded contracts became widespread. Since that time legislation in the Member States of the Community has become concerned with much broader-based consumer protection. In particular there has been a general move in consumer protection legislation to ensure appropriate jurisdictions for the consumer. Intolerable tensions would be bound to develop between national legislation and the 1968 Convention in the long run if the Convention did not afford the consumer much the same protection in the case of transfrontier contracts as he received under national legislation. The Working Party therefore decided to propose that the previous Section 4 of Title II be extended into a section on jurisdiction over consumer contracts, establishing at the same time for future purposes that only final consumers acting in a private capacity should be given special protection and not those contracting in the course of their business to pay by instalments for goods and services used. The Working Party was influenced on this last point by the proceedings in the Court of Justice of the European Communities in response to a reference from the French Cour de cassation concerning the interpretation of 'instalment sales and loans', proceedings which centred on the question of whether the existing Section 4 of Title II covered instalment sales contracts concluded by businessmen (Case 150/77: Société Bertrand v. Paul Ott KG).

The basic principle underlying the provisions of the new section is to draw upon ideas emerging from European Community law as it has evolved and is currently evolving. Consequently, most of the existing provisions on instalment sales and loans have been incorporated in the new section, which also draws on Article 5 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. On points of drafting detail, however, improvements

were made on the wording of the preliminary draft Convention. One substantive change was necessary, since to accord with the general structure of the 1968 Convention reference had to be made to the place where the parties are domiciled, rather than habitually resident. Details are as follows:

154. II. *The scope of the new Section*

Using the device of an introductory provision defining the scope of the Section, the proposal follows the practice previously adopted at the beginning of Sections 3 and 4 of Title II.

1. Persons covered

155. The only new point of principle is a provision governing the persons covered by the section, including in particular the legal definition of the section's central term, the 'consumer'. The substances of the definition is taken from Article 5 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations the most recent version of which was used by the Working Party. The amendments made were only drafting improvements.

2. Subject matter covered

156. As regards the subject matter covered by the new section, a clear distinction is drawn between instalment sales, including the financing of such sales, and other consumer contracts. The consequent effect on the precedence of the provisions of Sections 3 and 4 is as follows: Section 3 is a more specific provision than Section 4 and hence takes precedence over it. A contract of insurance is not a contract for the supply of services within the meaning of the 1968 Convention. Within Section 4, the provisions on instalment sales are more specific than the general reference to consumer sales in the first paragraph of Article 13.

157. (a) As in the past, instalment sales are subject to the special provisions without any further preconditions. The sole change lies in the stipulation that the special provisions apply only where the purchaser is a private consumer. The rules governing instalment sales also apply automatically to the legal institution of hire purchase, which has developed into the commonest legal form for transacting instalment sales in the United Kingdom and Ireland. For reasons which are not material for jurisdiction purposes, instalment sales in those countries usually take the form in law of a contract of hire with an option to purchase for the hirer. In form the instalments represent the hire fee, whereas in substance they form the purchase price. At the end of the prescribed 'hire' period, once all the prescribed instalments of the 'hire fee' have been paid, the 'hirer' is entitled to purchase the article for a nominal price. As the term 'instalment sale' under the continental legal systems by no means implies that ownership of the article must necessarily pass to the purchaser at the same time as physical possession, hire purchase is in practice tantamount to an instalment sale.

Contracts to finance instalment sales to private consumers are also subject to the special provisions without any further preconditions. Contrary to the legal position obtaining hitherto, the Working Party has made actions arising out of a loan contract to finance the purchase of movable property subject to the special provision, even if the loan itself is not repayable by instalments or if the article is purchased with a single payment (normally with the funds lent). Credit contracts are not, moreover, contracts for the supply of services, so that, apart from point (2) of the first paragraph of Article 13, the whole of Section 4 does not apply to such contracts. Contracts of sale not falling under point (1) of the first paragraph of Article 13 do not, for instance, come under point (2) of that paragraph, although Section 4 may be applicable to them subject to the further conditions contained in point (3) (see paragraph 158).

158. (b) On the other hand, consumer contracts other than those referred to in paragraph 157 are subject to the special provisions only if there is a sufficiently strong connection with the place where the consumer is domiciled. In this, the new provisions once again follow the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. Both the conditions referred to in point (3) of the first paragraph of Article 13—an offer or advertising in the State of the consumer's domicile, and steps necessary for the conclusion of the contract taken by the consumer in that State—must be satisfied. The introductory phrase should, moreover, ensure that Articles 4 and 5 (5)

will apply to all consumer contracts, as has until now been the case only for instalment sales and for loans repayable by instalments. One particular consequence of this is that, subject to the second paragraph of Article 13, Section 4 does not apply where the defendant is not domiciled in the EEC.

For further details of what is meant by 'a specific invitation' or 'advertising' in the State of the consumer's domicile and by 'the steps necessary for the conclusion of the contract', see the report currently being drawn up by Professor Giuliano on the Convention on the law applicable to contractual and non-contractual obligations.

3. Only a branch, agency or other establishment within the Community

159. The exclusion from the scope of Section 4 of contracts between consumers and firms domiciled outside the EEC would not be reasonable where such firms have a branch, agency or other establishment within the EEC. Under the national laws upon which jurisdiction is to be founded in such cases pursuant to Article 4, it would often be impossible for the consumer to sue in the courts which would be guaranteed to have jurisdiction for his purposes in the case of contracts with parties domiciled within the EEC. Insurers with branches, agencies or other establishments in the EEC are treated as regards jurisdiction in like manner to those domiciled within the Community (Article 8) and for the same reasons the other parties to contracts with consumers must also be deemed to be domiciled within the EEC if they have a branch, agency of other establishment in the Community. It is, however, only logical that it should not be possible to invoke exorbitant jurisdictions against such parties simply because their head office lies outside the EEC.

4. Contracts of transport

160. The last paragraph of Article 13 is again taken from Article 5 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. The reason for leaving contracts of transport out of the scope of the special consumer protection provisions in the 1968 Convention is that such contracts are subject under international agreements to special sets of rules with very considerable ramifications, and the inclusion of those contracts in the 1968 Convention purely for jurisdictional purposes would merely complicate the legal position. Moreover, the total exclusion of contracts of transport from the scope of Section 4 means that Sections 1 and 2 and hence in particular Article 5 (1) remain applicable.

161. III. *The substance of the provisions of Section 4*

There are only a few points requiring a brief explanation of the substance of the new provisions.

1. Subsequent change of domicile by the consumer

In substance, the new Article 14 closely follows the existing Article 14, while extending it to actions arising from all consumer contracts. The rearrangement of the text is merely a rewording due to the availability of a convenient description for one party to the contract, the 'consumer', which was better placed at the beginning of the text so as to make it more easily comprehensible. The Working Party's decision means in substance that, as in the case with the existing Article 14, the consumer may sue in the courts of his new State of domicile if he moves to another Community State after concluding the contract out of which an action subsequently arises. This only becomes practical, however, in the case of the instalment sales and credit contracts referred to in points (1) and (2) of the first paragraph of Article 13. For actions arising out of other consumer contracts the new Section 4 will in virtually all cases cease to be applicable if the consumer transfers his domicile to another State after conclusion of the contract. This is because the steps necessary for the conclusion of the contract will almost always not have been taken in the new State of domicile. The cross-frontier advertising requirement also ensures that the special provisions will in practice not be applicable to contracts between two persons neither of whom is acting in a professional or trading capacity.

2. Agreements on jurisdiction

161a. The new version of Article 15, too, is in substance based on the existing version relating to instalment sales and loans. The only addition is intended to make it clear that it is at the time of conclusion of the contract, and not when proceedings are subsequently instituted, that the parties must be domiciled in the same State. It

was then necessary to align and clarify Article 12 (3) in the same way.

Although Article 13 is not expressed to be subject to Article 17, the Working Party was unanimously of the opinion that agreements on jurisdiction must, in so far as they are permitted at all, comply with the formal requirements of Article 17. Since the form of such agreements is not governed by Section 4, it must be governed by Article 17.

Section 5

Exclusive jurisdiction

162. The only amendment proposed by the Working Party to the cases of exclusive jurisdiction provided for in Article 16 is a technical amendment in Article Vd of the Protocol annexed to the 1968 Convention, to clarify Article 16 (4). The Working Party did, however, spend some time discussing paragraphs (1) and (2) of that Article. Details of the information supplied to the new Member States regarding exclusive jurisdiction in actions relating to the validity of the constitution of companies or to their dissolution have already been given elsewhere (see paragraph 56 *et seq.*). It is only necessary to add that a company may have more than one seat. Where under a legal system it is possible for a company to have two seats, and it is that system which, pursuant to Article 53 of the 1968 Convention, is to determine the seat of the company, the existence of two seats has to be accepted. It is then open to the plaintiff to choose which of the two seats he will use to base the jurisdiction of the court for his action. Finally, it should be pointed out that Article 16 (2) also applies to partnerships established under United Kingdom and Irish law (see paragraph 55).

Thus essentially the only exclusive jurisdiction left to be dealt with more fully here is that in respect of actions relating to rights *in rem* in, or tenancies of, immovable property. There were five problems with regard to which the new Member States had requested explanations.

163. There was no difficulty in clarifying that actions for damages based on infringement of rights *in rem* or in damage to property in which rights *in rem* exist do not fall within the scope of Article 16 (1). In that context the existence and content of such rights *in rem*, usually rights of ownership, are only of marginal significance.

164. The Working Party was unable to agree whether actions concerned only with rent, i.e. dealing simply with the recovery of a debt, are excluded from the scope of Article 16 (1) as, according to the Jenard report, was the opinion of the Committee which drafted the 1968 Convention ([38]). However, the underlying principle of the provision quite clearly does not require its application to short-term agreements for use and occupation such as, for example, holiday accommodation.

165. Two of the three remaining problems which the Working Party examined relate to the differences between the law of immovable property on the continent and the corresponding law in the United Kingdom and Ireland; they require therefore somewhat more detailed comments. There is, first, the question what are rights *in rem* (1) within the meaning of Article 16 (1), and, secondly, the problem of disputes arising in connection with the transfer of immovable property (2). Certain other problems emerged as a result of developments which have taken place in the meantime in international patent law (3).

1. Rights 'in rem' in immovable property in the Member States of the Community

166. (a) The concept of a right *in rem* — as distinct from a right *in personam* — is common to the legal systems of the original Member States of the EEC, even though the distinction does not appear everywhere with the same clarity.

A right *in personam* can only be claimed against a particular person; thus only the purchaser is obliged to pay the purchase price and only the lessor of an article is obliged to permit its use.

A right *in rem*, on the other hand, is available against the whole world. The most important legal consequence flowing from the nature of a right *in rem* is that its owner is entitled to

demand that the thing in which it exists be given up by anyone not enjoying a prior right.

In the legal systems of all the original Member States of the EEC without exception, there are only a restricted number of rights *in rem*, even though they do not rigidly apply the principle. Some rights *in rem* are defined only in outline, with freedom for the parties to agree the details. The typical rights *in rem* are listed under easily identifiable heads of the civil law, which in all six countries is codified ([39]). In addition, a few rights *in rem* are included in some special laws, the most important of which are those on the co-ownership of real property. Apart from ownership as the most comprehensive right *in rem*, a distinction can be made between certain rights of enjoyment and certain priority rights to secure liabilities. All the legal systems know the concept of usufruct, which confers extensive rights to enjoyment of a property. More restricted rights of enjoyment can also exist in these legal systems in various ways.

167. (b) At first glance there appears to be in United Kingdom and Irish law too a small, strictly circumscribed group of statutory rights corresponding to the Continental rights *in rem*. However, the position is more complicated, because these legal systems distinguish between law and equity.

In this connection it has always to be borne in mind that equity also constitutes law and not something merely akin to fairness lying outside the concept of law. As a consequence of these special concepts of law and equity in the United Kingdom and in Ireland, equitable interests can exist in immovable property in addition to the legal rights.

In the United Kingdom the system of legal rights has its origin in the idea that all land belongs to the Crown and that the citizen can only have limited rights in immovable property. This is the reason why the term 'ownership' does not appear in the law of immovable property. However, the estate in fee simple absolute in possession is equivalent to full ownership under the Continental legal systems. In addition the Law of property Act 1925 provides for full ownership for a limited period of time ('term of years absolute'). The same Act limits restricted rights in immovable property ('interests or charges in or over land') to five. All the others are equitable interests, whose number and content are not limited by the Act. Equitable interests are not, however, merely the equivalent of personal rights on the Continent. Some can be registered and then, like legal rights, have universal effect, even against purchasers in good faith. Even if not registered they operate in principle against all the world; only purchasers in good faith who had no knowledge of them are protected in such a case ([40]). If the owner of an estate in fee simple absolute in possession grants another person a right of way over his property for the period of that person's life, this cannot amount to a legal right. It can only be an equitable interest, though capable of registration ([41]). Equitable interests can thus fulfil the same functions as rights *in rem* under the Continental legal systems, in which case they must be treated as such under Article 16 (1). There is no limit to the number of such interests. The granting of equitable interests is on the contrary the method used for achieving any number of subdivisions of proprietary rights ([42]).

168. (c) If an action relating to immovable property is brought in a particular State and the question whether the action is concerned with a right *in rem* within the meaning of Article 16 (1) arises, the answer can hardly be derived from any law other than that of the *situs*.

2. Actions in connection with obligations to transfer immovable property

169. The legal systems of the original and the new Member States of the Community also differ as regards the manner in which ownership of immovable property is transferred on sale. Admittedly the legal position even within the original Member States differs in this respect.

170. (a) German law distinguishes most clearly between the transfer itself and the contract of sale (or other contract designed to bring about a transfer). The legal position in the case of immovable property is no different from that obtaining in the case of movable property. The transfer is a special type of legal transaction which in the case of immovable property is called 'Auflassung' (conveyance) and which even between the parties becomes effective only on entry in the land register. Where a purchaser of German immovable property brings proceedings on the basis of a contract for sale of immovable property which is governed by German law, the

subject matter of such proceedings is never a right *in rem* in the property. The only matter in issue is the defendant's personal obligation to carry out all acts necessary to transfer and hand over the property. If one of the parties fails to fulfil its obligations under a contract for sale of immovable property, the remedy in German law is not a court order for rescission, but a claim for damages and the right to rescind the contract.

Admittedly it is possible with the vendor's consent to protect the contractual claim for a transfer of ownership by means of a caution in the land register. In that case the claim has, as against third parties, effects which normally only attach to a right *in rem*. The consequence for German domestic law is that nowadays rights secured by such a caution may be claimed against third parties in the jurisdiction competent to deal with the property concerned ([43]). However, any proceedings for a transfer of ownership against the vendor himself would remain an action based on a personal obligation.

171. (b) Under French, Belgian and Luxembourg law, which is largely followed by Italian law, the ownership, at any rate as between the parties, passes to the purchaser as soon as the contract of sale is concluded, just as it does in the case of movable property, unless the parties have agreed a later date (see e.g. Article 711 and 1583 of the French Civil Code and Article 1376 of the Italian Civil Code). The purchaser need only enter the transfer of ownership in the land register ('transcription') to acquire a legal title which is also effective against third parties. For the purchaser to bring proceedings for performance of the contract is therefore normally equivalent to a claim that the property be handed over him. Admittedly this claim is based not only on the obligation which the vendor undertook by the contract of sale, but also on ownership which at that point has already passed to the purchaser. This means that the claim for handing over the property has as its basis both a personal obligation and a right *in rem*. The system of remedies which is available in the event of one party to a contract not complying with its obligations is fully in accordance with this. Accordingly, French domestic law has treated such actions as a 'matière mixte' and given the plaintiff the right to choose between the jurisdiction applicable to the right *in rem* and the jurisdiction applicable to the personal obligation arising from the contract, i.e. the law of the defendant's domicile or of the place of performance of the contract ([44]).

The 1968 Convention does not deal with this problem. It would seem that the personal aspect of such claims predominates and Article 16 (1) is inapplicable.

172. (c) In the United Kingdom ownership passes on the conclusion of a contract of sale only in the case of movable property. In the case of a sale of immovable property the transfer of ownership follows the conclusion of the contract of sale and is effected by means of a separate document, the conveyance. If necessary, the purchaser has to bring an action for all necessary acts to be performed by the vendor. However, except in Scotland, in contrast with German law, the purchaser's rights prior to the transfer of ownership are not limited to a personal claim against the vendor. In fact the purchaser has an equitable interest (see paragraph 167) in the property which, provided the contract is protected by a notice on the Land Register, is also effective against third parties. Admittedly the new paragraph (6) of Article 5 does not apply (see paragraph 114 *et seq.)*, because a contract of sale does not create a trust within the meaning of Article 5 (6), even if it is in writing. It is only in one respect that a purchaser's equitable interest does not place him in as strong a position as the French owner of immovable property prior to 'transcription' (see paragraph 171): the vendor's cooperation is still required to make the new owner's legal title fully effective.

This legal position would justify application of the exclusive jurisdiction referred to in Article 16 (1) even less than the corresponding position under French law. The common law has developed the concept of equitable interests so as to confer on parties to an agreement which originally gave them nothing more than merely personal rights a certain protection as against third parties not acting in good faith. As against the other party to the contract the claim remains purely a personal one, as does a claim, under German law, to transfer of ownership (see paragraph 170) secured by a caution in the Land Register. In Scotland contracts in favour of a third party are enforceable by that party *(jus quaesitum tertii)*.

Actions based on contracts for the transfer of ownership or other rights *in rem* affecting immovable property do not therefore have as their object rights *in rem*. Accordingly they may also be brought before courts outside the United Kingdom. Admittedly, care will have to be exercised in that case to ensure that the plaintiff clearly specifies the acts to be done by the defendant so that the transfer of ownership (governed by United Kingdom law) does indeed become effective.

173. 3. Jurisdiction in connection with patent disputes

Since the 1968 Convention entered into force, two Conventions on patents have been signed which are of the greatest international importance. The Munich Convention on the grant of European patents was signed on 5 October 1973 and the Luxembourg Convention for the European patent for the common market was signed on 15 December 1975. The purpose of the Munich Convention is to introduce a common patent application procedure for the Contracting States, though the patent subsequently granted is national in scale. It is valid for one or more States, its substance in each case being basically that of a corresponding patent granted nationally. The aim of the Luxembourg Convention is to institute in addition a patent granted *ab initio* for all States of the Community in a standard manner and with the same substance, based on Community law; such a patent necessarily remains valid or expires uniformly throughout the EEC.

Both instruments contain specific provisions on jurisdiction which take precedence over the 1968 Convention. However, the special jurisdiction provisions relate only to specific matters, such as applications for the revocation of patents pursuant to the Luxembourg Convention. Article 16 (4) of the 1968 Convention remains relevant for actions for which no specific provision is made. In the case of European patents under the Munich Convention it is conceivable that this provision might be construed as meaning that actions must be brought in the State in which the patent was applied for and not in the State for which it is valid and in which it is challenged. The new Article Vd of the Protocol annexed to the 1968 Convention is designed to prevent this interpretation and ensure that only the courts of the State in which the patent is valid have jurisdiction, unless the Munich Convention itself lays down special provisions.

Clearly, such a provision cannot cover a Community patent under the Luxembourg Convention, since the governing principle is that the patent is granted, not for a given State, but for all the Member States of the EEC. Hence the exception at the end of the new provision. However, even in the area covered by the Luxembourg Convention patents valid for one or more, but not all, States of the Community are possible. Article 86 of that Convention allows this for a transitional period to which no term has yet been set. Where the applicant for a patent takes up the option available to him under this provision and applies for a patent for one or more, but not all, States of the EEC, the patent is not a Community patent even though it comes under some of the provisions of the Luxembourg Convention but merely a patent granted for one or more States. Accordingly, the courts of that State have exclusive jurisdiction under Article Vd of the Protocol annexed to the 1968 Convention. The same is true for any case in which a national patent is granted in response to an international application, e.g. under the Patent cooperation Treaty opened for signature at Washington on 19 June 1970.

It only remains to be made clear that Article 16 (4) of the 1968 Convention and the new Article Vd of the Protocol annexed to the Convention also cover actions which national legislation allows to be brought at the patent application stage, so as to reduce the risk of a patent being granted, and the correctness of the grant being subsequently challenged.

Section 6

Jurisdiction by consent [45]

174. Article 17, applying as it does only if the transaction in question is international in character (see paragraph 21), which the mere fact of choosing a court in a particular State is by no means sufficient to establish, presented the Working Party with four problems. First, account had to be taken of the practice of courts in the United Kingdom (excluding Scotland) and Ireland of deducing from the choice of law to govern the main issue an agreement as to the courts having jurisdiction. Secondly, there was the problem, previously ignored by the 1968 Convention, of agreements conferring jurisdiction upon a court outside the Community or agreements conferring jurisdiction upon courts within the Community by two parties both domiciled outside the Community. Thirdly, special rules had to be made for provisions in trusts. And finally, the Working Party had to consider whether it was reasonable to let Article 17 stand in view of the interpretation which had been placed upon it by the Court of Justice of the European Communites. It should be repeated (see paragraph 22) that the existence of an agreement conferring jurisdiction on a court other than the court seised of the proceedings is one of the points to be taken into account by the court of its own motion.

1. Choice-of-law clause and international jurisdiction

175. Nowhere in the 1968 Convention is there recognition of a connection between the law applicable to a particular issue and the international jurisdiction of the courts over that issue. However, persons who, relying on the practice of United Kingdom or Irish courts, have agreed on choice-of-law clauses before the entry into force of the Accession Convention, are entitled to expect protection. This explains the transitional provision contained in Article 35 of the proposed Accession Convention. The term 'entry into force' within the meaning of this provision refers to the date on which the Accession Convention comes into effect in the State in question. For the various systems of law applying in the United Kingdom, see paragraph 11.

2. Agreements conferring jurisdiction on courts outside the Community

176. (a) In cases where parties agree to bring their disputes before the courts of a State which is not a party to the 1968 Convention there is obviously nothing in the 1968 Convention to prevent such courts from declaring themselves competent, if their law recognizes the validity of such an agreement. The only question is whether and, if so, in what form such agreements are capable of depriving Community courts of jurisdiction which is stated by the 1968 Convention to be exclusive or concurrent. There is nothing in the 1968 Convention to support the conclusion that such agreements must be inadmissible in principle ([46]). However, the 1968 Convention does not contain any rules as to their validity either. If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own *lex fori*. In so far as the local rules of conflict of laws support the authority of provisions of foreign law, the latter will apply. If, when these tests are applied, the agreement is found to be invalid, then the jurisdictional provisions of the 1968 Convention become applicable.

177. (b) On the other hand, proceedings can be brought before a court within the Community by parties who, although both domiciled outside the Community, have agreed that that court should have jurisdiction. There is no reason for the Convention to include rules on the conditions under which the court stipulated by such parties must accept jurisdiction. It is however important for the Community to ensure, by means of more detailed conditons, that the effect of such an agreement on jurisdiction is recognized throughout the EEC. The new third sentence of the first paragraph of Article 17 is designed to cater for this. It covers the situation where, despite the fact that both parties are domiciled outside the Community, a court in a Community State ('X') would, were it not for a jurisdiction agreement, have jurisdiction, e.g. on the ground that the place of performance lies within that State. If in such a case the parties agree that the courts of another Community State are to have exclusive jurisdiction, that agreement must be observed by the courts of State X, provided the agreement meets the formal requirements of Article 17. Strictly speaking, it is true, this is not a necessary adjustment. Such situations were possible before, in relations between the original Member States of the Community. However, owing to the frequency with which jurisdiction is conferred upon United Kingdom courts in international trade, the problem takes on considerably greater importance with the United Kingdom's accession to the Convention than hitherto.

3. Jurisdiction clauses in trusts

178. A trust (see paragraph 111) need not be established by contract. A unilateral legal instrument is sufficient. As the previous version of Article 17 dealt only with 'agreements' on jurisdiction, it needed to be expanded.

4. The form of agreements on jurisdiction in international trade

179. Some of the first judgments given by the Court of Justice of the European Communities since it was empowered to interpret the 1968 Convention were concerned with the form of jurisdiction clauses incorporated in standardized general conditions of trade ([47]). The Court of Justice's interpretation of Article 17 of the 1968 Convention does protect the other party to a contract with anyone using such general conditions of trade from the danger of inadvertently finding himself bound by standard forms of agreement containing jurisdiction clauses without realizing it. However, the Court's

interpretation of that Article, which many national courts have also shown a tendency to follow ([45]), does not cater adequately for the customs and requirements of international trade. In particular, the requirement that the other party to a contract with anyone employing general conditions of trade has to give written confirmation of their inclusion in the contract before any jurisdiction clause in those conditions can be effective is unacceptable in international trade. International trade is heavily dependent on standard conditions which incorporate jurisdiction clauses. Nor are those conditions in many cases unilaterally dictated by one set of interests in the market; they have frequently been negotiated by representatives of the various interests. Owing to the need for calculations based on constantly fluctuating market prices, it has to be possible to conclude contracts swiftly by means of a confirmation of order incorporating sets of conditions. These are the factors behind the relaxation of the formal provisions for international trade in the amended version of Article 17. This is however, as should be clearly emphasized, only a relaxation of the formal requirements. It must be proved that a consensus existed on the inclusion in the contract of the general conditions of trade and the particular provisions, though this is not the place to pass comment on whether questions of consensus other than the matter of form should be decided according to the national laws applicable or to unified EEC principles. Dealing with the form of jurisdiction agreements in a separate second sentence in the first paragraph of Article 17, rather than in passing in the first sentence as hitherto, is designed merely to obviate rather cumbersome wording.

Section 7

Examination of own motion

Adjustments and further clarification were not necessary.

Section 8

'Lis pendens' and related actions ([48])

180. As regards *lis pendens,* there are two structural differences between the laws of the United Kingdom and Ireland, on the one hand, and the Continental legal systems on the other. However, neither of them necessitated a technical amendment of the 1968 Convention.

1. Discretion of the court

181. The rules governing *lis pendens* in England and Wales, and to some extent in Scotland, are more flexible than those on the Continent. Basically, it is a question for the court's discretion whether a stay should be granted. The doctrine of *lis pendens* is therefore less fully developed there than in the Continental States. The practice is in a sense an application of the doctrine of *forum conveniens* (see paragraph 77 *et seq.).* Generally a court will in fact grant an application for a stay of proceedings, where the matter in dispute is already pending before another court. Where proceedings are pending abroad, the courts in England and Wales exercise great caution, and if they grant a stay of proceedings at all, they will do so only if the plaintiff in England or Wales is also the plaintiff in the proceedings abroad. Scottish courts take into account to a considerable extent any conflicting proceedings which a Scottish defendant may have instituted abroad, or which are pending against him abroad.

After the United Kingdom has acceded to the 1968 Convention, it will no longer be possible for this practice to be maintained in relation to the other Member States of the Community. United Kingdom courts will have to acknowledge the existence of proceedings instituted in the other Member States, and even to take notice of them of their own motion (see paragraph 22).

2. Moment at which proceedings become pending

182. The fact that the moment at which proceedings become pending is determined differently in the United Kingdom and Ireland from the way it is determined on the Continent is due to peculiarities of procedural law in those States. In the original Member States of the Community a claim becomes pending when the document instituting the proceedings is served ([49]). Filing with the court is sometimes sufficient. In the United Kingdom, except Scotland, and in Ireland, proceedings become pending as soon as the originating document has been issued. In Scotland, however, proceedings become pending only when service of the summons has been effected on the defender. The moment at which proceedings become pending under the national

procedural law concerned is the deciding factor for the application of Article 21 of the 1968 Convention. The addition to the text of Article 20 does not concern this point. It is justified by the fact that in the United Kingdom and in Ireland foreigners who are abroad do not receive the original writ but only notification of the order of the court authorizing service.

Section 9

Provisional measures

183. No particular adjustments had to be made to the provisions of the 1968 Convention concerning provisional measures. The change in emphasis which the accession of further Member States introduced into the 1968 Convention consists in this field entirely in the wide variety of provisional measures available in the law of Ireland and of the United Kingdom. This will involve certain difficulties where provisional judgments given in these States have to be given effect by the enforcement procedures of the original Member States of the Community. However, this problem does not affect only provisional measures. The integration of judgments on the main issue into the respective national enforcement procedures also involves difficulties in the relationship between Ireland and the United Kingdom on the one hand and the original Member States of the Community on the other (see paragraph 221 *et seq.*).

CHAPTER 5

RECOGNITION AND ENFORCEMENT

A.

GENERAL REMARKS — INTERLOCUTORY COURT DECISIONS

184. Article 25 emphasizes in terms which could hardly be clearer that every type of judgment given by a court in a Contracting State must be recognized and enforced throughout the rest of the Community. The provision is not limited to a judgment terminating the proceedings before the court, but also applies to provisional court orders. Nor does the wording of the provision indicate that interlocutory court decisions should be excluded from its scope where they do not provisionally regulate the legal relationships between the parties, but are for instance concerned only with the taking of evidence. What is more, the legal systems of the original Member States of the Community describe such interlocutory decisions in a way which corresponds to the terms given, by way of example, in Article 25. Thus, in France court decisions which order the taking of evidence are also called 'jugements (d'avant dire droit)'. In Germany they are termed '(Beweis) beschlüsse' of the court. Nevertheless, the provisions of the 1968 Convention governing recognition and enforcement are in general designed to cover only court judgments which either determine or regulate the legal relationships of the parties. An answer to the question whether, and if so which, interlocutory decisions intended to be of procedural assistance fall within the scope of the 1968 Convention cannot be given without further consideration.

1. RELATIONSHIP OF THE CONTINENTAL STATES WITH EACH OTHER

185. This matter is of no great significance as between the original Member States of the EEC, or as between the latter and Denmark. All seven States are parties to the 1954 Hague Convention relating to civil procedure. The latter governs the question of judicial assistance, particularly in the case of evidence to be taken abroad, and its provisions take precedence over the 1968 Convention by virtue of Article 57. In any case, it is always advisable in practice to make use of the machinery of the Hague Convention, which is particularly suited to the processes required for obtaining judicial assistance. See paragraph 238, and note 59 (7) on the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters and on the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters.

2. RELATIONSHIP OF THE UNITED KINGDOM AND IRELAND WITH THE OTHER MEMBER STATES

186. It is only with the accession of the United Kingdom and Ireland to the 1968 Convention that the problem assumes any degree of

importance. Ireland has concluded no convention judicial assistance of any kind with the other States of the European Community. Agreements on judicial assistance do, however, exist between the United Kingdom and the following States: the Federal Republic of Germany (Agreement of 20 March 1928), the Netherlands (Agreement of 17 November 1967). The United Kingdom is also party to the Hague Conventions of 1965 and 1970 referred to in paragraph 185. It has concluded no other agreements with Member States of the Community.

3. PRECISE SCOPE OF TITLE III OF THE 1968 CONVENTION

187. If it were desired that interlocutory decisions by courts on the further conduct of the proceedings, and particularly on the taking of evidence, should be covered by Article 25 of the 1968 Convention, this would also affect decisions with which the parties would be totally unable to comply without the court's cooperation, and the enforcement of which would concern third parties, particularly witnesses. It would therefore be impossible to 'enforce' such decisions under the 1968 Convention. It can only be concluded from the foregoing that interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings, should be excluded from the scope of Title III of the 1968 Convention.

B.

COMMENTS ON THE INDIVIDUAL SECTIONS

Section 1

Recognition

188. With two exceptions (4), no formal amendments were required to Articles 26 to 30. The Working Party did, however, answer some questions raised by the new Member States regarding the interpretation of these provisions. Basically, these concerned problems arising in connection with the application of the public policy reservation in Article 27 (1) — (2), the right to a hearing — Article 27 (2) — (3), and the nature of the obligation to confer recognition, as distict from enforceability (1). The fact that Article 28 makes no reference to the provisions of Section 6 of Title II on jurisdiction agreements is intentional and deserves mention. When considering such agreements it must be borne in mind that the court seised of the proceedings in the State of origin must of its own motion take note of any agreement to the contrary (see paragraphs 22 and 174).

1. Article 26

189. Article 26, second paragraph, introduces a special simplified procedure for seeking recognition, modelled on the provisions governing the issue of orders for enforcement. However, this is not the only way in which recognition may be sought. Every court and public authority must take account of judgments which qualify for recognition, and must decide whether the conditions for recognition exist in a particular case, unless this question has already been determined under Article 26, second paragraph. In particular, every court must itself decide whether there is an obligation to grant recognition, if the principal issue in a foreign judgment concerns a question which in the fresh proceedings emerges as a preliminary issue. Each of these two recognition procedures involves a problem which the Working Party discussed.

190. (a) If proceedings are conducted in accordance with Article 26, second paragraph, the court may of its own motion take into account grounds for refusing recognition if they appear from the judgment or are known to the court. It may not, however, make enquiries to establish whether such grounds exist, as this would not be compatible with the summary nature of the proceedings. Only if further proceedings are instituted by way of an appeal lodged pursuant to Article 36 can the court examine whether the requirements for recognition have been satisfied.

191. (b) The effects of a court decision are not altogether uniform under the legal systems obtaining in the Member States of the Community. A judgment delivered in one State as a decision on a procedural issue may, in another State, be treated as a decision on an issue of substance. The same type of judgment may be of varying scope and effect in different countries. In France, a judgment against the principal debtor is also effective against the surety, whereas in the Netherlands and Germany it is not (50).

The Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems. However, one fact seemed obvious.

Judgments dismissing an action as unfounded must be recognized. If a German court declares that it has no jurisdiction, an English court cannot disclaim its own jurisdiction on the ground that the German court was in fact competent. Clearly, however, German decisions on procedural matters are not binding, as to the substance, in England. An English court may at any time allow (or, for substantive reasons, disallow) an action, if proceedings are started in England after such a decision has been given by a German court.

2. Article 27 (1) — public policy

192. (a) The 1968 Convention does not state in terms whether recognition may be refused pursuant to Article 27 (1) on the ground that the judgment has been obtained by fraud. Not even in the legal systems of the original Contracting States to the 1968 Convention is it expressly stated that fraud in obtaining a judgment constitutes a ground for refusing recognition. Such conduct is, however, generally considered as an instance for applying the doctrine of public policy ([51]). The legal situation in the United Kingdom and Ireland is different inasmuch as fraud constitutes a special ground for refusing recognition in addition to the principle of public policy. In the conventions on enforcement which the United Kingdom concluded with Community States, a middle course was adopted by expressly referring to fraudulent conduct, but treating it as a special case of public policy ([52]).

As a result there is no doubt that to obtain a judgment by fraud can in principle constitute an offence against the public policy of the State addressed. However, the legal systems of all Member States provide special means of redress by which it can be contended, even after the expiry of the normal period for an appeal, that the judgment was the result of a fraud (see paragraph 197 *et seq.*). A court in the State addressed must always, therefore, ask itself, whether a breach of its public policy still exists in view of the fact that proceedings for redress can be, or could have been, lodged in the courts of the State of origin against the judgment allegedly obtained by fraud.

193. (b) Article 41 (3) of the Irish Constitution prohibits divorce and also provides, as regards marriages dissolved abroad:

> 'No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.'

In so far as the jurisdiction of the 1968 Convention is concerned, this Article of the Constitution is of importance for maintenance orders made upon a divorce. The Irish courts have not yet settled whether the recognition of such maintenance orders would, in view of the constitutional provisions cited, be contrary to Irish public policy.

3. The right to a hearing (Article 27 (2))

194. Article 27 (2) is amended for the same reason as Article 20 (see paragraph 182). The object of the addition to Article 20 was to specify the moment when proceedings became pending before the Irish or British courts; in Article 27 (2) it is intended to indicate which documents must have been served for the right to a hearing to be respected.

4. Ordinary and extraordinary appeals

195. The 1968 Convention makes a distinction in Articles 30 and 38 between ordinary and extraordinary appeals. No equivalent for this could be found in the Irish and United Kingdom legal systems. Before discussing the reason for this and explaining the implications of the solutions proposed by the Working Party (b), something should be said about the distinction between ordinary and extraordinary appeals in the Continental Member States of the EEC, since judges in the United Kingdom and Ireland will have to come to terms with these concepts which to them are unfamiliar (a).

196. (a) A clearly defined distinction between ordinary and extraordinary appeals is nowhere to be found.

Legal literature and case law ([53]) have pointed out two criteria. In the first place neither an appeal ('Berufung') nor an objection to a default judgment ('Einspruch') has to be based on specific grounds; a party may challenge a judgment by alleging any kind of defect. Secondly execution is postponed during the period allowed for an appeal or objection, or after an appeal or objection has been lodged, unless the court otherwise directs or unless, exceptionally, different legal provisions apply.

Some legal systems contain a list of ordinary appeal procedures.

197. Part 1, Book 4 of the French Code de procédure civile of 1806, which still applies in Luxembourg, referred to extraordinary forms of appeal by which a judgment could be contested. It did not say, however, what was meant by ordinary appeals. Book 3 referred merely to 'courts of appeal'. However, in legal literature and case law appeals ('appel') and objections to default judgments ('opposition') have consistently been classified as ordinary appeals. The new French Code de procédure civile of 1975 now expressly clarifies the position. In future only objections (Article 76) and appeals (Article 85) are to be classified as ordinary appeals.

198. The Belgian Code judiciaire of 1967 has retained the French system which previously applied in Belgium. Only appeals and objections are considered as ordinary appeals (Article 21).

199. There is no distinction in Netherlands law between ordinary and extraordinary appeals. Academic writers classify the forms of appeal as follows: objections ('Verzet' — where a judgment is given in default), appeals ('Hoger beroep'), appeals in cassation ('Beroep in cassatie') and appeals on a point of law ('Revisie') are classed as ordinary appeals. 'Revisie' is a special form of appeal which lies only against certain judgments of the Hoge Raad sitting as a court of first instance.

200. The Italian text of Articles 30 and 38 refers to 'impugnazione' without distinguishing between ordinary and extraordinary appeals. However, Italian legal literature distinguishes very clearly between ordinary and extraordinary appeals. Article 324 of the Codice di procedura civile states that a judgment does not become binding as between the parties until the periods within which the following forms of appeal may be lodged have expired: appeals on grounds of jurisdiction ('regolamento di competenza'), appeals ('appello'), appeals in cassation ('ricorso per cassazione'), or petitions for review ('revocazione'), where these are based on one of the grounds provided for in Article 395 (4) and (5). These forms of appeal are classified as ordinary.

201. In Denmark, too, the distinction between ordinary and extraordinary appeals is recognized only in legal literature. The deciding factor mentioned there is whether a form of appeal may be lodged within a given period without having to be based on particular grounds, or whether its admissibility depends on special consent by a court or ministry. Accordingly, appeals ('Anke') and objections to default judgments ('Genoptagelse af sager, i hvilke der er afsagt udeblivelsesdom') are classified as ordinary appeals.

202. Book 3 of the German Code of Civil Procedure ('Zivilprozeßordnung') is headed 'Rechtsmittel' ('means of redress') and it governs 'Berufung' (appeals) 'Beschwerde' (complaints) and 'Revision' (appeals on a point of law). These are frequently said to have in common the fact that the decision appealed against does not become binding ('rechtskräftig') until the period within which these means of redress may be lodged has expired. However Article 705 of the Code defines 'Rechtskraft' as the stage when these means of redress are no longer available. The material difference between the means of redress and other forms of appeal is that the former need not be based on particular grounds of appeal, that they are addressed to a higher court and that, as long as the decision has not become binding, enforcement is also postponed pursuant to Article 704 unless the court, as is almost invariably the case, allows provisional enforcement. If the expression 'ordinary appeal' is used at all, a reference to 'Rechtsmittel' (means of redress) is intended.

German legal writers, in accordance with the phraseology used by the law, do not classify objections to default judgments as a means of redress ('Rechtsmittel') ([54]). It does not involve the competence of a higher court. However, it has the effect of suspending execution and is not tied to specific grounds of appeal, just like an

objection in the other original Member States of the Community. It must, therefore, be included under 'ordinary appeals' within the meaning of Articles 30 and 38 of the 1968 Convention.

203. In its judgment of 22 November 1977 ([55]) the European Court held that the concept of an 'ordinary appeal' was to be uniformly determined in the original Member States according to whether there was a specific period of time for appealing, which started to run 'by virtue of' the judgment.

204. (b) In Ireland and the United Kingdom nothing which would enable a distinction to be drawn between ordinary and extraordinary appeals can be found in either statutes, cases or systematic treaties on procedural law. The basic method of redress is the appeal. Not only is this term used where review of a judgment can be sought within a certain period, without being subject to special grounds for appeal; it is also the name given to other means of redress. Some have special names such as; for default judgments, 'reponing' (in Scotland) or 'application to set the judgment aside' (in England, Wales and Ireland); or again 'motion' (in Scotland) or 'application' (in England, Wales and Ireland) 'for a new trial', which correspond roughly to a petition for review in Continental legal systems. They are the only forms of redress against a verdict by a jury. A further distinctive feature of the appeal system in these States is the fact that the enforceability of a judgment is not automatically affected by the appeal period or even by the lodging of an appeal. However, the appellate court will usually grant a temporary stay of execution, if security is given. Finally there do exist in the United Kingdom legal procedures whose function corresponds to the ordinary legal procedures of Continental legal systems, but which are not subject to time limits. The judge exercises his discretion in deciding on the admissibility of each particular case. This is the case, for example, with default judgments. The case law of the European Court could therefore not be applied to the new Member States.

The Working Party therefore made prolonged efforts to work out an equivalent for the United Kingdom and Ireland of the Continental distinction between ordinary and extraordinary appeals, but reached no satisfactory result. This failure was due in particular to the fact that the term 'appeal' is so many-sided and cannot be regarded, like similar terms in Continental law, as a basis for 'ordinary appeals'. The Working Party therefore noted that the legal consequences resulting from the distinction drawn in Articles 30 and 38 between ordinary and extraordinary appeals do not have to be applied rigidly, but merely confer a discretion on the court. Accordingly, in the interests of practicality and clarity, a broad definition of appeal seemed justified in connection with judgments of Irish and United Kingdom courts. Continental courts will have to use their discretion in such a way that an equal balance in the application of Articles 30 and 38 in all Contracting States will be preserved. To this effect they will have to make only cautious use of their discretionary power to stay proceedings, if the appeal is one which is available in Ireland or the United Kingdom only against special defects in a judgment or which may still be lodged after a long period. A further argument in favour of this pragmatic solution was that, in accordance with Article 38, a judgment is in any event no longer enforceable if it was subject to appeal in the State of origin and the appellate court suspended execution or granted a temporary stay of execution.

5. Conflicts with judgments given in non-contracting States which qualify for recognition

205. In one respect the provisions of the 1968 Convention governing recognition required formal amendment. A certain lack of clarity in some of these provisions can be accepted since the European Court of Justice has jurisdiction to interpret them. However, Member States cannot be expected to accept lack of clarity where this might give rise to diplomatic complications with non-contracting States. The new Article 27 (5) is designed to avoid such complications.

This may be explained by way of an example. A decision dismissing an action against a person domiciled in the Community is given in non-contracting State A. A Community State, B, is obliged to recognize the judgment under a bilateral convention. The plaintiff brings fresh proceedings in another Community State, C, which is not obliged to recognize the judgment

given in the non-contracting State. If he is successful, the existing text of the 1968 Convention leaves it open to doubt whether the judgment has to be recognized in State B.

In future, it is certain that this is not the case. In order to avoid unnecessary discrepancies, the text of the new provision is based on Article 5 of the Hague Convention of 1 February 1971 on the recognition and enforcement of foreign judgments in civil and commercial matters. Its wording is slightly wider in scope than would have been required to avoid diplomatic complications. A judgment given in a non-contracting State takes priority even where it has to be recognized, not by virtue of an international convention but merely under national law. For obligations under conventions not to recognize certain judgments, see paragraph 249 *et seq.*

Section 2

Enforcement

1. Preliminary remarks

206. The Working Party's efforts were almost entirely confined to deciding which courts in the new Member States should have jurisdiction in enforcement proceedings, and what appeal procedures should be provided in this context. In this connection four peculiarities of United Kingdom and, to a certain extent, Irish law had to be considered.

The Working Party took no decision on amendments to deal with the costs of the enforcement procedure. On this point, however, reference should be made to the judgment of the Court of Justice of the European Communites of 30 November 1976 (Case 42/76). According to that decision, Article 31 prohibits a successful plaintiff from bringing fresh proceedings in the State in which enforcement is sought. But the Contracting States are obliged to adopt rules on costs which take into account the desire to simplify the enforcement procedure.

207. The Working Party also abandoned attempts to draft provisions in the Convention on seizure for international claims, although it was clear that problems would occur to a certain extent if debtors and third party debtors were domiciled in different States. If, in one State, the court of the debtor's domicile has jurisdiction over seizure for such claims, then the State of domicile of the third party debtor may regard the making of the order for seizure applicable to the latter as a violation of its sovereignty, and refuse to enforce it. In such a situation the creditor can seek assistance by obtaining a declaration that the judgment is enforceable in the State of domicile of the third party debtor, and enforcing the debtor's claim against the third party in that State, provided that this State assumes international jurisdiction over such a measure.

208. (a) United Kingdom and Irish law does not have the *exequatur* system for foreign judgments. In these countries an action on the basis of the foreign judgment is necessary unless, as in the United Kingdom, a system of registration applies to the judgments of certain States (including the six original Member States with the exception of Luxembourg) (see paragraph 6). In that case the foreign judgments, if they are to be enforced, must be registered with a court in the United Kingdom. They then have the same force as judgments of the registering court itself. The application has to be lodged by the creditor in person or by a solicitor on his behalf. Personal appearance is essential; lodging by post will not suffice. If the application is granted, an order to that effect will be entered in the register kept at the court.

Except in Scotland, however, the United Kingdom has no independent enforcement officer like the French 'huissier' or the German 'Gerichtsvollzieher' (see paragraph 221). Only the court which gave the judgment or where the judgment was registered can direct enforcement measures. Since this system of registration affords the same protection to a foreign judgment creditor as does the *exequatur* system on the Continent, the United Kingdom registration system could also be accepted for applying the provisions of the 1968 Convention.

209. (b) A special feature of the constitution of the United Kingdom has already been mentioned in the introductory remarks (see paragraph 11): England and Wales, Scotland and Northern Ireland are independent judicial areas. A new paragraph had to be added to Article 31 to cover this. Similarly the appeal possibilities provided for in Articles 37 and 40 apply separately to each registration. If a judgment has been validly registered with the High Court in London, another appeal is again possible against a subsequent registration with the Court of Session in Edinburgh.

210. (c) As far as the enforcement of foreign judgments is concerned the United Kingdom traditionally concedes special treatment to maintenance orders (see paragraph 7). Until now they have been enforced only in respect of a few Commonwealth countries and Ireland, and their enforcement is entrusted to courts different from those responsible for enforcing other judgments. Since the 1968 Convention contains no provisions precluding different recognition procedures for different types of judgment, there is no reason why maintenance orders cannot be covered by a special arrangement within the scope of the 1968 Convention. This will permit the creation of a uniform system for the recognition of maintenance orders from the Community and the Commonwealth and, in view of the type of court having jurisdiction, the setting up of a central agency to receive applications for enforcement (see paragraph 218). For agreements concerning maintenance see paragraph 226.

211. (d) Finally there were still problems in connection with judgments ordering performance other than the payment of money. Judgments directing a person to do a particular act are not generally enforceable under United Kingdom and Irish law, but only in pursuance of special legal provisions. These provisions cover judgments ordering the delivery of movable property or the transfer of ownership or possession of immovable property, and injunctions by which the court may in its discretion order an individual to do or refrain from doing a certain act. Enforcement is possible either by the sheriff's officer using direct compulsion or indirectly by means of fines or imprisonment for contempt of court. In Scotland, in addition to judgments for the transfer of possession or ownership of immovable property and preventative injunctions, there are also 'decrees *ad factum prestandum* by means of which the defendant can be ordered to perform certain acts, particularly to hand back movable property.

212. (aa) If an application is made in the Federal Republic of Germany for the enforcement of such a judgment given in Ireland or the United Kingdom, the court must apply the same means of compulsion as would be applicable in the case of a corresponding German judgment, i. e. a fine or imprisonment. In the reverse situation, the United Kingdom and Irish courts may have to impose penalties for contempt of court in the same way as when their own orders are disregarded.

213. (bb) The system for enforcing orders requiring the performance of a specific act is fundamentally different in other States of the Community, e.g. Belgium, France and Luxembourg. The defendant is ordered to perform the act and at the same time to pay a sum of money to the plaintiff to cover a possible non-compliance with the order. In France he is initially only threatened with a fine ('astreinte'). In case of non-compliance, a separate judgment is required and is hardly ever as high as the fine originally threatened. In Belgium the amount of the fine is already fixed in the judgment ordering the act to be performed ([56]). With a view to overcoming the difficulties which this could cause for the inter-State enforcement of judgments ordering specific acts. Article 43 provides that, if the sanction takes the form of a fine ('astreinte'), the original court should itself fix the amount. Enforcement abroad is then limited to the 'astreinte'. French, Belgian, Dutch and Luxembourg judgments can be enforced without difficulty in Germany, the United Kingdom and Italy if the original court has proceeded on that basis.

However, the 1968 Convention leaves open the question whether such a fine for disregarding a court order can also be enforced when it accrues not to the judgment creditor but to the State. Since this is not a new problem arising out of the accession of the new Member States, the Working Party did not express a view on the matter.

2. Formal adjustments as regards courts having jurisdiction and authorized appeals

214. Apart from the inclusion of a term equivalent in the Irish and United Kingdom legal systems to ordinary appeal (see paragraph 195), and apart from Article 44 which deals with legal aid (see paragraph 223), the formal adjustments to Articles 32 to 45 relate exclusively to the courts having jurisdiction and the possible types of appeal against their decisions. (See paragraph 108 for adjustments relating to maintenance.)

215. (a) For applications for a declaration of enforceability (see paragraph 208) of judgments other than maintenance orders only one court has been given jurisdiction in each of Ireland, England and Wales, Scotland and Northern Ireland. This is due to the peculiarities of the court systems in these countries (see paragraphs 11, 208 and 209).

216. If the judgment debtor wishes to argue against the authorization of enforcement, he must lodge his application to set the registration aside not with a higher court, as in Germany, France and Italy, but, as in Belgium and the Netherlands, with the court which registered the judgment. The proceedings will take the form of an ordinary contentious civil action.

A corresponding position applies regarding the appeal which the applicant may lodge if his application is refused, although in such a case it is a higher court which has jurisdiction in all seven Continental Member States of the Community.

217. The adjustment of the second paragraph of Article 37 and of Article 41 gave rise to difficulties with regard to the solution adopted for Articles 32 and 40.

In the original Member States of the Community an appeal against judgments of courts on which jurisdiction is conferred by Articles 37 and 40 could only be lodged on a point of law and with the highest court in the State. It was therefore sufficient to make the same provision apply to the appeals provided for in the 1968 Convention and, in the case of Belgium, simply to bypass the Cour d'appel. The purpose of this arrangement is to limit the number of appeals, in the interests of rapid enforcement, to a single appeal which may involve a full review of the facts and a second one limited to points of law. It would therefore not have been enough to stipulate for the new Member States that only one further appeal would be permitted against the judgment of the court which had ruled on an appeal made by either the debtor or the creditor. Instead, the second appeal had to be limited to points of law.

Ireland and the United Kingdom will have to adapt their appeal system to the requirements of the 1968 Convention. In the case of Ireland, which has only a two-tier superior court system, the Supreme Court is the only possibility. Implementing legislation in the United Kingdom will have to determine whether the further appeals should go direct to the House of Lords or, depending on the judicial area concerned (see paragraph 11), to the Court of Appeal in England and Wales, to the court of the same name in Northern Ireland or to the Inner House of the Court of Session in Scotland. The concept of 'appeal on a point of law' is the nearest equivalent as far as United Kingdom law is concerned to the 'Rechtsbeschwerde' of German law and the appeal in cassation in the legal systems of the other original Member States of the Community, the common feature of which is a restriction of the grounds of appeal to an incorrect application of the law (as opposed to an incorrect assessment of the facts). Even in relation to appeals in cassation and 'Rechtsbeschwerde' the distinction between points of law and matters of fact is not identical; for the United Kingdom and Ireland, too, this will remain a matter for its own legislation and case law to clarify.

Traditionally the leave of the Minister for Justice is required for an appeal to the highest Danish court at third instance. The Working Party was initially doubtful whether it should accept this in the context of the 1968 Convention. It emerged, however, that the Convention does not guarantee a third instance in all circumstances. In order to relieve the burden on their highest courts, Member States may limit the admissibility of the appeals provided for in Article 41. The Danish solution is only one manifestation of this idea. There was also no need in the case of Denmark to stipulate that the appeal to the highest court should be limited to a point of law. When granting leave the Ministry of Justice can ensure that the appeal concerns only questions of law requiring further elucidation. Denmark has given

an assurance that leave will always be granted, if the court of second instance has not made use of its discretion to refer a matter to the European Court of Justice or if enforcement of a foreign judgment has been refused on legal grounds.

218. (b) In Ireland the proposed arrangement also applies to maintenance orders. In the United Kingdom, however, maintenance orders are subject to a special arrangement (see paragraph 210). In England and Wales and in Northern Ireland registration is a matter for the Magistrates' Courts, and in Scotland for the Sheriff Courts. These courts also have jurisdiction in respect of other maintenance matters including the enforcement of foreign maintenance orders. Foreign maintenance creditors cannot, however, have recourse to any of the above courts directly, but must apply to the Secretary of State ([57]), who will transmit the order to the appropriate court. This arrangement was made in the interest of the foreign maintenance creditors, because Magistrates' Courts and Sheriff Courts have lay justices and no administrative machinery.

As regards jurisdiction in respect of appeals which may be brought by either the creditor or the debtor under the 1968 Convention, the usual system will continue to apply, i.e. the appeal is decided by the court which registered the order or refused such registration. It is impossible for a maintenance order to be amended during registration proceedings, even if it is claimed that the circumstances have changed (see paragraph 104 *et seq.*).

The special situation regarding maintenance orders in the United Kingdom offers a series of advantages to the maintenance creditor. After forwarding the order to the Secretary of State, he has virtually no further need to concern himself with the progress of the proceedings or with their enforcement. The rest will be done free of charge. The Secretary of State transmits the order to the appropriate court and, unless the maintenance creditor otherwise requests, the clerk of that court will be regarded as the representative *ad litem* within the meaning of Article 33, second paragraph, second sentence. In England and Wales and in Northern Ireland the clerk in question will also be responsible for taking the necessary enforcement measures and for ensuring that the creditor receives the proceeds obtained. Only in Scotland need the creditor under the order seek the services of a solicitor when applying for enforcement following registration of an order. The Law Society of Scotland undertakes to provide solicitors whose fees are, if necessary, paid in accordance with the principles of legal aid. Should the maintenance debtor move to another judicial area in the United Kingdom (see paragraph 11), a maintenance order will, unlike other judgments, be automatically registered with the court which then has jurisdiction. For agreements concerning maintenance, see paragraph 226.

3. Other adjustment problems

219. (a) The United Kingdom asked whether Article 34 excludes the possibility of notifying the debtor that an application for registration of a foreign judgment has been lodged. One of the aims of Article 34 is to secure the element of surprise, which is essential if measures of enforcement are to be effective. Therefore, although this provision does not expressly forbid notifying the debtor in the proceedings of the application for the grant of an enforcement order, such notification should be confined to very exceptional cases. An example might be an application for registration made a long time after the original judgment was given. In any case, the court may not consider submissions from the debtor, whether or not he was notified in advance.

220. (b) The appeal provided for in Article 36 can be based, *inter alia*, on the grounds that the judgment does not come within the scope of the 1968 Convention, that it is not yet enforceable, or that the obligation imposed by the judgment has already been complied with. However, the substance of the judgment to be enforced or the procedure by which it came into existence can be reviewed only within the limits of Articles 27 and 28. For the adjustment of maintenance orders, see paragraph 108.

221. (c) The Working Party discussed Article 39 at length. The provision in question is modelled on the French legal system and legal systems related to it, to which the institution of 'huissier' is familiar. Under these systems, measures of enforcement in respect of movable property or contractual claims belonging to the debtor can be taken, without involving the court, by instructing a 'huissier' to deal with their execution. It is for the creditor to choose between the available

methods of enforcement. The enforcing agency has no discretion whatsoever in the matter. The legal postion obtaining in the United Kingdom (especially in England and Wales and also in Scotland) and Ireland is quite different. In the United Kingdom it is the court which has given or registered the judgment which has jurisdiction over measures of enforcement. In Ireland it is the court which has given or enforced the judgment. The court also has some discretion as to which enforcement measures it will sanction. Protective measures confined to securing enforcement of a claim do not yet exist.

This position will have to be altered by the implementing legislation of these States, which will have to introduce protective measures, in so far as this consequence does not arise as an automatic result of the entry into force of the 1968 Convention for one of these States (see paragraph 256).

The 1968 Convention does not guarantee specific measures of enforcement to the creditor. Neither is it in any way incompatible with the 1968 Convention to leave the measures of enforcement entirely to the court. The 1968 Convention contains no express provision obliging the Member States to employ an institution similar to the French 'huissier'. Even within its original scope, creditors have to apply directly to the court in the case of certain measures of enforcement; in Germany, for example, they would be required to do so in the case of enforcement against immovable property. It is certain however that in the German text the phrase 'in das Vermögen des Schuldners' ('against the property of the party against whom enforcement is sought') does not mean that measures of enforcement are permissible as against third parties. The words quoted above could be omitted without changing the meaning of the provision. The question under what conditions measures of enforcement are possible against persons other than the judgment debtor is to be answered solely on the basis of national law. But the qualifications contained in Article 39 must also be observed.

The court enforcing the judgment need not be the one which grants the order of enforcement or registers the foreign judgment. Therefore, for the purposes of enforcement under the 1968 Convention, Denmark can retain its present system, by which execution is entrusted to a special enforcement judge.

222. (d) For the problems presented by the system of '*astreintes*', which applies in some Member States, see paragraph 213.

223. (e) In its present form, Article 44 does not provide for the case of a party who had been granted only partial legal aid in the State in which the judgment was given. Although this did not involve an adjustment problem specifically due to the accession of the new Member States, the Working Party decided to propose an amendment. The Working Party's discussions revealed that if the text were to remain in force in its present form, it could result in some undesirable complications. The Working Party's proposal was largely based on the formulation of Article 15 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations which has now come into force. This provision opts for a generous solution: even if only partial legal aid was granted in the State of origin, full aid is to be granted in the enforcement proceedings.

This has a number of further advantages:

As the main application of Article 44 as amended relates to maintenance claims, the amended version contributes to the harmonization of provisions in international conventions.

Moreover, it leads to a general simplification of applications.

Since the rules concerning the granting of partial legal aid are not the same in all the Contracting States, the amended version also ensures a uniform application of the legal aid provisions.

Lastly, it secures the suprise effect of enforcement measures abroad, by avoiding procedural delays caused by difficult calculations concerning the applicant's share in the costs.

The first paragraph of Article 44 does not, however, oblige States which do not at present have a system of legal aid in civil matters to introduce such a system.

224. (f) The reason for the new second paragraph of Article 44 relates to the jurisdiction of the Danish administrative authorities (see paragraph 67) whose services are free. No question of legal aid therefore arises. The new provision is designed to ensure that the enforcement of Danish maintenance orders is not, for this reason, at a disadvantage in the other EEC countries by comparison with maintenance orders from EEC countries other than Denmark.

Section 3

Common provisions

225. The discussion of Articles 46 to 49 centred on whether the new Member States, in accordance with their legal tradition, could require an affidavit, in particular to the effect that none of the grounds for refusing recognition, specified in Articles 27 and 28, obtain. Affidavit evidence is certainly admissible in appellate proceedings, where the debtor appeals against registration or against a declaration of enforceability, or the creditor against a refusal to register. However, all the other means of giving evidence which are normally admissible must also be available in those proceedings.

The addition to Article 46 (2) is proposed for the reasons given in paragraphs 182 and 194.

CHAPTER 6

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

226. In England and Ireland there is no equivalent of enforceable instruments. In Scotland, instruments establishing a clearly defined obligation to perform a contract can be entered in a public register. An extract from the public register can then serve as a basis for enforcement in the same way as a court judgment. Such extracts are covered by Article 50.

In the United Kingdom, the courts having jurisdiction for recognition and enforcement of maintenance orders are different from those concerned with other kinds of judgment (see paragraphs 210 and 218). It is for the internal law of the United Kingdom to determine whether foreign court settlements concerning maintenance should be treated as maintenance orders or as other judgments.

CHAPTER 7

GENERAL PROVISIONS

227. The outcome of the discussion of Articles 52 and 53 has already been recorded elsewhere (see paragraphs 73 *et seq.*, and 119).

CHAPTER 8

TRANSITIONAL PROVISIONS

228. Article 54 continues to apply to the relationships between the original Member States. For their relationships with the new Member States, and the relationships of the new Member States with each other, an appropriate transitional provision is included in Article 34 of the proposed Accession Convention. It is closely modelled on Article 54 of the 1968 Convention, but takes into

account the fact that the latter has already been in force in its present form between the original Member States since 1 February 1973, and also the fact that some amendments are to be made to it. Finally, the Interpretation Protocol of 3 June 1971 also had to be taken into account in the transitional rules. The detailed provisions are as follows ([58]):

I. JURISDICTION

229. 1. The provisions on jurisdiction in the 1968 Convention apply in the new Member States only in their amended version and only to proceedings instituted after the Accession Convention has come into force, and hence after the 1968 Convention has come into force, in the State in question (Article 34 (1)).

230. 2. The amended version also applies to proceedings instituted in the original Member States after that date. Jurisdiction in respect of proceedings instituted in the original Member States before that date but after 1 February 1973 will continue to be determined in accordance with the original text of the 1968 Convention (Article 34 (1)). It is to be noted, as regards the relationships of the old Member States with each other, that under Article 39 of the Accession Convention the amended version can only come into force simultaneously for all six of them.

II. RECOGNITION AND ENFORCEMENT

1. *END OF THE TRANSITIONAL PERIOD*

231. The recognition and enforcement of judgments are in all respects governed by the Convention as amended, provided the transitional period had already ended at the time of institution of the proceedings. For this purpose, the Accession Convention must have come into force by that time both in the State of origin and in the State subsequently addressed (Article 34 (1)). It is not sufficient for the Accession Convention to be in force in the former State only, since rules of exorbitant jurisdiction may still be invoked under Article 4 of the 1968 Convention against domiciliaries of the State subsequently addressed if that State was not also a party to the Accession Convention at the time of institution of the proceedings. This would render an obligation to recognize and enforce a judgment in that State without any preliminary review unacceptable.

If we assume that the Accession Convention comes into force for the original Member States of the Community and Denmark on 1 January 1981 and an action is brought in Germany against a person domiciled in Denmark on 3 January 1981, then a judgment on 1 July 1981 finding in favour of the plaintiff would be enforceable irrespective of transitional provisions, even if, say, the United Kingdom did not become a party to the Convention until 1 December 1981. However, if in this example the action was brought and judgment given against a person domiciled in the United Kingdom, Article 34 (1) would not govern recognition and enforcement in the United Kingdom. That would be a true transitional case.

Paragraphs (2) and (3) of Article 34 deal with judgments during the transitional period, i.e. judgments given after the Accession Convention has come into force in the State addressed, but in proceedings which were instituted at a time when, either in the State of origin or in the State addressed, the Accession Convention was not yet in force. In Article 34 (2) and (3) a distinction is drawn between cases involving only the original Member States of the Community and those involving new Member States as well.

2. Among the original Member States of the Community

232. Article 34 (2) makes the recognition and enforcement of judgments among the original Member States of the Community subject without any restriction to the 1968 Convention as amended, even if the actions were started before the entry into force of the Accession Convention, which will necessarily be simultaneous in those States (see the end of paragraph 230). This amounts indirectly to a statement that the situation as regards the recognition and enforcement of judgments among those States remains that in Article 54 of the 1968 Convention in the case of judgments given before the entry into force of the Accession Convention. The most important implication of Article 34 (2) is that in proceedings for the recognition of judgments among the original Member States of the Community there is to be no consideration of whether the court giving the

judgment whose recognition is sought would have had jurisdiction after the entry into force of the Accession Convention. If the action was started after 1 February 1973 then the jurisdiction of the court giving the judgment whose recognition is sought may no longer be examined. The point is of note since that court's jurisdiction could still have been founded on exorbitant jurisdictional rules where domiciliaries of the new Member States are concerned.

To illustrate the point with an example, if a Frenchman were in 1978 to bring an action in the French courts pursuant to Article 14 of the Civil Code against a person domiciled in Ireland, which would be possible under Article 4 of the 1968 Convention, and judgment was given in favour of the plaintiff in 1982; then, assuming the Accession Convention came into force for the original Member States of the Community and Ireland in 1981, the judgment would have to be recognized and enforced in Germany, but not in Ireland.

3. Where new Member States are involved

233. The arrangements obtaining under Article 34 (3) for the recognition and enforcement of judgments between the original Member States and the new Member States, or as between the new Member States, differ somewhat from those applying among the original Member States. Article 34 (3) is concerned with the possibility of recognition and enforcement being sought in one of the new Contracting States of a judgment from an original Contracting State or from another new Contracting State. Apart from the cases referred to in paragraph 231, this is possible after the end of the transitional period, subject to three requirements being met.

234. (a) The judgment must have been given after the Accession Convention came into force in both States.

235. (b) In addition, the proceedings must have been instituted, in the words of the Convention, before 'the date of entry into force of this Convention, between the State of origin and the State addressed'. The purport of this is that, at the time when the proceedings were instituted, the Accession Convention may have come into force either in the State of the court giving the judgment for which recognition is sought, or in the State in which recognition and enforcement are subsequently sought, but not in both of these States.

236. (c) Finally, the jurisdiction of the court giving the judgment for which recognition is sought must satisfy certain criteria which the court in the State addressed must check. These criteria exactly match what Article 54 of the 1968 Convention laid down regarding transitional cases which were pending when that Convention came into force between the six original Member States. In proceedings for recognition, the jurisdiction of the court which gave judgment is to be accepted as having been valid, provided one of two requirements is met:

(aa) The judgment must be recognized where the court in the State of origin would have had jurisdiction if the Accession Convention had already been in force as between the two States at the time when the proceedings were instituted.

(bb) The judgment must also be recognized where the court's jusrisdiction was covered at the time when the proceedings were instituted by another international convention which was in force between the two States.

Reverting to the example in paragraph 232, the position would be as follows: the French judgment would indeed have been given after the Accession Convention had come into force in Ireland and France. The proceedings would have been instituted at a time when the Accession Convention was not yet in force in France (or in Ireland). Had this Convention already been in force as between France and Ireland at that time, the French courts would no longer have been able to found their jurisdiction on Article 14 of the Civil Code and hence, it must further be assumed, would have been unable to assume jurisdiction. Lastly, there is no bilateral convention between France and Ireland concerning the direct or indirect jurisdiction of the courts. Consequently, the judgment would not have had to be recognized in Ireland.

If one changes the example so that it now concerns France and the United Kingdom, one has to take into consideration the Convention between those two States of 18 January 1934 providing for the reciprocal enforcement of judgments. However, jurisdiction deriving from

Article 14 of the Civil Code is not admitted under that Convention; thus the judgment would not have to be recognized in the United Kingdom either.

If the example concerned Germany and the United Kingdom, and the defendant resident in the United Kingdom had agreed orally before the commencement of the proceedings that the German courts should have jurisdiction, then under the 1968 Convention the judgment would have to be recognized and enforced in the United Kingdom. Under Article IV (1) (a) of the Convention between the United Kingdom and Germany of 14 July 1960, oral agreement is sufficient to give grounds for jurisdiction for the purposes of recognition ('indirect' jurisdiction). However, the German court would have had to be a 'Landgericht', since 'Amtsgericht' judgments are not required to be recognized under that Convention (Article I (2)). In the event of a written agreement on jurisdiction, even the judgment of an 'Amtsgericht' would have to be recognized, under Article 34 (3) of the Accession Convention, as the 'Amtsgericht' would in that case have assumed jurisdiction under circumstances in which jurisdiction would also have had to be assumed if the Accession Convention had been in force between Germany and the United Kingdom.

CHAPTER 9

RELATIONSHIP TO OTHER CONVENTIONS

I. ARTICLES 55 AND 56

237. The Working Party included in Article 55 the bilateral conventions between the United Kingdom and other Member States of the Community. No such conventions have been concluded by Ireland and Denmark.

II. ARTICLE 57 (59)

1. *THE BASIC STRUCTURE OF THE PROPOSED PROVISION*

238. Great difficulties arose when an attempt was made to explain to the new Member States the exact scope of Article 57, the main reason being the statement that the Convention 'shall not affect' any conventions in relation to particular matters, without stating how the provisions in such conventions could be reconciled with those of the 1968 Convention where they covered only part of the matters governed by the latter, which is usually the case. Special conventions can be divided into three groups. Many of them contain only provisions on direct jurisdiction, as in the case with the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air and the Additional Protocols thereto (*), and the Brussels Convention relating to the arrest of seagoing ships which is of great importance for maritime law (Article 7) (see paragraph 121). Most conventions govern only the recognition and enforcement of judgments, and merely refer indirectly to jurisdiction in so far as it constitutes a precondition for recognition. This is the case with the Hague Convention of 15 April 1958 on the recognition and enforcement of decisions relating to maintenance obligations towards children. Finally, there are also Conventions which contain provisions directly regulating jurisdiction as well as recognition and enforcement, as for example the Berne Convention on carriage by rail and the Mannheim Convention for the navigation of the Rhine. It is irrelevant for present purposes whether the conventions contain additional provisions on the applicable law or rules of substantive law.

239. (a) It is clear beyond argument that where a special convention contains no provisions directly governing jurisdiction, the jurisdiction provisions of the 1968 Convention apply. It is equally clear that where all the Contracting States are parties to a special convention containing provisions on

(*) Not to be confused with the Brussels Convention of the same date for the unification of certain rules relating to penal jurisdiction in matters of collision.

jurisdiction, those provisions prevail. But for situations between these two extremes the solution provided by Article 57 is a great deal less clear. This is particularly the case for a number of questions, which arise where only the State of origin and the State addressed are parties to the special convention. The problems become acute where only one of these two States is a party. If both States are parties to a special convention which governs only direct jurisdiction, will the provisions of the 1968 Convention regarding examination of jurisdiction by the court of its own motion (Article 20), *lis pendens* (Article 21) and enforcement apply? Do the provisions of the 1968 Convention on the procedure for recognition and enforcement apply, if a special convention on the recognition and enforcement of judgments does not deal with procedure? Can a person domiciled in a Contracting State which is not a party to a special convention be sued in the courts of another Contracting State on the basis of jurisdiction provisions in the special conventions, or can the State of domicile which is not a party to the special convention claim that the jurisdiction rules of the 1968 Convention must be observed? Must a judgment given in a court which has jurisdiction only under a special convention be recognized and enforced even in a Contracting State which is not a party to that particular special convention? And, finally, what is the position where the special convention does not claim to be exclusive?

240. (b) Tentative and conflicting views were expressed within the Working Party as to how these problems were to be solved in interpreting Article 57 in its original form. It become clear that it would not be practicable to provide a precise solution to all of them, particularly since it is impossible to predict the form of future conventions. It was however appropriate, in the interests of clarifying the obligations about to be assumed by the new Member States, to include in the Accession Convention an authentic interpretation which concerns some problems which are of especial importance. The opportunity was taken to make a drafting improvement to the present Article 57 of the 1968 Convention — the new paragraph 1 of this Article — which will speak of recognition or enforcement. By reason of the purely drafting nature of the amendment to the text, the provision laying down the authentic interpretation of the new Article 57 (1) also applies to the present version.

The solution arrived at is based on the following principles. The 1968 Convention contains the rules generally applicable in all Member States; provisions in special conventions are special rules which every State may make prevail over the 1968 Convention by becoming a party to such a convention. In so far as a special convention does not contain rules covering a particular matter the 1968 Convention applies. This is also the case where the special convention includes rules of jurisdiction which do not altogether fit the inter-connecting provisions of the various parts of the 1968 Convention, especially those governing the relationship between jurisdiction and enforcement. The overriding considerations are simplicity and clarity of the legal position.

The most important consequence of this is that provisions on jurisdiction contained in special conventions are to be regarded as if they were provisions of the 1968 Convention itself, even if only one Member State is a Contracting Party to such a special convention. Even Member States which are not Contracting Parties to the special convention must therefore recognize and enforce decisions given by courts which have jurisdiction only under the special convention. Furthermore, in the context of two States which are parties to a special convention, a person who wishes to obtain the recognition or enforcement of a judgment may rely upon the procedural provisions of the 1968 Convention on recognition and enforcement.

At the same time, the Working Party did not wish to reach a final conclusion on the question whether the general principle outlined above could be consistently applied in all its ramifications. To take a critical example, it was left open whether exclusive jurisdiction under the provisions of a special convention must invariably be applied. The same applies to the question whether a case of *lis pendens* arising from a special convention is covered by Article 21 of the 1968 Convention. The Working Party therefore preferred to provide expressly for the application of Article 20 and to leave the solution of the outstanding problems to legal literature and case law. For the implications of an authentic interpretation of Article 57 for maritime jurisdiction, see paragraph 121.

2. *EXAMPLES*

241. A river boatman domiciled in the Netherlands is liable for damages arising from an accident which occurred on the upper Rhine. It is however no

longer possible to determine whether the harmful event occurred on German or French territory or from where the damage emanated.

242. It is not possible in such a case for either German or French courts to assume jurisdiction under Article 5 (3) or any other provision of the 1968 Convention. According to Article 34 (2) (c) and Article 35a of the revised Rhine navigation Convention of 17 October 1868 in the version of the Protocol of 25 October 1972 ([60]), jurisdiction in such cases belongs to the court of the State which was the first or only one seised of the matter. That court must, however, take into account Article 20 of the 1968 Convention, even though no equivalent of this Article exists in the Rhine navigation Convention. For example, if the defendant fails to enter an appearance, the court must of its own motion (see paragraph 22) ascertain whether all means have been exhausted of determining exactly where the accident occurred, for only if this cannot be determined does the court have jurisdiction under the abovementioned provisions of the Rhine navigation Convention.

243. If the court first seised of the matter was French, then any judgment of that court must be recognized in Germany. The Rhine navigation Convention is even stricter than the 1968 Convention in forbidding any re-examination of the original judgment in the State addressed. According to the correct interpretation of Article 57 of the 1968 Convention the judgment creditor has the choice of availing himself of the enforcement procedure provided by the Rhine navigation Convention or by the 1968 Convention. However, if he proceeds under the 1968 Convention the court may not refuse recognition on any of the grounds given in Article 27 or Article 28 of the 1968 Convention. Unlike the enforcement procedure itself, the conditions for recognition and enforcement are exclusively governed by the special conventions — in this example, the Rhine navigation Convention.

244. If, however, a judgment has been given in the court with jurisdiction at the place of destination pursuant to Article 28 (1) of the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air, the 1968 Convention applies fully to both recognition and enforcement, because the Warsaw Convention contains no provisions at all on these matters. The same applies where in maritime law the jurisdiction of the court of origin was based on the provisions governing arrest contained in the 1952 Brussels Convention (see paragraph 121).

245. If the boatman in the above example on Rhine navigation had been domiciled in Luxembourg, which is not a party to the Rhine navigation Convention, the position would be as follows: any jurisdiction assumed in France or Germany pursuant to the Rhine navigation Convention can no longer be regarded in Luxembourg as an infringement of the 1968 Convention. Under the provisions and procedure of the 1968 Convention, Luxembourg is obliged to recognize and enforce a judgment given by the German or French Rhine navigation courts. If, conversely, the boatman is sued in the court of his Luxembourg domicile, which is also permissible, under the 1968 Convention, Germany and France would have to accept this, even though they are parties to the Rhine navigation Convention which does not recognize jurisdiction based on domicile.

3. *UNDERTAKINGS IN CONVENTIONS BETWEEN STATES NOT TO RECOGNIZE JUDGMENTS*

246. Whether Article 57 also covers conventions under which one Member State of the Community undertakes not to recognize judgments given in another Member State remains an open question. It could be argued that the admissible scope of such conventions was governed exclusively by Article 59.

International obligations of this sort can result from a special convention which provides for the exclusive jurisdiction of the courts of one of the Contracting Parties. Such an obligation can however also result indirectly from the fact that the exercise of jurisdiction under the special convention is linked to a special regime of liability. For example, the Paris Convention of 1960 on third party liability in the field of nuclear energy, apart from laying down rules of jurisdiction, recognition and enforcement:

1. places the sole liability for damage on the operator of a nuclear installation;

2. makes his liability an absolute one;

3. sets maximum limits to his liability;

4. requires him to insure against his liability;

5. allows a Contracting State to provide additional compensation from public funds.

The recognition and enforcement of a judgment which is given in a State not party to such a special convention and which is based on legal principles quite different from those outlined above could seriously undermine the operation of that special convention.

The 1968 Convention should always be interpreted in such a way that no limitations of liability contained in international conventions are infringed. The question however remains open whether this result is to be achieved by applying the public policy provision of Article 27 (1), by analogy with the new paragraph (5) of Article 27, or by a broad interpretation of Article 57.

For conventions limiting liability in maritime law, see paragraph 124 *et seq.*

4. *PRECEDENCE OF SECONDARY COMMUNITY LAW*

247. Within the Working Party opinion was divided as to whether secondary Community law, or national laws adopted pursuant to secondary Community law, prevail over international agreements concluded between the Member States, in particular in the case of a convention provided for in Article 220 of the Treaty of Rome. There was, however, agreement that national and Community law referred to above should prevail over the 1968 Convention. This decision is embodied in Article 57; the provision is based on Article 25 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations.

5. *CONSULTATIONS BEFORE THE FUTURE ACCESSION BY MEMBER STATES OF THE COMMUNITY TO FURTHER AGREEMENTS*

248. By their accession to the Convention, the new Member States are also bound by the Joint Declaration made by the Contracting States at the time of the signing of the 1968 Convention. In the Declaration the States declare that they will arrange for regular periodic contacts between their representatives. The Working Party was unanimously of the opinion that consultations should also take place when a Member State intended to accede to a convention which would prevail over the 1968 Convention by virtue of Article 57.

III. ARTICLE 59

249. This provision refers only to judgments given against persons domiciled or habitually resident outside the Community. Such persons may also be sued on the basis of jurisdictional provisions which could not be invoked in the case of persons domiciled within the Community, and which are classed as exorbitant and disallowed pursuant to the second paragraph of Article 3. Nevertheless, any judgment which may have been given is to be recognized and enforced in accordance with the 1968 Convention. As the Jenard report explains, it is intended that the Contracting States should remain free to conclude conventions with third States excluding the recognition and enforcement of judgments based on exorbitant jurisdictions — even though the 1968 Convention permits this in exceptional cases. The aim of the proposed amendment to Article 59 is further to limit the possibility of recognition and enforcement.

250. The way this will work may be illustrated by an example. If a creditor has a claim to be satisfied in France against a debtor domiciled in that country, then Danish courts have no jurisdiction under any circumstances to decide this issue, even if the debtor has property in Denmark and even if the claim is secured on immovable property there. Supposing the debtor is domiciled in Norway, then if Danish national law so allows Danish courts may very well claim jurisdiction, e.g. on the basis of the presence in Denmark of property owned by the debtor. Normally, the judgment given in such a case would also be enforceable in the United Kingdom. The United Kingdom could however undertake in a convention with Norway an obligation to refuse recognition and enforcement of such a judgment. This kind of treaty obligation may not however extend to a case where the jurisdiction of the Danish courts is based on the ground that immovable property in Denmark constitutes security for the debt. In such circumstances, the judgment would be enforceable even in the United Kingdom.

CHAPTER 10

FINAL PROVISIONS

1. *IRELAND*

251. Ireland has no territorial possessions outside the integral parts of its territory.

2. *UNITED KINGDOM*

252. The term 'United Kingdom' does not include the Channel Islands, the Isle of Man, Gibraltar or the Sovereign Base Areas in Cyprus. There is no obligation on the United Kingdom to extend the scope of the 1968 Convention to include these territories, even though it is responsible for their external relations. It might, however, be useful if the United Kingdom were to extend the 1968 Convention and it should be authorized to do so. It would have to undertake the necessary 'adjustments' itself, and there was no need to provide for them in the Accession Convention. The following adjustments would be required: indication of any exorbitant jurisdictions in the second paragraph of Article 3; a declaration as to whether in the newly included territories every appeal should be regarded as an ordinary appeal for the purposes of Articles 30 and 38; a declaration as to whether registration in any such territory in accordance with the second paragraph of Article 31 is effective only within its area; establishing which courts are competent under Articles 32, 37 and 40, the form in which the application should be made, and whether the adjustments in respect of the United Kingdom contained in the second paragraph of Article 37 as amended and in Article 41 as amended should also apply in the newly included territories. If any international conventions should apply to any one of the territories in question, appropriate adjustments would also have to be made to Article 55.

The penultimate paragraph of the proposed addition to Article 60 relates to the fact that judgments of courts in these territories which do not belong to the United Kingdom can be challenged in the last instance before the Judicial Committee of the Privy Council. It would be illogical to bring Privy Council decisions within the scope of the 1968 Convention if they related to disputes arising in territories to which the 1968 Convention does not apply.

3. *DENMARK*

253. For the purposes of EEC law, Greenland is included in the European territory of Denmark. The special constitutional positions of the Faroe Islands led to a solution corresponding closely to that proposed for the territories for whose foreign relations the United Kingdom is responsible. This had to allow for the fact that both appellate and first instance proceedings which relate to the Faroes and are therefore conducted under the Code of Civil Procedure specially enacted for these islands can be brought in Copenhagen.

4. *CHANGES IN A STATE'S TERRITORY*

254. The Working Party was unanimous that any territory which becomes independent of the mother country thereby ceases to be a member of the European Community and, consequently, can no longer be a party to the 1968 Convention. It was unnecessary to provide for this expressly and, in any case, to have drafted such a provision would have gone beyond the Working Party's terms of reference.

CHAPTER 11

ADJUSTMENTS 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. Formal adjustments to the Interpretation Protocol were few and fairly obvious. It became necessary to make only one short addition to its provisions: the courts in the new Member States which, in accordance with Article 2 (1) and Article 3, are required to request the Court of

Justice to give preliminary rulings on questions of interpretation, had to be designated ([61]). In the United Kingdom, unlike the other Member States, not only the highest court within the country has been included, as it is more difficult to refer a matter to the House of Lords than it is to have recourse to the highest courts on the continent. Therefore, at least the appellate proceedings provided for in the second paragraph of Article 37 and in Article 41 of the 1968 Convention should in the United Kingdom also terminate in a court which is obliged to request a preliminary ruling from the Court of Justice. The expression 'appellate capacity' in Article 2 (2) should not be construed in a narrow technical sense, but in the sense of any challenge before a higher jurisdiction, so that it might be taken also to include the French 'contredit'.

The remaining formal adjustments concerned merely the scope (Article 1) and territorial application of the Protocol. Article 6, which deals with the latter point, is wholly based on Article 60 of the 1968 Convention (see paragraphs 251 to 254). Which authorities are to be designated as competent within the meaning of the third paragraph of Article 4 is a question to be decided entirely by the new Member States.

2. *THE SPECIAL NATURE OF IMPLEMENTING LEGISLATION IN THE UNITED KINGDOM AND IRELAND*

256. The extension of the Interpretation Protocol to the United Kingdom and Ireland will, however, in all probability also present a procedural problem. A long-standing legal tradition in these States does not allow provisions of international treaties to become directly applicable as national law. In the United Kingdom legislation has to be passed transforming such provisions into national law. In many cases the legislative enactment does not follow precisely the wording of the treaty. The usual form of legislation in this State often calls for a more detailed phraseology than that used in a treaty. The treaty and the corresponding national law are, therefore, to be carefully distinguished.

If the implementing legislation in the United Kingdom follows the usual pattern, courts in that country would only rarely be concerned with the interpretation of the 1968 Convention, but mostly with interpretation of the national implementing legislation. Only when the latter is not clear would it be open to a court, under the existing rules of construction in that country, to refer to the treaty on which the legislation is based, and only when the court is then faced with a problem of interpretation of the treaty may it turn to the European Court of Justice. If the provisions of implementing legislation are clear in themselves, the courts in the United Kingdom may as a rule refer neither to the text of the treaty nor to any decision by an international court on its interpretation.

This would undoubtedly lead to a certain disparity in the application of the Interpretation Protocol of 3 June 1971. The Working Party was of the opinion that this disparity could best be redressed if the United Kingdom could in some way ensure in its implementing legislation that the 1968 Convention will there too be endowed with the status of a source of law, or may at any rate be referred to directly when applying the national implementing legislation.

In the event of a judgment of the European Court of Justice being inconsistent with a provision of the United Kingdom implementing legislation, the latter would have to be amended.

It is also the case in Ireland that international agreements to which that State is a party are not directly applicable as national law. Lately, however, a number of Acts putting international agreements into force in national law have taken the form of an incorporation of the text of the agreement into national law. If the Act putting into force the 1968 Convention as amended by the Accession Convention were to take this form, the problems described above in relation to the United Kingdom would not arise in the case of Ireland.

ANNEX I

Extract from the Protocol to the preliminary draft Bankruptcy Convention (1975) (see paragraph 54)

Certain details of this list have been amended by later documents which, however, are not themselves final.

(aa) *Bankruptcy proceedings:*

Belgium:

'faillite' — 'faillissement';

Denmark:

'Konkurs';

Federal Republic of Germany:

'Konkurs';

France:

'liquidation des biens';

Ireland:

'bankruptcy', 'winding-up in bankruptcy of partnerships','winding-up by the court under Sections 213, 344 and 345 of the Companies Act 1963', 'creditors' voluntary winding-up under Section 256 of the Companies Act 1963';

Italy:

'fallimento';

Luxembourg:

'faillite';

Netherlands:

'faillissement';

United Kingdom:

'bankruptcy' (England, Wales and Northern Ireland), 'sequestration' (Scotland), 'administration in bankruptcy of the estates of persons dying insolvent' (England, Wales and Northern Ireland), 'compulsory winding-up of companies', 'winding-up of companies under the supervision of the court'.

(bb) *Other proceedings:*

Belgium:

'concordat judiciaire' — 'gerechtelijk akkoord',
'sursis de paiement' — 'uitstel van betaling';

Denmark:

'tvangsakkord',
'likvidation af insolvente aktieselskaber eller anpartsselskaber',
'likvidation af banker eller sparekasser, der har standset deres betalinger';

Federal Republic of Germany:

'gerichtliches Vergleichsverfahren';

France:

'règlement judiciaire',
'procédure de suspension provisoire des poursuites et d'apurement collectif du passif de certaines entreprises';

Ireland:

'arrangements under the control of the court', 'arrangements, reconstructions and compositions of companies whether or not in the course of liquidation where sanction of the court is required and creditors' rights are affected';

Italy:

'concordato preventivo',
'amministrazione controllata',
'liquidazione coatta amministrativa' — in its judicial stage;

Luxembourg:

'concordat préventif de la faillite',
'sursis de paiement',
'régime spécial de liquidation applicable aux notaires';

Netherlands:

'surséance van betaling',
'regeling, vervat in de wet op de vergadering van houders van schuldbrieven aan toonder';

United Kingdom:

'compositions and schemes of arrangement' (England and Wales),
'compositions' (Northern Ireland),
'arrangements under the control of the court' (Northern Ireland),
'judicial compositions' (Scotland),
'arrangements, reconstructions and compositions of companies whether or not in the course of liquidation where sanction of the court is required and creditors' rights are involved',
'creditors' voluntary winding-up of companies',
'deeds of arrangement approved by the court' (Northern Ireland).

ANNEX II

(1) When references are given to Articles without any further mention, reference is to the 1968 version of the Convention.

(2) The Royal Decree of 13 April 1938, reproduced in 'Bundesanzeiger' 1953, No 105, p. 1 and in Bülow-Arnold, 'Internationaler Rechtsverkehr', 925.5.

(3) For this concept, see the Jenard report, Chapter II, B and C, and Chapter IV, A and B.

(4) Zweigert-Kötz, 'Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts', Vol. 1 (1971), p. 78 *et seq.*

(5) Case No 29/76 [1976] ECR 1541. The formal part of the Judgment reads as follows:

1. In the interpretation of the concept 'civil and commercial matters' for the purposes of the application of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, in particular Title III thereof, reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems;
2. A judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention.

(6) Law No 75—617, JO 1975, 7171.

(7) In the text of Law No 75—617 (note (6)).

(8) Document of the Commission of the European Communities XI/449/75—F.

(9) The word 'analogous' does not appear in Article 1 (1) simply because the proceedings in question are listed in a Protocol.

(10) See the Report on the Convention on bankruptcy, winding-up arrangements, compositions and similar proceedings by Noël-Lemontey (16.775/XIV/70) Chapter 3, section I.

(11) See preliminary draft Bankruptcy Convention, Article 17 and Protocol thereto, Articles 1 and 2 (note 8).

(12) *op. cit.*

(13) 1975 preliminary draft (see note (8)), Article 1 (1), subparagraph (3), and Article II of the Protocol. See Noël-Lemontey report (note (10)) for reasons for exclusion.

(14) Although it does not have its own legal personality it corresponds by and large to the 'offene Handelsgesellschaft' in German law and the 'société en nom collectif' in French law.

(15) In the form of a 'private company' it corresponds to the continental 'Gesellschaft mit beschränkter Haftung' (company with limited liability) and in the form of a 'public company' to the continental 'Aktiengesellschaft' (joint stock company).

(16) UK: Bankruptcy Act 1914, Sections 119 and 126. See Tridmann-Hicks-Johnson, 'Bankruptcy Law and Practice' (1970), page 272.

(17) In respect of Great Britain — Companies Act 1948; in respect of Northern Ireland — Companies Acts 1960 and Companies (Amendment) Act 1963; in respect of Ireland — Company Act 1963, Section 213.

(18) 'if ... the company is unable to pay its debts'.

(19) Decree No 75—1123 of 5 December 1975, (JO) 1975, 1251.

(20) The adjustment proposed for Article 57 admittedly has certain repercussions on the scope of Article 20 (see paragraph 240).

(21) The following cases may be mentioned with regard to difficulties of interpretation which have arisen hitherto in judicial practice in connection with the application of Articles 5 and 6: Corte Cassazione Italiana of 4 June 1974, 'Giur. it.' 1974, 18 (with regard to the concept of place of performance); Corte Cassazione Italiana No 3397 of 20 October 1975 (place of performance in the case of deliveries via a forwarding agent who has an obligation to instal); Tribunal de Grande Instance Paris D 1975, 638 with commentary by Droz (place where the harmful event occurred in cases of illegal publication in the press); Court of Justice of the European Communities, 6 October 1976, Case No 12/76 [1976] ECR 1473.

(22) In the judgments referred to the formal parts of the judgments read as follows:

The 'place of performance of the obligation in question' within the meaning of Article 5 (1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is to be determined in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought (Case No 12/76).

In disputes in which the grantee of an exclusive sales concession is charging the grantor with having infringed the exclusive concession, the word 'obligation' contained in Article 5 (1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters refers to the contractual obligation forming the basis of the legal proceedings, namely the obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application (Case No 14/76 [1976] ECR 1497).

In disputes concerning the consequences of the infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or the dissolution of the contract, the obligation to which reference must be made for the purposes of applying Article 5 (1) of the Convention is that which the contract imposes on the grantor and the non-performance of which is relied upon by the grantee in support of the application for damages or for the dissolution of the contract (Case No 14/76).

In the case of actions for payment of compensation by way of damages, it is for the national court to ascertain whether, under the law applicable to the contract, an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved (Case No 14/76).

When the grantee of an exclusive sales concession is not subject either to the control or to the direction of the grantor, he cannot be regarded as being at the head of a branch, agency or other establishment of the grantor within the meaning of Article 5 (5) of the Convention of 27 September 1968 (Case No 14/76).

Where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5 (3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it (Case No 21/76 [1976] ECR 1735).

The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage (Case No 21/76).

(23) Divorce law of 1 December 1970, No 898, Article 5.

(24) Law of 11 July 1975, new Article 281 of the Code civil.

(25) Chapter III, end of Section IV.

(26) Stein-Jonas (Münzberg) (note (27)), paragraph 765 a II 3 with reference to case law in note (28)).

(27) Stein-Jonas (Leipold) 'Kommentar zur Zivilprozeßordnung', 19th ed., paragraph 323 II 2 c and other references.

(28) In the case of France: Cour de Cassation of 21 July 1954 D 1955, 185.

(29) Magistrates' Court Rules 1952 r 34 (2), and Rayden's 'Law and Practice in Divorce and Family Matters' (1971), p. 1181.

(30) Bromley, 'Family Law', 4th ed. (1971), p. 451 containing references to case-law.

(31) Section 9 of the Maintenance orders (reciprocal enforcement) Act 1972.

(32) A.E. Anton, 'Private International Law' (1967), p. 470; Graveson, 'The Conflict of Laws' (1969), p. 565; Lord President Clyde in Clarks Trustee Petitioners 1966 SLT 249, p. 251.

(33) *op. cit.*

(34) The new Convention on limitation of liability for maritime claims, signed in London on 19 November 1976, was not yet in force at the end of the Working Party's discussions.

(35) The Court of Justice of the European Communities has already decided in this sense: see judgment of 6 October 1976 (Case No 14/76).

(36) In 1974 the premium income from overseas business amounted to no less than £ 3 045 million, £ 520 million of which consisted of business with Member States of the EEC, and 10 % of which was accounted for by re-insurance business. A sizeable proportion of this insurance market consisted of marine and aviation insurance. For these classes alone the overseas premium income amounted to £ 535 million including £ 50 million worth of business with other EEC countries.

(37) Extract from 'Pflichtversicherung in den Europäischen Gemeinschaften', a study by Professor Ernst Steindorff, Munich.

(38) The Landgericht of Aachen (NJW 76,487) refused to endorse this standpoint.

(39) Germany: Bürgerliches Gesetzbuch, Book 3, Sections 3—8; France: Code civil, Book 2, and Book 3, Title XVII, Title XVIII, Chapters II and III; Italy: Codice civile, Book 3, Titles 4—6, Book 6, Title 3, Chapter 2, Section III, and Chapter 4.

(40) Megarry and Baker, 'The Law of Real Property', 5th ed. (1969), p. 71 *et seq.*, p. 79 *et seq.*

(41) Megarry and Baker, *op. cit.*, p. 546.

(42) R. David, 'Les grands systèmes de droit contemporains', 5th ed. (1973) No 311.

(43) Stein-Jonas (Pohle) (note (27)), paragraph 24 III 2.

(44) Code de procédure civile, Article 46, third indent; Vincent, 'Procédure Civile', 16th ed. (1973) No. 291.

(45) From past case law: Brunswick Landgericht, Recht der internationalen Wirtschaft/Außenwirtschaftsdienst des Betriebsberaters (RIW/AWD) 74, 346 (written confirmation must actually be preceded by oral agreement); Hamburg Oberlandesgericht (RIW/AWD) 1975, 498 (no effective jurisdiction agreement where general terms of business are exchanged which are mutually contradictory); Munich Oberlandesgericht (RIW/AWD) 75,694; Italian Corte di Cassazione No 3397 of 20 October 1975 (written confirmation, containing a jurisdiction clause for the first time, is not of itself sufficient); Bundesgerichtshof, MDR 77, p. 1013 (confirmation of an order by the seller not sufficient when the buyer has previously refused the incorporation); Heidelberg Landgericht (RIW/AWD) 76, p. 532 (reference to general conditions of sale not sufficient); Frankfurt Oberlandesgericht (RIW/AWD) 76, p. 532 (reference to general conditions of sale for the first time in the confirmation of the order from the supplier; reminder from the seller does not conclusively incorporate the jurisdiction clause included in the conditions); Düsseldorf Oberlandesgericht (RIW/AWD) 76, p. 297 (jurisdiction clause contained in the condition of a bill of lading of no effect against persons who themselves have given no written declaration); Pretura of Brescia, Foro it. 1976 No 1, Column I 250 (subsequent national law prevails over Article 17); Tribunal of Aix-en-Provence of 10 May 1974, Dalloz 74, p. 760 (jurisdiction agreements in favour of the courts of the employer's domicile may be entered into even in contracts of employment); Tribunal de commerce of Brussels, Journal des Tribunaux 1976, 210 (Article 17 has precedence over contrary national law).

(46) As correctly stated by von Hoffmann (RIW/AWD) 1973, 57 (63); Droz ('Compétence judiciaire et effets des jugements dans le marché commun') No 216 *et seq.*, Weser ('Convention communautaire sur la compétence judiciaire et l'exécution des décisions') No 265.

(47) In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser (Case No 25/76, [1976] ECR 1851.

The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction (Case No 25/76).

Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is fulfilled only if the contract signed by both parties contains an express reference to those general conditions (Case No 24/76 [1976] ECR 1831).

In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 of the Convention is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care (Case No 24/76).

(48) For further questions in Section 8, see paragraphs 22 and 240.

(49) Germany: Article 253 (1) of the Zivilprozeßordnung; France: Article 54 of the Code de procédure civile.

(50) For details see Droz (note (46)) No 448.

(51) Italy: Article 798 (1) together with Article 395 (1) of the Codice di procedura civile; France: Batiffol, 'Droit international privé' 5th ed. (1971), No 727.

(52) Article 3 (1) (c) (2) of the German-British Treaty of 14 July 1960; Article 3 (1) (c) (ii) of the Franco-British Treaty of 18 January 1934.

(53) From a comparative law point of view: Walther J. Habscheid, 'Introduction à la procédure judiciaire, les systèmes de procédures civiles', published by the Association internationale de droit comparé, Barcelona 1968.

(54) Stein-Jonas (Grunsky) (note (27)), introduction to paragraph 511 I 1; Rosenberg-Schwab, 'Zivilprozeßrecht', 11th ed., paragraph 135 I 1 b.

(55) Case No 43/77 (Industrial Diamond Supplies v. Riva).

(56) Cour de Cassation, 25 February 1937 Pas. 1937 I 73.

(57) Exact name and address: If the judgment is to be executed in Scotland — Secretary of State for Scotland, Scottish Office, New St. Andrew's House, St. James Centre, Edinburgh EH1 3 SX; Otherwise — Secretary of State for the Home Department, Home Office, 50 Queen Anne's Gate. London SW1H 9AT.

(58) Typical case law examples for Article 54: Hamburg Landgericht (RIW/AWD) 74, 403 *et seq.*; Frankfurt Oberlandesgericht (RIW/AWD) 76, 107.

(59) The original and new Member States of the Community, or some of them, are already parties to numerous international conventions governing jurisdiction and the recognition and enforcement of judgments in particular areas of law. The following should be mentioned, including those already listed in the Jenard report:

1. The revised Mannheim Convention for the navigation of the Rhine of 17 October 1868 together with the Revised Agreement of 20 November 1963 and the Additional Protocol of 25 October 1972 (Belgium, Germany, France, Netherlands, United Kingdom);

2. The Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air and the Amending Protocol of 28 September 1955 and Supplementary Convention of 18 September 1961 (all nine States) with the Additional Protocols of 8 March 1971 and 25 September 1975 (not yet in force);

3. The Brussels International Convention of 10 May 1952 on certain rules concerning civil jurisdiction in matters of collision (Belgium, Germany, France, United Kingdom);

4. The Brussels International Convention of 10 May 1952 relating to the arrest of seagoing ships (Belgium, Germany, France, United Kingdom);

5. The Rome Convention of 7 October 1952 relating to damage caused by foreign aircraft to third parties on the surface (Belgium, Luxembourg);

6. The London Agreement of 27 February 1953 on German external debts (all nine States);

7. (a) The Hague Convention of 1 March 1954 on civil procedure (Belgium, Denmark, Germany, France, Italy, Luxembourg, Netherlands),

   (b) The Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters (Belgium, Denmark, France, Italy, Luxembourg, Netherlands, United Kingdom),

   (c) The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters (Denmark, France, Italy, Luxembourg, United Kingdom);

8. The Geneva Convention of 19 May 1956 together with its Protocol of Signature on the contract for the international carriage of goods by road (CMR) (Belgium, Denmark, Germany, France, Italy, Luxembourg, Netherlands, United Kingdom);

9. The Convention of 27 October 1956 between the Grand Duchy of Luxembourg, the Federal Republic of Germany and the French Republic on the canalization of the Moselle, with the Additional Protocol of 28 November 1976 (the three signatory States);
10. The Hague Convention of 15 April 1958 on the recognition and enforcement of decisions relating to maintenance obligations in respect of children (Belgium, Denmark, Germany, France, Italy, Netherlands);
11. The Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods (not yet ratified);
12. The Paris Convention of 29 July 1960 on third party liability in the field of nuclear energy (Belgium, France, Germany), together with the Paris Additional Protocol of 28 January 1964 (Belgium, Denmark, France, Germany, Italy), and the Brussels Convention and Annex thereto of 31 January 1963 supplementary to the Paris Convention of 29 July 1960 and the Paris Additional Protocol to the Supplementary Convention of 28 January 1964 (Denmark, France, Germany, Italy, United Kingdom);
13. The Supplementary Convention of 26 February 1966 to the International Convention of 25 February 1961 concerning the carriage of passengers and luggage by rail (CIV) on the liability of railways for death or injury to passengers, amended by Protocol II of the Diplomatic Conference for the entry into force of the CIM and CIV International Agreements of 7 February 1970 concerning the extension of the period of validity of the Supplementary Convention of 26 February 1966 (all nine States);
14. The Brussels Convention of 25 May 1962 on the liability of operators of nuclear ships and Additional Protocol (Germany)
15. The Brussels International Convention of 27 May 1967 for the unification of rules relating to the carriage of passengers' luggage by sea (not yet in force);
16. The Brussels International Convention of 27 May 1967 for the unification of certain rules relating to maritime liens and mortgages (not yet in force);
17. The Brussels International Convention of 29 November 1969 on civil liability for oil pollution damage (Belgium, Denmark, France, Germany, Netherlands, United Kingdom) and the International Convention to supplement that Convention of 18 December 1971 on the establishment of an international fund for compensation for oil pollution damage (Denmark, France, Germany, United Kingdom);
18. The Berne International Conventions of 7 February 1970 on the carriage of goods by rail (CIM) and the carriage of passengers and luggage by rail (CIV), together with the Additional Protocol and Protocol I of 9 November 1973 of the Diplomatic Conference for the implementation of the Conventions (all nine States with the exception of Ireland for Protocol I);
19. The Athens Convention of 13 December 1974 on the carriage by sea of passengers and their luggage (not yet in force);
20. The European Agreement of 30 September 1957 covering the international carriage of dangerous goods by road (ADR) (United Kingdom) and the Additional Protocol of 21 August 1975 (United Kingdom) (not yet in force);
21. The Geneva Convention of 1 March 1973 on the contract for the international carriage of passengers and baggage by road (CUR) (not yet in force);
22. The Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations (no Community Member State is a party to this Convention).

([60]) See note ([59]) (1).

([61]) The expression 'court' should not be taken as meaning the opposite of other jurisdictions (such as tribunals) but means the legal body which is declared competent in each case.