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