

CONVENTION**on jurisdiction and the enforcement of judgments in civil and commercial matters
done at Lugano on 16 September 1988**

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REPORT

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In addition to the draft Convention and the other instruments drawn up by the government experts, the draft explanatory report was submitted to the Governments of the Member States of the European Communities and of the European Free Trade Association before the Diplomatic Conference held in Lugano from 12 to 16 September 1988.

This report takes account of the comments made by certain Governments and of the amendments made by the Diplomatic Conference to the drafts before it. It takes the form of a commentary on the Convention signed in Lugano on 16 September 1988.

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CHAPTER I

GENERAL CONSIDERATIONS

1. INTRODUCTORY REMARKS

1. The Lugano Convention, opened for signature on 16 September 1988, is concluded between the Member States of the European Communities and the Member States of the European Free Trade Association (EFTA).

It will be referred to in this report as the 'Lugano Convention' although during the preparatory proceedings it was known as the 'Parallel Convention'. It was given that name because it corresponds very closely to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, which was concluded between the six original Community Member States⁽¹⁾ and adopted consequent upon the accession of new Member States to the Communities⁽²⁾. For convenience, that Convention, in its adopted form, will be referred to as the 'Brussels Convention'.

Although the Lugano Convention takes not only its structure but also numerous provisions from the Brussels Convention, it is nevertheless a separate instrument.

2. This report does not contain a detailed commentary on all the provisions of the Lugano Convention.

Where provisions are identical to those of the Brussels Convention, the reader should refer to the existing reports by Mr P. Jenard on the 1968 Convention, by Mr P. Schlosser on the 1978 Convention on the accession of Denmark, Ireland and the United Kingdom and by Messrs Evrigenis and Kerameus on the 1982 Convention on the accession of Greece⁽³⁾.

The provisions in force in each of the EFTA Member States on the recognition and enforcement of foreign judgments and an account of the relevant conventions concluded by those States with one another or with Member States of the Communities are not included in the body of this report but are given in Annexes I and II. This different layout from previous reports has been adopted so as not to complicate the text.

2. JUSTIFICATION FOR AND BACKGROUND TO THE LUGANO CONVENTION

3. The European Communities and EFTA are at present made up of a great many European countries who share very similar conceptions of constitu-

tional (separation of powers between the legislature, the executive and the judiciary), legal (primacy of the rule of law and the rights of the individual) and economic matters (market economy).

The two organizations differ however with regard to their objectives and institutions. That is why we felt it useful to give a brief outline.

A. THE EUROPEAN COMMUNITIES

4. The European Communities differ substantially from the other international or European organizations on account of their particular aims and the originality of their institutional machinery.

They pursue the specific objectives assigned to them by the three Treaties establishing them (ECSC, EEC and Euratom) but their ultimate objective is to establish a real European union.

The economic dimension of this union in the making is complemented by a political discussion which is expressed through the medium of European Political Cooperation, by means of which the Twelve endeavour to harmonize their foreign policies.

The construction of Europe initiated by the six founding States (Belgium, the Federal Republic of Germany, France, Italy, the Grand Duchy of Luxembourg and the Netherlands) took a step forward with the signing first of all of the Treaty of Paris (18 April 1951) which established the European Coal and Steel Community (ECSC) and subsequently (on 25 March 1957) of the two Treaties of Rome which laid the foundations of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).

Denmark, Ireland and the United Kingdom acceded to those three Treaties on 1 January 1973 (the Nine), Greece on 1 January 1981 (the Ten), Spain and Portugal on 1 January 1986 (the Twelve).

The European Communities therefore currently comprise twelve European countries which are bound together by jointly undertaken commitments.

5. With the Single European Act, which entered into force on 1 July 1987, a new stage was reached on the path towards a European union. This new Community legal instrument aims in particular at the progressive establishment, over a period expir-

ing on 31 December 1992, of a real internal market providing for the free movement of goods, persons, services and capital. It also aims at promoting significant progress in both the monetary field and new policy sectors (in particular the environment and new technologies). It makes Community decision-making machinery more flexible in a number of fields and, by means of treaty provisions, institutionalizes European Political Cooperation.

6. The institutional architecture of the Communities rests on four pillars:

1. The Council of Ministers

The Council consists of the representatives of the Member States and each Government delegates one of its members to it, depending on the field of competence and the nature of the subjects under discussion.

The Ministers of Foreign Affairs coordinate general Community policy.

The Council of Ministers is the Communities' decision-making body. It participates in legislative power and as such is empowered to take binding measures in the form of Regulations or Directives which are directly binding on the Member States and/or their nationals. The Regulations are directly applicable in the Member States, whereas Directives have to be incorporated into national legislation.

The Council's decisions are prepared by the Permanent Representatives Committee (Coreper), composed of the Permanent Representatives of the Member States to the European Communities.

The Council's decisions are taken unanimously, by a simple majority or by a qualified majority, depending on the legal provisions on which they are based.

The Single Act aims at multiplying the cases in which a majority vote becomes standard practice, so as to expedite the proceedings of an enlarged Community.

Twice a year the European Council brings together the Heads of State or of Government of the Member States. This body, set up at the highest level on a political basis in 1975, was given Treaty recognition following the adoption of the Single Act.

Its main task is to work out guidelines and give the necessary impetus to the development of the Community process.

2. The Commission

The Commission currently consists of 17 members chosen by common agreement by the Governments.

The Commission is the most original institution in the Community's institutional machinery. It cannot be likened to a secretariat because the authors of the Treaties chose to make it the prime mover of European integration. It participates actively in the preparation and formulation of the acts of the Council by virtue of its power of initiative.

3. The Court of Justice

The role of the Court of Justice is to ensure that Community law is obeyed in the implementation of the three Treaties establishing the European Communities. Its powers are manifold and it has *inter alia* the power to give rulings in the form of judgments on the validity of the acts of Community authorities and on the interpretation of the Treaties and Community acts.

In its decisions, the Court has affirmed the precedence of Community law over Member States' constitutional and legislative provisions.

Under the Luxembourg Protocol of 3 June 1971, the Member States of the Communities conferred jurisdiction upon the Court of Justice for giving judgment on the interpretation of the 1968 Brussels Convention, which is of particular concern to us.

4. The European Parliament

Since 1979 the Members of the European Parliament have been elected by direct universal suffrage for a five-year term of office.

Although the European Parliament has quite extensive powers of political supervision in respect of the action of the Council and the Commission and in the budgetary field, it does not however have legislative powers similar to those of national Parliaments.

The Single Act contains new cooperation arrangements designed to involve the Parliament more closely in the exercise of the legislative power conferred jointly upon the Council and the Commission.

7. In conclusion, in the field under review, it should be noted that:

1. the Lugano Convention is linked to the 1968 Brussels Convention which is based on Article 220 of the Treaty establishing the European Economic Community;
2. with regard to Community acts, legislative power is mainly conferred upon the Council;

3. the European Communities have created a very dense network of relations with the outside world which are embodied in agreements of various kinds, either with States or with organizations.

B. EFTA

8. The European Free Trade Association is a group of six European countries which share with the European Communities the aim of creating a dynamic, homogeneous European economic area embracing the Member States of the EEC and EFTA. That aim was laid down in the Luxembourg Declaration adopted on 9 April 1984 by the Ministers of all EEC and EFTA Member States.

EFTA's goal is the removal of import duties, quotas and other obstacles to trade in Western Europe and the upholding of liberal, non-discriminatory practices in international trade. Set up in 1960, the Association now has six member countries: Austria, Finland, Iceland, Norway, Sweden and Switzerland.

EFTA's establishment and evolution form part of the story of economic integration in Western Europe. Its founder members, which included Denmark, Portugal and the United Kingdom, adopted as their *first objective* the introduction of free trade between themselves in industrial goods. This objective was realized three years ahead of schedule at the end of 1966.

9. The trade between the EFTA countries accounts for only 13 to 14 % of their overall trade. Much more important is their trade with the EEC which is the source of more than half of their imports and the destination of more than half of their exports. The EFTA countries are also important trading partners for the EEC, providing markets for between a fifth and a quarter of EEC exports (excluding trade between the EEC countries).

The closeness of the commercial links between the EFTA and the EEC countries was one of the reasons for the attempt in the 1950s to negotiate a free trade area embracing the original six-nation EEC and the other Western European countries. The attempt failed. But when seven of these countries resolved to strengthen their own links by founding EFTA they saw the Association as, among other things, a means of preparing the way for the eventual fulfilment of their hopes of a single European market. Thus EFTA was born with the ambition of bringing about a larger market including all the countries of Western Europe. This was the *second objective* of EFTA's founder members.

This second goal was in effect achieved in the 1970s through negotiations which brought each of the present EFTA countries into a new relationship with the EEC, and at the same time the EEC was enlarged by the entry of two former EFTA countries, Denmark and the United Kingdom, and of Ireland. Free trade agreements came into force between the enlarged EEC and Austria, Portugal, Sweden and Switzerland on 1 January 1973, and the EEC and Iceland on 1 April 1973. Similar agreements came into force between Norway and the EEC on 1 July 1973 and between Finland and the EEC on 1 January 1974. Under these agreements the import duties on almost all industrial products were abolished from July 1977. These free trade agreements also apply to trade between the EFTA countries and three countries which joined the EEC at later dates: Greece from 1 January 1981, Portugal and Spain from 1 January 1986.

As mentioned above, the extension and intensification of EEC-EFTA cooperation have given rise since 1984 to talks between the two groups of States in many areas connected, directly or indirectly, with the EEC's ambitious programme for the creation of a genuine internal market in 1992. They concern matters such as technical barriers to trade, competition rules, intellectual property rights, product liability, etc.

The negotiations for the Lugano Convention came within that context.

C. JUSTIFICATION FOR THE CONVENTION

10. According to a report produced by Mr Johnsen for the Parliamentary Assembly of the Council of Europe (document 5774 of 9 September 1987 — FDO C5774), 'the Member States of EFTA and the EEC now make up a vast market of 350 million European consumers. With a few exceptions, industrial products circulate within this area without being subject to custom duties or quantitative restrictions. It is the largest market in the world, surpassing the United States market (240 million) and the Japanese market (120 million).'

It thus became apparent that this economic cooperation between the two groupings of European States ought to be strengthened through a convention on jurisdiction and the recognition and enforcement of judgments.

In this connection, the Brussels Convention was considered to embody a number of principles which could serve to strengthen judicial and economic cooperation between the States involved.

The aim of the Brussels Convention is to simplify the formalities needed for mutual recognition and enforcement of court decisions. For this reason the Convention begins by specifying the rules of jurisdiction regarding the courts before which proceedings are to be brought in civil and commercial matters relating to property. The Convention goes on to lay down a procedure for the enforcement of judgments given in another Member State which is simpler than traditional arrangements and swift because the initial stages are non-adversarial.

The Brussels Convention and the 1971 Protocol on its interpretation by the Court of Justice have both assumed considerable practical importance: hundreds of decisions based on the Convention have been given in the Member States and there is a series of interpretative judgments of the Court (see Chapter VI).

Because of the magnitude of trade between the EEC Member States and EFTA, it was to be expected that the need would arise for a judgment given in a Community Member State to be enforced in an EFTA country, or for a judgment given in an EFTA member country to be enforced in a Member State of the European Communities.

D. BACKGROUND TO THE CONVENTION

11. In 1973, when discussions over the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention were under way, the Swedish Government indicated its interest in the creation of contractual links between the Community Member States on the one hand, and Sweden plus other countries which might be interested on the other hand, with a view to facilitating the recognition and enforcement of judgments in civil and commercial matters.

In 1981, the Swiss Mission to the European Communities took up the Swedish Government's initiative and inquired of the competent authorities of the Commission whether and on what terms the recognition and enforcement of judgments in civil and commercial matters between the Member States of the Communities and Switzerland could be facilitated along the lines of the Brussels Convention of 27 September 1968. The inquiry was renewed in April 1982 to Mr Thorn, President of the Commission, by Mr Furgler, Member of the Swiss Federal Council.

In January 1985, acting on the instructions of the Council of the European Communities, an *ad hoc* working party met to examine, on the basis of a paper submitted by the Commission, the possibility

of organizing negotiations with the EFTA countries with a view to extending the Brussels Convention.

With the assistance of the Council Secretariat and the Commission departments, preliminary talks were entered into with the Member States of EFTA in order to establish whether an extension of the Brussels Convention could be envisaged.

It emerged that Norway, Sweden, Switzerland, Finland, and subsequently Iceland, were in favour of opening negotiations on the drafting of a parallel Convention to the Brussels Convention.

At the end of this exploratory stage, the representatives of the Governments of the EEC Member States, meeting in the Permanent Representatives Committee in May 1985, noted that all the conditions obtained for negotiations to be initiated. They therefore agreed to issue an invitation to the EFTA Member States to take part in such negotiations.

A working party made up of governmental experts from the Member States of the European Communities and experts appointed by the EFTA Member States was set up to this end. The working party met for the first time on 8 and 9 October 1985 under the alternating chairmanship of Mr Voyame, Director at the Ministry of Justice of the Swiss Confederation, and Mr Saggio, Counsellor at the Italian Court of Appeal. A delegation sent by the Austrian Government attended the negotiations in an observer capacity, as did representatives of The Hague Conference. The working party also appointed two rapporteurs, Mr P. Jenard, at the time Director of Administration at the Belgian Ministry of Foreign Affairs, for the Member States of the European Communities and Mr Möller, at that time Counsellor on Legislation to the Finnish Ministry of Justice and now President of the Court of First Instance in Toijala, for the EFTA Member States.

The working party's discussions lasted two years, during which a preliminary draft Convention was prepared for use as the basic document for a diplomatic conference.

An overall assessment of the results achieved by the working party can be nothing if not positive, since wide consensus was reached with regard to the draft Convention, to the Protocols which supplement it and are an integral part thereof, and to three Declarations.

At all events, the conclusion of a multilateral Convention between a number of States offers better prospects of legal certainty and practical convenience than a series of bilateral, and inescapably divergent, agreements. The Convention also opens the way towards implementation of a common sys-

tem of interpretation, a point which is specifically mentioned in Protocol 2.

Another possibility might have been for the EFTA Member States to accede to the Brussels Convention. This possibility was not followed up because, being based on Article 220 of the Treaty of Rome and being the subject of the Protocol of 3 June 1971 which entrusted the Court of Justice of the European Communities with the power to interpret the Convention, the Brussels Convention is a Community instrument and it would have been difficult to ask non-Member States to become signatories.

12. The draft Convention and the other instruments drawn up by the working party were submitted to a diplomatic conference held, at the invitation of the Swiss Federal Government, in Lugano from 12 to 16 September 1988. All the Member States of the European Communities and of the European Free Trade Association were represented at this conference. Certain amendments were made to the drafts prepared by the working party. In accordance with the Final Act of the conference (see Annex III), the representatives of all the States concerned adopted the final texts of the Convention, the three Protocols and the three Declarations.

On 16 September 1988, the date of opening for signature, the required signatures were appended by the representatives of 10 States, that is, for the Member States of the European Communities, Belgium, Denmark, Greece, Italy, Luxembourg and Portugal, and for the Member States of EFTA, Iceland, Norway, Sweden and Switzerland. The Convention was signed by Finland on 30 November 1988 and by the Netherlands on 7 February 1989.

3. IDENTITY OF STRUCTURE BETWEEN THE BRUSSELS CONVENTION AND THE LUGANO CONVENTION — FUNDAMENTAL PRINCIPLES

13. The two Conventions are based on identical fundamental principles which can be summarized as follows:

First principle:

The scope of the two Conventions as determined *ratione materiae* is confined to civil and commercial matters relating to property. The two Conventions have the same Article 1.

Second principle:

Both Conventions fall into the 'double treaty' category, that is to say they contain rules of direct ju-

risdiction. These rules are applicable in the State in which the initial proceedings are brought and serve to determine the court vested with jurisdiction, whereas 'simple treaties' merely contain rules of indirect jurisdiction which do not apply until the stage of recognition and enforcement has been reached.

Third principle:

A defendant's domicile is the point on which the rules on jurisdiction hinge. For the purposes of the 1978 Accession Convention, the United Kingdom and Ireland adjusted their legislation to align their concept of domicile on that of many continental countries (4). Proceedings against any person domiciled in the territory of a Contracting State must, save where the Conventions provide otherwise, be brought before the courts of that State. Under no circumstances may rules of exorbitant jurisdiction be invoked as arguments (Articles 2 and 3).

However, where a defendant is not domiciled in the territory of a Contracting State jurisdiction continues to be determined in each State by the law of that State. Furthermore, persons domiciled in the territory of a Contracting State may, regardless of their nationality, avail themselves of the rules of jurisdiction which apply in that State, including exorbitant jurisdiction (Article 4), in the same way as nationals of that State.

Fourth principle:

Both Conventions contain precise and detailed rules of jurisdiction specifying the instances in which a person domiciled in a Contracting State may be sued in the courts of another Contracting State.

In this respect, the structures of the two Conventions are again identical, these rules being contained in the following sections.

(a) *Additional rules of jurisdiction*

Title II, Section 2 (Articles 5 and 6) contains additional rules of jurisdiction in that the courts therein specified are not mentioned in Article 2. The section relates to proceedings which can be considered as having a particularly close link with the court before which proceedings are brought.

The rules of jurisdiction set out in this section are special because, in general, both Conventions directly specify which court has jurisdiction.

As will be seen below, there are certain differences between the Brussels Convention and the Lugano

Convention with regard to the provisions contained in this section (see Article 5 (1) and Article 6 (4), points 36 to 44, 46 and 47).

(b) *Mandatory rules*

Both Conventions contain mandatory rules on jurisdiction in matters relating to insurance (Section 3) and consumer contracts (Section 4), the primary objective of which is to protect the weaker party. The rules are mandatory in that the parties are not permitted to depart from them before a dispute has arisen. These sections are the same in both Conventions.

(c) *Exclusive jurisdiction*

Both Conventions contain rules of exclusive jurisdiction (Section 5, Article 16):

- (a) in some cases, disputes must be brought before the courts of a given State (rights *in rem* in, or tenancies of, immovable property; validity, nullity or dissolution of companies; validity of entries in public registers; registration or validity of patents, trade marks and designs; proceedings concerned with the enforcement of judgments);
- (b) the parties are not permitted to waive the jurisdiction of the competent courts, either by an agreement conferring jurisdiction even if entered into after a dispute has arisen (Article 17), or by submission to the jurisdiction (Article 18);
- (c) a court of a State other than the State whose courts have exclusive jurisdiction must declare, of its own motion, that it has no jurisdiction (Article 19);
- (d) breach of the rules constitutes grounds for refusing recognition and enforcement (Articles 28 and 34);
- (e) the rules apply whether or not the defendant is domiciled in a Contracting State.

The only difference between the two Conventions relates to tenancies of immovable property (see points 49 to 54).

(d) *Prorogation of jurisdiction*

The two Conventions also contain rules of prorogation of jurisdiction by agreement or tacitly (Title II, Section 6, Articles 17 and 18). The Conventions differ in the case of Article 17 (prorogation by

agreement — see points 55 to 61) but not in the case of Article 18 (submission to jurisdiction).

(e) *Lis pendens and related actions*

Both Conventions contain provisions on the case of a *lis pendens* (Article 21) and related actions (Article 22) in Section 8, the aim of which is to avoid conflicting judgments. The wordings differ slightly here with regard to a *lis pendens* (see point 62).

Fifth principle:

The defendant's rights must have been respected in the State of origin.

Both Conventions provide in the first paragraph of Article 20, the importance of which should be emphasized, that if a defendant does not enter an appearance the court must declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.

The second and third paragraphs of Article 20 cover the problem of notification of legal documents to the defendant, the court being obliged to stay its proceedings so long as it has not been shown that the defendant was able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence. This Article has not been amended.

Sixth principle:

Grounds for refusing recognition and enforcement are limited.

Pursuant to the first paragraph of Article 26 of both Conventions, judgments given in a Contracting State must be recognized in the other Contracting States without any special procedure being required. In other words, judgments are entitled to automatic recognition: the Conventions establish the presumption in favour of recognition and the only grounds for refusal are those listed in Articles 27 and 28.

There are two conditions which agreements such as this usually contain but which these two Conventions omit: recognition does not require that the foreign judgment should have become *res judicata*, and the jurisdiction of the court in the State of origin is no longer examined by the court of the State in which enforcement is being sought. In this respect there are some differences between the two Conventions with regard to Article 28 (see points 16 and 82).

Seventh principle:

The enforcement procedure is unified and simplified.

It is unified in that, in every Contracting State, the procedure is initiated by submission of an application.

It is simplified in particular with reference to the appeals procedure.

The Lugano Convention makes a number of technical adjustments as against the 1968 Convention (see points 68 to 70).

Eighth principle:

The Conventions govern relations with other international Conventions. On this point, and with

regard to Conventions concluded on particular matters, there are a few differences between the two Conventions (see points 79 to 82).

Ninth principle:

Steps are taken to ensure that interpretation of the two Conventions is uniform.

Interpretation of the 1968 Convention is entrusted to the Court of Justice by the Luxembourg Protocol of 3 June 1971.

Interpretation of the Lugano Convention is governed by Protocol 2 to that Convention (see points 110 to 119).

CHAPTER II

RESPECTIVE SCOPE OF THE BRUSSELS CONVENTION AND THE LUGANO CONVENTION

(Article 54b)

14. As shown above, although the structure of the two Conventions is identical and they contain a great number of comparable provisions, they remain separate Conventions.
15. The respective application of the two Conventions is governed by Article 54b. The first point to note is that this Article primarily concerns the courts of member countries of the European Communities, these being the only courts which may be required to deliver judgments pursuant to either Convention. Courts in EFTA Member States are not bound by the Brussels Convention since the EFTA States are not parties to that Convention.

However, Article 54b is relevant for the courts of EFTA countries since it was felt advantageous that Article 54b should, for reasons of clarity, contain details relating to the case of a *lis pendens*, related actions and recognition and enforcement of judgments.

The philosophy of Article 54b is as follows:

According to paragraph 1, the Brussels Convention continues to apply in relations between Member States of the European Communities.

This applies in particular where:

- (a) a person, of whatever nationality, domiciled in one Community State, e.g. France, is summoned to appear before a court in another such State, e.g. Italy. The plaintiff's nationality and domicile are immaterial;

- (b) a judgment has been delivered in one European Community Member State, e.g. France, and must be recognized or enforced in another such State, e.g. Italy.

The Brussels Convention also applies where a person domiciled outside the territory of a European Community Member State and outside the territory of any other State party to the Lugano Convention, e.g. in the United States, is summoned to appear before a court in a European Community Member State (Article 4 of the Brussels Convention).

In each of these three instances, the Court of Justice of the European Communities has jurisdiction under the 1971 Protocol to rule on problems which may arise with regard to the interpretation of the Brussels Convention.

16. However, under paragraph 2, the court of a European Community Member State must apply the Lugano Convention where:

- (1) a defendant is domiciled in the territory of a State which is party to the Lugano Convention and an EFTA member or is deemed to be so domiciled under Articles 8 or 13 of the Convention. For instance, if a person domiciled in Norway is summoned before a French court, jurisdiction will be vested in that court only in the cases for which the Lugano Convention

provides. In particular the rules of exorbitant jurisdiction provided for in Article 4 of the Brussels Convention may not be relied on as against that person;

- (2) the courts of an EFTA Member State possess exclusive jurisdiction (Article 16) or jurisdiction by prorogation (Article 17). The courts of Member States of the European Communities may not, for instance, be seised of a dispute relating to rights *in rem* in immovable property situated in the territory of a State party to the Lugano Convention and an EFTA Member State, notwithstanding Article 16 (1) of the Brussels Convention, which will apply only if the immovable property is situated in the territory of a State party to the 1968 Convention;
- (3) recognition or enforcement of a judgment delivered in a State party to the Lugano Convention and an EFTA Member State is being sought in a Community Member State (paragraph 2 (c)).

Paragraph 2 also provides that the Lugano Convention applies where a judgment delivered in a Community Member State is to be enforced in an EFTA Member State party to the Lugano Convention.

This does not resolve potential conflicts between the two Conventions, but it does define their respective scope. Obviously if a judgment has been delivered in a State party to the Lugano Convention and an EFTA Member State and is to be enforced either in a Community Member State or in an EFTA Member State, the Brussels Convention does not apply;

- (4) Article 54b also contains provisions relating to a *lis pendens* (Article 21) and related actions (Article 22). Under Article 54b (2) (b) a court in a Community Member State must apply these Articles of the Lugano Convention if a court in an EFTA Member State is seised of the same dispute or a related claim.

Apart from the greater clarity which they bring, these provisions serve a double purpose: to remove all uncertainty, and to ensure that judgments delivered in the different States concerned do not conflict;

- (5) Article 54b (3) provides that a court in an EFTA Member State may refuse recognition or enforcement of a judgment delivered by a court in a Community Member State if the grounds on which the latter court has based its jurisdiction are not provided for in the Lugano Convention and if recognition or enforcement is being sought against a party who is domiciled in any EFTA Contracting State.

These grounds for refusal are additional to those provided for in Article 28, and arise essentially from a guarantee sought by the EFTA Member States. The cases involved can be expected to arise relatively seldom, since the Conventions are so similar in respect of their rules of jurisdiction. The possibility nevertheless remains. The case would arise in the event of a judgment on a contract of employment delivered by a court in a Community Member State which had erroneously based its jurisdiction with regard to a person domiciled in an EFTA Member State either on Article 4 or Article 5 (1) of the Brussels Convention, i.e. in a manner inconsistent with Article 5 (1) of the Lugano Convention, which includes a specific provision on contracts of employment, or on an agreement conferring jurisdiction which predated the origin of the dispute (Article 17).

However, in the interests of freedom of movement of judgments, the judgment will be recognized and enforced provided that this can be done in accordance with the rules of common law of the State addressed, in particular its common law rules on the jurisdiction of foreign courts;

- (6) for convenience, we have used the term 'EFTA Member States' in the above examples. Obviously, the same arrangements would apply to States which are not members of either the EEC or EFTA but accede to the Lugano Convention (see Article 62 (1) (b)).

17. The question remained unresolved as to how the Lugano Convention would apply between Community Member States one of which was not a party to the Brussels Convention such as, for instance, Spain or Portugal, while both were parties to the Lugano Convention. The issue would, for example, arise should both Belgium and Spain

become parties to the Lugano Convention before the Treaty on the accession of Spain to the Brussels Convention has been concluded or has entered into force and should enforcement of a judgment delivered in one of these States be requested in the

other. In the rapporteurs' opinion, the Lugano Convention would, as a source of law, apply in the case in point pending entry into force between Belgium and Spain of the Treaty on the accession of Spain to the Brussels Convention.

CHAPTER III

PROVISIONS WHICH DISTINGUISH THE LUGANO CONVENTION FROM THE BRUSSELS CONVENTION

1. SUMMARY OF THESE PROVISIONS

Articles 31 to 41

18. The amendments are not numerous. Before considering them in detail it might be helpful to list the Articles in the Lugano Convention which differ from the corresponding Articles in the Brussels Convention.

Technical modifications have been made to some of these Articles with regard to procedure for enforcement and modes of appeal.

Article 3

Article 50

This Article adds the rules of exorbitant jurisdiction current in the EFTA Member States and in Portugal. It should be noted that no such rules exist in Spain.

The wording of this Article, which concerns authentic instruments, has been slightly altered.

Article 54

This Article has been clarified with regard to the transitional provisions.

Article 5 (1)

A special provision has been inserted covering matters relating to contracts of employment.

Article 54A

This Article is based on Article 36 of the 1978 Accession Convention and contains additions.

Article 6

A new paragraph 4 relates to the combination of proceedings *in rem* with proceedings *in personam*.

Article 54B

This is a new Article governing the respective scope of the Brussels Convention and the Lugano Convention.

Article 16

Matters relating to tenancies in immovable property are the subject of a new provision (paragraph 1 (b)) and of a reservation (Protocol No 1, Article 1b).

Article 55

This Article concerns relations with other conventions and refers only to conventions to which EFTA Member States are party.

Article 17

This Article has been amended with regard to the reference to commercial practices and contracts of employment.

Article 57

This Article governs implementation of conventions concluded with regard to particular matters and differs appreciably from Article 57 of the Brussels Convention.

Article 21

The reference in this Article to *lis pendens* has been somewhat amended.

Articles 60 to 68 (Final provisions)

These Articles have been amended.

Article 28

This Article now contains further grounds for refusing recognition and enforcement.

19. Protocol 1

Article 1a

This new Article contains a reservation requested by the Swiss delegation.

Article Ib

This new Article contains a reservation resulting from the amendment of Article 16 (1) relating to tenancies in immovable property.

Article V

This Article covers actions on a warranty or guarantee and contains additions covering current legislation in several States.

Article Va

The Article covers maintenance matters in particular and contains additions to take account of the situation in several States.

Article Vb

This Article covers disputes between the master and a member of the crew of a vessel and again contains additions to take account of the laws in a number of States.

20. Protocol 2

This Protocol has been added in order to ensure that, as far as possible, the Lugano Convention and the provisions therein which are identical to the Brussels Convention are interpreted uniformly.

21. Protocol 3

This Protocol deals with the problem of Community acts.

22. Declarations

First Declaration: supplementary to Protocol 3.

Second and Third Declarations: supplementary to Protocol 2 on the uniform interpretation of the Lugano Convention.

2. DETAILED EXAMINATION*TITLE I***SCOPE OF THE LUGANO CONVENTION
(Article 1)**

23. Since this differs in no respect from the Brussels Convention, the reader is referred to the Jenard and Schlosser reports.

*TITLE II***JURISDICTION (Articles 2 to 24)****Section 1****General provisions (Articles 2 to 4)****(a) Introductory remarks**

24. The proposed adaptations to Articles 2 to 4 are confined to mentioning, in the second paragraph of Article 3, certain exorbitant jurisdictions in the legal systems of the EFTA Member States and of Portugal. A brief explanation of the proposed additional provisions (see point 1) precedes, as in the *Schlosser* report, two more general remarks on the relevance of these provisions to the whole structure of the Lugano Convention.

(b) Exorbitant jurisdictional bases in force in the EFTA Member States and Portugal**1. Austria**

25. Article 99 of the Law on Court Jurisdiction (Jurisdiktionsnorm) provides that any person neither domiciled nor ordinarily resident in Austria may, in matters relating to property, be sued in the court for any place where he has assets or where the disputed property is located. The value of the assets located in Austria may, however, not be considerably lower than the value of the matter in dispute.

Foreign establishments, foundations, companies, cooperatives and associations may, according to the abovementioned Article (paragraph 3), also be sued in the court for the place where they have their permanent representation for Austria or an agency.

2. Finland

26. The second sentence of Article 1 of Chapter 10 of the Finnish Code of Judicial Procedure provides that a person who has no habitual residence in Finland may be sued in the court of the place where the documents instituting the proceeding were served on him or in the court of the place where he has assets. The third sentence of the same Article provides that a Finnish national who is staying abroad may also be sued in the court for the place where he had his last residence in Finland. The fourth sentence of the same Article provides that a foreign national, having neither domicile nor resid-

ence in Finland may, unless there is a special provision to the contrary as to nationals of a particular State, be sued in the court for the place where the documents instituting the proceedings were served on him or in the court for the place where he has assets.

3. Iceland

27. Article 77 of the Icelandic Civil Proceedings Act provides that in matters relating to property obligations to Icelandic citizens, firms etc. any person not domiciled in that country may be sued in the court for the place where the person was when the documents instituting the proceedings were served on him or where he has assets.

4. Norway

28. Article 32 of the Norwegian Civil Proceedings Act provides that any person not domiciled in Norway may be sued, in matters relating to property, in the court for the place where he has assets or where the disputed property is located at the time when the documents instituting the proceedings were served on him.

5. Sweden

29. The first sentence of Section 3 of Chapter 10 of the Swedish Code of Judicial Procedure provides that anyone without a known domicile in Sweden may be sued, in matters concerning payment of a debt, in the court for the place where he has assets.

6. Switzerland

30. Article 40 of the Federal Law on Private International Law states that if there is no other provision on jurisdiction in Swiss law an action concerning sequestration may be brought before the court for the place where the goods were attached in Switzerland.

7. Portugal

31. Article 65 of Chapter II of the Code of Civil Procedure provides that a foreign national may be sued in a Portuguese court where:

- (paragraph 1 (c)) the plaintiff is Portuguese and, if the situation were reversed, he could be sued in the courts of the State of which the defendant is a national,
- (paragraph 2) under Portuguese law, the court with jurisdiction would be that of the defend-

ant's domicile, if the latter is a foreigner who has been resident in Portugal for more than six months or who is fortuitously on Portuguese territory provided that, in the latter case, the obligation which is the subject of the dispute was entered into in Portugal.

Article 65a (c) of the Code of Civil Procedure confers exclusive jurisdiction on Portuguese courts for actions relating to employment relationships if any of the parties is of Portuguese nationality.

Article 11 of the Code of Labour Procedure gives jurisdiction to Portuguese labour courts for disputes concerning a Portuguese worker where the contract was concluded in Portugal.

(c) *The relevance of the second paragraph of Article 3 to the whole structure of the Lugano Convention*

1. Scope of the second paragraph of Article 3

32. The rejection as exorbitant of jurisdictional bases hitherto considered to be important in the various States should not, any more than the second paragraph of Article 3 of the 1968 Brussels Convention, mislead anyone as regards the scope of the first paragraph of Article 3. Only particularly extravagant claims to international jurisdiction for the courts of a Contracting State are expressly underlined. Other rules founding jurisdiction in the national laws of the Contracting States also remain compatible with the Lugano Convention only to the extent that they do not offend against Article 2 and Articles 4 to 18. Thus, for example, the jurisdiction of Swedish courts in respect of persons domiciled in a Contracting State can no longer be based, in contractual matters, on the fact that the contract was entered into in Sweden.

2. Impossibility of founding jurisdiction on the location of property

33. With regard to Austria, Denmark, Finland, Germany, Iceland, Norway, Sweden 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 invoked even if the proceedings concern a dispute over rights of ownership, or possession or the capacity to dispose of the specific property in question.

34. With regard to Switzerland, the list in the second paragraph contains a provision rejecting jurisdiction derived solely from an attachment of property located in Switzerland. There is, however, no obstacle for Swiss courts pursuant to Article 24, to grant such provisional, including protective, measures as may be available under the law of Switzerland, even if, under the Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

35. As regards persons who are domiciled outside the Contracting States, the provisions which hitherto governed the jurisdiction of courts in the Contracting States remain unaffected. Even the rules on 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 Contracting States unless one of the exceptions in paragraph 5 of Article 27 or in Article 59 of the Convention applies.

The 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.

Section 2

Special jurisdiction (Articles 5 and 6)

(a) Article 5 (1) — Contract of employment

36. The domicile of the defendant constitutes the basic rule of both the Brussels Convention and the Lugano Convention.

However, Section 2 (Articles 5 and 6) of Title II on jurisdiction contains a number of supplementary provisions. Under these provisions, the plaintiff may choose to bring the action in the court specified in Section 2, or in the courts of the State in which the defendant is domiciled (Article 2).

Article 5 (1) of the Brussels Convention provides that the defendant may be sued 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

37. This paragraph is applicable with regard to a contract of employment (see Jenard report, p. 24 and Chapter VI: judgment of the Court of Justice of 13 November 1979 in *Sanicentral v. Collin*, according to which employment legislation comes within the Convention's scope). When asked to give a ruling on this matter, the Court of Justice ruled that the obligation to be taken into account in the case of claims based on different obligations arising under

a contract of employment as a representative binding a worker to an undertaking was the obligation which characterized the contract, i.e. that of the place where the work was carried out (judgment of the Court of 26 May 1982 in *Ivenel v. Schwab*, see Chapter VI).

This ruling was based, amongst other things, on Article 6 of the Rome Convention on the law applicable to contractual obligations (OJ No L 266, 1980, p. 1), which provides that in matters relating to an employment contract, the contract 'is to be governed, in the absence of choice of the applicable law, by the law of the country in which the employee habitually carries out his work in performance of the contract, unless it appears that the contract is more closely connected with another country'. In the above judgment, the Court commented that the aim of this provision was to secure adequate protection for the party who from the socioeconomic point of view was to be regarded as the weaker in the contractual relationship (see also Giuliano-Lagarde report, OJ No C 282, 1982, p. 25).

In another ruling, the Court of Justice observed that contracts of employment, like other contracts for work other than on a self-employed basis, differed from other contracts — even those for the provision of services — by virtue of certain particularities: they created a lasting bond which brought the worker to some extent within the organizational framework of the business of the undertaking or employer, and they were linked to the place where the activities were pursued, which determined the application of mandatory rules and collective agreements (judgment of 15 January 1987 in *Shenavai v. Kreisler*, see Chapter VI).

During negotiation of the Lugano Convention the EFTA Member States requested that, in respect of Article 5 and Article 17 (for this last Article, see point 60), matters relating to employment contracts should be the subject of a separate provision.

This request was granted.

38. Under the new Article 5 (1) on matters relating to contracts of employment, the place of performance of the obligation in question is deemed to be that where the employee habitually carries out his work. If he does not habitually carry out his work in any one country, the place is that in which is situated the place of business through which he was engaged. It should be noted that such an issue is currently before the Court of Justice (see Chapter VI, *Six Constructions v. Humbert* case).

As we have seen, this provision is in line with the previous judgments of the Court of Justice corresponding quite closely to Article 6 of the Rome Convention (5).

39. The stipulation in Article 5 (1) gives rise to the following comments:

According to the general structure of the Lugano Convention, the following have jurisdiction where there are disputes between employers and employees:

- the courts of the State in which the defendant is domiciled (Article 2),
- the courts specified in Article 5 (1). If an employee habitually carries out his work in the same country, but not in any particular place, the internal law of that country will determine the court which has jurisdiction,
- courts on which jurisdiction has been conferred by an agreement entered into after the dispute has arisen (see Article 17 (5)),
- courts whose jurisdiction is implied by submission (Article 18).

However, these rules do not apply unless the dispute contains an extraneous element. The Conventions only lay down rules of international jurisdiction (see preamble). They have no effect if the contract (domicile of the employer, domicile of the employee and place of work) is actually situated in a single country. In this connection, the employee's nationality must not be taken into account, as the employee must be treated in the same way as other employees.

On the other hand, if the defendant is domiciled outside the territory of one of the Contracting States, Article 4 is applicable.

40. Where the defendant does not habitually carry out his work in any one country, the courts of the place in which the place of business through which he was engaged is situated will have jurisdiction. This system is in keeping with that laid down by Article 6 (2) (b) of the Rome Convention on the law applicable to contractual obligations.

The purpose of the provision is to avoid increasing the number of courts with jurisdiction in disputes between employers and employees where the employee is required to carry out his work in several countries. In addition, for States parties to the Rome Convention and the Lugano Convention,

jurisdiction will be congruent with the applicable law. The same applies in some States which are not parties to the Rome Convention.

41. The question whether a contract of employment exists is not settled by the Convention. If the judge to whom the matter has been referred gives an affirmative reply to this question, he will have to apply the second part of Article 5 (1), which constitutes a specific provision. Although there is as yet no independent concept of what constitutes a contract of employment, it may be considered that it presupposes a relationship of subordination of the employee to the employer (see Chapter VI, judgments in *Shenavai v. Kreischer*, cited earlier, and in *Arcado v. Haviland* of 8 March 1988).
42. Article 5 (1) refers only to individual employment relationships, and not to collective agreements between employers and workers' representatives.
43. The term 'place of business' is to be understood in the broad sense; in particular, it covers any entity such as a branch or an agency with no legal personality.
44. In conclusion, it may be considered that although the texts of the Brussels Convention and the Lugano Convention are not identical, they do converge, particularly by reason of the interpretation by the Court of Justice of Article 5 (1) of the Brussels Convention.

(b) *Article 6 (1) — Co-defendants*

45. No change has been made to the text of the Brussels Convention which provides that 'a person domiciled in a Contracting State may be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled'. However, this provision was taken over verbatim only in the light of the comments made in the Jenard report on the 1968 Convention (OJ No C 59/79, p. 26) to the effect that 'in order for this rule to be applicable there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors. It follows that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled.' A few days after the diplomatic conference ended, the Court of Justice delivered a judgment along these lines (judgment of 27 September 1988 in *Kalfelis v. Schroder*, see Chapter VI, OJ No C 281, 4. 11. 1988, p. 18).

(c) *Article 6 (4) — Combination of actions in rem and in personam*

46. When a person has a mortgage on immovable property the owner of that property is quite often also personally liable for the secured debt. Therefore it has been made possible in some States to combine an action concerning the personal liability of the owner with an action for the enforced sale of the immovable property. This presupposes of course that the court for the place where the immovable property is situated also has jurisdiction as to actions concerning the personal liability of the owner.

It was agreed that it was practical that an action concerning the personal liability of the owner of an immovable property could be combined with an action for the enforced sale of the immovable property in those States where such a combination of actions was possible. Therefore it was deemed appropriate to include in the Convention a provision according to which a person domiciled in a Contracting State also may be sued in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Contracting State in which the property is situated.

To illustrate, let us assume that a person domiciled in France is the owner of an immovable property situated in Norway. This person has raised a loan which is secured through a mortgage on his immovable property in Norway. In the eventuality of the loan not being repaid when due, if the creditor wishes to bring an action for the enforced sale of the immovable property, the Norwegian court has exclusive jurisdiction under Article 16 (1). However, under the present provision, this court also has jurisdiction as to an action against the owner of the property concerning his personal liability for the debt, if the creditor wishes to combine the latter action with an action for the enforced sale of the property.

47. It is evident that this jurisdictional basis cannot exist by itself. It must necessarily be supplemented by legal criteria which determine on which conditions such a combination is possible. Thus the provisions already existing in or which in the future may be introduced into the legal systems of the Contracting States with reference to the combining of the abovementioned actions remain unaffected

by the Lugano Convention. It goes without saying however that the combination of the two actions which this paragraph deals with have to be instituted by the 'same claimant'. The 'same claimant' includes of course also a person to whom another person has transferred his rights or his successor.

Sections 3 and 4

**Jurisdiction in matters relating to insurance
(Articles 7 to 12a) and over consumer contracts
(Articles 13 to 15)**

48. Since no amendments have been made to these sections, reference should be made to the Jenard and Schlosser reports.

Section 5

Exclusive jurisdiction

Article 16 (1) — Tenancies

49. Under Article 16 (1) of the Brussels Convention, only courts of the Contracting State in which the immovable property is situated have jurisdiction concerning rights *in rem* in, or tenancies of, immovable property. Thus the wording covers not only all disputes concerning rights *in rem* in immovable property, but also those relating to tenancies of such property. According to the Jenard report (p. 35), the Committee which drafted the Brussels Convention intended to cover disputes between landlord and tenant over the existence or interpretation of tenancy agreements, compensation for damage caused by the tenant, eviction, etc. The rule was, according to the same report, not intended by the Committee to apply to proceedings concerned only with the recovery of rent, since such proceedings can be considered to relate to a subject-matter which is quite distinct from the rented property itself.

The working party which drafted the Convention on the accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol on its interpretation by the Court of Justice was, however, according to the Schlosser report (paragraph 164), unable to agree whether actions concerned only with rent, i.e. dealing simply with recovery of a debt, are excluded from the scope of Article 16 (1).

As stated in the Jenard report, the reference to tenancies in Article 16 (1) of the Brussels Convention includes tenancies of dwellings and of premises for professional or commercial use, and agricultural

holdings. According to the Schlosser report, 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.

50. The Court of Justice of the European Communities has ruled that Article 16 (1) does not cover disputes relating to transfer of an usufructuary right in immovable property (judgment of 14 December 1977 in *Sanders v. Van der Putte*, see Chapter VI). The Court held that Article 16 (1) must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor. However, departing from the intentions of the authors of the 1968 Convention, the Court of Justice recently ruled that the exclusive jurisdiction provided for in Article 16 (1) also applies to proceedings in respect of the payment of rent, and that this includes short-term lettings of holiday homes (judgment of 18 January 1985 in *Rösler v. Rottwinkel*, see Chapter VI). The Court held that this exclusive jurisdiction applies to all lettings of immovable property, even for short term and even where they relate only to the use and occupation of a holiday home and that this jurisdiction covers all disputes concerning the obligations of the landlord or the tenant under a tenancy, in particular those concerning the existence of tenancies or the interpretation of the terms thereof, their duration, the giving up of possession to the landlord, the repairing of damage caused by the tenant or the recovery of rent and of incidental charges for the consumption of water, gas and electricity. This decision seems at least partially to be in contradiction with what, according to the Jenard and Schlosser reports, was the intention of those who drafted the Brussels Convention.

51. Having regard especially to the ruling given by the Court of Justice in the case of *Rösler v. Rottwinkel*, the EFTA Member States insisted on the inclusion of a special provision concerning short-term tenancies of immovable property in the Lugano Convention. As an alternative, these States put forward the idea of excluding tenancies totally from the scope of the Convention or particularly from Article 16. The working party agreed that it was inappropriate to exclude tenancies altogether from the scope of the Convention, in view of the importance of this matter. As to the proposal for excluding tenancies from Article 16 especially, the delegations of the Community Member States found such a solution

totally unacceptable as the normal jurisdiction rules of the Convention would have been applicable to tenancies of immovable property, which was alien to the whole philosophy existing in this respect at least in the Community States. Thus the working party decided to include in Article 16 (1) a new subparagraph (b) containing a special provision concerning short-term tenancies.

52. The result of this change is that, where tenancies are concerned, there will be two exclusive jurisdictions, which might be described as alternative exclusive jurisdictions. Under subparagraph (a), the courts of the Contracting State in which the immovable property is situated will always have jurisdiction without restriction. However, under subparagraph (b), in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months — which covers particularly holiday lettings — the plaintiff may also apply to the courts of the Contracting State in which the defendant is domiciled. This option is open to him only if the tenant (and not the owner) is a natural person and if, in addition, neither party is domiciled in the Contracting State in which the property is situated.

Legal persons holding tenancies were excluded since they are generally engaged in commercial transactions.

Furthermore, where one of the parties is domiciled in the Contracting State in which the property is situated, it was considered appropriate to retain the rule in Article 16 (1) which lays down the principle of the jurisdiction of the courts of that State.

53. Article 16 (1) (b) did, however, create serious political difficulties for certain Community Member States. In order to overcome these difficulties, the working party agreed that this provision be accompanied by the possibility of a reservation. By means of this, any Contracting State may declare that it will neither recognize nor enforce a judgment in respect of a case concerning tenancies of immovable property, if the immovable property concerned is situated on its territory even if the tenancy is such as referred to in Article 16 paragraph 1 (b) and the jurisdiction of the court which has given the judgment has been based on the domicile of the defendant. This reservation is given in Article Ib of Protocol No 1.

This possibility of a reservation only concerns such cases in which the immovable property is situated

in the State where recognition and enforcement are sought. If, thus, for instance, Spain makes use of this possibility, that does not mean that Spain is entitled to refuse the recognition or enforcement of a judgment given in proceedings which had as their object a tenancy referred to in Article 16 (1) (b) if the immovable property is situated in another State e.g. Italy, and the judgment is given by a court in a third State, where the defendant has his domicile, e.g. Sweden. Whether the State where the immovable property is situated has made use of the reservation is in this case completely irrelevant.

It was however understood that any State which wishes to use this reservation may make a narrower reservation than that provided for. Thus a State may, for instance, declare that the reservation is limited to the case where the landlord is a legal person.

54. Article 16 (1) applies only if the property is situated in the territory of a Contracting State. The text is sufficiently explicit on this point. If the property is situated in the territory of a third State, the other provisions of the Convention apply, e.g. Article 2 if the defendant is domiciled in the territory of a Contracting State, and Article 4 if he is domiciled in the territory of a third State, etc.

Section 6

Prorogation of jurisdiction (Articles 17 and 18)

(a) Article 17 — Prorogation by an agreement

55. 1. Paragraph 1 of this Article essentially concerns the formal requirements for agreements conferring jurisdiction. The question of whether an agreement on jurisdiction has been validly entered into (e.g. lack of due consent) is to be regulated by the applicable law (judgment of the Court of Justice of 11 November 1986 in *Iveco Fiat v. Van Hool*, see Chapter VI). As to whether such an agreement can be validly entered into in specific matters it should be pointed out that the Court of Justice (judgment of 13 November 1979 in *Sanicentral v. Collin*, see Chapter VI) ruled that in matters governed by the Convention national procedural law was set aside in favour of the Convention's provisions.
56. According to the original version of Article 17 of the Brussels Convention, an agreement conferring jurisdiction must be in writing or evidenced in writing. In the light of the interpretation of the Court of Justice of the European Communities in some of its first judgments concerning Article 17 of the

Brussels Convention (see Chapter VI), the working party preparing the 1978 Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol of 3 June 1971 on its interpretation by the Court of Justice was of the opinion that these formal requirements did not cater adequately for the customs and needs of international trade. Therefore a relaxation of these formal requirements as far as agreements on jurisdiction in international trade or commerce are concerned was felt necessary. According to Article 17 of the Brussels Convention as amended by the 1978 Accession Convention, an agreement conferring jurisdiction may in international trade or commerce be in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

57. During the negotiations on the Lugano Convention, the EFTA Member States, however, felt that this provision was too vague and might create legal uncertainty. Those States feared that Article 17 (1), as far as agreements on jurisdiction in international commerce or trade are concerned, might make it possible to consider an agreement established by the mere fact that no protest has been launched against a jurisdiction clause in certain unilateral statements by one party, for instance in an invoice or in terms of trade presented as a confirmation of the contract. Therefore the EFTA Member States proposed the following amendment of the second sentence of Article 17 (1):

'Such an agreement conferring jurisdiction shall be either

- (a) in writing (or clearly evidenced in writing) including an exchange of letters, telegrams and telexes (or other modern means of technical communications), or
- (b) included or incorporated by reference in a bill of lading or a similar transport document.'

The representatives of the Community Member States found however that this proposal would not only lead to an excessive amount of rigidity but would also be in contradiction with the rulings of the Court of Justice of the European Communities, according to which it should be possible to take into account particular practices (judgment of 14 December 1976 in *Segoura v. Bonakdarian*, see Chapter VI).

58. Article 17 (1) (a) of the Lugano Convention is based on Article 9 paragraph 2 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (the so-called Vienna Convention). Since the Member States of the EEC and the EFTA States may become parties to that Convention, the working party found it desirable to align in this respect the text of Article 17 on the text of Article 9 paragraph 2 of the Vienna Convention. The provision can be seen as a compromise between the two groups of States.

First, according to Article 17 (1) (b) of the Lugano Convention, an agreement conferring jurisdiction fulfils the formal requirements if it is in a form that accords with practices which the parties have established between themselves. This is not provided for in the wording of Article 17 of the Brussels Convention. In the light of the case law of the Court of Justice of the European Communities (see Chapter VI), this seems, however, to be the understanding of Article 17 of the Brussels Convention. The working party was of the opinion that this understanding should be explicitly reflected in the text of the Lugano Convention.

Secondly, in international trade or commerce an agreement conferring jurisdiction fulfils the formal requirements if it is in a form that accords with a usage of which the parties are or ought to have been aware and which in such trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Thus, even in international trade or commerce, it is not sufficient that an agreement conferring jurisdiction be in a form which accords with practices (or a usage) in such trade or commerce of which the parties are or ought to have been aware. It is moreover required that the usage shall be, on the one hand, widely known in international trade or commerce and, on the other, regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned.

In particular, having regard to the words 'internationale Handelsbräuche' and 'usages' which are used in the German and French versions of Article 17 of the Brussels Convention, it seems that there are at least no major differences in substance between the provisions concerned in the two Conventions. In order to ensure a uniform interpretation it was, however, felt by the EFTA States that the present wording of paragraph 1 (c) was necessary in the Lugano Convention.

Court of Justice of the European Communities. In this connection, readers are referred to Chapter VI.2, point 12 'Article 17', paragraphs 1 to 12.

However, it should be mentioned in this context that the Court of Justice has ruled that an agreement between the parties with regard to the place of performance, which constitutes a ground of jurisdiction pursuant to Article 5 (1), is sufficient to confer jurisdiction without being subject to the formal requirements laid down in Article 17 for prorogation of jurisdiction (judgment of 17 January 1980 in *Zelger v. Salinitri*, see Chapter VI).

60. 2. Article 17 (5) was proposed by the EFTA Member States. It provides that in matters relating to contracts of employment an agreement conferring jurisdiction within the meaning of the first paragraph shall have legal force only if it is entered into after the dispute has arisen. The background of this provision is the same as that for Article 5 (1), i.e. the protection of the employee, who from the socioeconomic point of view is regarded as the weaker in the contractual relationship. It seemed desirable that it should not be possible for the protection intended to be given to employees by virtue of Article 5 (1) to be taken away by prorogation agreements entered into before the dispute arose. As in the case of Article 5 (1) this provision applies only to individual employment relationships and not to collective agreements concluded between employers and employees' representatives.

61. During the Diplomatic Conference, stress was laid on the difference between the Brussels and Lugano Conventions as regards agreements conferring jurisdiction with respect to contracts of employment, and a number of problems were highlighted. The example given was that of an agreement conferring jurisdiction which, at the time, was concluded between parties domiciled in the territory of two States which had ratified the Brussels Convention. Under that Convention, prorogation of jurisdiction by agreement may, as regards a contract of employment, be effected before the dispute arises.

What happens if, at a later stage, one of the parties transfers his domicile to an EFTA Member State? What would be the attitude either of the court in a Community Member State to which a dispute is referred on the basis of that agreement conferring jurisdiction, or of a court in an EFTA Member State to which a dispute is referred despite the agreement?

The question was left open and, although the solutions adopted by the Brussels and the Lugano Conventions are not without their merits, might possibly be resolved in the Convention on the accession

59. Article 17 of the Brussels Convention has given rise to a considerable number of judgments by the

of Spain and Portugal to the Brussels Convention by aligning the Brussels Convention on the Lugano Convention.

(b) *Article 18 — Submission to jurisdiction*

62. Discrepancies have been noted between the various versions of the Brussels Convention. A number of versions, for example the English and the German ones, provide that the rule whereby the court of the Contracting State has jurisdiction does not apply where appearance was entered 'solely' to contest the jurisdiction, which restriction is not included in the French text.

However, no amendment was made to the various texts in view of a judgment given by the Court of Justice to the effect that Article 18 applies under certain conditions where the defendant contests the court's jurisdiction and also makes submissions on the substance of the action (judgment of 24 June 1981 in *Elefanten Schuh v. Jacqmain*, see Chapter VI).

Section 7

Examination as to jurisdiction and admissibility
(Articles 19 and 20)

63. Although these Articles correspond to Articles 19 and 20 of the Brussels Convention, Article 20 requires some comment, given that it is a particularly important provision where the defendant fails to enter an appearance (see Jenard report, page 39).

A judge required to apply the Lugano Convention must declare of his own motion that he has no jurisdiction unless his jurisdiction is derived from the provisions of Sections 2 to 6 of Title II of that Convention. For example, a French judge before whom a person domiciled in Norway is required to appear on the basis of Article 14 of the Code Civil (jurisdiction derived from the French nationality of the applicant) must declare of his own motion that he has no jurisdiction if the defendant fails to enter an appearance.

Likewise, the judge must declare of his own motion that he has no jurisdiction unless his jurisdiction is derived from the provisions of an international convention governing jurisdiction in particular matters, as stipulated in Article 57 (2). In this connection reference should be made to the comments on Article 57.

It should be noted that almost all the Community and EFTA Member States are currently parties to the Hague Convention of 15 November 1965 on

the service abroad of judicial and extra-judicial documents in civil or commercial matters since, at 1 June 1988, the sole exceptions are Austria, Ireland, Iceland and Switzerland.

Section 8

***Lis pendens* — related actions** (Articles 21 to 23)

64. *Article 21*

Only this Article has been amended in Section 8.

Article 21 of the Brussels Convention provides that in case of a *lis alibi pendens*, any court other than the court first seised must of its own motion decline jurisdiction in favour of that court and may stay its proceedings if the jurisdiction of the other court is contested.

The representatives of the EFTA Member States thought this solution was too radical.

They observed that an action often had to be brought in order to comply with a time limit or stop further time from running, and that opinions differed as to whether a time limit had been complied with where an action had been brought before a court lacking jurisdiction internationally.

Thus, in their view, if an action was brought before a judge who would have had jurisdiction, but was not the first to be seised, that judge would of his own motion have to decline jurisdiction in favour of the court first seised. However, that court might perhaps decide that it did not have jurisdiction. In that case, both actions would have been dismissed with the result that the time limits might have run out and the action be time barred.

These remarks have been taken into consideration.

Article 21 has been amended so that the court other than the court first seised will of its own motion stay its proceedings until the jurisdiction of the other court has been established.

A court other than the one first seised will not decline jurisdiction in favour of the court first seised until the jurisdiction of the latter has been established (see Schlosser report, paragraph 176).

The Court of Justice has ruled that the term *lis pendens* used in Article 21 covers a case where a party brings an action before a court in a Contracting State for a declaration that an international sales contract is inoperative or for the termination thereof whilst an action by the other party to secure performance of the said contract is pending before a court in another Contracting State (judgment of 8 December 1987 in *Gubisch v. Palumbo*).

Section 9

65. *Article 24 — Provisional, including protective, measures*

As this provision has not been amended, reference should be made to the Jenard report, page 42 and the Schlosser report, paragraph 183.

TITLE III

RECOGNITION AND ENFORCEMENT
(Articles 25 to 49)

Section 1

Recognition (Articles 26 to 30)(a) *Article 27 (5)*

66. Article 27 (5) refers only to cases where the judgment recognition of which is requested is irreconcilable in the State addressed with an earlier judgment given in a *non-Contracting* State and recognizable in the State addressed.

The case of a judgment given in a *Contracting State* which is irreconcilable with an earlier judgment given in another Contracting State and recognizable in the State addressed is not specifically dealt with, nor is it covered in the Brussels Convention. It was felt that such cases would be extremely exceptional given the mechanisms provided for in Title II and in particular Articles 21 and 22 with a view to avoiding contradictory decisions. Should such a case, however, arise it would be for the court in the State addressed to apply its rules of procedure and the general principles arising out of the Convention and to refuse to recognize and enforce the judgment given after the first judgment had been recognized. It might, indeed, be argued that, since it has already been recognized in the State addressed, the first judgment should produce the same effects there as a judgment given by the courts in that State, the situation covered by Article 27 (3).

(b) *Article 28*

67. Two grounds for refusal have been added. They concern the cases provided in Articles 54B and 57; reference should be made to the comments on those Articles.

Section 2

Enforcement (Articles 31 to 45)(a) *Article 31*

68. Under the first paragraph of this Article in the Brussels Convention, 'A judgment given in a Con-

tracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there'. Since United Kingdom law does not have the *exequatur* system for foreign judgments, paragraph 2 of this Article provides that such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland where, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom (see Schlosser report, paragraphs 208 *et seq.*).

69. In Switzerland, a distinction must be drawn between judgments ordering the payment of a sum of money and those ordering performance other than the payment of money. The enforcement of judgments ordering the payment of a sum of money is governed by Articles 69 *et seq.* of the federal law on suit for bankruptcy debts (LP). Articles 80 and 81 LP require, for the purposes of enforcement, the production of an enforceable judgment in a civil case. In the case of foreign judgments, involving an order for payment of money, an order for its enforcement is necessary only if the judgment was given in a State which has not concluded a treaty on recognition and enforcement with Switzerland. If such a treaty exists, a foreign judgment involving an order for payment of money is enforceable in the same way as a Swiss judgment. The only objections which can be raised are those provided for in the convention in question (third paragraph of Article 81 LP).

A foreign judgment ordering performance other than the payment of money is enforced under cantonal law, even if there is a treaty with the State concerned. In general, the cantonal rules governing orders for enforcement are then applicable. With the convention in mind, Switzerland declared that it intends to continue to grant the preferential treatment it gives to judgments involving an order for payment of money.

The working party agreed that the wording of Article 31 (1) of the Brussels Convention had been chosen to comply with the legal system of the original six Member States of the European Communities and acknowledged that this wording could create problems for States with different enforcement procedures than those existing in these six States. Therefore and in order to take account, in

particular, of the Swiss position the words 'the order for its enforcement has been issued' in the first paragraph of Article 31 of the Brussels Convention have been replaced in the Lugano Convention by the words 'it has been declared enforceable'.

(b) *Articles 32 to 45*

70. The formal adjustments to Articles 32 to 45 relate exclusively to the courts having jurisdiction and possible types of appeal against their decisions.

For applications for a declaration of enforceability of judgments only one court has been given jurisdiction in Iceland and in Sweden. In Sweden, this is due to the practice according to which the 'Svea hovrätt' is competent to declare enforceable foreign judgments and arbitral awards.

If the judgment debtor wishes to argue against the authorization of enforcement, he must lodge his application to set the enforcement order aside not with the higher court, as in most other Contracting States, but as in Austria, Belgium, Ireland, Italy, the Netherlands and the United Kingdom, with the same court as declared the judgment enforceable. The proceedings will take the form of an ordinary contentious civil action. This applies also regarding the appeal which the applicant may lodge if his application is refused.

Section 3

Common provisions (Articles 46 to 48)

71. Since no amendments have been made to the provisions of this section, reference should be made to the Jenard report (pp. 54 to 56) and the Schlosser report (paragraph 225).

TITLE IV

**AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS
(Articles 50 and 51)**

Article 50 — Authentic instruments

72. The representatives of the EFTA Member States were able to agree to the text of Article 50, although the concept of an authentic instrument is contained only in Austria's legislation.

However, they did request that the report should specify the conditions which had to be fulfilled by an authentic instrument in order to be regarded as authentic within the meaning of Article 50 (see Schlosser report, paragraph 226).

The conditions are as follows:

- the authenticity of the instrument should have been established by a public authority,
- this authenticity should relate to the content of the instrument and not only, for example, the signature,
- the instrument has to be enforceable in itself in the State in which it originates.

Thus, for example, settlements occurring outside courts which are known in Danish law and enforceable under that law (*udenretlig forlig*) do not fall under Article 50.

Likewise, commercial bills and cheques are not covered by Article 50.

As in Article 31 (see point 69), the phrase 'have an order for its enforcement issued there' has been replaced by the words 'be declared enforceable'.

It should be noted that the application of Article 50 of the Brussels Convention appears to be relatively uncommon.

TITLE V

GENERAL PROVISIONS

Article 52 — Domicile

73. The third paragraph of Article 52 of the Brussels Convention relates to persons whose domicile depends on that of another person or on the seat of an authority.

It adopts a common rule of conflicts based on the personal status of the person making the application, in the case in point, the national law of the person.

The EFTA Member States challenged this rule, particularly in view of the developments regarding the domicile of married women that have taken place since the 1968 Convention was drawn up.

It was decided to delete the third paragraph.

It follows that in order to determine whether the defendant is a minor or legally incapacitated, the judge will apply the law specified by the conflicts rules applied in his country.

In the affirmative case, either the first paragraph or the second paragraph of Article 52, depending on the case, will be applied to determine the legal domicile. Thus, to determine whether a minor is domiciled in the territory of the State whose courts are seised of a matter, the judge will apply his internal law.

When the minor is domiciled in the territory of the State whose courts are seised of the matter, the judge will, in order to determine whether the minor is domiciled in another Contracting State, apply the law of that State.

TITLE VI

TRANSITIONAL PROVISIONS (Articles 54 and 54a)

(a) Article 54 — Temporal application

74. The adjustments made to this Article are only technical ones, given that the procedures for entry into force of the two Conventions are not identical, but that no substantive changes have been made (see Jenard report, pp. 57 and 58 and Schlosser report, paragraphs 228 to 235).

(b) Article 54a (Maritime claims)

75. Article 54a corresponds to Article 36 of the 1978 Accession Convention (see Schlosser report, paragraphs 121 *et seq.*).

Paragraph 5 of this Article defines the expression 'maritime claim'. A maritime claim, according to this definition, is *inter alia* a claim arising out of dock charges and dues (point (1)). The German version of this Convention as well as of the Brussels Convention uses the word 'Hafenabgaben' for dock charges and dues. This should however not mislead anybody into thinking that port charges, dues or tolls or similar public fees are regarded as dock charges or dues for the purposes of this Article.

TITLE VII

RELATIONSHIP TO THE BRUSSELS CONVENTION AND OTHER CONVENTIONS

(a) Article 54b (Relationship to the Brussels Convention)

76. Reference should be made to the comments in Chapter II.

(b) Articles 55 and 56 (Conventions concerning the EFTA Member States)

77. Article 55 lists conventions concluded between the EFTA Member States and conventions concluded between EFTA Member States and Community Member States (see Annex II).

Conventions between Community Member States have not been included since they are already covered by Article 55 of the Brussels Convention and, where Spain and Portugal are concerned, will be covered by the Conventions on Accession to the Brussels Convention.

78. Article 56 has not been amended.

(c) Article 57 (Conventions in relation to particular matters)

79. It may be said that the problem of conflicts of law, together with the problem of conflicts of jurisdiction, are the chief concern of private international law.

However, the problem of conflicts of convention also requires attention, since nowadays, with so many international organizations drawing up international conventions, the number which deal directly or indirectly with the same subject is considerable. As for solving the problem, several systems could perfectly well be contemplated under international law. Some are based on the principle *specialia generalibus derogant*, others on the rule of antecedence. Lastly, yet others advocate taking the effectiveness criterion into consideration. For example, where a judgment is to be recognized and enforced, the conventions which exist might be considered and the one selected which, translating the aim sought by the authors of the conventions, gives the party to whom judgment has been delivered in one country the best possibility of getting it recognized and enforced in another.

As noted by Professor Schlosser in his report (paragraphs 238 to 246), this question was dealt with at length during the negotiations on the 1978 Accession Convention.

The solution was enshrined in Article 25 of that Convention.

80. The problem was taken up again during negotiation of the Lugano Convention. The same basic principle has been adopted in both Conventions: namely, that the Convention will not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments⁽⁶⁾.

The arrangements adopted are set out in Article 57. They may be examined on two levels: firstly, the

level of jurisdiction, and secondly, that of recognition and enforcement.

81. *Regarding jurisdiction*, the two Conventions, i.e. the 1968 Convention as amended by the 1978 Convention, and the Lugano Convention, both contain similar provisions.

Article 57 (2) of the Lugano Convention, like Article 25 (2) of the 1978 Accession Convention, provides that the Convention will not prevent a court of a Contracting State which is party to a convention relating to a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in a State party to the Lugano Convention, but not to the convention on the particular matter.

In this respect, Article 57 provides another exception to Article 2, which lays down the principle that the defendant must be sued in the courts of his domicile.

Take the following example:

The International Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw on 12 October 1929, has not been ratified by Luxembourg. The carrier is domiciled in Luxembourg, but the Warsaw Convention provides that the court with jurisdiction is that of the place of 'destination' (a court not adopted *as such* by the Lugano Convention, nor, for that matter, by the Brussels Convention).

Article 57 enables the applicant to sue the Luxembourg carrier in the court of a State party to the Lugano Convention and to the Warsaw Convention, since that court is allowed under that Convention.

Exactly the same arrangement is adopted in the Brussels Convention. It is the special convention which prevails, in the interests, as stated by Professor Schlosser in his report on the 1978 Convention (paragraph 240 (b)), of 'simplicity and clarity of the legal position' and, let us add, so as not to fail to recognize the rights that nationals of third States might hold under the special convention.

However, the court seised will have to apply Article 20 of the Lugano Convention in order to ensure respect for the rights of the defence.

In the case in point, if the defendant fails to enter an appearance, the judge must of his own motion

examine whether he does indeed have jurisdiction under the special convention and whether the defendant has been sued properly, and in sufficient time to enable him to arrange his defence.

82. *Regarding recognition and enforcement*, the arrangements in the Brussels Convention (as adjusted on this point by the 1978 Convention) and the Lugano Convention are not the same. Unlike the Brussels Convention, the Lugano Convention provides that recognition or enforcement may be refused if the State addressed is not a contracting party to the special convention and if the person against whom recognition or enforcement is sought is domiciled in that State.

The reason for this difference is that the Brussels Convention applies between Member States of the same Community, while the Lugano Convention is not based on a similar principle.

The EFTA Member States therefore requested that the courts of the State addressed should be able to refuse recognition or enforcement if the person against whom they were sought was domiciled in that State, on the grounds that such a guarantee should be granted the defendant, particularly for fear that the special convention might contain grounds for jurisdiction considered as exorbitant by the State addressed in accordance with the law of that State.

It must be emphasized that this ground for refusal is an exception, given that paragraph 3 establishes the principle of recognition and enforcement. It does not therefore apply automatically, but is left to the discretion of the judge in the State addressed under the law of that State.

It goes without saying that a judgment delivered in an EFTA Member State on the basis of a rule of jurisdiction provided for in a special convention might be refused recognition or enforcement, under the same terms, in a Community Member State.

83. In the opinion of the rapporteurs, although the question is not expressly dealt with in the text of Article 57, if a court in a Contracting State having jurisdiction under a special convention is seised first, the rules on *lis pendens* and related actions in Articles 21 and 22 are applicable. Hence, for instance, in the case of *lis pendens*, the courts of another Contracting State would, even though that

State was not party to the special convention, have to stay their proceedings of their own motion if seised subsequently. The jurisdiction of the court first seised is recognized by the Lugano Convention through the conjunction of Articles 21 and 57, with the latter recognizing the jurisdiction of the court first seised on the basis of a special convention.

84. For the purposes of the Lugano Convention, Community acts are to be treated in the same way as special conventions. Reference should be made here to the comments on Protocol 3.

TITLE VIII

FINAL PROVISIONS (Articles 60 to 68)

(a) *Introductory remarks*

85. Although final provisions are usually fairly standard, those in the present Convention are somewhat different and therefore require quite detailed comment. This is a Convention which first and foremost requires the Contracting States to have extremely similar thinking on constitutional and economic matters (see Chapter I.2, point 3). Moreover, the Convention was negotiated between States all of which belong to European organizations, either the European Communities or EFTA.

The drafters of the Convention had to deal with several questions. The first was the general one of deciding which States could become parties to the Convention. Other more specific questions were:

What was the position of those States which, after the opening of the Convention for signature, became members either of the European Communities or EFTA?

What was the position of third States, i.e. countries which did not belong to either of these two organizations but wished to become parties to the Convention?

What was the territorial application of the Convention?

What, finally, was the position if one of the territories for whose international relations a Contracting State was responsible were to become independent?

Each of these questions was examined in detail and a series of solutions was found (7).

(b) *Article 60 — States which may become parties to the Convention*

86. *Article 60* deals with this question, while Articles 61 and 62 define the relevant procedures involving

either signature and ratification (Article 61) or accession (Article 62).

The following may in any case become parties to the Convention:

1. States which, at the date of the opening of the Convention for signature, are members either of the European Communities or of EFTA;
2. States which, after that date, become members of one or other of the two organizations. In view of the origins of the Convention, this solution was virtually self-evident since neither of the two organizations could remain fixed in time;
3. third States. This was undoubtedly the most delicate question. There are, in addition to Member States of the two organizations, States which share the same fundamental conceptions even though they are not European. As we shall see in the comments on Article 62, provision has been made for fairly strict conditions for the accession of such States to the Convention. In brief, although the Convention reflects a desire for openness, its approach is clearly a cautious one.

(c) *Article 61 — Signature, ratification and entry into force*

87. According to Article 61, the Lugano Convention shall be opened for signature by those States which were members of one or other of the two organizations on the date — 16 September 1988 — on which it was opened for signature.

This was agreed because it was at the diplomatic conference that the final text was drawn up and adopted by the persons empowered to do so by their States.

On that date, the Convention was signed by 10 States: for the Community Member States: Belgium, Denmark, Greece, Italy, Luxembourg and Portugal, and for the EFTA Member States: Iceland, Norway, Sweden and Switzerland. The Convention was subsequently signed by Finland on 30 November 1988 and by the Netherlands on 7 February 1989.

The Convention may be signed at any subsequent time by the other six States (Federal Republic of Germany, Spain, France, Ireland and the United Kingdom on the one hand and Austria on the other).

88. Pursuant to Article 61 (3), the Convention shall enter into force when it has been ratified by one

Community Member State and one Member State of EFTA.

Since this is a multilateral Convention, such a method of entry into force might seem somewhat surprising.

The intention was deliberately to speed up entry into force of the Lugano Convention. For persons domiciled in a Member State of EFTA, the Convention offers a number of guarantees when they are sued in the courts of a Community Member State. Thus, for example, Article 4 of the Brussels Convention will cease to apply to such persons. Moreover, persons domiciled in a Community Member State will not be able to be sued in the courts of a Member State of EFTA on the basis of exorbitant rules of jurisdiction.

Furthermore, ratification procedures can be quite slow and this would delay the entry into force of a multilateral Convention where a certain number of ratifications are required.

Examples of this are the 1968 Convention, which only entered into force in 1973, and the 1978 Accession Convention, which only entered into force between the six original Member States and Denmark on 1 October 1986, the United Kingdom on 1 January 1987 and Ireland on 1 June 1988. The Convention on the accession of Greece of 25 October 1982 entered into force on 1 April 1989 with regard to Belgium, Denmark, the Federal Republic of Germany, Greece, France, Ireland, Italy, Luxembourg and the Netherlands and on 1 October 1989 with regard to the United Kingdom.

In brief, it is sufficient therefore for one Community Member State and one EFTA Member State to ratify the Lugano Convention in order to bring it into force between those two States as from the first day of the third month following the deposit of the second instrument of ratification.

(d) *Articles 62 and 63 — Accession*

1. New Member States

89. Those States which, after the opening of the Convention for signature, become members of either the Communities or EFTA may accede to the Convention.

Under Article 62 (4), a Contracting State may, however, consider that it is not bound by such an accession.

This clause was adopted in view of the fact that a Member State of one of the two organizations has

no say in the accession of new States to the other organization and, for reasons of its own, might feel it cannot have ties with that new State which are as close as those created by the Lugano Convention. This is a safeguard clause which also applies to third States.

2. Third States

90. A cautious attitude to such States is reflected in specific conditions.

Firstly, their wish to accede to the Lugano Convention must be 'sponsored' by a Contracting State, i.e. a State which has either ratified the Convention or acceded to it, which will inform the depositary State of the third State's intention.

Secondly, the third State will have to inform the depositary State of the contents of any declarations it intends to make in order to apply the Convention and of any details it would like to furnish in order to apply Protocol No 1, and the depositary State will then communicate that information to the other signatory States and States which have acceded. Negotiations may be held on this subject: they may not, in any circumstances, call into question the provisions of the Lugano Convention itself. The device envisaged therefore differs from that in Article 63 of the Brussels Convention, which stipulates that a new Member State of the European Economic Community may ask for 'necessary adjustments' to be the subject of a special convention. This procedure, which was followed notably when drawing up the 1978 Accession Convention, is not therefore applicable in the present case.

Thirdly, the States referred to in Article 60 (a) and (b) must, when they have thus been informed of the declarations and details envisaged by the State applying for accession, decide unanimously whether that State should be invited to accede.

The States referred to in Article 60 (a) and (b) are either those States which were members of one or other of the two organizations on the date on which the Convention was opened for signature, i.e. 16 September 1988, or States which became members of one or other of the two organizations after that date. The agreement of any third States which have acceded to the Convention is not therefore required. This was agreed because the Convention is essentially a Convention between Community and EFTA Member States and consequently it did not seem advisable to give a third State which has become a party to the Convention

the right to veto the accession of another third State.

Fourthly, once the decision has been taken to look at the application of a third State, negotiations can be started, either at that State's request or at the request of other States concerned, regarding the details it intends to furnish for the purposes of Protocol No 1.

Finally, it should be noted that a last safeguard clause allows any Contracting State (pursuant to paragraph 4) to refuse application of the Convention in its relations with a third State which has acceded to the Convention. This system, which is based on various Conventions drawn up pursuant to The Hague Conference on Private International Law, takes account of the (possibly political) problems which might arise between a Contracting State and a third State.

(e) *Territorial application*

91. Article 60 of the 1968 Convention and Article 27 of the 1978 Convention deal with the territorial application of those Conventions, limiting it to the European territory of the Contracting States, subject to clearly defined exceptions.

92. In the negotiations leading up to the Lugano Convention it was found that application of the Convention to non-European territories forming an integral part of the national territory of Contracting States or for whose international relations the latter assume responsibility needed to be envisaged on a broader basis. A number of these territories are frequently important financial centres having close relations with Contracting States. Given the speed with which means of communication are developing, assets could be transferred to such territories, and if the Convention could not be applied to them, this would create a situation which would defeat the desired aim, since judgments given in a State which was party to the Convention could not be enforced in such territories under these provisions.

93. It was agreed at the diplomatic conference that it would be better if, like many other international conventions, the Convention contained no provision on territorial application. The limitation to European territories laid down in principle in the 1968 and 1978 Conventions is thus not included in the Lugano Convention.

94. However, it was clear from the negotiations that in the absence of any specific clause the Lugano Convention applies automatically to:

- the entire territory of the Kingdom of Spain,
- the entire territory of the Portuguese Republic,
- in the case of France: all territories which are an integral part of the French Republic (see Article 71 *et seq.* of the Constitution), including therefore the French Overseas Departments (Guadeloupe, Martinique, Guiana, Réunion), the Overseas Territories (Polynesia, New Caledonia, Southern and Antarctic Territories) and the individual territorial collectivities (Saint Pierre and Miquelon, Mayotte).

95. The situation is slightly different where Denmark and the Netherlands are concerned.

Denmark:

With a view to ratification of the Lugano Convention, Denmark made known its wish to reserve the right to extend the scope of the Convention at a later stage to the Faroe Islands and Greenland which are part of the Kingdom of Denmark but enjoy autonomy in their internal affairs (Law No 137 of 23 March 1948 for the Faroe Islands and No 577 of 29 November 1978 for Greenland) and which must be consulted on draft laws affecting their territories. In the light of the outcome of such consultations, Denmark will be able to state, in a declaration to be addressed at any time to the depositary State, what the situation is with respect to the application of the Convention to these territories.

The Netherlands:

Since 1 January 1986, the Kingdom of the Netherlands consists of three countries, namely: the Netherlands, the Netherlands Antilles (the islands of Bonaire, Curaçao, Sint Maarten (Netherlands part of the island), Sint Eustatius and Saba) and Aruba. Following the necessary consultations, the Netherlands, just like Denmark in the case of the Faroe Islands and Greenland, will be able to state in a declaration which may be addressed at any time to the depositary State, what the situation is with respect to the application of the Convention to the Netherlands Antilles and to Aruba.

96. On the other hand, other Contracting States (the United Kingdom and Portugal in the case of Macao and Timor-Leste) comprise entities which are separate from the metropolitan territory. International agreements cannot be concluded on behalf of these entities other than by the United Kingdom and Portugal.

United Kingdom:

During the negotiations, the United Kingdom, like the other States, provided a full list of non-Euro-

pean territories for whose international relations it is responsible⁽⁸⁾. For the European territories, see Schlosser report, paragraph 252.

This list of non-European territories is included in the acts of the diplomatic conference. The United Kingdom also gave an indication of the territories to which it might consider making the Convention actually apply. It was agreed that provision of such information did not imply any binding obligation that other extensions could not be made, but the information provided was intended to assist the other States in assessing the practical consequences for them of an extension of the application of the Convention.

For this purpose, the United Kingdom indicated that, of its non-European territories, Anguilla, Bermuda, British Virgin Islands, Montserrat, Turks and Caicos Islands and Hong Kong were ones to which there might be a real prospect of the Convention being extended.

Portugal:

The question of extending the Convention to Macao and Timor-Leste has not yet been settled.

(f) *Territories which become independent*

97. The question of what would happen regarding application of the Lugano Convention to territories gaining independence was also considered.

The Convention contains no provisions on this subject. Such a clause is not usual in international Conventions. On the other hand, this is a familiar problem in public international law and it is generally accepted that, if a country gains independence, any Contracting State is free to decide whether or not it is bound by the Convention in question in respect of the new State and vice versa (on this point, see Schlosser report, paragraph 254).

In any event, a State which has become independent may, if it wishes to become a party to the Lugano Convention, make use of the accession procedure provided for third States in Article 62 of the Lugano Convention (see point 90).

CHAPTER IV

PROTOCOLS

98. Under Article 65, the three supplementary Protocols form an integral part of the Convention.

PROTOCOL 1 ON CERTAIN QUESTIONS OF JURISDICTION, PROCEDURE AND ENFORCEMENT

1. Introductory remarks

99. This Protocol corresponds to the Protocol annexed to the Brussels Convention. The provisions contained in Articles I, II, III and Vd of that Protocol are reproduced unmodified in Protocol 1 to the Lugano Convention. The provisions contained in Article Vc of the Protocol annexed to the Brussels Convention are not reproduced in this Protocol. Those provisions were inserted into the Protocol annexed to the Brussels Convention only to make it clear that the concept of 'residence' in the English text of the Convention for the European patent for the common market, signed at Luxembourg on 15 December 1975, should be deemed to have the same scope as the concept of 'domicile' in the Brussels Convention. Such provisions

were, however, redundant in the Lugano Convention. The other provisions of the Protocol annexed to the Brussels Convention are reproduced in this Protocol with minor amendments most of which are due to the law in force in various EFTA Member States. Furthermore, the Protocol contains two Articles (Ia and Ib) which have no equivalent in the Protocol annexed to the Brussels Convention.

2. Article Ia — Swiss reservation

100. This Article contains a reservation asked for by Switzerland. It provides that Switzerland may declare, at the time of depositing its instrument of ratification, that a judgment given in another Contracting State shall neither be recognized nor enforced in Switzerland if the jurisdiction of the court which has given the judgment is based only on Article 5 (1) (place of performance of contract) of the Lugano Convention and if certain other conditions are met. As this head of jurisdiction is regarded by many States as the most commer-

cially significant of all the special bases of jurisdiction in the Lugano Convention, the terms of this part of Protocol No 1 were the subject of close discussion.

For Switzerland the need for a reservation arose from the provisions of Article 59 of the Swiss Federal Constitution⁽⁹⁾ which reserves the right for a person of Swiss domicile, whatever his nationality, to be sued over a contract in the courts of his domicile. Whilst some exceptions existed to this general principle, it became clear that a provision such as Article 5 (1) of the Convention could involve a conflict with the constitutional rule in Switzerland and make Swiss participation in the Convention impossible. The compromise reached limits the effect of the reservation to the minimum necessary.

101. In the first place, any reservation will only apply if the defendant was domiciled in Switzerland at the time of the introduction of the proceedings. In the application of the reservation the question of domicile will be determined and acknowledged in accordance with the general principles and rules of the Convention. However, a company or other legal person is considered to be domiciled in Switzerland only if it has its registered seat and the effective centre of activities in Switzerland. The reservation will thus not apply if the effective centre of activities of a company or other legal person is outside Switzerland even if the company or other legal person has its registered seat in Switzerland. Furthermore, the reservation will never apply unless the company or legal person concerned has its registered seat in Switzerland.

Secondly, recognition and enforcement may only be refused under the reservation if the jurisdiction of the court which has given the judgment was based solely on Article 5 (1). If, for example, a defendant domiciled in Switzerland were to submit to the jurisdiction in the other Contracting State the reservation would not apply, because in that event jurisdiction would not have been based solely on Article 5 (1), but also on Article 18. Equally, the reservation will not apply if the jurisdiction of the original court is based on an agreement to confer jurisdiction over contractual disputes, since in that case jurisdiction would have been derived from Article 17.

Thirdly, the reservation will not apply unless the defendant raises an objection to the recognition and enforcement of the judgment in Switzerland. The objection must be raised in good faith. It was explained by the Swiss delegation that it was entirely possible under Swiss law for the defen-

dant to waive the protection available under Article 59 of the Constitution and that this waiver could validly be made at any time. Thus this waiver can be made even before Switzerland has made any declaration. This is reflected in the text of the Article by the words 'the declaration *foreseen* under this paragraph'. It will therefore be possible for persons contracting with persons enjoying Swiss domicile to stipulate a waiver of the protection provided for in Article 59 of the Swiss Federal Constitution which would otherwise be available. An agreement between the parties on the waiver of such protection could be made orally or in writing as long as there is sufficient proof that the waiver has been made. In the event that such an agreement has been made, or if the Swiss court is otherwise satisfied as a matter of fact that the defendant has waived his rights, then recognition and enforcement will not be refused in Switzerland even if a reservation has been made.

Fourthly, the reservation will not apply to contracts in respect of which, at the time recognition and enforcement is sought, a derogation has been granted from Article 59 of the Swiss Federal Constitution. The Swiss Government is obliged to communicate such derogations to the signatory States and the acceding States.

Fifthly, the Swiss delegation has declared that a reservation envisaged in this Article will not apply to contracts of employment. Thus Switzerland will in no event refuse the recognition or enforcement of a judgment given in a matter relating to an individual contract of employment on the ground that the jurisdiction of the court which has given the judgment is based only on the second part of Article 5 (1) of the Convention.

Finally, any declaration made by Switzerland under this Article is to expire on a fixed date, i.e. on 31 December 1999. If, by that time, the Swiss Federal Constitution has not been amended so as to remove the constitutional difficulty, one possibility would be for Switzerland to consider denouncing the Convention, and become a party to it again when the constitutional difficulty has been removed.

102. If Switzerland makes the reservation provided for in this Article it will be open to other Contracting States to reciprocate the effect of that reservation by refusing to enforce judgments originating in Switzerland if the jurisdiction of the Swiss court is based solely on Article 5 (1) of the Convention and if conditions corresponding to those mentioned in Article Ia of the Protocol are fulfilled.

By reason of the difference in constitutional systems, a reciprocity clause was not inserted in the Protocol. The result is that the matter of reciprocity will be left to the normal rules of public international law. In view of the fact that such rules may be incorporated differently into national law, solutions to the question of reciprocity may vary from country to country.

In countries applying the 'dualist' system the question of reciprocity will be dealt with at a legislative level, thus settling the question of reciprocity in a general manner. In those countries where the 'monist' system exists it is for the courts or other authorities to decide on the question of reciprocity. For instance in France, where the 'monist' system exists, a treaty, according to the French constitution, has a higher level than law provided that the treaty is applied in a reciprocal manner. If the question of whether a treaty is applied in a reciprocal manner is raised before a court and the answer is not clear, the judge will submit the question to the Ministry of Foreign Affairs which is competent for the interpretation of treaties.

As far as the aspect of application of Article 7 of the Treaty establishing the European Economic Community is concerned (non-discrimination on grounds of nationality), the judge in a Community Member State can, if the question arises before him, submit it to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EEC Treaty.

From the discussions it is apparent that certain States will not reciprocate.

3. Article Ib — Reservation on tenancies

103. This Article provides that any Contracting State may, by a declaration made at the time of signing or deposit of its instrument of ratification or accession, reserve the right not to recognize and enforce judgments given in other Contracting States if the jurisdiction of the court of origin is based, pursuant to Article 16 (1) (b), exclusively on the domicile of the defendant in the State of origin.

This provision has been commented on above (see point 53).

4. Article IV — Judicial and extra-judicial documents

104. This Article reproduces Article IV of the Protocol annexed to the Brussels Convention. The declaration referred to in paragraph 2 of this Article will, however, not be made to the Secretary-General of the Council of the European Communities but to the depositary of the Lugano Convention.

5. Article V — Actions on a warranty or guarantee

105. Under Austrian, Spanish and Swiss law, as under German law, the function performed by an action on a warranty or guarantee or any other third party proceedings is fulfilled by means of third-party notices. A rule analogous to that contained in Article V of the Protocol annexed to the Brussels Convention (see Jenard report, page 27, comments on Article 6 (2)) has accordingly been applied to Austria, Spain and Switzerland in this Article. Unlike the case of Austria, the Federal Republic of Germany and Spain, it has not been possible to refer to a single legislative source in Swiss law. Provisions on third-party notices are to be found both in the federal law of civil procedure and in the 26 cantonal codes of civil procedure.

Third party intervention in proceedings is not governed by explicit rules in the Spanish legal system and the want of proper procedures is the source of procedural uncertainty. This legal hiatus has been severely criticized in the works of legal experts, who have recommended that it be remedied in the near future. However, this has not prevented acceptance of third party proceedings in some fields of jurisprudence or in civil laws governing certain specific cases, e.g. Article 124 (3) of Law No 11 of 20 March 1986 on patents and Article 1482 (*) of the Civil Code, regarding eviction. Generally speaking, it is the latter rule which is applicable in cases of non-voluntary third party proceedings; in the negotiations between the Member States of the European Communities and those of the European Free Trade Association, it was therefore judged advisable to include it in Article V of Protocol No 1.

Article 1482 is referred to, albeit indirectly, in Article 638 (gift), 1145 (joint and several obligations), 1529 (assignment of claims), 1540 (exchange), 1553 (tenancy), 1681 (obligations of partners), 1830 (surety), 1831 (co-surety), etc. of the Civil Code.

6. Article Va — Jurisdiction of administrative authorities

106. In Iceland and Norway administrative authorities are, as in Denmark, competent in matters relating to maintenance. Thus Iceland and Norway have been included in this Article in addition to Denmark.

107. In Finland, for historical reasons the 'ulosotonhaltija/överexekutor' (regional chief enforcement authority) is competent for protective measures referred to in Article 24 of the Lugano Convention. Furthermore, a documentary procedure for collecting debts based on a promissory note or a similar document, as well as some other summary proceedings e.g. eviction, take place before that authority. These proceedings are an optional alternative to court proceedings. The 'ulosotonhaltija/överexekutor' is clearly not a court but an administrative authority, which in the aforementioned cases plays a judicial role. The abolition of the 'ulosotonhaltija/överexekutor' is envisaged and its functions as far as civil and commercial matters are concerned will be transferred to the courts.

In order to avoid any imbalance a second paragraph has been inserted in this Article according to which the expression 'court' in civil and commercial matters includes the Finnish 'ulosotonhaltija/överexekutor'.

7. Article Vb — Dispute between the master and a member of a ship's crew

108. Following specific requests from the Icelandic, Norwegian, Portuguese and Swedish delegations, Iceland, Norway, Portugal and Sweden have been included in this Article.

8. Article VI — Amendment of national legislation

109. This Article reproduces Article VI of the Protocol annexed to the Brussels Convention. The communication provided for in this Article will, however, not be made to the Secretary-General of the Council of the European Communities but to the depositary of the Lugano Convention.

PROTOCOL 2 ON THE UNIFORM INTERPRETATION OF THE CONVENTION

1. Introductory remarks

110. Without uniform interpretation, the unifying force of the Lugano Convention would be considerably reduced. In addition, a considerable number, if not the majority, of its provisions are reproduced from the Brussels Convention, which posed a further problem. As we know, in order to avoid such differences of interpretation, the Community Member States concluded a Protocol on 3 June 1971 giving jurisdiction to the Court of Justice of the European Communities to rule on the interpretation of the Brussels Convention. When applying that Convention, the courts of the Community Member States must comply with the interpretation given by the Court of Justice.

However, the Court of Justice could not be assigned jurisdiction to interpret the Lugano Convention which is not a source of Community law. Furthermore, the EFTA Member States could not have accepted a solution according to which an institution of the Communities would, as a court of last resort, rule on the Lugano Convention. Nor was it conceivable to assign such jurisdiction to any other international court or to create a new court since, *inter alia*, the Court of Justice of the European Communities already had jurisdiction under the 1971 Protocol to rule on the interpretation of the Brussels Convention and conflicts of jurisdiction between international courts had at all events to be avoided.

111. The solution adopted to resolve this somewhat complex situation (i.e. ensuring uniform interpretation of the Lugano Convention while taking account of the powers of the Court of Justice of the European Communities as regards the interpretation of the Brussels Convention, many of the provisions of which were reproduced in the Lugano Convention) is based on the principle of consultation and not on judicial hierarchy.

It was thus agreed that judgments delivered pursuant to the Lugano Convention or the Brussels Convention are to be communicated through a central body to each signatory State and acceding State and that meetings of representatives appointed by each such State are to be convened to exchange views on the functioning of the Convention. As regards legal technique, it was decided that the provisions aiming at uniform interpretation should be included in a Protocol

annexed to the Convention, the provisions of which would form an integral part thereof. It was furthermore agreed that two Declarations would be annexed to the Protocol. One of these Declarations was to be signed by the representatives of the Governments of the States signatories to the Lugano Convention which were members of the European Communities and the other by the representatives of the Governments of the States signatories to the Lugano Convention which were members of EFTA.

2. Preamble

112. The *first* recital in the preamble makes reference to Article 65 of the Lugano Convention. According to this Article, a Protocol 2 on the uniform interpretation of the Convention by the courts will form an integral part of the Convention.

The *second* recital refers to the substantial link between the Lugano Convention and the Brussels Convention.

As has already been mentioned, the Court of Justice of the European Communities has, under the Protocol of 3 June 1971, been entrusted with jurisdiction to give rulings on the interpretation of the provisions of the Brussels Convention. A starting point for the negotiations for the conclusion of the Lugano Convention was that those provisions of the Brussels Convention which were to be substantially reproduced in the Lugano Convention should be understood in the light of these rulings given up to the date of opening for signature of the latter Convention. The working party which drafted the Convention was aware of all those rulings delivered up to that date. The intention was to arrive at as uniform as possible an interpretation where the provisions in question were identical in the two Conventions. On the other hand, insofar as a provision of the Brussels Convention as interpreted by the Court of Justice of the European Communities, e.g. Article 16 (1), was found not to be acceptable, it was not reproduced unmodified in the Convention (for judgments of the Court of Justice, see Chapter VI).

The *third*, *fourth* and *fifth* recitals were included in the Preamble in order to stress the relevance of the rulings on the interpretation of the Brussels Convention given by the Court of Justice of the European Communities up to the time of the signature of the Lugano Convention.

The *sixth* recital confirms the wish of the Contracting States to prevent, in full deference to the independence of the courts, divergent interpretations.

3. Article 1

113. This Article relates only to decisions concerning provisions of the Lugano Convention. It provides

that the courts of each Contracting Party shall, when applying and interpreting that Convention, pay due account to the principles laid down by any *relevant decision* delivered by courts of the other Contracting Parties concerning provisions of the Lugano Convention. The expression 'any relevant decision' means in this Article those decisions delivered by courts of the Contracting Parties which according to Article 2 (1), first indent, have been transmitted to a central body, i.e. judgments delivered by courts of last instance and other judgments of particular importance which have become final.

114. This Article does not *explicitly* refer to decisions concerning the application and interpretation of those provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention.

It must be remembered that the courts of the Community Member States are the only courts required to apply the Brussels Convention and that when they interpret provisions of that Convention, they must respect the judgments of the Court of Justice. The Community Member States were, however, not in a position to commit the Court of Justice, a separate institution, to pay due regard to judgments of national courts in EFTA Member States. For their part, the representatives of the EFTA Member States thought that it would not be entirely fair to include a provision in the Protocol which expressly stipulated that the courts of these States had to take account not only of the decisions given by the courts of the other Contracting States but also of the judgments of the Court of Justice of the European Communities, while the latter would not be subject to any undertaking as regards the interpretation of the provisions of the Brussels Convention which were reproduced in the Lugano Convention.

115. It was, however, recognized that the courts of the Community Member States, when interpreting provisions of the Lugano Convention which are reproduced from the Brussels Convention, would understand those provisions in the same way as the identical provisions of the Brussels Convention and in accordance with the interpretations given in the rulings of the Court of Justice of the European Communities. It was therefore essential, in order to ensure as uniform an interpretation as possible of the Lugano Convention, that the courts of the EFTA Member States apply it in the same way as the courts of the Community Member States. But it was equally necessary for the Court of Justice, when interpreting provisions of the Brussels Convention which were repro-

duced in the Lugano Convention to pay due account in particular to the case law of the courts of the EFTA Member States.

116. In order to achieve this twofold objective two Declarations accompany the Convention. In one of them the representatives of the Governments of the States signatories to the Lugano Convention which are members of the Communities declare that they consider as appropriate that the Court of Justice, when interpreting the Brussels Convention, pay due account to the rulings contained in the case law of the Lugano Convention. In the other, the representatives of the EFTA States declare that they consider as appropriate that their courts, when interpreting the Lugano Convention, pay due account to the rulings contained in the case law of the Court of Justice of the European Communities and of the courts of the Member States of the European Communities in respect of provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention.

At the request of the representatives of the EFTA States, a list and the contents of the judgments delivered by the Court of Justice when interpreting the 1968 Convention is given in this report (see Chapter VI).

4. Article 2

117. As we have already said, it was agreed that a uniform interpretation of the common provisions of the Lugano and Brussels Conventions would be achieved by means of information and consultation. According to the first paragraph of this Article the Contracting States agree to set up a system of exchange of information concerning judgments delivered pursuant to the Lugano Convention as well as *relevant* judgments under the Brussels Convention. The expression 'relevant judgments' means, in this context, those judgments delivered pursuant to the Brussels Convention which are relevant for the interpretation of the Lugano Convention as well.

This system of exchange of information comprises:

- transmission to a central body by the competent national authorities of judgments delivered pursuant to the Lugano Convention or the Brussels Convention,
- classification of these judgments by the central body including, as far as necessary, the drawing up and publication of translations and abstracts,
- communication by the central body of the relevant documents to the competent national authorities of all signatories and acceding States to the Lugano Convention and to the Commission of the European Communities.

The abovementioned central body will, according to paragraph 2 of this Article, be the Registrar of the Court of Justice of the European Communities. The Registrar has signified his agreement to this, provided that the detailed arrangements for the system of exchange of information, and in particular the question of the translation of judgments not drawn up in an official language of the Communities, are worked out with the Court after the Diplomatic Conference and that the department of the Court receive the necessary aid and budgetary support. The competent national authorities referred to in the first and third indent of paragraph 1 of this Article are to be designated by each Member State concerned.

This system of exchange of information will, however, not include every judgment delivered by a national court pursuant to the Lugano Convention or every relevant judgment delivered pursuant to the Brussels Convention. For the purposes of the objective which the Protocol is aiming at it will suffice that judgments delivered by courts of last instance and the Court of Justice as well as judgments of other courts which are of particular importance and have become final are transmitted to the central body referred to in this Article (paragraph 1 first indent). Only those judgments will thus be classified by the central body and communicated pursuant to the third indent of paragraph 1 of this Article.

To the extent that the communication of documentation implies publication of translations and abstracts by the central body, it was agreed that such publication, in the interests of economy, could take a simplified form.

5. Article 3

118. In order to ensure a uniform interpretation of the common provisions of the Lugano and Brussels Conventions, it was deemed necessary that representatives appointed by each signatory or acceding State meet to exchange views on the functioning of the Lugano Convention. To this end Article 3 provides that a Standing Committee composed of representatives appointed by each signa-

tory or acceding State shall be set up. This Standing Committee is not intended to be a bureaucratic body but rather a forum where national experts could exchange their views on the functioning of the Convention and in particular on the case law as it develops in the various Contracting States, with the aim of fostering in that manner, as far as possible, uniformity in the interpretation of the Convention. No regular meetings of the Committee are provided for in the Protocol. Meetings of the Committee will, according to Article 4 (1) of the Protocol, be convened only at the request of a Contracting Party.

In this context it deserves to be emphasized that not only States which have already become parties to the Convention (either by ratifying it or by acceding to it), but also States which have signed the Convention but not yet become parties to it may appoint their representatives as members of the Standing Committee. This solution was adopted since a distinction between signatory and Contracting States would suggest that certain States might sign the Lugano Convention without any intention of ratifying it.

Divergent views were expressed as to whether the Standing Committee should be composed of judges or civil servants. It was decided that it would be for each State to appoint its representatives on the Committee. Thus, it may well be that certain States will appoint judges whereas other States may appoint civil servants or others. It goes without saying that each State is free to decide how and for which period of time anyone is appointed to represent it on the Committee.

Because of the links between the Lugano Convention and the Brussels Convention, paragraph 3 of this Article provides that representatives of the European Communities (i.e. of the Commission, the Court of Justice and the General Secretariat of the Council) and of EFTA may attend the meetings of the Committee as observers.

If necessary, it will be for the Committee to establish its own rules of procedure.

6. Article 4

119. The provisions of paragraph 1 of this Article concern the convocation and the tasks of the Standing Committee. As already mentioned, the meetings of the Committee will be convened at the request of a Contracting Party for the purpose of exchanging views on the functioning of the Convention. In this context it deserves to be emphasized that a meeting of the Committee cannot be convened at the request of a State which has only signed the Convention but not yet become a party

to it, even though the Committee, according to Article 3 (2), will be composed of representatives appointed by each signatory State or acceding State. The task of convening the Committee has been entrusted to the depositary of the Convention.

There are no limitations as to the questions relating to the functioning of the Convention which oblige the depositary to convene meetings of the Committee at the request of a Contracting Party.

In view of the purpose of the Protocol, Article 4 provides that meetings of the Committee will be convened for the purpose of exchanging views in particular on the development of the case law as communicated under the first indent of Article 2 (1). The purpose of this provision is not, however, to invest the Committee with the role of a higher body which would assess the judgments given by national courts. It is rather a body, which, by examining such judgments, would identify divergences of interpretation and, as far as possible, foster uniformity in the interpretation of the Convention.

Article 57 (1) of the Convention provides that it will not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. According to Protocol No 3, provisions which govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities will be treated in the same way as conventions referred to in Article 57 (1).

Provisions which in relation to particular matters govern jurisdiction may, irrespective of whether such provisions are contained in a convention or in a Community act, amount to a change of the rules of jurisdiction contained in the Convention without the agreement of all the Contracting Parties. Therefore paragraph 1 of this Article further provides that meetings of the Committee will be convened for exchanging views on the application of Article 57 of the Convention. Paragraph 2 of Protocol No 3 on Community acts makes provision for a similar procedure. Thus the Committee will provide a forum where views can be exchanged *inter alia* on the provisions governing jurisdiction in particular matters adopted or envisaged in Community acts.

In the light of these exchanges of views it may appear that an amendment of the Convention would be appropriate. This may be the case if the Committee, when examining the case law com-

municated under Article 2, were to identify divergences of interpretation arising from a lack of clarity in one or more of the provisions of the Convention. Therefore, paragraph 2 of the Article provides that the Committee may also examine the appropriateness of starting on particular topics a revision of the Convention and make recommendations.

This power of the Committee should not be confused with the right for any Contracting State under Article 66 of the Convention to request the revision of the Convention. The powers and procedures in that Article differ radically from those provided for in Article 4 (2) of the Protocol. A recommendation made by the Committee is thus not to be assimilated with a request by a Contracting State under Article 67 of the Convention for a revision conference. Only a Contracting State but not the Committee may request the depositary of the Convention to convene a revision conference. Neither is a recommendation of the Committee a prerequisite for the right of a Contracting State to request the revision of the Convention.

PROTOCOL 3 ON THE APPLICATION OF ARTICLE 57

120. This Protocol is in response to the problems which might arise from any provisions on jurisdiction and the recognition and enforcement of judgments appearing in Community acts.

1. Concern of the States party to the Lugano Convention

121. The entirely justified concern of both Community and EFTA Member States has been vigorously expressed in regard to Community acts. Why is this?

(a) For the Community Member States, it is because they have, in a manner of speaking, a dual personality. They are sovereign States. But they are also members of the Communities and are thus bound, by virtue of this latter point, to comply with the obligations to which they have subscribed under the Treaties establishing the European Communities (ECSC, EEC and Euratom). Under those Treaties, it is the Council which is competent to adopt Regulations and Directives which in specific matters may possibly concern jurisdiction and the recognition and enforcement of judgments, according to the requirements of those Communities⁽¹⁰⁾.

The concern of these States was threefold:

— the need to comply with the obligations they have entered into by becoming party to the Treaties establishing the Communities,

— the need to avoid hampering any development taking place in the context of the Treaties and relating to the powers of the Community institutions,

— the need to respect the commitments entered into by the Lugano Convention *vis-à-vis* the EFTA Member States.

(b) For the EFTA Member States, because they feared that the guarantees offered them by the Lugano Convention regarding jurisdiction and the recognition and enforcement of judgments could, in certain areas, be practically wiped out by a Community act. In particular, the representatives of the EFTA Member States voiced the fear that the protection guaranteed by the Lugano Convention, particularly by Article 3, to defendants domiciled in an EFTA Member State might be undermined by a Community act. Such defendants might thus be treated differently from defendants domiciled in a Community Member State, or even be put in the same situation as defendants domiciled in third States. For example, for the representatives of these States it was inconceivable to accept that it should be possible for a person domiciled in the territory of an EFTA Member State (e.g. Norway) to be required to appear before the courts of a Member State of the Communities (such as France) on the basis of a Community act which they had played no part in drawing up and on the basis of a criterion of jurisdiction not provided for in the Lugano Convention. In any event, for these States, it was unacceptable that it should be possible for a judgment delivered on the basis of such a rule of jurisdiction to be recognized and enforced in their territory under the Lugano Convention. These fears would seem to be as well-founded as those of the Member States of the Communities.

In short, for the EFTA Member States, the inclusion of rules of jurisdiction and of recognition and enforcement of judgments in Community acts could, in the absence of any correcting mechanism, be regarded as empowering the Community Member States to amend the Lugano Convention unilaterally.

2. Response to this concern

122. The question for the authors of the Convention was how to respond to these various concerns, all equally justified, and to work out a solution that could be accepted by all the Contracting Parties. We shall try and answer two questions, the problem having been resolved: Why was it possible to solve the problem? How was it solved?

It was possible to respond to this concern because there existed on both sides a conviction or, one might prefer to say, a deep awareness that despite its difficulties the problem posed could and had to be resolved, in accordance with the principles of public international law, because of the fundamental objectives of the Lugano Convention, i.e. the granting of guarantees to a defendant domiciled in the territory of a Contracting State and the free movement of judgments.

In addition, it emerged during the discussions that despite its theoretical aspect the problem had only a very relative impact in practice; thus the Member States of the Communities stressed the fact that in 30 years no Community act containing provisions on jurisdiction had been adopted. It should however be noted that a draft Regulation on the Community trade mark containing such jurisdiction rules is currently in preparation.

Also, some Community Member States made it clear that for practical reasons they were not in favour of Community acts including provisions relating to jurisdiction and to the recognition and enforcement of judgments. For these States, the issue had to be settled by the Brussels Convention, even if that meant its being revised, amended or supplemented, since for the practitioner (lawyers, judges, and others) this Convention constituted a Community code which was becoming well known. If these provisions were scattered throughout numerous Community instruments it would weaken the scope of this code and make it more difficult to apply. These States were well aware of the importance that Community acts might have in this matter and they considered that any resort to these instruments, in the areas in question, should continue to be entirely exceptional.

3. Solution adopted

123. How was the problem resolved?

The solution is to be found in Protocol 3 and in the Declaration by the Member States of the Communities which supplements it.

What is involved in this solution that has given satisfaction to both sides?

Protocol 3 and the Declaration supplementing it form a whole.

(a) Protocol 3

124. *In paragraph 1*, for the purposes of the Lugano Convention, Protocol No 3 treats Community acts in the same way as the conventions which have been concluded on particular matters and whose effect on the Lugano Convention is determined by Article 57 of the Convention (see points 79 to 83). In the view of the representatives of the Community Member States, there is no difference, except as regards the way they were drawn up, between these two types of instrument.

They pointed out that if the EFTA Member States were willing to entertain the possibility for the States party to the Lugano Convention of the rules of that Convention being amended by conventions concluded in particular areas (transport, etc.) they could also agree to the Community amending the Convention by means of Community acts. These representatives also stressed that to be approved a Community act required in principle the agreement of the 12 Member States, whereas a convention on a particular matter, whose rules could depart from those of the Lugano Convention, could be concluded between two States only. In their view, there was accordingly no substantive difference between the two types of instrument: conventions on particular matters and Community acts.

The representatives of the EFTA Member States were able to accept this view only for the purposes of this Convention and in conjunction with paragraph 2 of Protocol 3 and the Declaration supplementing it (see point 127 below). They also said that their States had no wish to obstruct the Communities' proper and specific demands that they preserve a certain freedom to develop Community law.

125. What are the consequences of paragraph 1 of Protocol 3 which, for the purposes of this Convention, treats Community acts in the same way as conventions concluded on particular matters?

It will be possible for a person domiciled in the territory of a Contracting State (such as Switzerland) to be summoned to appear in the territory

of another Contracting State belonging to the European Communities (such as Belgium) on the basis of a rule of jurisdiction which is not laid down in the Lugano Convention but results from a Community act (just like a convention on a particular matter).

A judgment handed down by a court in a Community Member State — which has jurisdiction by virtue of the Community act which derogates, as regards jurisdiction, from the Lugano Convention — will be recognized and enforced in the other Community Member States. However, recognition and enforcement may be refused under the conditions laid down in Article 57 (4), i.e. in an EFTA Member State where the person against whom recognition or enforcement of the decision is being sought is domiciled, unless such recognition and enforcement are permitted under the law of the State.

It should be noted that paragraph 1 of the Protocol refers only to Community acts and not to the legislation of the Community Member States where this has been harmonized pursuant to those acts, in this case by Directives. The assimilation of Community acts to conventions concluded on particular matters can only refer to an act which is equivalent to such a convention and cannot therefore extend to national legislation.

Moreover, if a national legislation, departing from a Directive, were to introduce rules of jurisdiction derogating from the Lugano Convention, the situation would be different, i.e. it would be a question of the responsibility of the State which had taken such measures.

As explained above, the representatives of the EFTA Member States were able to agree to Community acts being treated in the same way as conventions concluded on particular matters only subject to a Declaration by the Community Member States that they will comply with the rules on jurisdiction and recognition and enforcement of judgments established by the Lugano Convention (for comments on that Declaration, see point 127 below).

domiciled outside the Community and therefore in an EFTA Member State.

Paragraph 2 has the effect of a *pactum de negotiando*. If one of the Contracting Parties considers there is incompatibility between the Community act and the Lugano Convention, negotiations will be initiated to amend, if necessary, the Lugano Convention. To this end the review procedure provided for in Article 66 of the Lugano Convention will apply without prejudice to the possibility of a meeting of the Standing Committee set up by Article 3 of Protocol 2 being convened to hear this request in accordance with Article 4 of that Protocol.

Negotiations will have to begin immediately to establish rapidly whether or not there is any need to amend the Lugano Convention. Paragraph 2 contains only an undertaking to contemplate an amendment rather than actually to amend the Convention.

Moreover, paragraph 2 of Protocol 3 does not contain any undertaking, nor could it, to contemplate an amendment to a Community act. Such negotiations would lie outside relations between the States party to the Convention and should be undertaken with the Community institutions, as Community acts fall within the competence of the latter.

It should be noted that the procedure laid down in paragraph 2 could be instigated equally well by a Community Member State or by an EFTA Member State. An EFTA Member State will be able in particular to request the amendment of the Lugano Convention to avoid derogating measures being taken through a Community act in respect of persons domiciled in its territory. On the other hand, a Community Member State could have an interest in adapting the Lugano Convention so that judgments delivered in its territory can be recognized and executed in all EFTA Member States, to which Article 57 (4) might prove an obstacle.

(b) *The Declaration by the Governments of the Member States of the Communities*

126. Paragraph 2 of Protocol 3 refers to the case where, notwithstanding the precautions taken, in the view of one of the Contracting Parties, a provision of a Community act is not compatible with the Lugano Convention. For example, this is the situation that might arise if the Community act provided for the jurisdiction of the court of the plaintiff's domicile *vis-à-vis* a defendant who was

127. Protocol 3 is accompanied by an important Declaration by the Community Member States. This unilateral Declaration represents an essential element of the solution adopted, the other two being the placing of Community acts on the same footing as conventions on particular matters and the undertaking to negotiate if there is any divergence between a Community act and the Lugano Convention.

As we have explained, the Community Member States are caught between two stools. On the one hand, they have to respect the institutional machinery laid down by the Treaties establishing the Communities while on the other they must respect the undertakings they entered into under the Lugano Convention in respect of the EFTA Member States.

The Declaration is important because the Community Member States, without forgetting that they belong to the Communities and with due respect for its institutions:

- (a) take into consideration the undertakings which they have entered into with regard to the EFTA Member States. For those States the Lugano Convention is therefore an instrument to be complied with. On their side there is therefore what was regarded as a 'best efforts' clause aimed at avoiding as far as possible any divergence between the provisions of Community acts and those of the Lugano Convention;
- (b) indicate their concern not to jeopardize the unity of the legal system established by the Lugano Convention. This is an obvious concern if we consider that the Lugano Convention, through rules based firmly on the Brussels Convention, is intended to guarantee the free movement of judgments among the great majority of West European States, i.e. including judgments delivered by the courts of the Member States of the Communities;
- (c) the Community Member States consequently undertake, when drafting Community acts, to take all the steps in their power to ensure that the rules contained in the Lugano Convention are complied with, particularly as regards the protection which the Convention gives a

defendant domiciled in a Contracting State. The result is that when a Community act is discussed in the Council of the Communities, particular attention will have to be paid by each of the Member States to the rules of the Lugano Convention.

To sum up, the Declaration represents a moral and political undertaking, made in good faith by the Community Member States, to keep intact the efforts towards unification which are being made by the Lugano Convention.

4. Conclusion

128. The questions raised by Community acts were amongst the most difficult with which the drafters of the Lugano Convention had to deal. A solution was reached thanks to the constructive will of the representatives of all the States concerned. This compromise solution appears to us to allay the concern shown on both sides. To summarize, it may be said to be a three-storey edifice:

- (a) it places Community acts on the same footing as conventions on particular matters, which corresponds to the wishes of the Community Member States;
- (b) the Community Member States have given a unilateral undertaking to make every effort to ensure that the unity of the legal system established by the Lugano Convention is not put in jeopardy, which satisfies the EFTA Member States;
- (c) as a corrective, there is the undertaking to seek a negotiated solution in the case of a divergence between a Community act and the Lugano Convention. As we have stated, this satisfies both sides.

The compromise thus appears to be perfectly balanced.

CHAPTER V

DECLARATIONS ANNEXED TO THE CONVENTION

129. The Lugano Convention is supplemented by three Declarations. The first concerns Protocol 3 which relates to Community acts (see points 120 to 128) and the two others Protocol 2 on the uniform interpretation of the Convention (see points 110 to 119).

CHAPTER VI

JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES CONCERNING THE INTERPRETATION OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968

1. General

130. The Protocol of 3 June 1971 confers on the Court of Justice of the European Communities jurisdiction to rule on the interpretation of the Brussels Convention.

Article 30 of the Accession Convention of 9 October 1978 (Denmark, Ireland, United Kingdom) provides that the Court of Justice also has jurisdiction to rule on the interpretation of that Convention. Article 10 of the Convention of 25 October 1982 on the accession of Greece contains a similar provision.

As at 1 June 1988 the six original Member States of the Communities together with Denmark, Ireland and the United Kingdom are parties to the Protocol.

On the scope of the Protocol, reference should be made to the Jenard report (pp. 66 to 70) and the Schlosser report (paragraphs 255 and 256).

It should be noted, however, that the Protocol makes provision for two forms of reference: reference for a preliminary ruling and reference in the interests of the law. The latter possibility has not so far been used. Reference for a preliminary ruling means that a national court required to rule on a question of interpretation of the Convention or the Protocol refers the matter to the Court of Justice and stays its proceedings, pending the latter's decision.

Since the Protocol came into force on 1 September 1975, nearly 60 judgments have been handed down by the Court (see point 3 below) and a number of cases are currently pending (see point 4 below).

As stated in the comments on Protocol 2 (see points 112 and 116), in the negotiations on the Lugano Convention it was agreed that the provisions of the Brussels Convention should be construed as interpreted by the Court of Justice and that the report would mention the various judgments handed down by the Court.

This Chapter meets the latter stipulation.

The judgments are given not in chronological order but by reference to those Articles of the Brussels Convention, the Protocol annexed ther-

eto and the 1971 Protocol which have been interpreted, since this seems a more convenient arrangement.

This Chapter gives only the operative part of the decision and not, barring exceptions, the grounds. For it is not the purpose of this report to study the judgments of the Court of Justice but merely to indicate how it has interpreted a number of Articles.

2. Content of the judgments ⁽¹⁾

131. (1) *Application of the Convention*

National procedural laws are set aside in the matters governed by the Convention in favour of the provisions thereof (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

(2) Article 1, first paragraph: Civil and commercial matters

1. The Court held that the concept of civil and commercial matters must be regarded as autonomous. It ruled that 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 (judgment of 14 October 1976 in Case 29/76 LTU v. Eurocontrol (1976) ECR 1541-1552).

2. It confirmed its decision in its judgment of 16 December 1980 in Case 814/79 Netherlands State v. Ruffer to the effect that the concept of civil and commercial matters does not include the recovery of the costs incurred by the agent responsible for administering public waterways, in this instance the Netherlands State, in the removal of a wreck pursuant to an international Convention ((1980) ECR 3807-3822).

3. Contracts of employment come within the scope of the Convention (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

(3) Article 1, second paragraph**(1) (a) Status of persons**

1. Judicial decisions authorizing provisional measures in the course of proceedings for divorce

do not fall within the scope of the Convention 'if those measures concern or are closely connected with either questions of the status of the persons involved in the divorce proceedings or proprietary legal relations resulting directly from the matrimonial relationship or the dissolution thereof' (judgment of 27 March 1979 in Case 143/78 J. De Cavel v. L. De Cavel (1979) ECR 1055-1068).

2. However, the Convention is applicable, on the one hand, to the enforcement of an interlocutory order made by a French court in divorce proceedings whereby one of the parties to the proceedings is awarded a monthly maintenance allowance and, on the other hand, to an interim compensation payment, payable monthly, awarded to one of the parties by a French divorce judgment pursuant to Article 270 *et seq.* of the French Civil Code.

The Court held that the scope of the Convention extends to maintenance obligations and that the treatment of an ancillary claim is not necessarily linked to that of the principal claim.

Ancillary claims come within the scope of the Convention according to the subject matter with which they are concerned and not according to the subject matter involved in the principal claim (judgment of 6 March 1980 in Case 120/79 L. De Cavel v. J. De Cavel (1980) ECR 731).

(b) Matrimonial relationships

1. The term 'rights in property arising out of a matrimonial relationship' includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof (judgment of 27 March 1979 in Case 143/78 J. De Cavel v. L. De Cavel (1979) ECR 1055-1068).

2. An application for provisional measures to secure the delivery up of a document in order to prevent it from being used as evidence in an action concerning a husband's management of his wife's property does not fall within the scope of the Convention if such management is closely connected with the proprietary relationship resulting directly from the marriage bond (judgment of 31 March 1982 in Case 25/81 C. H. W. v. G. J. H. (1982) ECR 1189-1205).

(2) Bankruptcy

A decision such as that of a French civil court based on Article 99 of the French Law of 13 July

1967, ordering the *de facto* manager of a legal person to pay a certain sum into the assets of a company must be considered as given in the context of bankruptcy or analogous proceedings (judgment of 22 February 1979 in Case 133/78 Gourdain v. Nadler (1979) ECR 733-746).

(4) Article 5 (1): Contractual matters

1. The place of performance of the obligation in question is to be determined in accordance with the law which governs the obligations in question according to the rules of conflict of laws of the court before which the matter is brought (judgment of 6 October 1978 in Case 12/76 Tessili v. Dunlop (1976) ECR 1473-1487).

2. If the place of performance of a contractual obligation has been specified by the parties in a clause which is valid according to the national law applicable to the contract, the court for that place has jurisdiction to take cognizance of disputes relating to that obligation under Article 5 (1), irrespective of whether the formal conditions provided for under Article 17 have been observed (judgment of 17 January 1980 in Case 56/79 Zelger v. Salinitri (1980) ECR 89-98).

3. The word 'obligation' contained in Article 5 (1) refers to the contractual obligation forming the basis of the legal proceedings, namely the obligation of the grantor in the case of an exclusive sales contract (judgment of 6 October 1976 in Case 14/76 De Bloos v. Bouyer).

4. The plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5 (1) of the Convention even when the existence of the contract is in dispute between the parties (judgment of 4 March 1982 in Case 38/81 Effer v. Kantner (1982) ECR 825-836).

5. The obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract, i.e. that of the place where the work is carried out (judgment of 26 May 1982 in Case 133/82 Ivenel v. Schwab (1982) ECR 1891-1902).

6. The concept of matters relating to a contract is an autonomous concept. Obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an

association and its members by virtue of membership are 'matters relating to a contract', whether the obligations in question arise simply from the act of becoming a member or from decisions made by organs of the association (judgment of 22 March 1983 in Case 34/82 Peters v. Znav (1983) ECR 987-1004).

7. For the purpose of determining the place of performance within the meaning of Article 5 (1), the obligation to be taken into consideration in an action for the recovery of fees, commenced by an architect commissioned to prepare plans for the building of houses, is the contractual obligation actually forming the basis of the legal proceedings.

In the case in point that obligation consists of a debt for a sum of money payable at the defendant's permanent address.

The place of payment is determined by the law applicable to the contract (judgment of 15 January 1987 in Case 266/85 Shenavai v. Kreischer, OJ No C 39, 17. 2. 1987, p. 3).

8. (a) On the question of whether a claim for compensation for sudden and premature termination of an agreement was a matter relating to a contract or to quasi-delict, the Court of Justice replied that 'proceedings relating to the wrongful repudiation of an independent commercial agency agreement and the payment of commission due under such an agreement are proceedings in matters relating to a contract within the meaning of Article 5 (1) of the Brussels Convention'.
- (b) It repeated that matters relating to a contract should be regarded as an '*autonomous*' concept (judgment of 22 March 1983 in Case 34/82 Peters v. Znav).
- (c) Compensation for wrongful repudiation of an agreement is based on failure to comply with a contractual obligation.
- (d) Lastly, the Court referred to the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, which includes (Article 10) within the field of the law applicable to a contract the consequences of total or partial non-performance of the obligations arising from it and hence the contractual liability of the party responsible for non-perform-

ance (judgment of 8 March 1988 in Case 9/87 Arcado v. Haviland, OJ No C 89, 6. 4. 1988, p. 9).

(5) *Article 5 (2): Maintenance*

The subject of maintenance obligations falls within the scope of the Convention even if the claim in question is ancillary to divorce proceedings (judgment of 6 March 1980 in Case 120/79 L. De Cavel v. J. De Cavel (1980) ECR 731).

(6) *Article 5 (3): Tort or delict*

1. The expression 'place where the harmful event occurred' 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.

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 (judgment of 30 November 1976 in Case 21/76 Bier, Reinwater v. Mines de potasse d'Alsace (1976) ECR 1735-1748).

2. (a) The term 'tort, delict or quasi-delict' in Article 5 (3) of the Convention must be regarded as an autonomous concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1).
- (b) A court which has jurisdiction under Article 5 (3) to entertain an action with regard to tortious matters does not have jurisdiction to entertain that action with regard to other matters not based on tort (judgment of 27 September 1988 in Case 189/87 Kalfelis v. Schröder, OJ No C 281, 4. 11. 1988, p. 18).

(7) *Article 5 (5): Branch, agency or other establishment*

1. 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) (judgment of 6 October 1976 in Case 14/76 De Bloos v. Bouyer (1976) ECR 1497-1511).

2. The Court has given an *autonomous* interpretation to the concepts of 'operations of a branch, agency or other establishment':

(a) the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension;

(b) the concept of 'operations' comprises:

(1) actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there,

(2) actions relating to undertakings which have been entered into at the abovementioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established,

(3) actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment has engaged at the place in which it is established on behalf of the parent body (judgment of 22 November 1978 in Case 33/78 Somafer v. Ferngas (1978) ECR 2183-2195).

3. An 'independent commercial agent', inasmuch as he is free to arrange his own work and the undertaking which he represents may not prevent him from representing several firms at the same time and he merely transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch (judgment of 18 March 1981 in Case 139/80 Blanckaert & Willems v. Trost (1981) ECR 819-830).

4. Article 5 (5) must be interpreted as applying to a case in which a legal person established in a

Contracting State does not operate any dependent branch, agency or other establishment in another Contracting State but nevertheless pursues its activities there by means of an independent undertaking which has the same name and identical management, which negotiates and conducts business in its name and which it uses as an extension of itself (judgment of 9 December 1987 in Case 218/86 Schotte v. Rothschild, OJ No C 2, 6. 1. 1988, p. 3).

(7a) *Article 6 (1): Co-defendants*

For the application of Article 6 (1) of the Convention there must exist between the various actions brought by the same plaintiff against different defendants a link such that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (judgment of 27 September 1988 in Case 189/87 Kalfelis v. Schröder, OJ No C 281, 4. 11. 1988, p. 18).

(8) *Article 13: Sale of goods on instalment credit terms and loans repayable by instalments*

The Court ruled in favour of an autonomous concept of the sale of goods on instalment credit terms albeit implicitly in that it is not to be understood to extend to the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of bills of exchange spread over a period.

The jurisdictional advantage is to be restricted to buyers who are in need of protection (judgment of 21 June 1978 in Case 150/77 Bertrand v. Ott (1978) ECR 1431-1447).

It should be noted that this Article was amended in the 1978 Convention in line with the judgment.

(9) *Article 16 (1): Immovable property*

1. The concept of 'matters relating to ... tenancies of immovable property' must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor.

Article 16 (1) must not be given a wider interpretation than is required by its objective (judgment of 14 December 1977 in Case 73/77 Sanders v. Van Der Putte).

2. Article 16 (1) applies to all lettings of immovable property (judgment of 15 January 1985 in

Case 241/83 Rösler v. Rottwinkel (1985) ECR 99-129).

This not uncontroversial judgment was not followed in the Lugano Convention (see points 50 and 51). Nor was it in line with the views of those who framed the 1968 Convention (see Jenard report, page 35 and Schlosser report, paragraph 164).

3. Article 16 (1) must be interpreted as meaning that in a dispute as to the existence of a lease relating to immovable property situated in two Contracting States (Belgium and the Netherlands in the case in point), exclusive jurisdiction over the property situated in each Contracting State is held by the courts of that State (judgment of 6 July 1988 in Case 158/87 Scherens v. Maenhout and Van Poucke, OJ No C 211, 11. 8. 1988, p. 7).

(10) *Article 16 (4): Patents*

See the judgment of 15 November 1983 in Case 288/82 Duijnste v. Goderbauer (1983) ECR 3663-3679.

(11) *Article 16 (5): Applications to oppose enforcement*

Applications to oppose enforcement, as provided for under paragraph 767 of the German Code of Civil Procedure, fall, as such, within the jurisdiction provision contained in Article 16 (5) of the Convention; that provision does not however make it possible, in an application to oppose enforcement made to the courts of the Contracting State in which enforcement is to take place, to plead a set-off between the right whose enforcement is being sought and a claim over which the courts of that State would have no jurisdiction if it were raised independently.

The Court held that this amounts to a clear abuse of the process on the part of the plaintiff for the purpose of obtaining indirectly from the German courts a decision regarding a claim over which those courts have no jurisdiction under the Convention (judgment of 4 July 1985 in Case 220/84 AS-Autoteile v. Malhe (1985) ECR 2267-2279).

(12) *Article 17: Agreements conferring jurisdiction*

1. (a) 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 is fulfilled only if the contract signed by both parties contains an express reference to those general conditions and

(b) 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 is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care (judgment of 14 December 1976 in Case 24/76 Colzani v. Ruwa (1976) ECR 1831-1843).

2. (a) In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 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 and

(b) 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 (judgment of 14 December 1976 in Case 25/76 Segoura v. Bonakdarian (1976) ECR 1851-1863).

3. (a) The first paragraph of Article 17 cannot be interpreted as prohibiting an agreement under which the two parties to a contract for sale, who are domiciled in different States, can be sued only in the courts of their respective States and

(b) in the above case the Article cannot be interpreted as prohibiting the court before which a dispute has been brought in pursuance of such a clause from taking into account a set-off connected with the legal relationship in dispute (judgment of 9 November 1978 in Case 23/78 Meeth v. Glacetal (1978) ECR 2133-2144).

4. (a) National procedural laws are set aside in the matters governed by the Convention in favour of the provisions thereof and
- (b) in judicial proceedings instituted after the coming into force of the Convention, clauses conferring jurisdiction included in contracts of employment concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).
5. If the place of performance of a contractual obligation has been specified by the parties in a clause which is valid according to the national law applicable to the contract, the court for that place has jurisdiction to take cognizance of disputes relating to that obligation under Article 5 (1) of the Convention, irrespective of whether the formal conditions provided for under Article 17 have been observed (judgment of 17 January 1980 in Case 56/79 Zelger v. Salinitri (1980) ECR 89-98).
6. Article 17 must be interpreted as meaning that the legislation of a Contracting State may not allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation (judgment of 24 June 1981 in Case 150/81 Elefanten Schuh v. Jacqumain (1981) ECR 1671-1690).
7. Article 17 must be interpreted as meaning that where a contract of insurance, entered into between an insurer and a policy-holder and stipulated by the latter to be for his benefit and to enure for the benefit for third parties, contains a clause conferring jurisdiction relating to proceedings which might be brought by such third parties, the latter, even if they have not expressly signed the said clause, may rely upon it (judgment of 14 July 1983 in Case 201/82 Gerling v. Amministrazione del tesoro dello Stato (1983) ECR 2503-2518).
8. On bills of lading, the Court handed down a judgment to the effect that:
- (a) the bill of lading issued by the carrier to the shipper may be regarded as an 'agreement' 'evidenced in writing' between the parties, within the meaning of Article 17. The jurisdiction clause applies if the parties have signed the bill of lading. If the clause conferring jurisdiction appears in the general conditions, the shipper must have expressly accepted it in writing. The wording of the bill of lading signed by both parties must expressly refer to the general conditions. However, if the carrier and the shipper have a continuing business relationship, which is governed as a whole by the carrier's general conditions, the clause conferring jurisdiction applies even without acceptance in writing;
- (b) the bill of lading issued by the carrier to the shipper may be regarded as an 'agreement' 'evidenced in writing', within the meaning of Article 17, *vis-à-vis* a third party holding the bill only if that third party is bound by an agreement with the carrier under the relevant national law and if the bill of lading, as 'evidence in writing' of the 'agreement', satisfies the formal conditions in Article 17 (judgment of 19 June 1984 in Case 71/83 Russ v. Nova, Goeminne (1984) ECR 2417-2436).
9. The court of a Contracting State before which the applicant, without raising any objection as to the court's jurisdiction, enters an appearance in proceedings relating to a claim for a set-off which is not based on the same contract or subject-matter as the claims in his application and in respect of which there is a valid agreement conferring exclusive jurisdiction on the courts of another Contracting State within the meaning of Article 17 has jurisdiction by virtue of Article 18 (judgment of 7 March 1985 in Case 48/84 Spitzley v. Sommer (1985) ECR 787-800).
10. The first paragraph of Article 17 must be interpreted as meaning that the formal requirements therein laid down are satisfied if it is established that jurisdiction was conferred by express oral agreement, that written confirmation of that agreement by *one* of the parties was received by the other and that the latter raised no objection (judgment of 11 July 1985 in Case 221/84 Berghoefer v. ASA (1985) ECR 2699-2710).
11. An agreement conferring jurisdiction is not to be regarded as having been concluded for the benefit of only one of the parties, within the meaning of the third paragraph of Article 17 of the Convention, where all that is established is that the parties have agreed that a court or the courts of the Contracting State in which that party is domiciled are to have jurisdiction.
- The Court held that clauses which expressly state the name of the party for whose benefit they were agreed and those which, whilst specifying the courts in which either party may sue the other, give one of them a wider choice of courts must be

regarded as clauses whose wording shows that they were agreed for the exclusive benefit of one of the parties (judgment of 24 June 1986 in Case 22/85 *Anterist v. Credit Lyonnais*, OJ No C 196, 5. 8. 1986).

12. Article 17 must be interpreted as meaning that where a written agreement containing a jurisdiction clause and stipulating that the agreement can be renewed only in writing has expired but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in Article 17 if, under the law applicable, the parties could validly renew the original contract otherwise than in writing, or if, conversely, either party has confirmed in writing either the jurisdiction clause or the group of clauses which have been tacitly renewed and of which the jurisdiction clause forms part, without any objection on the part of the other party to whom such confirmation has been notified (judgment of 11 November 1986 in Case 313/85 *Iveco Fiat v. Van Hool*, OJ No C 308, 2. 12. 1986, p. 4).

(13) *Article 18: Submission to the jurisdiction*

1. (a) Article 18 applies even where the parties have by agreement designated a court in another State since Article 17 is not one of the exceptions laid down in Article 18 and
- (b) Article 18 is applicable where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised (judgment of 24 June 1981 in Case 150/81 *Elefanten Schuh v. Jacqmain* (1981) ECR 1671-1690).

(See also the judgments of 22 October 1981 in Case 27/81 *Rohr v. Ossberger*, 31 March 1982 in Case 25/81 *C. H. W. v. G. J. H* and 14 July 1983 in Case 201/82 *Gerling v. Amministrazione del tesoro dello Stato*.)

2. The court of a Contracting State before which the applicant, without raising any objection as to the court's jurisdiction, enters an appearance in proceedings relating to a claim for a set-off which is not based on the same contract or subject matter as the claims in his application and in respect of which there is a valid agreement conferring exclusive jurisdiction on the courts of another Contracting State within the meaning of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters has jurisdiction by virtue of Article 18 of that Convention (judgment of 7 March 1985 in Case 48/84 *Spitzley v. Sommer* (1985) ECR 787-800).

(14) *Article 19: Examination of jurisdiction*

Article 19 requires the national court to declare of its own motion that it has no jurisdiction whenever it finds that a court of another Contracting State has exclusive jurisdiction under Article 16 of the Convention, even in an appeal in cassation where the national rules of procedure limit the court's review to the grounds raised by the parties (judgment of 15 November 1983 in Case 288/82 *Duijnste v. Goderbauer* (1983) ECR 3663-3679).

(15) *Article 21: Lis pendens*

1. See the judgment of 7 June 1984 in Case 129/83 *Zelger v. Salinitri*.
2. The term *lis pendens* used in Article 21 covers a case where a party brings an action before a court in a Contracting State for a declaration that an international sales contract is inoperative or for the termination thereof whilst an action by the other party to secure performance of the said contract is pending before a court in another Contracting State.

The Court also ruled that the terms used in Article 21 to determine a situation of *lis pendens* are to be regarded as *autonomous* concepts (judgment of 8 December 1987 in Case 144/86 *Gubisch v. Palumbo*, OJ No C 8, 13. 1. 1988, p. 3).

(16) *Article 22: Related actions*

Article 22 does not confer jurisdiction.

It applies only where related actions are brought before courts of two or more Contracting States (judgment of 24 June 1981 in Case 150/81 *Elefanten Schuh v. Jacqmain* (1981) ECR 1671-1690).

(17) *Article 24: Provisional, including protective, measures*

1. The inclusion of provisional measures in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect (judgment of 27 March 1979 in Case 143/78 J. De Cavel v. L. De Cavel (1979) ECR 1055-1068).

2. On the enforcement of judicial decisions authorizing provisional and protective measures, see Article 27 below (judgment of 21 May 1980 in Case 125/79 Denilauler v. Couchet (1980) ECR 1553).

3. Article 24 may not be relied on to bring within the scope of the Convention provisional measures relating to matters which are excluded from it (judgment of 31 March 1982 in Case 25/81 C. H. W. v. G. J. H. (1982) ECR 1189-1205).

(18) *Article 26: Recognition*

A foreign judgment recognized by virtue of Article 26 must *in principle* have the same effects in the State in which enforcement is sought as it does in the State in which the judgment was given.

Subject, however, it should be added, to the grounds for non-recognition laid down in the Convention (judgment of 4 February 1988 in Case 145/86 Hoffmann v. Krieg. See also in the same case the Court's interpretation of Articles 27 (1) and (3), 31 and 36, OJ No C 63, 8. 3. 1988, p. 6).

(19) *Article 27 (1): Public policy*

Recourse to the public policy clause, which is to be had only in exceptional cases, ... is in any event not possible where the problem is one of compatibility of a foreign judgment with a domestic judgment. That problem must be resolved on the basis of Article 27 (3), which covers the case of a foreign judgment irreconcilable with a judgment given between the same parties in the State in which enforcement is sought (judgment of 4 February 1988 in Case 145/86 Hoffmann v. Krieg, OJ No C 63, 8. 3. 1988, p. 6).

(20) *Article 27 (2): Rights of the defence*

1. Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are

intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by Title III of the Convention (judgment of 21 May 1980 in Case 125/79 Denilauler v. Couchet (1980) ECR 1553).

2. Article 27 (2) must be interpreted as follows:

(a) the words 'the document which instituted the proceedings' cover any document, such as the order for payment (Zahlungsbefehl) in German law;

(b) a decision such as the enforcement order (Vollstreckungsbefehl) in German law is not covered by the words 'the document which instituted the proceedings';

(c) in order to determine whether the defendant has been enabled to arrange for his defence as required by Article 27 (2) the court in which enforcement is sought must take account only of the time, such as that allowed under German law for submitting an objection (Widerspruch), available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the Convention;

(d) Article 27 (2) remains applicable where the defendant has lodged an objection against the decision given in default and a court of the State in which the judgment was given has held the objection to be inadmissible on the ground that the time for lodging an objection has expired;

(e) even if a court of the State in which the judgment was given has held, in separate adversary proceedings, that service was duly effected, Article 27 (2) still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence;

(f) the court in which enforcement is sought may as a general rule confine itself to examining whether the period, reckoned from the date on which service was duly effected, allowed the defendant sufficient time for his defence; it must, however, consider whether, in a particular case, there are exceptional circumstances such as the fact that, although service was duly effected, it was inadequate for the purposes of causing that time to begin to run;

(g) Article 52 of the Convention and the fact that the court of the State in which enforcement is sought concluded that under the law of that State the defendant was habitually resident within its territory at the date of service of the document which instituted the proceedings do not affect the replies given above (judgment of 16 June 1981 in Case 166/80 *Kloms v. Michel* (1981) ECR 1593-1612).

3. The court of the State in which enforcement is sought may, if it considers that the conditions laid down by Article 27 (2) are fulfilled, refuse to grant recognition and enforcement of a judgment, even though the court of the State in which the judgment was given regarded it as proven, in accordance with the third paragraph of Article 20 of that Convention in conjunction with Article 15 of the Hague Convention of 15 November 1965, that the defendant, who failed to enter an appearance, had an opportunity to receive service of the document instituting the proceedings in sufficient time to enable him to make arrangements for his defence (judgment of 15 July 1982 in Case 288/81 *Pendy Plastic Products v. Pluspunkt* (1982) ECR 2723-2737).

4. (a) Article 27 (2) is also applicable, in respect of its requirement that service of the document which instituted the proceedings should have been effected in sufficient time, where service was effected within a period prescribed by the court of the State in which the judgment was given or where the defendant resided, exclusively or otherwise, within the jurisdiction of that court or in the same country as that court.

(b) In examining whether service was effected in sufficient time, the court in which enforcement is sought may take account of exceptional circumstances which arose *after* service was duly effected.

(c) The fact that the plaintiff was apprised of the defendant's new address, after service was effected, and the fact that the defendant was responsible for the failure of the duly served document to reach him are matters which the court in which enforcement is sought may take into account in assessing whether service was effected in sufficient time (judgment of 11 June 1985 in Case 49/84 *Debaecker*

and *Plouvier v. Bouwman* (1985) ECR 1779-1803).

(21) *Article 27 (3): Irreconcilable judgments*

A foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his obligations, arising out of the marriage, to support her is irreconcilable for the purposes of Article 27 (3) with a national judgment which has decreed the divorce of the spouses in question (judgment of 4 February 1988 in Case 145/86 *Hoffmann v. Krieg*, OJ No C 63, 8. 3. 1988, p. 6).

(22) *Articles 30 and 38: Ordinary appeal*

The Court ruled in favour of an *autonomous* concept of ordinary appeal. An 'ordinary appeal' is constituted by any appeal:

- (a) which is such that it may result in the annulment or the amendment of the judgment which is the subject matter of the procedure for recognition or enforcement and
- (b) the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment (judgment of 22 November 1977 in Case 43/77 *Industrial Diamond v. Riva* (1977) ECR 2175-2191).

(23) *Article 31: Enforcement*

1. The provisions of the Convention prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State (judgment in Case 42/76 *De Wolf v. Cox*).

2. A foreign judgment the enforcement of which has been ordered in a Contracting State pursuant to Article 31, and which remains enforceable in the State in which it was given, need not remain enforceable in the State in which enforcement is sought when, under the legislation of the latter State, it ceases to be enforceable for reasons which lie outside the scope of the Convention.

In the case in point a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his obligations, arising out of the marriage, to support her is irreconcilable with a national judgment which has decreed the divorce of the spouses in question (judgment of 4 February 1988 in Case 145/86 *Hoffman v. Krieg*, OJ No C 63, 8. 3. 1988, p. 6).

(24) *Article 33: Address for service*

1. (a) The second paragraph of Article 33 must be interpreted as meaning that the requirement to give an address for service laid down in that provision must be complied with in accordance with the rules laid down by the law of the State in which enforcement is sought or, if those rules do not specify when that requirement must be complied with, *no later than* the date on which the enforcement order is served.
- (b) The consequences of an infringement of the rules concerning the choice of an address for service are, by virtue of Article 33 of the Convention, governed by the law of the State in which enforcement is sought, provided that the aims of the Convention are respected, i.e. the law of the latter State remains subject to the aims of the Convention; the penalty cannot therefore call into question the validity of the judgment granting enforcement or allow the rights of the party against whom enforcement is sought to be prejudiced (judgment of 10 July 1986 in Case 198/85 Carron v. FRG, OJ No C 209, 20. 8. 1986, p. 5).

(25) *Article 36: Enforcement procedure*

1. (a) Article 36 of the Convention excludes any procedure whereby interested third parties may challenge an enforcement order, even where such a procedure is available to third parties under the domestic law of the State in which the enforcement order is granted.
- (b) The Court held that the Convention has established an enforcement procedure which constitutes an *autonomous* and complete *system*, including the matter of appeals. It follows that Article 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law.
- (c) The Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought, so that inter-

ested third parties may contest execution by means of the procedures available to them under the law of the State in which execution is levied (judgment of 2 July 1985 in Case 148/84 Deutsche Genossenschaftsbank v. Brasserie du Pêcheur (1985) ECR 1981-1993).

2. The Article must be interpreted as meaning that the party who has failed to appeal against the enforcement order referred to in Article 31 (in the case in point within one month of service of the enforcement order) is thereafter precluded, at the stage at which the judgment is enforced, from relying upon a valid reason which he could have invoked in such appeal. That rule is to be applied *ex officio* by the courts of the State in which enforcement is sought. *However*, that rule does not apply when it has the effect of obliging the national court to make the effects of a national judgment lying outside the scope of the Convention (divorce) conditional on that judgment being recognized in the State in which the foreign judgment whose enforcement is at issue was given (judgment of 4 February 1988 in Case 145/86 Hoffman v. Krieg, OJ No C 63, 8. 3. 1988, p. 6).

(26) *Article 37: Enforcement procedure*

1. (a) The second paragraph of Article 37 must be interpreted as meaning that an appeal in cassation and, in the Federal Republic of Germany, a 'Rechtsbeschwerde' may be lodged only against the judgment given on the appeal.
- (b) That provision cannot be extended so as to enable an appeal to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made (judgment of 27 November 1984 in Case 258/83 Brennero v. Wendel (1984) ECR 3971-3984).

(27) *Article 38: Enforcement procedure*

1. See (20) above on 'ordinary appeal'.
2. The second paragraph of Article 38 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that a court with which an appeal has been lodged against a decision authorizing enforcement, given pursuant to the Convention, may make enforcement conditional on the provision

of security only when it gives judgment on the appeal (judgment of 27 November 1984 in Case 258/83 Brennero v. Wendel (1984) ECR 3971-3984).

(28) *Article 39: Enforcement procedure*

1. (a) By virtue of Article 39 of the Convention, a party who has applied for and obtained authorization for enforcement may, within the period mentioned in that Article, proceed directly with protective measures against the property of the party against whom enforcement is sought and is under no obligation to obtain specific authorization.
- (b) A party who has obtained authorization for enforcement may proceed with the protective measures referred to in Article 39 until the expiry of the period prescribed in Article 36 for lodging an appeal and, if such an appeal is lodged, until a decision is given thereon.
- (c) A party who has proceeded with the protective measures referred to in Article 39 of the Convention is under no obligation to obtain, in respect of those measures, any confirmatory judgment required by the national law of the court in question (judgment of 3 October 1985 in Case 119/84 Capelloni v. Pelkmans (1985) ECR 3147-3164).

(29) *Article 40: Enforcement procedure*

The court hearing an appeal by a party seeking enforcement is required to hear the party against whom enforcement is sought, pursuant to the first sentence of the second paragraph of Article 40 of the Convention, even though the application for an enforcement order was dismissed in the lower court simply because documents were not produced at the appropriate time.

This is because the Convention formally requires that both parties should be given a hearing at the appellate level, without regard to the scope of the decision in the lower court (judgment of 12 July 1984 in Case 178/83 P. v. K. (1984) ECR 3033-3043).

(30) *Article 54: Temporal application*

The effect of Article 54 is that the only essential for the rules of the Convention to be applicable to

litigation relating to legal relationships created before the date of the coming into force of the Convention is that the judicial proceedings should have been instituted subsequently to that date. This is true even if an agreement conferring jurisdiction was concluded before the Convention came into force and could be regarded as void under the law applicable to it; the case in point concerns a contract of employment between a French employee and a German firm, to which French law was applicable (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

(31) *Articles 55 and 56: Bilateral Conventions*

As the first paragraph of Article 56 of the Convention states that the bilateral Conventions listed in Article 55 continue to have effect in relation to matters to which the Convention does not apply, the court of the State in which enforcement is sought may apply them to decisions which, without coming under the second paragraph of Article 1, are excluded from the Convention's scope. This is the case as regards application of the German-Belgian Convention of 1958, which may continue to have effect in 'civil and commercial matters', irrespective of the autonomous construction placed upon that concept by the Court for the purposes of interpretation of the 1968 Convention (judgment of 14 July 1977 in joined Cases 9/77 and 10/77 Bavaria and Germanair v. Eurocontrol (1977) ECR 1517-1527).

(32) *Article I, second paragraph, of the Protocol annexed to the Convention (Luxembourg)*

A clause conferring jurisdiction is not binding upon a person domiciled in Luxembourg unless that clause is mentioned in a provision:

- (a) specially and exclusively meant for this purpose;
- (b) specifically signed by that party; in this respect the signing of the contract as a whole does not suffice. It is not necessary for that clause to be mentioned in a separate document (judgment of 6 May 1980 in Case 784/79 Porta-Leasing v. Prestige International (1980) ECR 1517).

(33) *Article II of the Protocol annexed to the Convention*

1. The expression 'an offence which was not intentionally committed' should be understood

as meaning any offence the legal definition of which does not require the existence of intent, and

2. Article II of the Protocol applies in all criminal proceedings concerning offences which were not intentionally committed, 'in which the accused's liability at civil law, arising from the elements of the offence for which he is being prosecuted, is in question or on which such liability might subsequently be based' (judgment of 26 May 1981 in Case 157/80 Rinkau (1981) ECR 1391-1484).

(34) *Article 2 of the Protocol of 3 June 1971*

Lower courts not sitting in an appellate capacity are not empowered to seek a preliminary ruling from the Court of Justice on a question of interpretation of the Convention.

See the Court of Justice's order of 9 November 1983 in Case 80/83 Habourdin v. Italocremona (1983) ECR 3639-3641) and order of 28 March 1984 in Case 56/84 Von Gallera v. Maitre ((1984) ECR 1769-1772).

132. 3. **List of judgments of the Court of Justice**
(from 6 October 1976 to 27 September 1988)

I.	6. 10. 1976	Case 12/76	Tessili v. Dunlop	Article 5 (1)	(1976) ECR 1473-1487
II.	6. 10. 1976	Case 14/76	De Bloos v. Bouyer	Article 5 (1) and Article 5 (5)	(1976) ECR 1497-1511
III.	14. 10. 1976	Case 29/76	LTU v. Eurocontrol	Article 1	(1976) ECR 1541-1552
IV.	30. 11. 1976	Case 21/76	Reinwater v. Potasse d'Alsace	Article 5 (3)	(1976) ECR 1735-1748
V.	30. 11. 1976	Case 42/76	De Wolf v. Cox	Article 31	(1976) ECR 1759-1768
VI.	14. 12. 1976	Case 24/76	Colzani v. Ruwa	Article 17, paragraph 1	(1976) ECR 1831-1843
VII.	14. 12. 1976	Case 25/76	Segoura v. Bonakdarian	Article 17, paragraph 1	(1976) ECR 1851-1863
VIII.	14. 7. 1977	Case 9/77 and 10/77	Bavaria-Germanair v. Eurocontrol	Article 56	(1977) ECR 1517-1527
IX.	22. 11. 1977	Case 43/77	Diamond v. Riva	Articles 30 and 38	(1977) ECR 2175-2191
X.	14. 12. 1977	Case 73/77	Sanders v. Van der Putte	Article 16 (1)	(1977) ECR 2382-2392
XI.	21. 6. 1978	Case 150/77	Bertrand v. Ott	Article 13	(1978) ECR 1431-1447
XII.	9. 11. 1978	Case 23/78	Meeth v. Glacetal	Article 17	(1978) ECR 2133-2144
XIII.	22. 11. 1978	Case 33/78	Somafer v. Ferngas	Article 5 (5)	(1978) ECR 2183-2195
XIV.	22. 9. 1979	Case 133/78	Gourdain v. Nadler	Article 1, paragraph 2, point 2	(1979) ECR 733-746
XV.	27. 3. 1979	Case 143/78	J. De Cavel v. L. De Cavel	Articles 1, paragraph 2, and 24	(1979) ECR 1055-1068
XVI.	13. 11. 1979	Case 25/79	Sanicentral v. Collin	Articles 17 and 54	(1979) ECR 3423-3431
XVII.	17. 1. 1980	Case 56/79	Zelger v. Salinitri	Articles 5 (1) and 17	(1980) ECR 89-98
XVIII.	6. 3. 1980	Case 120/79	L. De Cavel v. J. De Cavel	Articles 5 (2) and 24	(1980) ECR 731
XIX.	6. 5. 1980	Case 784/79	Porta-Leasing v. Prestige International	Article I, paragraph 2 of Protocol	(1980) ECR 1517
XX.	21. 5. 1980	Case 125/79	Denilauler v. Couchet	Title III	(1980) ECR 1553

XXI.	16. 12. 1980	Case 814/79	Netherlands State v. Rüffer	Article 1	(1980) ECR 3807-3822
XXII.	18. 3. 1981	Case 139/80	Blanckaert & Willems v. Trost	Article 5 (5)	(1981) ECR 819-830
XXIII.	26. 5. 1981	Case 157/80	Rinkau	Article II of Protocol	(1981) ECR 1391-1404
XXIV.	16. 6. 1981	Case 166/80	Klomps v. Michel	Article 27 (2)	(1981) ECR 1593-1612
XXV.	24. 6. 1981	Case 150/80	Elefenten Schuh v. Jacquain	Articles 17, 18 and 22, paragraph 1	(1981) ECR 1671-1698
XXVI.	22. 10. 1981	Case 27/81	Rohr v. Ossberger	Article 18	(1981) ECR 2431-2448
XXVII.	4. 3. 1982	Case 38/81	Effer v. Kantner	Article 5 (1)	(1982) ECR 825-836
XXVIII.	31. 3. 1982	Case 25/81	C. H. W. v. G. J. H.	Articles 1, 18 and 24	(1982) ECR 1189-1205
XXIX.	26. 5. 1982	Case 133/81	Ivenel v. Schwab	Article 5 (1)	(1982) ECR 1891-1902
XXX.	15. 7. 1982	Case 228/81	Pendy Plastic Products v. Pluspunkt	Articles 20, paragraph 3 and 27 (2)	(1982) ECR 2723-2737
XXXI.	22. 3. 1983	Case 34/82	Peters v. ZNAV	Article 5 (1)	(1983) ECR 987-1004
XXXII.	14. 7. 1983	Case 201/82	Gerling v. Amministrazione del Tesoro dello Stato	Articles 17 and 18	(1983) ECR 2503-2518
XXXIII.	21. 9. 1983	(order) Case 157/82	Verheezen v. Müller	Articles 1 and 50	—
XXXIV.	15. 11. 1983	Case 288/82	Duijnste v. Goderbauer	Articles 16 (4) and 19	(1983) ECR 3663-3679
XXXV.	9. 11. 1983	(order) Case 80/83	Habourdin v. Italocremona	Article 2 of Protocol of 3. 6. 1971	(1983) ECR 3639-3641
XXXVI.	7. 6. 1984	Case 129/83	Zelger v. Salinitri	Article 21	(1984) ECR 2397-2409
XXXVII.	19. 6. 1984	Case 71/83	Russ v. Goeminne	Article 17	(1984) ECR 2417-2436
XXXVIII.	12. 7. 1984	Case 178/83	P. v. K.	Article 40	(1984) ECR 3033-3043
XXXIX.	27. 11. 1984	Case 258/83	Brennero v. Wendel	Articles 37 and 38	(1984) ECR 3971-3984
XL.	15. 1. 1985	Case 241/83	Rösler v. Rottwinkel	Article 16 (1)	(1985) ECR 99-129
XLI.	7. 3. 1985	Case 48/84	Spitzley v. Sommer	Articles 17 and 18	(1985) ECR 787-800
XLII.	11. 6. 1985	Case 49/84	Debaecker & Plouvier v. Bouwman	Article 27	(1985) ECR 1779-1803
XLIII.	2. 7. 1985	Case 148/84	Genossenschaftsbank v. Brasserie du Pêcheur	Article 36	(1985) ECR 1981-1993
XLIV.	4. 7. 1985	Case 228/84	AS-Autoteile v. Malhé	Article 16 (5)	(1985) ECR 2267-2279
XLV.	11. 7. 1985	Case 221/84	Berghoefer v. ASA	Article 17	(1985) ECR 2699-2710
XLVI.	3. 10. 1985	Case 119/84	Capelloni-Aquilini v. Pelkmans	Article 39	(1985) ECR 3147-3164
XLVII.	24. 6. 1986	Case 22/85	Anterist v. Crédit Lyonnais	Article 17	OJ No C 196, 5. 8. 1986, p. 5
XLVIII.	10. 7. 1986	Case 198/85	Carron v. FRG	Article 33	OJ No C 209, 20. 8. 1986, p. 5

XLIX.	11. 11. 1986	Case 313/85	Iveco Fiat v. Van Hool	Article 17	OJ No C 308, 2. 12. 1986, p. 4
L.	15. 1. 1987	Case 266/85	Shenavai v. Kreischer	Article 5 (1)	OJ No C 39, 17. 2. 1987, p. 3
LI.	8. 12. 1987	Case 144/86	Gubisch v. Palumbo	Article 21	OJ No C 8, 13. 1. 1988, p. 3
LII.	9. 12. 1987	Case 218/86	Schotte v. Rothschild	Article 5 (5)	OJ No C 2, 6. 1. 1988, p. 3
LIII.	4. 2. 1988	Case 145/86	Hoffman v. Krieg	Articles 26, 27, 31 and 36	OJ No C 63, 8. 3. 1988, p. 6
LIV.	8. 3. 1988	Case 9/87	Arcado v. Haviland	Article 5 (1)	OJ No C 89, 6. 4. 1988, p. 9
LV.	6. 7. 1988	Case 158/87	Scherens v. Maenhout	Article 16 (1)	OJ No C 211, 11. 8. 1988, p. 7
LVI.	27. 9. 1988	Case 189/87	Kalfelis v. Schröder	Articles 5 (3) and 6 (1)	OJ No C 281, 4. 11. 1988, p. 18

4. Cases pending as at 1 February 1989

133. A number of applications for preliminary rulings are currently before the Court of Justice. The cases involved are as follows:

- (a) Case 32/88 Six Constructions v. Humbert
Article 5 (1) — Contract of employment

What if a contract of employment is performed in a number of countries?
OJ No C 55, 26. 2. 1988, p. 12.

- (b) Case 36/88 Schilling v. Merbes
Article 27 (2)

What if the defaulting defendant was not served with the document instituting proceedings in due form, albeit in sufficient time to enable him to arrange for his defence?
OJ No C 79, 26. 3. 1988, p. 4.

This case has been removed from the register following the withdrawal of the appeal.

- (c) Case 115/88 Reichert-Kockler v. Dresdner Bank
Article 16 (1) — Concept of rights *in rem* in immovable property
OJ No C 125, 12. 5. 1988, p. 13.

- (d) Case 220/88 Dumez Bâtiment SA v. Hessische Landesbank
Article 5 (3)
OJ No C 226, 1. 9. 1988, p. 6.

- (e) Case 305/88 Lancray SA v. Peters & Sickert KG
Article 27 (2)
OJ No C 300, 25. 11. 1988, p. 10.

- (f) Case 365/88 Congress Agentur Hagen GmbH/Zeehaghe BV
Article 5 (beginning) and point 1 and Article 6 (beginning) and point 2
OJ No C 20, 26. 1. 1989, p. 8.

ANNEX I

THE LAW IN FORCE IN THE EFTA MEMBER STATES CONCERNING THE
RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. AUSTRIA

134. Foreign judgments in civil and commercial matters are not recognized and cannot be enforced in Austria unless a treaty is in force with the State in which the judgment was given. However, foreign judgments concerning the status or legal capacity of persons are in most cases recognized even if there are no statutory provisions requiring such recognition. A foreign judgment which is neither recognized nor enforced in Austria may however have a certain evidential value there. The evidential value of a foreign judgment will depend on the circumstances in each particular case.

B. FINLAND AND SWEDEN

135. The main principle of Finnish and of Swedish law is that foreign judgments are neither recognized nor enforced, unless there is a statutory provision to the contrary. Such statutory provisions are very few and they are almost always based on international conventions or agreements. Most of these provisions cover only decisions dealing with rather special matters, such as some aspects of international carriage, maintenance or civil liability in the field of nuclear energy.

What has been mentioned above does, however, not apply to decisions relating to status and legal capacity. Those decisions are in most cases recognized even where there is no statutory provision ordering recognition.

The fact that a foreign judgment is, in the absence of a statutory provision to the contrary, neither recognized nor enforced in Finland and Sweden does not mean that such a foreign judgment is completely without value in those countries. Firstly a foreign judgment can be invoked as evidence concerning certain facts or the contents of applicable foreign law. According to Finnish and Swedish law there is, generally speaking, no 'inadmissible' evidence at all. Within the framework of this principle, the court may take into consideration the facts established in foreign proceedings and the foreign courts' legal reasoning. Naturally this evidential value of a foreign judgment will depend on the circumstances in each particular case, especially on the degree of confidence in the foreign court. In some situations, particularly when according to the rules on conflict of laws the dispute is to be decided by the substantive law of the foreign court and the foreign court has applied the same law (*lex fori*), the foreign judgment may shift the burden of proof to the party challenging its outcome. If the judgment of a foreign court relates to immovable property within its jurisdiction there will — at least in most cases — be no review of the substance of the dispute.

Secondly, a foreign judgment may be of great value in Finland and Sweden also in those cases where Finnish and Swedish courts do not have jurisdiction and where a party nevertheless has an interest to rely upon the judgment in the country concerned, e.g. in order to obtain enforcement of a money judgment. If, for instance, a foreign court according to a forum-selection clause has exclusive jurisdiction for a dispute, Finnish and Swedish courts will usually decline jurisdiction. The judgment of the chosen foreign court (*forum prorogatum*) cannot, however, be enforced in Finland or Sweden as such. The plaintiff (the creditor) can in this situation sue in a Finnish or Swedish court invoking the foreign judgment. The court will, under such circumstances, most probably abstain from considering the merits of the case and base its decision on the foreign judgment. In any case there will be no complete review of the merits (*révision au fond*) of the foreign judgment.

C. ICELAND

136. The main principle of Icelandic law is that foreign judgments are neither recognized nor enforced, unless there is a statutory provision to the contrary. Such provisions have hitherto

always been based on international conventions. However, foreign judgments concerning the status or legal capacity of a natural person are usually recognized even if there is no statutory provision ordering recognition. Foreign judgments which are neither recognized nor enforced in Iceland can, however, have a certain evidential value there. This is mainly due to the fact that there is, generally speaking, no inadmissible evidence in Icelandic courts. The findings of fact in a foreign judgment are therefore likely to have a certain relevance.

D. NORWAY

137. Foreign judgments in civil and commercial matters are not recognized and may not be enforced in Norway unless there is a treaty with the State in which the judgment in question was rendered.

However, foreign judgments concerning the status or legal capacity of a natural person are recognized in Norway even if there is no treaty with the State in question, provided that certain criteria are fulfilled.

As regards jurisdiction and enforcement of judgments based on a convention conferring jurisdiction, Norway operates a procedure similar to those applying in Finland and Sweden (see point 135 above).

The remarks in point 135 above on the evidential validity of a foreign judgment also apply to Norway.

E. SWITZERLAND

138. In Switzerland, the rules relating to international jurisdiction and the principles governing the recognition and enforcement of foreign judgments were until very recently scattered among several legal sources, these being partly federal and partly cantonal. On a number of matters relevant to international jurisdiction, neither federal law nor cantonal law contained explicit rules. In such situations the principles of intercantonal law were applied by analogy to international cases.

On 18 December 1987, the Swiss Parliament passed a new Act on Private International Law. The new law, which will come into force on 1 January 1989, contains provisions on the international jurisdiction of Swiss courts and on the recognition and enforcement of judgments in civil and commercial matters. These provisions replace the present provisions of cantonal and federal law concerning jurisdiction and recognition and enforcement of judgments. Thus, the recognition and enforcement of judgments in civil and commercial matters will in its entirety be governed by federal law, which prevails over the cantonal laws. According to the APIL, reciprocity will no longer be a formal requirement for obtaining recognition or enforcement of foreign judgments. In fact, the effects of the reciprocity-test are replaced by the new system of control of jurisdiction of the State of origin.

- According to Article 25 of the APIL, a foreign judgment will be recognized in Switzerland:
 - a) if the courts of the State of origin had jurisdiction according to the APIL;
 - b) if the judgment is no longer subject to ordinary forms of review or if the judgment is final;
 - c) if there is no ground for refusal mentioned in APIL Article 27.
- A foreign court is according to APIL Article 26 considered to have jurisdiction:
 - a) if this follows from a provision in the APIL (e.g. Articles 112 to 115 as regards contracts and civil liability, and Articles 151 to 153 as regards company law) or, in the absence of such a provision, if the defendant had his domicile in the State of origin;
 - b) in the case of dispute concerning a sum of money, if the parties have agreed that the court which has given the judgment had jurisdiction and this agreement was not invalid according to the provisions of the APIL,
 - c) in the case of a dispute concerning a sum of money, if the defendant has argued the merits without challenging the jurisdiction of the court or making any reservation thereon (*exceptio incompetentiae internationalis*),

- d) in the case of a counterclaim, if the court had jurisdiction to try the principal claim and the principal claim and the counterclaim were interrelated.
- A foreign judgment will, according to Article 27, paragraph 1 of the APIL, not be recognized if recognition would be manifestly incompatible with the public policy of Switzerland.
- Recognition of a judgment will, according to Article 27 paragraph 2, also be refused at the request of a party against whom it is invoked if that party furnishes proof:
 - a) that he was, neither according to the law of his domicile nor according to the law of his habitual residence, duly served with the document which instituted the proceedings, unless he has argued the merits without reservation;
 - b) that the judgment resulted from proceedings incompatible with fundamental principles of the Swiss law of procedure, especially that the party concerned has not had an opportunity to defend himself;
 - c) that proceedings between the same parties and concerning the same matter
 - i) are already pending before a court in Switzerland,
 - ii) have resulted in a decision by a Swiss court, or
 - iii) have resulted in an earlier judgment by a court of a third State which fulfills the conditions for recognition in Switzerland.
- Under Article 29, paragraph 1, a judgment which is recognized according to Articles 25 to 27 of the APIL will be enforced in Switzerland, on the application of any interested party. The application for enforcement must be submitted to the competent authority of the canton where the foreign judgment is invoked. The following documents must be attached to the application:
 - a) a complete and authenticated copy of the decision;
 - b) an attestation according to which the judgment is no longer subject to the ordinary forms of review in the State of origin or that it is final;
 - c) if the judgment was rendered by default, an official document establishing that the defaulting party was served with the document instituting the proceedings and had an opportunity to defend himself.

In the proceedings for recognition and enforcement the party against whom enforcement is sought must be heard (Article 29, paragraph 2).

*ANNEX II***EXISTING CONVENTIONS WHICH CONCERN THE EFTA MEMBER STATES**

139. Apart from conventions dealing with particular matters, various conventions on recognition and enforcement of judgments exist between certain EFTA Member States and certain States of the European Communities. These are the conventions listed in Article 55 of the Lugano Convention between Denmark, Finland, Iceland, Norway and Sweden, the bilateral treaties concluded between Austria and Belgium, Spain, France, Italy, Luxembourg, the Netherlands, the Federal Republic of Germany and the United Kingdom, and the bilateral treaties concluded between the Swiss Confederation and Belgium, Spain, France, Italy, Norway and the Federal Republic of Germany and between Norway and the United Kingdom and the Federal Republic of Germany.

In addition to conventions dealing with particular matters, various conventions on recognition and enforcement also exist between the EFTA Member States. These are the abovementioned convention between Denmark, Finland, Iceland, Norway and Sweden, the bilateral conventions concluded by Austria with Finland, Norway, Sweden and the Swiss Confederation and the bilateral convention between Sweden and the Swiss Confederation listed in Article 55 of the Lugano Convention. Thus, relations between Switzerland on the one hand, and Finland, Iceland and Norway on the other hand, as well as relations between Austria and Iceland, are hampered by the absence of such conventions.

There are also differences between the various conventions. The convention between Switzerland and France is based on 'direct' jurisdiction; but all the others are based on 'indirect' jurisdiction. There are also various other differences between these conventions which need not be discussed in detail; they relate in particular to the determination of courts with jurisdiction and to the conditions governing recognition and enforcement.

*ANNEX III***FINAL ACT**

The representatives of

THE GOVERNMENT OF THE KINGDOM OF BELGIUM,
THE GOVERNMENT OF THE KINGDOM OF DENMARK,
THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY,
THE GOVERNMENT OF THE HELLENIC REPUBLIC,
THE GOVERNMENT OF THE KINGDOM OF SPAIN
THE GOVERNMENT OF THE FRENCH REPUBLIC,
THE GOVERNMENT OF IRELAND,
THE GOVERNMENT OF THE REPUBLIC OF ICELAND,
THE GOVERNMENT OF THE ITALIAN REPUBLIC,
THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG,
THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS,
THE GOVERNMENT OF THE KINGDOM OF NORWAY,
THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA,
THE GOVERNMENT OF THE PORTUGUESE REPUBLIC,
THE GOVERNMENT OF THE KINGDOM OF SWEDEN,
THE GOVERNMENT OF THE SWISS CONFEDERATION,
THE GOVERNMENT OF THE REPUBLIC OF FINLAND,
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND,

Assembled at Lugano on the sixteenth day of September in the year one thousand nine hundred and eighty-eight on the occasion of the Diplomatic Conference on jurisdiction in civil matters, have placed on record the fact that the following texts have been drawn up and adopted within the Conference:

- I. the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters;
- II. the following Protocols, which form an integral part of the Convention:
 - 1, on certain questions of jurisdiction, procedure and enforcement,
 - 2, on the uniform interpretation of the Convention,
 - 3, on the application of Article 57;
- III. the following Declarations:
 - Declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities on Protocol 3 on the application of Article 57 of the Convention,
 - Declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities,
 - Declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Free Trade Association.

En fe de lo cual, los abajo firmantes suscriben la presente Acta final.

Til bekræftelse heraf har undertegnede underskrevet denne slutakt.

Zu Urkund dessen haben die Unterzeichneten ihre Unterschrift unter diese Schlußakte gesetzt.

Σε πίστωέρω των ανωτέρωμ ιθ υπογράωοντεζ πληρεξούσιοι έυεσαν την υπογραπή τουζ κάτω από την παρούσα τελική πράξη.

In witness whereof, the undersigned have signed this Final Act.

En foi de quoi, les soussignés ont apposé leurs signatures au bas du présent acte final.

Dá fhianú sin, chuir na daoine thíos-síithe a lámh leis an Ionstraim Chriochnaitheach seo.

Pessu til staófestu hafa undirritaóir undirritaó lokageró pessa.

In fede di che, i sottoscritti hanno apposto le loro firme in calce al presente atto finale.

Ten blijke waarvan de ondergetekenden hun handtekening onder deze Slotakte hebben gesteld.

Til bekræftelse har de undertegnede underskrevet denne Sluttakt.

Em fé do que os abaixo-assinados apuseram as suas assinaturas no final do presente Acto Final.

Tämän vakuudeksi allekirjoittaneet ovat, allekirjoittaneet tämän Päättöpöytäkirjan.

Till bekræftelse härav har undertecknade undertecknat denna Slutakt.

Hecho en Lugano, a dieciseis de septiembre de mil novecientos ochenta y ocho.

Udfærdiget i Lugano, den sekstende september nitten hundrede og otteogfirs.

Geschehen zu Lugano am sechzehnten September neunzehnhundertachtundachtzig.

Έγινε στο Λουγκάνο, στις όέκα έξι Σεπτεμβρίου χίλια εννιακόια ιγρόόντό.

Done at Lugano on the sixteenth day of September in the year one thousand nine hundred and eighty-eight.

Fait à Lugano, le seize septembre mil neuf cent quatre-vingt-huit.

Arna dhéanamh i Lugano, an séú lá déag de Mhéan Fómhair sa bhliain míle naoi gcéad ochtó a hocht.

Gjört í Lugano hinn sextánda dag septembermánaóar níjtán hundruó áttatíu og átta.

Fatto a Lugano, addi' sedici settembre millenovecentottantotto.

Gedaan te Lugano, de zestiende september negentienhonderd achtentachtig.

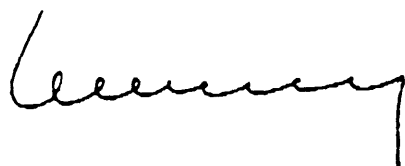
Utfærdiget i Lugano, den sekstende september nitten hundre og áttiátte.

Feito em Lugano, em dezasseis de Setembro de mil novecentos e oitenta e oito.

Tehty Luganossa kuudentenaatoista päivänä syyskuuta vuonna tuhat yhdeksänsataa kahdeksänkymmentäkahdeksan.

Som skedde i Lugano den sextonde september nittonhundraåttioåtta.

Pour le gouvernement du royaume de Belgique
Voor de Regering van het Koninkrijk België



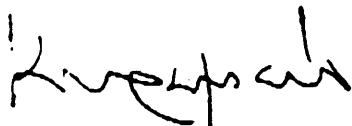
For regeringen for Kongeriget Danmark



Für die Regierung der Bundesrepublik Deutschland



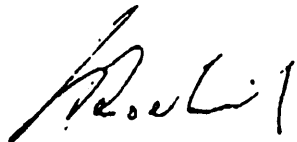
Για την Κυβέρνηση της Ελληνικής Δημοκρατίας



Por el Gobierno del Reino de España



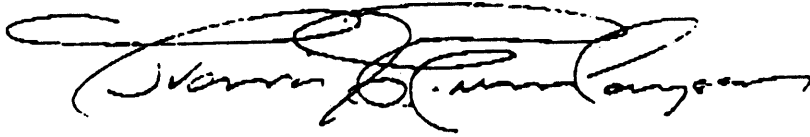
Pour le gouvernement de la République française



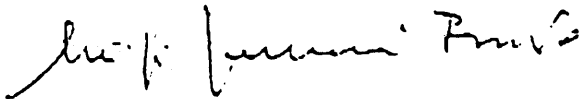
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Fyrir ríkisstjórn lýóveldisins Íslands



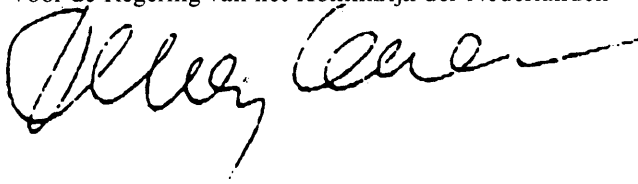
Per il governo della Repubblica italiana



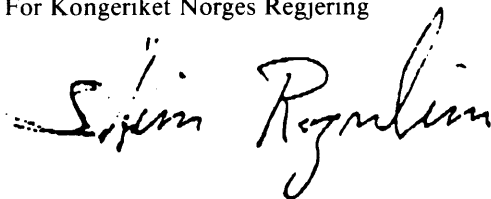
Pour le gouvernement du grand-duché de Luxembourg



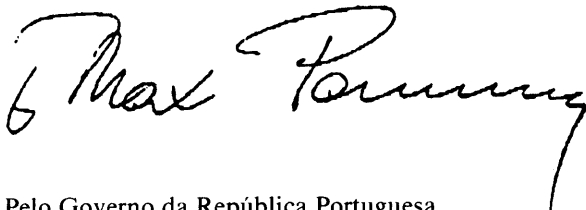
Voor de Regering van het Koninkrijk der Nederlanden



For Kongeriket Norges Regjering



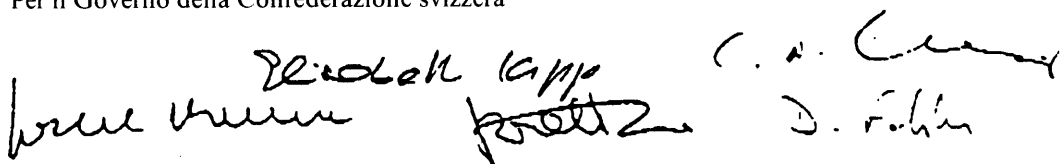
Für die Regierung der Republik Oesterreich



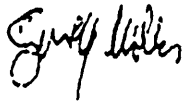
Pelo Governo da República Portuguesa



Für die Regierung der Schweizerischen Eidgenossenschaft
Pour le gouvernement de la Confédération suisse
Per il Governo della Confederazione svizzera



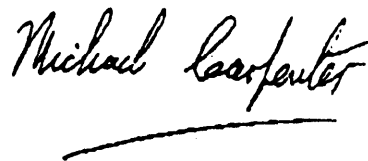
Suomen tasavallan hallituksen puolesta



För Konungariket Sveriges regering



For the Government of the United Kingdom of Great Britain and Northern Ireland



- (1) Belgium, Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.
- (2) Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ No L 304, 30. 10. 1978) and Convention of 25 October 1982 on the accession of Greece (OJ No L 388, 31. 12. 1982).
- (3) The Jenard and Schlosser reports were published on OJ No C 59, 15. 3. 1979. The report by Mr Evrigenis and Mr Kerameus was published in OJ No C 298, 24. 11. 1986.
- (4) In order to align the United Kingdom concept of domicile on that of many continental countries the Civil Jurisdiction Act 1982, introducing the Convention into United Kingdom law, deals with the matter in Section 41. According to the Act, a person is deemed to have his domicile in the United Kingdom if he resides there and the nature and circumstances of his residence show there to be an effective link between his residence and the United Kingdom. For Ireland, see the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988, Sections 13 and 5 in the Schedule.
- (5) Article 6 of the Rome Convention provides that:
- '1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
- (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
- (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
- unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.'
- (6) These international agreements are numerous and relate to fields as varied as inland waterway transport, transport by sea, air, road and rail, and maintenance obligations. See, for instance, Jenard report, pp. 59 and 60.
- (7) In the course of the negotiations no account was taken of the distinction between 'Contracting State' and 'party' made in the Vienna Convention on the Law of Treaties (Article 2 (f) and (g)). As in the Brussels Convention, the term 'Contracting State' refers both to a State which has consented to be bound by the Convention, either by ratifying it or by acceding to it, and to a State in respect of which the Convention has entered into force.
- (8) — Non-European dependent territories of the United Kingdom, which have expressed interest in participating in the EEC/EFTA Convention on jurisdiction and the enforcement of judgments in civil and commercial matters: Anguilla, Bermuda, British Virgin Islands, Montserrat and Turks and Caicos Islands, Hong Kong.
- Non-European dependent territories of the United Kingdom other than those mentioned above:
- Caribbean and North Atlantic: Cayman Islands,
- South Atlantic: British Antarctic Territory, Falkland Islands, South Georgia and the South Sandwich Islands, St Helena and dependencies (Ascension Island) (Tristan da Cunha),
- Indian Ocean: British Indian Ocean Territory,
- South Pacific: Pitcairn Island, Henderson, Ducie and Oeno.
- (9) Article 59 of the Federal Constitution states that:
- '1. For the purposes of personal claims a solvent debtor domiciled in Switzerland must be sued before the court for his domicile; his property may not therefore be seized or sequestrated outside the canton in which he is domiciled, in pursuance of personal claims.
2. In the case of foreign nationals this is without prejudice to the provisions of international treaties.'

(*) Article 1482 of the Spanish Civil Code:

'The purchaser against whom an action for eviction is brought shall request, within the period specified by the Code of Civil Procedure for replying to the action, that it be served on the vendor(s) as soon as possible.

Service shall be in the manner specified in the said Code for service on defendants.

The time limit for reply by the purchaser shall be suspended until the expiry of the period notified to the vendor(s) for appearing and replying to the action, which shall correspond to the periods laid down for all defendants by the Code of Civil Procedure and shall run from the date of the service referred to in paragraph 1 of this Article.

If the persons against whom eviction proceedings are brought fail to appear in the manner and time specified, the period allowed for replying to the action shall be extended in respect of the purchaser.'

(¹⁰) It should be noted that to date one draft Regulation contains such provisions.

(¹¹) Much of this section is taken from Weser-Jenard: *Manuel de droit international privé* Van der Elst, Volume II: *Les conflits de juridictions*, Bruylant, Brussels, 1985.

The Spanish and Portuguese language editions of the *Official Journal of the European Communities* also contain the Spanish and Portuguese versions of the reports by Mr P. Jenard and Professor Dr P. Schlosser (these reports are published in Danish, Dutch, English, French, German and Italian in *Official Journal of the European Communities* No C 59 of 5 March 1979 and in Greek in *Official Journal of the European Communities* No C 298 of 24 November 1986) and of the report by Professors D. Evrigenis and K. D. Kerameus (this report is published in Danish, Dutch, English, French, German, Greek and Italian in *Official Journal of the European Communities* No C 298 of 24 November 1986).
