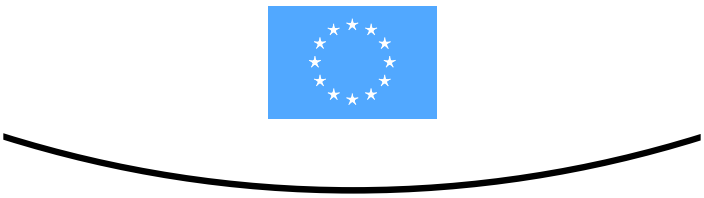
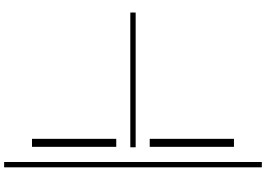


Council of the European Union

Civil Law

European Judicial Cooperation



2004

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Luxembourg: Office for Official Publications of the European Communities, 2005

ISBN 92-824-3123-1

Printed in Italy

Printed on white chlorine-free paper

Contents

Preface

Selected Community acts in the area of judicial cooperation in civil matters

1. The foundations for the construction of judicial cooperation in civil matters were laid in the 1960s. Two instruments were established at that time: firstly, the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and, secondly, the 1980 Rome Convention on the law applicable to contractual obligations.

2. Although only the Member States of the European Community could become contracting parties to those Conventions, neither instrument was based on the provisions of the EC Treaty. A European judicial area was still a long way off, although the 1970s saw the first expressions of political support for it.

3. Within the framework of European political cooperation during the 1980s, the Member States concluded a further two conventions, neither of which was particularly ambitious in its scope. The first simplified procedures for the recovery of maintenance payments through the establishment of reinforced administrative cooperation in that specific area. The second abolished the legalisation of documents in the Member States. Only a few of the Member States actually ratified those instruments.

4. The entry into force of the Maastricht Treaty on 1 November 1993 heralded the beginning of a new stage in the construction of judicial cooperation in civil matters, with Article K.1 including such cooperation among the objectives to be achieved within the framework of the European Union. This period was marked by a will to create new instruments in areas hitherto excluded from cooperation between Member States, such as family law, and saw the adoption of the Brussels II Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of child custody, as well as the Convention on the service of judicial and extrajudicial documents in civil and commercial matters.

5. The entry into force of the Treaty of Amsterdam on 1 May 1999, as subsequently amended by the Treaty of Nice, first enabled judicial cooperation in civil matters to develop a grand design. The conclusions of the Tampere European Council on 15 and 16 October 1999 paved the way for decisive progress by the European Community towards the establishment of a genuine system of private European law between the Member States of the European Union.

6. Furthermore, since this entire area had been transferred from the Treaty on European Union to the EC Treaty, judicial cooperation in civil matters began to function, generally speaking, according to rules more in tune with those which had governed the traditional fields of European construction.

7. Various instruments were concluded during this period. The Council 'communitarised' the earlier Conventions on jurisdiction and the recognition and enforcement of judgments and established new instruments in this area including, most notably the Brussels I, the Brussels II and the Brussels IIa Regulations and the Regulation on insolvency proceedings.

8. The Council has also adopted a number of instruments introducing provisions to improve judicial assistance between Member States. These instruments, of crucial importance to the everyday life of people seeking justice, relate to the taking of evidence abroad and the service of judicial and extrajudicial documents in civil or commercial matters.

9. Access to justice is another important aspect of the area of justice which is being developed. The adoption of the Directive to improve access to justice has made it possible to raise the level of legal aid in cross-border disputes, and for parties to civil or commercial disputes to defend their rights in court even where their financial situation prevents them from meeting the legal costs involved.

10. The Council has also created a European Judicial Network for the gradual establishment of an information system for the general public and specialists alike. The network improves, simplifies and speeds up judicial cooperation between Member States in civil and commercial matters, both in the areas already covered by instruments in force and in areas where no instrument yet applies.

11. Most of the above instruments are included in this publication, which aims to further the objective set by the Tampere European Council of keeping citizens in general, and legal practitioners in particular, better informed about the instruments that exist.

12. Judicial cooperation in civil matters is still at the development stage. As far as defining rules for jurisdiction and the recognition and enforcement of judgments is concerned, its horizons should be extended to other areas of civil and commercial law, such as inheritance matters and rights in property arising out of a matrimonial relationship.

13. Furthermore, the Community should step up cooperation on the free movement of judgments to the point where, for certain types of judgment, judicial control ceases to be necessary between Member States. The Regulation creating a European enforcement order for uncontested claims, which was adopted recently, is a case in point.

14. The adoption of conflict-of-law rules is also an important stone in the edifice of judicial cooperation in civil matters. Reference here should be made to the Rome II draft Regulation on the law applicable to non-contractual obligations.

15. As far as judicial cooperation in civil matters is concerned, the area of freedom, security and justice is thus gradually being created. I trust that all practitioners of law will find this selection of texts a useful working tool.

Charles Elsen
Director-General, Council of the European Union
Directorate-General H— Justice and home affairs
Brussels, April 2004

Brussels I

I

FAUSTO POCAR

Fausto Pocar has been Professor of International Law and Private International Law at the University of Milan since 1976, where he also taught European Community law for many years. He lectured at the Hague Academy of International Law in 1983 and delivered the general course on private international law there in 1993.

Fausto Pocar was the rapporteur for the Working Party on Revision of the Brussels I Convention; his explanatory report remained unpublished because of the conversion of the draft revised convention into Regulation (EC) No 44/2001. He has represented Italy at the Hague Conference on Private International Law on various occasions since 1980: he was co-rapporteur of the Special Commission preparing a draft worldwide convention on jurisdiction and the enforcement of judgments and is currently Chairman of the Special Commission preparing a draft convention on maintenance obligations. He is a member of the Institut de droit international and of numerous learned societies and professional associations, both Italian and foreign, including the European Group for Private International Law, which he chaired from 1994 to 1997.

Fausto Pocar is the author of over 100 publications on private international law and European law, including one of the first university textbooks published in Italy on European Community law (now in its ninth edition), a commentary on the Treaty establishing the European Community and the Treaty on European Union, and various articles on Community employment law, private international commercial and family law and international law on civil procedure, with particular reference to the Brussels and Lugano Conventions.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation'). See also the corrigenda set out at the end of the Act.

I — Background

1. In the process of 'communitarisation' of private international law resulting from the Treaty of Amsterdam, the rules on jurisdiction and the enforcement of judgments in civil and commercial matters — the title of Regulation (EC) No 44/2001 — most certainly play a central role. The predecessor instrument, the Brussels Convention of 27 September 1968 (Brussels I Convention), adopted by the then six EC Member States under Article 220 of the Treaty, covered the same subject matter and entered into force on 1 February 1973 (1). The Brussels I Convention was the first general multilateral instrument on the recognition of judgments which directly regulated the jurisdiction of the contracting States and then relied on that direct jurisdiction for the enforceability of judgments in other contracting States, thereby ensuring that the exercise of direct and indirect jurisdiction coincide. The Brussels I Convention thus falls into the category of double conventions (2). It was amended several times, with the successive waves of enlargement of the European Community (3).

2. It should be remembered that the substance of the Brussels I Convention went to form the Lugano or 'Parallel' Convention, concluded in Lugano on 16 September 1988 between the EC Member States and other European States (the then EFTA countries) (4), albeit with some textual differences, only partly ironed out during subsequent amendments of the Brussels I Convention. In 1997, in order both to fully align the two conventions and to resolve by legislative means certain problems that the Court of Justice of the European Communities had highlighted when interpreting the convention's provisions (see below), the Council decided that the two conventions should be revised simultaneously and instructed a group of experts from the convention contracting States to carry out that task. The revised version was submitted in 1999 (5). Because of the entry into force of the Treaty of Amsterdam and the subsequent communitarisation of judicial cooperation in civil matters, the working party's proposed draft was never enacted as a new version of the Brussels I Convention. It was, however, very largely incorporated into the new Commission proposal for a regulation presented to the Council on the basis of Article 61 of the EC Treaty, with the necessary adjustments to the new form of the instrument (regulation) and with the addition of new provisions on consumer contracts (6); the text was examined afresh by the Council's Committee on Civil Law Matters. Against this background, the Brussels I Regulation

(1) OJ L 299, 31.12.1972. The Brussels Convention was accompanied by an explanatory report drawn up by P. Jenard (OJ C 59, 5.3.1979) (Jenard report).
(2) G. A. L. Droz, *Compétence judiciaire et exécution des jugements dans le marché commun*, Paris, 1972, pp. 2 et seq.
(3) Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom (OJ L 304, 30.10.1978), with explanatory report by P. Schlosser (OJ C 59, 5.3.1979); Convention of 25 October 1982 on the accession of Greece (OJ L 388, 31.12.1982), with explanatory report by D. I. Evrigenis and K. D. Kerameus (OJ C 298, 24.11.1986); Convention of 26 May 1989 on the accession of Spain and Portugal (OJ L 285, 3.10.1989), with explanatory report by M. de Almeida Cruz, M. Desantes Real and P. Jenard (OJ C 189, 28.7.1990); Convention of 29 November 1996 on the accession of Austria, Finland and Sweden (OJ C 15, 17.1.1997).
(4) OJ L 319, 25.11.1988, with explanatory report by P. Jenard and G. Möller (OJ C 189, 28.7.1990). See also G. A. L. Droz and H. Gaudemet-Tallon, 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciales', *Revue critique de droit international privé*, 2001, pp. 601 et seq.; H. Tagaras, 'La révision et communautarisation de la Convention de Bruxelles par le règlement 44/2001', *Cahiers de droit européen*, 2003, pp. 399 et seq.; B. von Hoffmann, *Internationales Privatrecht*, Seventh edition, pp. 118 et seq.; L. Collins (ed.), *Dicey and Morris on the conflict of laws*, 13th edition, Third supplement, London, 2003, pp. 25 et seq.
(5) For a description of the procedure followed, see the

was approved on 22 December 2000 and entered into force on 1 March 2002, becoming directly applicable in all Member States by virtue of its publication in the *Official Journal of the European Communities* (7).

3. The 1968 Brussels Convention was followed by a protocol, which was signed in Luxembourg on 3 June 1971 and entered into force on 1 September 1975 (8), giving the Court of Justice jurisdiction to interpret the convention if so requested by national courts of appeal or last resort. The protocol has given rise to a wealth of case-law over the last 30 years, which, by adopting independent legal concepts and limiting reliance on national law by the contracting States' courts, has made for uniform interpretation of the provisions of the convention. Over the years, the Court's rulings have ensured that the provisions of the convention carry a high degree of legal certainty, making it a very reliable instrument for legal practitioners. It was not possible, however, to attach to the Lugano Convention a procedure for ensuring uniform interpretation; nevertheless, national courts in non-EC countries have frequently been guided by Court of Justice case-law, which has made for harmonious solutions among the States concerned. The 1971 protocol does not apply to the Brussels I Regulation. The task of ensuring uniform interpretation of the regulation falls to the Court of Justice under the ordinary procedures for interpreting Community law laid down in Article 234 of the EC Treaty. However, Article 68 of the EC Treaty introduces a questionable provision whereby only those courts and tribunals in a Member State against whose decisions there is no judicial remedy under national law may, in fact, submit questions of interpretation to the Court of Justice (9). In any event, it should be remembered that the Court of Justice has already provided interpretations on the basis of the 1971 protocol for those provisions of the regulation which simply reproduce the provisions of the Brussels I Convention, interpretations which remain valid and must continue to be taken into consideration.

4. The value of a Community instrument like the Brussels I Regulation for bringing about full and harmonious freedom of movement of persons, goods, services and capital in the European Union is inestimable. The need for it was already clearly apparent when the Treaty establishing the European Community was concluded: Article 220 of the Treaty lists the free movement of judgments as an area in which Member States should negotiate agreements. But it is the experience of the Brussels Convention — its success from the moment it entered into force and the impressive body of case-law accompanying its interpretation and application which made it a familiar legal landmark in the life of the European Community — that confirms the significance of the regulation. With the convention, the Community acquired an instrument based on uniform rules of direct jurisdiction, compliance with which did not need review by the court of

Commission document referred to in the next footnote. The author of this article was the working party's rapporteur. As with the previous versions, the explanatory report should have accompanied the new version of the Brussels I Convention. The events which led to the adoption of a regulation rather than a convention prevented the publication of the explanatory report which may yet be published as the report on the new version of the Lugano (Parallel) Convention when this has been concluded.

(6) COM(1999) 348 final, 14.7.1999.

(7) OJ L 12, 16.1.2001.

(8) OJ C 27, 26.1.1998 (latest version of the protocol). *Re* the original version, see F. Pocar, *La convenzione di Bruxelles sulla giurisdizione e l'esecuzione delle sentenze*, Third edition, Milan, 1995, pp. 32 et seq.

(9) H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, Third edition, Paris, 2002, p. 22; S. Bariatti, 'La cooperazione giudiziaria in materia civile dal terzo pilastro dell'Unione europea al titolo IV del Trattato CE', *Diritto dell'Unione europea*, 2001, p. 277; F. Pocar, 'Remarques sur la coopération judiciaire en matière civile dans la CE', *Mélanges en l'honneur de B. Dutoit*, Geneva, 2002, p. 229.

the State in which enforcement was sought, and on automatic recognition of decisions, which together accelerated the movement of judgments between the EU Member States. The regulation, however, which further simplifies the procedure for declaring a judgment given in one Member State enforceable in another, has the potential to gradually dismantle almost all the obstacles still in the way of the automatic enforceability of judgments throughout the Community. The Brussels I Regulation stands as a milestone on the road to a genuine European judicial area which has dismantled the barriers between Member States. The convention not by chance has been described as a federating instrument, a description which holds even truer of the regulation (1).

II — Scope

1. *Territorial scope*

The regulation is applicable in all Member States except Denmark, which under Article 69 of the EC Treaty does not take part in acts adopted pursuant to Title IV of the EC Treaty, whereas it does apply in the United Kingdom and Ireland, which notified their wish to be bound by the regulation. Thus, the Brussels I Convention (in the version preceding the revision process leading to the adoption of the regulation) continues to apply in relations between Denmark and its fellow EC Member States.

2. *Material scope*

1. Despite the broad sweep of its title, covering civil and commercial matters in general, and Article 1(1), according to which it is applicable 'whatever the nature of the court or tribunal', the regulation does provide for various exceptions. These are listed in Article 1(2) as follows: the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; and social security and arbitration. Moreover, the regulation does not apply to revenue, customs or administrative matters.

2. The Court of Justice has tended to interpret these exceptions widely to cover disputes, which, while not explicitly included among the subjects listed, are nevertheless indirectly related to them. The Court has clearly

(1) V. B. Goldman, 'Un traité fédérateur: la convention entre les États membres de la CEE sur la reconnaissance et l'exécution des décisions en matière civile et commerciale', *Revue trimestrielle de droit européen*, 1971, pp. 1 et seq.

stated that there is no provision that necessarily links the treatment of an ancillary claim to that of a principal claim; ancillary claims accordingly come within the scope of the convention (and, now, of the regulation) 'according to the subject matter with which they are concerned and not according to the subject matter involved in the principal claim' (1). It should also be remembered that some of the areas outside the regulation's scope are governed by other Community instruments, for example Regulation (EC) No 1346/2000 on insolvency proceedings and Regulation (EC) No 1347/2000 on matrimonial matters and matters of parental responsibility for children of both spouses. Under Article 67 of the regulation, the provisions of such Community instruments take precedence over the regulation itself and may therefore be taken into consideration for the purpose of interpreting matters outside its scope.

3. The material scope of the regulation is limited not only by the exceptions under Article 1 but also, under Article 71, by provisions on jurisdiction and the enforcement of judgments contained in other conventions 'in relation to particular matters', which remain unaffected. However, even where a national court has applied the rules on jurisdiction of a convention on a particular matter, its decisions are recognised and enforced in the other Member States pursuant to the regulation, unless both the Member State of origin and the Member State addressed are parties to the particular convention. In that case, the conditions for the recognition or enforcement are governed by that convention, but it is still possible to apply the provisions of the regulation which concern the procedure for recognition and enforcement.

3. Temporal scope

Under Article 66, the Brussels I Regulation applies to legal proceedings instituted and to documents formally drawn up after the regulation's entry into force on 1 March 2002. Article 66(2), however, goes on to specify two situations in which, in proceedings instituted in a Member State before that date, judgments given thereafter will be recognised and enforced in accordance with the regulation. These are (i) if, when the proceedings were instituted in the Member State of origin, that Member State was a party to the Brussels I Convention or the Lugano Convention or (ii) if, in the Member State of origin, jurisdiction was founded on rules which accorded with those provided for in the regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. This is a transitional provision designed to ensure the maximum continuity between the regulation and conventions applying among Member States and to promote uniformity in the rules applied to the enforcement of judgments throughout the European Union.

(1) Judgment of the Court of Justice of 6 March 1980 in Case 120/79 *De Cavel II* [1980] ECR 731.

III — Direct jurisdiction

1. General ground of jurisdiction

1. The system of direct jurisdiction embodied in the regulation is based — like that of its predecessor the Brussels I Convention — on a general ground, on a number of special grounds as alternatives to the general ground, on 'protective' jurisdiction, which introduces special rules safeguarding the weaker party, on the prorogation of jurisdiction by the parties, and lastly on exclusive jurisdiction.

2. The general rule set out in Article 2 is that jurisdiction lies with the courts of the Member State of the defendant's domicile. Persons domiciled in a Member State are sued in the courts of that State whatever their nationality, which has been outlawed as a ground of jurisdiction in accordance with the principle that nationality-based distinctions have no place in the internal market. Persons domiciled in a Member State may be sued in the courts of another Member State on the strict condition that the regulation so provides. In particular, the rules of national jurisdiction listed — albeit partially — in Annex I to the regulation may not be applied against them. It should be noted that while the defendant's domicile in a Member State may determine that jurisdiction lies with that State's courts, it does not at the same time regulate those courts' territorial or material jurisdiction. Both these matters are governed by the Member State's own rules.

3. The choice of the defendant's domicile as the general ground for jurisdiction came in for criticism in connection with the Brussels I Convention, which provided no uniform definition of domicile but left the matter to the national law of the court seised. Although no problems actually arose when applying the convention, a uniform definition of the domicile of companies or other legal persons is given in the regulation. Thus, if the defendant is a natural person, the court of the Member State seised of the matter determines whether or not he is domiciled there by applying its domestic law; if the court establishes that he is not domiciled in that State, then in order to determine whether the defendant is domiciled in another Member State, the court applies the law of that Member State (Article 59). If the defendant is a company or other legal person, Article 60 lays down that, for the purposes of the regulation, it is domiciled at the place where it has its statutory seat, or central administration or its principal place of business. The grounds of jurisdiction specified in Article 60, which is modelled on Article 48 of the EC Treaty, are alternatives, with two consequences: firstly, that the plaintiff has several alternative forums available as regards the territorial application of the regulation, and, secondly, that, if any one of those grounds is present in a Member State, the regulation is

applicable, even though the other grounds would determine that the company was domiciled in a third State. This rule is useful less as a tool for settling issues of concurrent jurisdiction than as a means of ensuring that companies with at least one link with the territory of the European Union are brought within the scope of the regulation's uniform rules.

4. As well as being the general ground for determining jurisdiction (which may be concurrent with other grounds only where the regulation so allows), the defendant's domicile is also the criterion delimiting the scope of the regulation's direct rules on jurisdiction. Under Article 4, if the defendant is not domiciled in a Member State, jurisdiction is only indirectly regulated by the regulation, by referring to the law of each Member State; the exceptions are the rules on exclusive jurisdiction and the prorogation of jurisdiction (Articles 22 and 23), which apply regardless of domicile. Against defendants domiciled in third countries it is then possible to rely on the national rules of jurisdiction listed in Annex I to the regulation, even when these assert exorbitant jurisdiction. Judgments given in actions based on such national rules are — as will be seen later — recognised in the other Member States on the same conditions as judgments in accordance with the regulation's own rules on jurisdiction. This provision, already found in the Brussels I Convention, has been attacked as discriminating against persons domiciled in third countries ([1]); to remedy this, albeit partially, Article 72 leaves unaffected any existing bilateral agreements with third countries that provide for non-recognition of judgments ([2]).

2. *Special jurisdiction*

1. As an alternative to the general rule that jurisdiction lies with the courts of the Member State of the defendant's domicile, plaintiffs may avail themselves of the special jurisdiction specified in Articles 5 to 7 of the regulation and bring an action in another Member State. This form of jurisdiction covers matters relating to contract, maintenance, tort, civil claims for damages or restitution based on an act giving rise to criminal proceedings, disputes arising out of the operations of a branch or agency, trusts, and certain shipping disputes. Unlike general jurisdiction, the grounds of special jurisdiction in principle ([3]) establish both the jurisdiction of the Member State concerned and the local jurisdiction of that State's courts, which may depart from national rules on territorial jurisdiction ([4]).

2. Without entering into the detail of all the above grounds of jurisdiction, it should be mentioned that **in matters relating to contract** the regulation, like the Brussels I Convention, lays down that a person may be sued 'in the courts for the place of performance of the obligation in question' (Article

([1]) See, for example, K. H. Nadelmann, 'Jurisdictionally improper fora in treaties on recognition of judgments: the Common Market draft', *Columbia Law Review*, 1967, pp. 995 et seq.; P. Hay, 'The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments — Some considerations of policy and interpretation', *American Journal of Comparative Law*, 1968, pp. 149 et seq.; T. C. Hartley, *Civil jurisdiction and judgments*, London, 1984, p. 8.

([2]) Under Article 72, the regulation does not affect agreements by which a Member State and a third State undertook, prior to the entry into force of the regulation, not to recognise judgments given in another Member State against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of the Brussels Convention, the judgment could only be founded on a ground of jurisdiction considered exorbitant under the second paragraph of Article 3 of the convention. But, unlike the counterpart Article 59 of the Brussels Convention, this provision does not apply to agreements entered into subsequently.

([3]) Except for jurisdiction with regard to trusts under Article 5(6), which refers to the courts of the Member State in which the trust is domiciled.

([4]) On the gradual development of Community rules on the jurisdiction of the courts both of and within the Member States, see S. M. Carbone, *Il nuovo spazio giudiziario europeo dalla convenzione di Bruxelles al Regolamento CE 44/2001*, Fourth edition, Turin, 2002, pp. 54 et seq.

5(1)(a)). This provision has raised various problems of interpretation regarding (a) the definition of 'matters relating to contract', (b) the identification of the contractual obligation to be taken into consideration for the purposes of jurisdiction, and (c) the determination of the place of performance.

(a) What are 'matters relating to contract'? Given the differences in Member States' national law on the precise scope of matters relating to contract (for example, *culpa in contrahendo* — pre-contractual liability — is regarded as contractual in some Member States but non-contractual in others), the Court of Justice has identified the need for an independent concept but has not developed a hard and fast definition. The Court has tended to address the problem pragmatically, ruling out as a matter of course any reference to the national law of the States concerned and providing guidance for determining where a case involves a contractual obligation and where no contract is involved (1). A dispute as to the existence or the validity of a contract is also considered to be a matter relating to contract (2). Moreover, when an action is based on both a claim of breach of a contractual duty and a claim of tort, no ancillary jurisdiction may be assumed. Jurisdiction for the first claim has to be determined by reference to Article 5(1) and for the second by reference to Article 5(3) regarding tort, even if this involves the plaintiff in bringing two actions before courts in different States (3), a situation which can always be avoided by applying the general rule that jurisdiction is vested in the courts of the defendant's domicile (4).

(b) Which is the obligation in question? The Court of Justice has developed an independent concept regarding the contractual obligation to be taken into account for determining jurisdiction, ruling that it is the obligation which corresponds to the contractual right on which the plaintiff's action is based and the non-performance of which is relied upon to support the plaintiff's claims (5). This solution, which is fully in accordance with Article 5(1), has been criticised for allowing multiple jurisdiction for a single contract. That disadvantage is mitigated by the fact that, where a plaintiff's action is based on more than one obligation under the same contract, the court seised may refer to the principal obligation in order to determine whether it has jurisdiction (6). The decision as to whether or not the obligations are to be ranked as equivalent falls to the court seised and should normally be taken on the basis of the law applicable to the contract (7).

(c) Where is the place of performance of the obligation in question? The Court of Justice, which had various available options (including the adoption of an independent concept for the place of performance and reference to the *lex fori*), chose to refer to the *lex causae* of the disputed

(1) See the judgments of the Court of Justice of 22 March 1983 in Case 34/82 *Martin Peters* [1983] ECR 987 and of 17 June 1992 in Case C-26/91 *Jacob Handte* [1992] ECR I-3967.

(2) See, in so far as such a dispute constituted a plea by way of preliminary objection in a case for the performance of a contract, the judgment of the Court of Justice of 4 March 1982 in Case 38/81 *Effer* v *Kantner* [1982] ECR 825.

(3) See the judgment of the Court of Justice of 27 September 1988 in Case 189/87 *Kalfelis* [1988] ECR 5565.

(4) Reference must also be made to Article 2 when the obligation in question cannot be geographically located: see the judgment of the Court of Justice of 19 February 2002 in Case C-256/00 *Besix* [2002] ECR I-1699.

(5) See, in particular, the judgment of the Court of Justice of 6 October 1976 in Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497; in this case, which concerned claims for damages for non-performance of a contract, the Court ruled that the obligation to which reference must be made is not the obligation to pay damages but the obligation non-performance of which is relied upon, by the plaintiff in support of his application for damages.

(6) See the judgment of the Court of Justice of 15 January 1987 in Case 266/85 *Shenavai* v *Kriescher* [1987] ECR 239.

(7) See the judgment of the Court of Justice of 28 September 1999 in Case C-440/97 *Groupe Concorde* [1999] ECR I-6307.

obligation, as determined according to the private international law of the court before which the matter is brought (1). This solution, initially criticised as lacking uniformity and encouraging forum shopping, became more acceptable after the entry into force of the Convention on the Law applicable to Contractual Obligations of 19 October 1980, although the latter did not iron out all the problems involved in recourse to private international law. In order to ensure more uniform application of the place-of-performance rule, the regulation introduces a new provision designed to avoid litigants invoking conflict-of-laws rules. This ties the place of performance of the most common contracts to the underlying facts, specifying that, unless otherwise agreed between the parties, it is 'in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered' and 'in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided' (Article 5(1)(b)). However independent, pragmatic and factually-based it may be in intention (2), this provision can hardly replace conflict-of-laws rules in cases where the parties have not clearly stipulated the place of performance of the obligation in the contract, or where the obligation has already been performed and the place of performance is in dispute. In practice, such cases will involve reverting to the general rule under Article 5(1)(a). The latter applies in any event, in accordance with Article 5(1)(c), to all cases not covered by paragraph (b) (i.e. contracts other than contracts for the sale of goods or the provision of services) and to those contracts as well if the place of performance is in a third State.

3. In matters of **maintenance**, the need to protect the maintenance creditor when suing the maintenance debtor resulted in the creditor's domicile or habitual residence being added to the general rule of the defendant's domicile, so providing the maintenance creditor with a choice of alternative forums. Moreover, if the matter is ancillary to proceedings concerning the status of a person, the maintenance creditor may also sue in the court which, according to its own law, has jurisdiction to entertain the proceeding on status, unless that jurisdiction is based solely on the nationality of one of the parties (Article 5(2)).

4. In matters of **tort, delict or quasi-delict**, Article 5(3) of the regulation provides that the plaintiff may sue in the courts for the place where the harmful event occurred or may occur. Given the Member States' differing legal approaches to determining where a tort involving more than one State was committed (some being based on the principle of the place of the act or omission giving rise to the damage and some on the place where the damage occurred), the Court of Justice's interpretation of the correspond-

(1) See the judgments of the Court of Justice of 6 October 1976 in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473 and in *Groupe Concorde* (cited above).
(2) See section on Article 5 in COM(1999) 348 final.

ing provision of the Brussels I Convention was to accept both theories and to allow the plaintiff the option of suing either in the place of the act or in the place of the damage (1). Although this interpretation increases the scope for forum shopping, it should be pointed out that reference to the place of the act theory alone would have overly favoured the wrongdoer, since that place frequently coincides with his domicile, and would have deprived the plaintiff of the option which special jurisdiction is intended to provide. In order to avoid the multiplication of courts with competent jurisdiction, the place where the harmful event occurred is to be understood as being the place where the initial damage manifested itself directly and not that where any subsequent damage to assets may indirectly occur (2). The special problem of damage inflicted via the press, radio or television (defamation), in which an act in one country may cause harmful events in several others, has been solved by the ruling that the victim may bring an action before the courts of the defendant's domicile, which have general jurisdiction in respect of all the harm caused by the defamation, or before the courts of each State in which the plaintiff claims to have suffered injury, which have jurisdiction to rule solely in respect of the harm ascertained in that State (3).

5. The regulation also provides for special jurisdiction in certain cases on the basis of related actions. As will also be clear from the case-law reviewed so far, the relatedness of actions is not a general ground of jurisdiction; it may only determine jurisdiction in the four cases specified in Article 6 of the regulation, i.e. where there are a number of defendants and the claims are closely connected, in the case of a third party in an action on a warranty or guarantee, where there is a counterclaim arising from a contract on which the original claim was based, and where an action relating to a contract may be combined with an action relating to immovable property.

3. Protective jurisdiction

1. For some matters, where contracts usually involve a socioeconomic imbalance between the two sides, the jurisdiction grounds considered so far would often entail a further advantage for the stronger party. That is certainly true of the general forum when the application is made by the relatively weak party, but it also holds true for special jurisdiction, in view of the scope for the stronger party to stipulate the place of performance in the contract. In order to afford the weaker party due judicial protection, the regulation contains jurisdiction rules designed to ensure that proceedings are preferably conducted in courts readily accessible to that party. The matters concerned are insurance contracts, consumer contracts and individual employment contracts.

(1) See the judgment of the Court of Justice of 30 November 1976 in Case 21/76 *Mines des potasse d'Alsace* v *Bier* [1976] ECR 1735.
(2) See the judgments of the Court of Justice of 11 January 1990 in Case C-220/88 *Dumez* [1990] ECR I-49 and of 19 September 1995 in Case C-364/93 *Marinari* [1995] ECR I-2739.
(3) See the judgment of the Court of Justice of 7 March 1995 in Case C-68/93 *Shevill* [1995] ECR I-415.

2. In the case of **insurance**, conferral of jurisdiction on courts more accessible to the insured is achieved by enabling the plaintiff (policyholder, insured or beneficiary) to bring proceedings in the courts for his own domicile as an alternative to the defendant-related general forum. An insurer who is not domiciled in a Member State but has a branch or other place of business in a Member State is deemed, for disputes arising out of its operations, to be domiciled in that Member State (Article 9). In the case of liability insurance or insurance of immovable property, the insurer may also be sued in the courts of the place where the harmful event occurred. The insurer, on the other hand, may only have recourse to the general forum and must bring proceedings in the courts of the domicile of the policyholder, insured or beneficiary.

3. The same option of submitting a dispute to the courts of their own domicile as an alternative to the defendant-related forum is available to **consumers**, who may themselves, however, as a rule be sued by the other party only in the courts of the State in which they are domiciled. It should be pointed out that such protection applies only where the party contracting with a consumer pursues commercial or professional activities in the Member State of the consumer's domicile or directs such activities to that State 'by any means'; this provision is designed to include electronic commerce, provided activities are specifically directed at the State in which the consumer is domiciled.

4. In the case of **employment contracts**, too, while the employer may only avail himself of the general forum of the defendant's domicile, the employee has a choice between that forum and one closer to him, although this is not that of his domicile but that of the place where he habitually carries out or carried out his work or, for work carried out in more than one country, that of the place where the business which engaged him is or was situated.

5. The weaker parties in question are also protected from the danger of having a deviating jurisdiction agreement foisted upon them by the other party when concluding the contract. Such an agreement is valid only if it is entered into after the dispute has arisen, if it allows the weaker parties access to further forums besides those specified by the regulation or, for insurance policyholders and consumers, if it confers jurisdiction on the courts of the State in which both parties are domiciled or habitually resident.

4. Prorogation of jurisdiction

1. Subject to the limits referred to above, the Brussels I Regulation allows the parties extensive scope to decide for themselves on international jurisdic-

tion. That scope, laid down in Article 23 of the regulation, enabling the parties, one or more of them domiciled in a Member State, to designate a Member State's courts to which to submit any future disputes between them, stems from a gradual process of legislative development. While the Brussels I Convention originally recognised a jurisdiction agreement as valid in form only if in writing or evidenced in writing, the 1978 Accession Convention added the possibility of the agreement being in a form according with an international trade usage of which the parties were or ought to have been aware and which is widely known to and regularly observed by parties to such contracts in the particular trade concerned. To those cases of valid jurisdiction agreements, the 1989 Accession Convention then added the possibility of the agreement being in a form according with practices which the parties have established between themselves, thereby further departing from the original restrictive wording (1). Taking on board the latest convention wording and thus confirming the tendency to favour validity of such an agreement, the regulation also, firstly, made it clear that any communication by electronic means which provides a durable record of the jurisdiction agreement is deemed equivalent to writing and, secondly, relaxed the provision conferring exclusive jurisdiction on the courts designated, by stipulating that jurisdiction is exclusive unless the parties have agreed otherwise. This brings greater flexibility to jurisdiction agreements, making them a working tool more responsive to the needs of international trade, in which parties' self-determination has a key part to play.

2. Apart from agreement between the parties, prorogation of jurisdiction may also arise from tacit acceptance of a court, if the defendant enters an appearance, without contesting the jurisdiction of the court seised, in his first defence (2). Since this is prorogation after a dispute has arisen, it also, unlike that under a jurisdiction agreement, applies as an exception to protective jurisdiction, being barred only by exclusive jurisdiction.

5. *Exclusive jurisdiction*

As mentioned earlier, the set of rules by which the regulation directly governs jurisdiction also includes some bases for exclusive jurisdiction, to apply in all cases, even where the defendant is domiciled in a non-EU State. Those jurisdiction bases are laid down in addition to jurisdiction under a prorogation agreement between the parties, in so far as such jurisdiction is exclusive. In particular, they involve proceedings principally (3) concerned with rights *in rem* in immovable property or long-term tenancies of immovable property, for which jurisdiction lies with the courts of the Member State in which the property is situated, with valid constitution or dissolution of companies or other legal persons, for which their seat (4) is the point of reference, with entries in

(1) The provision was taken from the 1988 Lugano Convention.
(2) The Court of Justice has made it clear that lodging an objection to jurisdiction along with a defence on the substance of the case, as required under some countries' national law, does not entail acceptance of jurisdiction; see the judgment of 24 June 1981 in Case 150/80 *Elefanten Schuh* [1981] ECR 1671.
(3) Under Article 25 of the regulation, requiring a court to decline jurisdiction, of its own motion, only if seised of a claim principally concerned with a matter for which exclusive jurisdiction lies elsewhere.
(4) It should be noted that the regulation stipulates that, in determining the seat, the court is to apply its rules of private international law, an arrangement deviating from that applicable generally under Article 60 in determining domicile for the purposes of Article 2.

public registers and registration or validity of patents, for which jurisdiction lies with the courts in the State of registration, and with enforcement of judgments, which comes within the jurisdiction of the courts in the State of enforcement. The exclusive nature of those jurisdiction rules is warranted on account of the dispute's particularly close link with a Member State, while leaving open the question of whether such exclusive jurisdiction also has the effect of establishing that the court seised does not have jurisdiction when the link specified is with a third State (1).

6. *Jurisdiction to grant interim relief*

The jurisdiction criteria laid down in the regulation come into play as regards interim relief, too, in that the courts with jurisdiction as to the substance of the matter also have jurisdiction to order provisional, including protective, measures. Under Article 31, however, in addition to the courts with jurisdiction as to the substance, jurisdiction may also be available under the law of any Member State to whose courts a measure is applied for, even if another Member State's courts have jurisdiction as to the substance. The reference to Member States' national law is general in scope, but presupposes an actual link between measures applied for and territorial jurisdiction of the State applied to (2), so that jurisdiction in essence lies with the courts in the State of location of the property on which a protective measure is to be imposed.

7. *Coordination of jurisdiction*

1. The availability of alternative forums for many disputes covered by the regulation means that proceedings on the same claim may be brought and conducted concurrently in courts in different Member States, with the risk that those courts arrive at mutually incompatible judgments. Proper administration of justice requires that that risk be kept to a minimum, with the avoidance, as far as possible, of concurrent proceedings conducted in parallel in different Member States. In trying to find a clear, effective way of resolving cases of *lis pendens* or related actions, the draftsmen of the regulation, as of the convention before it, were faced with considerable differences between national legal systems, beginning with some Member States' arrangement whereby proceedings already pending take precedence and others' application of the *forum non conveniens* approach. Even with the latter approach generally ruled out and with it stipulated that in *lis pendens* cases any court other than the court first seised must decline jurisdiction in favour of the court first seised, where that court's jurisdiction is established, there remained fundamental differences as to the time at which proceedings become pending, since some systems make reference

(1) The issue raised, of whether exclusive jurisdiction rules have what has been termed a 'reflex effect', has not been finally settled in legal scholarship or in case-law, although it has previously been resolved in the negative for the Brussels I and Lugano Conventions; see H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (cited above), pp. 72 et seq.

(2) On this point, see the judgment of the Court of Justice of 17 November 1998 in Case C-391/95 *Van Uden* [1998] ECR I-7091.

to the lodging of the document instituting proceedings with the court and others to its service on the defendant. The inadequacy of referring to the national law of each of the States concerned, as suggested by the Court of Justice (1), as a satisfactory way of resolving the problem prompted attempts to arrive at separate definitions, albeit based on a compromise between Member States' systems. Under Article 30 of the regulation, therefore, if proceedings become pending upon lodging of the document instituting them with a court, the court is deemed to be seised at that time, provided the plaintiff has not subsequently failed to take all necessary steps for service on the defendant; if proceedings become pending upon service on the defendant, on the other hand, the court is deemed to be seised when the document instituting them is received by the authority responsible for service, provided the plaintiff has not subsequently failed to take all necessary steps to have the document lodged with the court. For all its apparent complexity, this arrangement is designed to reduce the potential advantage to either party of referring to national systems, while still conferring jurisdiction on the court first seised.

2. Some flexibility is advisable, however, in the case of related actions. Here, any court other than the court first seised is merely given the option of staying proceedings, but not required to do so. That other court may also decline jurisdiction, upon application by either party, if the court first seised has jurisdiction over the actions in question and its law allows their consolidation. Without bringing the greater flexibility that reference to the *forum non conveniens* principle would, the coordination provided for is nevertheless based on careful consideration by courts other than the court first seised (2).

(1) Judgment of the Court of Justice of 7 June 1984 in Case 129/83 *Zelger* v *Salinitri* [1984] ECR 2397; see, however, the subsequent judgment of 8 December 1987 in Case 144/86 *Gubisch* v *Colombo* [1987] ECR 4861, in which the Court made it clear that the reference to national law relates only to the time at which proceedings become pending and that, as regards its essential components, *lis pendens* is to be regarded as separately defined.

(2) With this in mind, it might be asked whether it would not be worth bringing about closer coordination by also attaching significance to consideration by the court first seised, with a view to a possible transfer of proceedings to another court seised.

IV — Recognition and enforcement of judgments

1. While the rules governing jurisdiction made the Brussels I Convention, as they now make the regulation, the first general instrument to deal with this, Chapter III of the regulation, concerning recognition and enforcement of judgments, is no less of a new departure in comparison with previous instruments. It, too, stems from developments in the convention provisions, which it further builds upon with the aim of increasingly easy, automatic giving of effect to judgments handed down in other Member States.

2. Like the convention before it, the regulation first of all allows for recognition in Member States of all judgments given by courts in other Member

States within its scope as to subject matter, regardless of what judgments are called and of the final or provisional nature of their content. Article 32 leaves no room for doubt on that score, nor as to the applicability of the regulation's provisions, which do not require any consideration of the original court's jurisdiction. Even judgments given on the basis of jurisdiction criteria under national law, as only indirectly referred to in Article 4 of the regulation, in the case of defendants domiciled in a third State, will therefore qualify for free movement in other Member States.

3. The regulation continues to distinguish between recognition and enforcement of foreign judgments. Recognition is automatic, without any special procedure unless in dispute, under the principle of mutual trust between Member States' judicial systems; only for enforcement is any procedure required, albeit a simplified one. The distinction is, of course, limited in effect, since it presupposes an undisputed foreign judgment, but does have its significance in coordinating Member States' jurisdiction. As pointed out by the Court of Justice in one of its earliest judgments, the automatic *res judicata* effect entailed by recognition, under Article 33, means that any further proceedings involving the same cause of action are barred in other Member States ([3]). Nor is the significance of the invocability of recognition as an incidental issue in a court in any Member State, even one other than that having jurisdiction for enforcement, to be underestimated.

4. The grounds for non-recognition are also fairly limited and have been further reduced by the regulation. They concern a manifest clash with public policy in the Member State in which recognition is sought, defective service of the document instituting proceedings on the defendant, such that he was unable to arrange for his defence, and irreconcilability of the judgment with another judgment given in the State in which recognition is sought, or even in another Member State or a third State, provided that judgment is recognised in the State in which recognition is sought. These circumstances should arise increasingly rarely, both as legislative harmonisation makes for growing uniformity of public policy within Europe, including in procedural matters, and as conflicting judgments ought normally to be prevented by operation of the rules on *lis pendens* and related actions.

5. The only real obstacle which the regulation still places in the way of recognition seems rather to be that, while review of the original court's jurisdiction has generally been done away with, it still stands in cases involving protective jurisdiction in respect of insurance and consumer contracts or exclusive jurisdiction. Retention of review is of questionable value and somewhat at variance with the reasons for eliminating review of the foreign court's jurisdiction generally, i.e. mutual trust in the administration of justice, as asserted in the regulation and reflected in the procedural safeguards for de-

([3]) Judgment of the Court of Justice of 30 November 1976 in Case 42/76 *De Wolf* v *Cox* [1976] ECR 1759.

fendants and the exclusion of any review as to the substance of judgments (1). It should also be pointed out that the regulation does not allow for review of jurisdiction in the case of individual employment contracts, so as not to jeopardise an employee's right to secure recognition of a judgment in his favour, obtained in another Member State (2).

6. The regulation appears even more of a new departure as regards enforcement of foreign judgments. Without going so far as to remove the need for any procedure, the declaration of enforceability involves a procedure further simplified from that under the Brussels I Convention, so as to become virtually automatic, with purely formal scrutiny of the documents produced by the party applying for it. These are confined to a copy of the judgment which satisfies the conditions necessary to establish its authenticity and a certificate issued, using a form annexed to the regulation (3), by the court or competent authority in the State in which the judgment was given. Having ascertained that the documents are in order, the court declares the judgment enforceable, upon application by any interested party, without considering recognition requirements under the regulation, in the absence of the party against whom enforcement is sought, who is not allowed to make any submissions at this stage of proceedings.

7. Only once the declaration of enforceability has been served on the other party may he, within one month (4), appeal against it on the grounds for non-recognition under the regulation (5). The court (6) must give its decision without delay on that appeal, which is dealt with under the rules governing adversarial procedure. The regulation thus follows the pattern of the summary procedure previously laid down in the Brussels I Convention, with the further simplification that scrutiny as to recognition requirements, performable by the court twice under the convention, first for a declaration of enforceability and then for an appeal against it, is confined to the second stage, if the party against whom enforcement is sought so requests by appealing. Where he does not, the foreign judgment is thus enforced without any scrutiny as to recognition requirements (7). The elimination of scrutiny at the first stage therefore has significant implications and makes for automatic giving of effect to foreign judgments.

V — Concluding remarks

As pointed out at the beginning of this account of it, the Brussels I Regulation represents a key instrument for the establishment of a European judicial area. Not only does it cover a wide range of civil and commercial matters, following on from the Brussels I Convention, but it has been able to draw on the experi-

(1) See the regulation's 16th recital. The same reasons for eliminating review of jurisdiction had previously been adduced in the Jenard report (cited above), p. 46.

(2) There can, of course, be no question of any review as to the substance of a foreign judgment, even as to the law applied by the original court, as allowed by Article 27(4) of the Brussels I Convention, under which a judgment will not be recognised if, in order to arrive at its judgment, the court in the State in which the judgment was given has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with the rules of private international law of the State in which recognition is sought, unless the same result would have been reached by application of those rules. The omission of that provision has to be seen as a welcome development, on account of its substantive review implications. Its retention in the regulation would, moreover, in part at least, run counter to the course followed in the Brussels II Regulation, which makes no provision for such review. On this point, see H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (cited above), p. 320.

(3) Annex V. The form is designed to show at a glance the main details of the judgment and of service of the document instituting proceedings at the court in the source Member State.

(4) Within two months if the party against whom enforcement is sought is domiciled in a State other than that in which the declaration of enforceability was issued.

(5) The party applying for a declaration of enforceability of a foreign judgment is also entitled to appeal if it is not granted.

(6) The court with jurisdiction to hear the appeal, like that with

ence built up over decades of applying the convention, as witnessed by thousands of national judgments and well over 100 interpretative rulings by the Court of Justice, to come up with more advanced ways of simplifying formalities and procedures for judgments given in one Member State to travel and to take effect in other Member States. Availability of direct jurisdiction rules and of arrangements for coordinating jurisdiction of Member States' courts pursuant to them, increasingly based on common definitions rather than on Member States' national law, brings progressive harmonisation of the exercise of civil jurisdiction in Member States in the case of defendants domiciled in other Member States, to which might be added more harmonised rules on the exercise of jurisdiction for defendants domiciled in non-member countries. Even though not yet complete, gradual elimination of review of the source Member State's jurisdiction in other Member States in which judgments are to be enforced, as well as more generally of any requirements for recognition of judgments and of any procedural formalities, follows the approach of making the source State responsible for establishing compliance with principles laid down by law in issuing judgments and of having those judgments automatically recognised in other States ([8]). Incorporation of the regulation's provisions into a forthcoming revised version of the Lugano Convention with certain third States, which might be joined by others, including non-European ones ([9]), is in addition a prerequisite if, besides helping to establish a European judicial area, those provisions are also to serve as a point of reference in regulating relations between persons domiciled in the EU and in third States.

jurisdiction to issue the declaration of enforceability, for each Member State is not now specified in the body of the regulation, as it was in the Brussels I Convention. In order to obviate the need to amend the regulation for future European Union enlargements, or possibly in response to different information supplied by Member States, the courts having jurisdiction are listed in annexes to the regulation; these can be amended by the Commission on the basis of information supplied by the Member State concerned. See Annexes II, III and IV.

([7]) On this point, including the procedure's similarities with the system of registration of judgments in the United Kingdom, see W. A. Kennet, *The enforcement of judgments in Europe*, Oxford, 2000, pp. 217 et seq.

([8]) On this, including the prospect of introducing a European enforcement order, see R. Wagner, 'Vom Brüsseler Übereinkommen über die Brüssel I-Verordnung zum Europäischen Vollstreckungstitel', *IPRax*, 2002, pp. 75 et seq., and A. Marmisse, *La libre circulation des décisions de justice en Europe*, Limoges, 2000, pp. 196 et seq.

([9]) Especially if the proceedings of the Hague Conference on Private International Law for the drafting of a worldwide convention on jurisdiction and enforcement of judgments should not prove successful. A draft general convention drawn up in 1999, with an explanatory report by P. Nygh and F. Pocar (available on the conference website), has been put aside for the time being and a draft convention confined to choice-of-court agreements is now being discussed.

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 44/2001

of 22 December 2000

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the 'Brussels Convention') [4]. On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

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[1] OJ C 376, 28.12.1999, p. 1.
[2] Opinion delivered on 21 September 2000 (not yet published in the Official Journal).
[3] OJ C 117, 26.4.2000, p. 6.
[4] OJ L 299, 31.12.1972, p. 32.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

(14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol [1] should remain applicable also to cases already pending when this Regulation enters into force.

(20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty

[1] OJ L 204, 2.8.1975, p. 28.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text see OJ C 27, 26.1.1998, p. 28.

establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(22) Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation.

(23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

(24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

(29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1],

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark.

CHAPTER II

JURISDICTION

Section 1

General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

[1] OJ L 184, 17.7.1999, p. 23.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2

Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

   — in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

   — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

   (c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

   (a) has been arrested to secure such payment, or

   (b) could have been so arrested, but bail or other security has been given;

   provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled,

provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. 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 Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3

Jurisdiction in matters relating to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

   (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

   (b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

   (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

   (b) for loss or damage caused by goods in transit as described in point 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in points 1 to 3;

5. notwithstanding points 1 to 4, all 'large risks' as defined in Council Directive 73/239/EEC [1], as amended by Council Directives 88/357/EEC [2] and 90/618/EEC [3], as they may be amended.

Section 4

Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

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[1] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).

[2] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2000/26/EC.

[3] OJ L 330, 29.11.1990, p. 44.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5

Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

   (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

   (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8

Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [1] shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9

***Lis pendens* — related actions**

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

[1] OJ L 160, 30.6.2000, p. 37.

Section 10

Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2

Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Section 3

Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative *ad litem*.

CHAPTER IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 57

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

Article 58

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

CHAPTER V

GENERAL PROVISIONS

Article 59

1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 60

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.

2. For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 61

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

Article 62

In Sweden, in summary proceedings concerning orders to pay (*betalningsföreläggande*) and assistance (*handräckning*), the expression 'court' includes the 'Swedish enforcement service' (*kronofogdemyndighet*).

Article 63

1. A person domiciled in the territory of the Grand Duchy of Luxembourg and sued in the court of another Member State pursuant to Article 5(1) may refuse to submit to the jurisdiction of that court if the final place of delivery of the goods or provision of the services is in Luxembourg.

2. Where, under paragraph 1, the final place of delivery of the goods or provision of the services is in Luxembourg, any agreement conferring jurisdiction must, in order to be valid, be accepted in writing or evidenced in writing within the meaning of Article 23(1)(a).

3. The provisions of this Article shall not apply to contracts for the provision of financial services.

4. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 64

1. In proceedings involving a dispute between the master and a member of the crew of a seagoing ship registered in Greece or in Portugal, concerning remuneration or other conditions of service, a court in a Member State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It may act as soon as that officer has been notified.

2. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 65

1. The jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria. Any person domiciled in another Member State may be sued in the courts:

(a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (*Zivilprozessordnung*) concerning third-party notices,

(b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (*Zivilprozessordnung*) concerning third-party notices.

2. Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany and Austria in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 66

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII

RELATIONS WITH OTHER INSTRUMENTS

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 68

1. This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

Article 69

Subject to Article 66(2) and Article 70, this Regulation shall, as between Member States, supersede the following conventions and treaty concluded between two or more of them:

— the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899,

— the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925,

— the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930,

— the Convention between Germany and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 9 March 1936,

— the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments relating to Maintenance Obligations, signed at Vienna on 25 October 1957,

— the Convention between Germany and Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958,

— the Convention between the Netherlands and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 17 April 1959,

— the Convention between Germany and Austria on the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 6 June 1959,

— the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments, Arbitral Awards and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 16 June 1959,

— the Convention between Greece and Germany for the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed in Athens on 4 November 1961,

— the Convention between Belgium and Italy on the Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at Rome on 6 April 1962,

— the Convention between the Netherlands and Germany on the Mutual Recognition and Enforcement of Judgments and Other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962,

— the Convention between the Netherlands and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at The Hague on 6 February 1963,

— the Convention between France and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 15 July 1966,

— the Convention between Spain and France on the Recognition and Enforcement of Judgment Arbitration Awards in Civil and Commercial Matters, signed at Paris on 28 May 1969,

— the Convention between Luxembourg and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Luxembourg on 29 July 1971,

— the Convention between Italy and Austria on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, of Judicial Settlements and of Authentic Instruments, signed at Rome on 16 November 1971,

— the Convention between Spain and Italy regarding Legal Aid and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Madrid on 22 May 1973,

— the Convention between Finland, Iceland, Norway, Sweden and Denmark on the Recognition and Enforcement of Judgments in Civil Matters, signed at Copenhagen on 11 October 1977,

— the Convention between Austria and Sweden on the Recognition and Enforcement of Judgments in Civil Matters, signed at Stockholm on 16 September 1982,

— the Convention between Spain and the Federal Republic of Germany on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 14 November 1983,

— the Convention between Austria and Spain on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 17 February 1984,

— the Convention between Finland and Austria on the Recognition and Enforcement of Judgments in Civil Matters, signed at Vienna on 17 November 1986, and

— the Treaty between Belgium, the Netherlands and Luxembourg in Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 24 November 1961, in so far as it is in force.

Article 70

1. The Treaty and the Conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Regulation.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Article 72

This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

CHAPTER VIII

FINAL PROVISIONS

Article 73

No later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation.

Article 74

1. The Member States shall notify the Commission of the texts amending the lists set out in Annexes I to IV. The Commission shall adapt the Annexes concerned accordingly.

2. The updating or technical adjustment of the forms, specimens of which appear in Annexes V and VI, shall be adopted in accordance with the advisory procedure referred to in Article 75(2).

Article 75

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

Article 76

This Regulation shall enter into force on l March 2002.

This Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 December 2000.

For the Council
The President
C. PIERRET

ANNEX I

Rules of jurisdiction referred to in Article 3(2) and Article 4(2)

The rules of jurisdiction referred to in Article 3(2) and Article 4(2) are the following:

— in Belgium: Article 15 of the Civil Code (*Code civil*/*Burgerlijk Wetboek*) and Article 638 of the Judicial Code (*Code judiciaire*/*Gerechtelijk Wetboek*);

— in Germany: Article 23 of the Code of Civil Procedure (*Zivilprozessordnung*),

— in Greece, Article 40 of the Code of Civil Procedure (*Κώδικας Πολιτικής Δικονομίας*);

— in France: Articles 14 and 15 of the Civil Code (*Code civil*),

— in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,

— in Italy: Articles 3 and 4 of Act 218 of 31 May 1995,

— in Luxembourg: Articles 14 and 15 of the Civil Code (*Code civil*),

— in the Netherlands: Articles 126(3) and 127 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*),

— in Austria: Article 99 of the Court Jurisdiction Act (*Jurisdiktionsnorm*),

— in Portugal: Articles 65 and 65A of the Code of Civil Procedure (*Código de Processo Civil*) and Article 11 of the Code of Labour Procedure (*Código de Processo de Trabalho*),

— in Finland: the second, third and fourth sentences of the first paragraph of Section 1 of Chapter 10 of the Code of Judicial Procedure (*oikeudenkäymiskaari*/*rättegångsbalken*),

— in Sweden: the first sentence of the first paragraph of Section 3 of Chapter 10 of the Code of Judicial Procedure (*rättegångsbalken*),

— in the United Kingdom: rules which enable jurisdiction to be founded on:

(a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) the presence within the United Kingdom of property belonging to the defendant; or

(c) the seizure by the plaintiff of property situated in the United Kingdom.

ANNEX II

The courts or competent authorities to which the application referred to in Article 39 may be submitted are the following:

— in Belgium, the '*tribunal de première instance*' or '*rechtbank van eerste aanleg*' or '*erstinstanzliches Gericht*',

— in Germany, the presiding judge of a chamber of the '*Landgericht*',

— in Greece, the '*Μονομελές Πρωτοδικείο*',

— in Spain, the '*Juzgado de Primera Instancia*',

— in France, the presiding judge of the '*tribunal de grande instance*',

— in Ireland, the High Court,

— in Italy, the '*Corte d'appello*',

— in Luxembourg, the presiding judge of the '*tribunal d'arrondissement*',

— in the Netherlands, the presiding judge of the '*arrondissementsrechtbank*';

— in Austria, the '*Bezirksgericht*',

— in Portugal, the '*Tribunal de Comarca*',

— in Finland, the '*käräjäoikeus/tingsrätt*',

— in Sweden, the '*Svea hovrätt*',

— in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court on transmission by the Secretary of State;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court on transmission by the Attorney General of Gibraltar.

ANNEX III

The courts with which appeals referred to in Article 43(2) may be lodged are the following:

— in Belgium,

  (a) as regards appeal by the defendant: the '*tribunal de première instance*' or '*rechtbank van eerste aanleg*' or '*erstinstanzliches Gericht*',

  (b) as regards appeal by the applicant: the '*Cour d'appel*' or '*hof van beroep*',

— in the Federal Republic of Germany, the '*Oberlandesgericht*',

— in Greece, the '*Εφετείο*',

— in Spain, the '*Audiencia Provincial*',

— in France, the '*cour d'appel*',

— in Ireland, the High Court,

— in Italy, the '*corte d'appello*',

— in Luxembourg, the '*Cour supérieure de Justice*' sitting as a court of civil appeal,

— in the Netherlands:

  (a) for the defendant: the '*arrondissementsrechtbank*',

  (b) for the applicant: the '*gerechtshof*',

— in Austria, the '*Bezirksgericht*',

— in Portugal, the '*Tribunal de Relação*',

— in Finland, the '*hovioikeus/hovrätt*',

— in Sweden, the '*Svea hovrätt*',

— in the United Kingdom:

  (a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court;

  (b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court;

  (c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court;

  (d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court.

ANNEX IV

The appeals which may be lodged pursuant to Article 44 are the following

— in Belgium, Greece, Spain, France, Italy, Luxembourg and the Netherlands, an appeal in cassation,

— in Germany, a '*Rechtsbeschwerde*',

— in Ireland, an appeal on a point of law to the Supreme Court,

— in Austria, a '*Revisionsrekurs*',

— in Portugal, an appeal on a point of law,

— in Finland, an appeal to the '*korkein oikeus/högsta domstolen*',

— in Sweden, an appeal to the '*Högsta domstolen*',

— in the United Kingdom, a single further appeal on a point of law.

ANNEX V

Certificate referred to in Articles 54 and 58 of the Regulation on judgments and court settlements

(English, inglés, anglais, inglese, …)

1. Member State of origin

2. Court or competent authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Court which delivered the judgment/approved the court settlement (*)

   3.1. Type of court

   3.2. Place of court

4. Judgment/court settlement (*)

   4.1. Date

   4.2. Reference number

   4.3. The parties to the judgment/court settlement (*)

      4.3.1. Name(s) of plaintiff(s)

      4.3.2. Name(s) of defendant(s)

      4.3.3. Name(s) of other party(ies), if any

   4.4. Date of service of the document instituting the proceedings where judgment was given in default of appearance

   4.5. Text of the judgment/court settlement (*) as annexed to this certificate

5. Names of parties to whom legal aid has been granted

The judgment/court settlement (*) is enforceable in the Member State of origin (Articles 38 and 58 of the Regulation) against:

Name:

Done at . . . . . , date . . . . . .

Signature and/or stamp . . . . . .

(*) Delete as appropriate.

ANNEX VI

Certificate referred to in Article 57(4) of the Regulation on authentic instruments

(English, inglés, anglais, inglese .....)

1. Member State of origin

2. Competent authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Authority which has given authenticity to the instrument

   3.1. Authority involved in the drawing up of the authentic instrument (if applicable)

      3.1.1. Name and designation of authority

      3.1.2. Place of authority

   3.2. Authority which has registered the authentic instrument (if applicable)

      3.2.1. Type of authority

      3.2.2. Place of authority

4. Authentic instrument

   4.1. Description of the instrument

   4.2. Date

      4.2.1. on which the instrument was drawn up

      4.2.2. if different: on which the instrument was registered

   4.3. Reference number

   4.4. Parties to the instrument

      4.4.1. Name of the creditor

      4.4.2. Name of the debtor

5. Text of the enforceable obligation as annexed to this certificate

The authentic instrument is enforceable against the debtor in the Member State of origin (Article 57(1) of the Regulation)

Done at ....., date .....

Signature and/or stamp .....

CORRIGENDA

Corrigendum to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(Official Journal of the European Communities L 12 of 16 January 2001)

On page 15, Article 69:

1. between the indent relating to the Convention between France and Italy of 3 June 1930 and the indent relating to the Convention between Germany and Italy of 9 March 1936, insert the following two indents:

   '— the Convention between the United Kingdom and the French Republic providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Paris on 18 January 1934,

   — the Convention between the United Kingdom and the Kingdom of Belgium providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Brussels on 2 May 1934,';

2. between the indent relating to the Convention between Belgium and Austria of 16 June 1959 and the indent relating to the Convention between Greece and Germany of 4 November 1961, insert the following two indents:

   '— the Convention between the United Kingdom and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Bonn on 14 July 1960,

   — the Convention between the United Kingdom and Austria providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Vienna on 14 July 1961, with amending Protocol signed at London on 6 March 1970,';

3. between the indent relating to the Convention between the Netherlands and Austria of 6 February 1963 and the indent relating to the Convention between France and Austria of 15 July 1966, insert the following indent:

   '— the Convention between the United Kingdom and the Republic of Italy for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 7 February 1964, with amending Protocol signed at Rome on 14 July 1970,';

4. between the indent relating to the Convention between France and Austria of 15 July 1966 and the indent relating to the Convention between Spain and France of 28 May 1969, insert the following indent:

   '— the Convention between the United Kingdom and the Kingdom of the Netherlands providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at The Hague on 17 November 1967,'.

Brussels II

II

ALEGRÍA BORRÁS

Alegría Borrás has been Professor of Private International Law at the University of Barcelona since 1985, and was previously at the University of Cordoba and at the Autonomous University of Barcelona. She was a professor at the Academy of International Law at The Hague in 1994, having also been Director of Studies there in 1989. She will be the guest professor for a new course there in 2005.

She has been Spain's representative at the Hague Conference on Private International Law since 1987, and also Spain's representative for cooperation on justice (civil matters) in the European Union since 1993 and rapporteur on the Brussels II Convention for which she drafted the explanatory report published in Official Journal C 221 of 16 July 1998, together with the convention which was the basis for Regulation (EC) No 1347/2000. She is a member of numerous scientific and professional associations — Spanish, international and foreign — particularly the European Group for Private International Law (Groupe européen de droit international privé) which she has chaired since September 2003.

She is the author of over 100 publications on private international law and European Community law, particularly on international protection of children and adoption, international family law and successions law, international civil proceedings and the Brussels and Lugano Conventions, Community private international law, foreigners law and non-unified legal systems law.

Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ('Brussels II Regulation') and Regulation (EC) No 2201/2003 repealing it ('Brussels IIa Regulation')

I — Background and current situation

1. Considering that family law was not previously a matter of any interest to a Community centred on purely economic issues, developments in family law within the European Union in recent years have been truly spectacular. A situation of complete lack of provision in the field of family law has been transformed in a very short space of time by the adoption, firstly, of Council Regulation (EC) No 1347/2000 and, subsequently, of Regulation (EC) No 2201/2003, its intended replacement. An insight into the background is required for an understanding of these developments.

2. The immediate background was the adoption of the Brussels Convention of 28 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (the 'Brussels II Convention') under the third pillar of the Treaty of Maastricht, which was accompanied by a report drafted by the rapporteur (1). However, the 1998 convention did not come into force because the Treaty of Amsterdam came into force on 1 May 1999 and reversed the intergovernmental approach which had prevailed up to then in judicial matters; on the basis of Articles 61(c) and 67 of the Treaty establishing the European Community, the Commission submitted a proposal for a regulation (2) to transform the 1998 convention into a regulation, which resulted in the adoption of Regulation (EC) No 1347/2000 of 29 May 2000 (the 'Brussels II Regulation' (3)) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. The text of the convention was changed little during transformation and the amendments made were either the result of the transformation of the convention into a regulation or due to the fact that, in the course of the process of review and transformation of the 1968 Brussels Convention into Regulation (EC) No 44/2001, some improvements had been made which merited incorporation. That is how the Brussels II Regulation (4) came to be approved on 29 May 2000 and entered into force on 1 March 2001 (in accordance with Article 46 thereof).

3. In a marriage breakdown, a foreign element is an increasingly frequent occurrence, as it is in relationships between parents and children, which gives rise to three problems: international jurisdiction, applicable law, and

(1) Convention and explanatory report by A. Borrás (OJ C 221, 16.7.1998). That report is referred to in the footnote to recital 6 of Regulation (EC) No 1347/2000 and in the footnote to recital 3 of Regulation (EC) No 2201/2003. Community regulations cannot be accompanied by an explanatory report. However, the explanatory report on the 1998 convention is still relevant, as its extensive use by commentators on the regulation shows, provided that two limitations are borne in mind. The first relates to the content of the regulations themselves in that the report is valid only in so far as no amendments have been made to the corresponding convention provisions. The second relates to the unifying function of the Court of Justice in the interpretation and application of Community law, since assertions contained in the report are valid only if the Court has not ruled differently. It should also be pointed out that the opinions expressed today do not necessarily coincide with the content of that report since it had to be approved by the working party which prepared the convention.

(2) OJ C 247, 31.8.1999.

(3) On account of its relationship with the 1968 Brussels Convention and Regulation (EC) No 44/2001, known as the 'Brussels I Convention' and the 'Brussels I Regulation', respectively.

(4) OJ L 160, 30.6.2000. On the background to the regulation, see P. Beaumont and G. Moir,

recognition and enforcement of judgments. The Brussels II Regulation provides an answer to the first and the third of these questions and is therefore what is known as a 'double' instrument in that it regulates both jurisdiction and the recognition and enforcement of judgments. The issue of the law applicable to divorce has not yet been dealt with in depth nor has it been the subject of any initiative ([5]). It remains somewhat surprising that measures have been taken to facilitate movement of judgments in matrimonial matters without any attempt to unify conflict-of-law rules at the same time, given that approximation of national legislation is almost inconceivable at the moment.

4. A further development should be mentioned in this context. The Tampere European Council established that the principle of mutual recognition of judgments was a cornerstone for the creation of a genuine area of justice, stressing rights of access as a matter of priority in the field of family law. This led France to present an initiative on 3 July 2000 with a view to adopting a Council regulation on the mutual enforcement of judgments on rights of access to children ([6]), which was linked to Regulation (EC) No 1347/2000 in that it confined itself to simplifying the recognition and enforcement of judgments on rights of access given in matrimonial proceedings and in relation to the children of both spouses. That limitation clearly signalled a fear of going beyond the legal basis provided by Articles 61(c) and 67 of the Treaty. However, the limitation was deemed inappropriate in view of the need to ensure equal treatment for all children. Accordingly, the Commission submitted a proposal ([7]) which resulted in the adoption of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ([8]). Article 72 of this regulation provides that the regulation will enter into force on 1 August 2004 and apply from 1 March 2005. The first comment to make here is that there has been no amendment to the measures on annulment, divorce and separation, the object being to amend the rules on child protection in such a way that it is not confined to protection on grounds of marriage breakdown or protection only of the children of both spouses. Hence the usefulness of the comparative table in Annex V to Regulation (EC) No 2201/2003 showing the correspondence between the articles of the two regulations ([9]). The following points focus on the main aspects of Regulation (EC) No 2201/2003 and, in particular, draw attention to the differences between it and Regulation (EC) No 1347/2000, which it replaces.

'Brussels Convention II: A new private international law instrument in family matters for the European Union or the European Community?', *European Law Review,* 1995, pp. 268 et seq.; H. Gaudemet-Tallon, 'La Convention de "Bruxelles II": Convention concernant la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale', *Travaux du Comité français de droit international privé*, 1999; M. Jantera-Jareborg, 'Marriage dissolution in an integrated Europe', *Yearbook of Private International Law*, 1, 1999; B. Sturlese, 'L'extension du système de la Convention de Bruxelles au droit de la famille', *Travaux du Comité français de droit international privé*, 1995–96, pp. 49 et seq.; P. de Vareilles-Sommières, 'La libre circulation des jugements rendus en matière matrimoniale en Europe', *Gazette du Palais,* 17–18 October 1999, pp. 15 et seq.

([5]) The current state of preliminary work is to be found at http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/divorce_matters_en.pdf.

([6]) OJ C 234, 15.8.2000.

([7]) OJ C 203 E, 27.8.2002.

([8]) Article 71 of the regulation (OJ L 338, 23.12.2003).

([9]) OJ L 338, 23.12.2003, p. 28.

II — Scope

1. *Territorial scope*

5. Both regulations apply in principle to the 'Member States' but in practice exclude Denmark since, in accordance with Article 69 of the EC Treaty, Denmark does not participate in the adoption of Community acts pursuant to Title IV and is therefore not bound by such instruments.

   Accordingly, Article 2 of Regulation (EC) No 2201/2003 which gives a series of definitions, defines 'Member State' as 'all Member States with the exception of Denmark'. The United Kingdom and Ireland exercised their right under Article 69 of the EC Treaty to opt in. The regulations thus apply to 14 Member States.

2. *Material scope*

6. The instruments under examination originated in the work of the European Group on Private International Law (1) which discussed the matter in Louvain-la-Neuve in 1991 on the basis of work by C. Kohler (2), starting from Article 220 of the EC Treaty and conflicting competence in matters of family law. The outcome became known as the 1993 'Heidelberg project', which was more ambitious in terms of material scope than the instruments discussed here, which do not cover the issues of personal and family law excluded from the scope of the 1968 Brussels Convention and Regulation (EC) No 44/2001. It is also worth recalling that the Jenard report (3) pinpointed difficulties with family law issues at a time when there were only six Member States with more closely related legal systems than at present.

7. The material scope of the regulations is set out in Article 1 in each case, with a distinction to be drawn between matters relating to matrimonial proceedings and those pertaining to parental responsibility.

   (a) In relation to matrimonial proceedings, the scope of the regulations is very limited. In fact, it is confined to proceedings relating to the marriage bond as such (4), i.e. annulment, divorce and separation (5). So the recognition of judgments affects only the dissolution of the marriage link. That is the description in the explanatory report on the 1998 convention and also in recitals 10 and 8 of the Brussels II and Brussels IIa Regulations, respectively (6). The scope is thus very limited, useful though it is to the public. In reality, a divorce settlement includes provisions on the couple's economic arrangements and other

(1) This group's function is to study points of convergence between private international law and European Community law. For proceedings since 1991, see notes by J. D. González Campos and A. Borrás in *Revista Española de Derecho internacional*. The group's website may also be consulted (http://www.drt.ucl.ac.be/gedip).

(2) C. Kohler, 'L'article 220 du Traité CEE et les conflits de juridiction en matière de relations familiales: premières réflexions', *Rivista di Diritto internazionale privato e processuale*, 2, 1992, pp. 221 et seq. Subsequently, A. Borrás, 'Luz verde a la extensión del Convenio de Bruselas a cuestiones de familia', *Revista Española de Derecho internacional*, 2, 1994, pp. 906 et seq.

(3) Chapter III, Section IVA, of the explanatory report on the 1968 Brussels Convention, explaining the reasons for the exclusion of certain matters under Article 1(2).

(4) We should emphasise that the reference is only to the 'marriage bond' and the text deliberately refrains from specifying whether it is a traditional marriage or a homosexual union, as already permitted in some Member States; this runs counter to some interpretations, such as that of H. Gaudemet-Tallon, 'Le règlement nº 1347/2000 du Conseil du 29 mai 2000: compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentales des enfants communs', *Journal de droit international*, 2001, p. 387, which would confine it to 'traditional' marriage. Doubts are expressed in J. Y. Carlier, S. Francq and J. L. Van Boxstael, 'Le règlement de Bruxelles II — Compétence, reconnaissance et exécution en matière matrimoniale et en matière de responsabilité parentale', *Journal des tribunaux — Droit européen*, No 78, 2001. There is deliberately no attempt to be more specific either in the text itself or in the Borrás report.

matters and the provisions to be used for those will have to be those of national legislation or of other international conventions to which the States are party. All of that creates obvious complications for law professionals involved, as a result of the ensuing 'dépeçage' (7).

(b) The difference between the two instruments lies in the protection of children. Regulation (EC) No 1347/2000 includes ancillary claims relating to parental responsibility for the children of both spouses. It therefore covers protection of the children of both spouses on issues that are closely linked to the matrimonial proceedings, taking into account how directly children are affected by the breakdown between their parents.

The Brussels IIa Regulation applies to 'the attribution, exercise, delegation, restriction or termination of parental responsibility' (Article 1(1)(b)), which, as explained in recital 5, stems from a desire to 'ensure equality for all children', with the result that the regulation 'covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding'. The problems relating to Member States' signing and ratifying the 1996 Hague Convention on the Protection of Children cast some doubt on the wisdom of including the two areas in a single instrument and suggest that it might have been better to have kept a separate instrument for matters relating to marriage breakdown. The case for including the two areas in the same instrument is made in recital 6, which states that 'since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility'.

The reference to parental responsibility as a whole has two implications. Firstly, Article 1(2) listing the matters which 'in particular' fall within the scope of the regulation and Article 1(3) listing the matters to which Regulation (EC) No 2201/2003 does not apply are clear parallels of Articles 3 and 4 of the 1996 Hague Convention. Secondly, a number of definitions had to be included in Article 2. Importantly, 'parental responsibility' is defined in Article 2(7) as 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access'. The Lagarde report on the 1996 Hague Convention offers a similar, albeit wider, definition (8). It should be stressed that it was not possible to include a definition of this kind in the Brussels II Convention or in the recitals to the Brussels II Regulation (9), which shows that attitudes have become more flexible since then.

(5) The term 'proceedings' includes administrative divorces which occur in some Member States. It is, however, doubtful if it includes the so-called 'divorce by contract' referred to by J. Carrascosa, 'Cuestiones polémicas en el Reglamento 1347/2000', in A. L. Calvo and J. L. Iriarte (eds), *Globalización y familia*, Madrid, 2001, p. 228.

(6) Point 22 of the Borrás report. Recital 10 is described as 'sibylline' by B. Ancel and H. Muir Watt, 'La désunion européenne: le règlement dit "Bruxelles I"', *Revue critique de droit international privé*, 2001, p. 408. Recital 8 of the Brussels IIa Regulation states that the regulation does not deal with 'issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures'.

(7) J. Y. Carlier et al., 'Le règlement de Bruxelles II — Compétence, reconnaissance et exécution en matière matrimoniale et en matière de responsabilité parentale', op cit.

(8) Point 14.

(9) It should be noted here that the rapporteur did define parental responsibility in the draft explanatory report but that the definition was rejected by the working party and, consequently, appears neither in the explanatory report nor in the text of the convention. It was proposed in point 24 of the draft report that 'the concept [of parental responsibility] should include both child custody and contact rights. Reference will also have to be made both to the exercise of parental responsibility and to total or partial withdrawal: the award of custody will not, however, be affected, bearing in mind the discussions on Article 3 of the 1996 Hague Convention. Finally, the term should also include any measures taken by the public authorities regarding the child. On the other hand, it does not affect maintenance obligations (in that connection see Article 1(2) and Article 4 of the 1996 Hague Convention).'

3. Scope in time

8. As stated earlier, the Brussels II Regulation came into force on 1 March 2001 (Article 46) and, as a result (Article 42(1)), its provisions apply only to proceedings instituted after that date. But Article 42(2) does lay down a transitional provision to the effect that judgments given after the date of entry into force of the regulation in proceedings instituted before that date would be recognised and enforced in accordance with the provisions of the regulation if jurisdiction was founded on rules which accorded with those provided for either in the regulation itself or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. Nevertheless, that rule does not cover all of the transitional law problems and we shall have occasion, later in this report, to deal with problems relating to *lis pendens*, which the Brussels IIa Regulation, with more complex entry into force and transitional provisions, has not solved.

9. Regulation (EC) No 2201/2003 entered into force on 1 August 2004 (Article 72) but only applies from 1 March 2005, with the exception of Articles 67 ('Information on central authorities and languages accepted'), 68 ('Information relating to courts and redress procedures'), 69 ('Amendments to the Annexes') and 70 ('Committee'), which apply from the date of entry into force. A similar distinction between entry into force and application can be found in Article 24 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [1].

10. Hence the added importance in this case of the transitional provisions, which are set out in Article 64 and provide for four possibilities:

    (a) The general rule in paragraph 1, which is that the regulation will apply only to proceedings instituted after its date of application.

    (b) The regulation will also apply to the recognition and enforcement of judgments given after its date of application in proceedings instituted before its date of application but after the date of entry into force of Regulation (EC) No 1347/2000 in cases where jurisdiction is founded on rules which accord with those provided for in Regulation (EC) No 2201/2003, Regulation (EC) No 1347/2000 or a convention between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

    (c) Judgments given before the date of application of Regulation (EC) No 2201/2003 in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 will be recognised and enforced in

[1] OJ L 174, 27.6.2001, p. 1.

accordance with Regulation (EC) No 2201/2003 provided that they relate to matrimonial proceedings or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

(d) Judgments given before the date of application of Regulation (EC) No 2201/2003 but after the entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the entry into force of Regulation (EC) No 1347/2000 are subject to the same material limitation as that in (c) above. Additionally, jurisdiction must be founded on rules which accord with those provided for in Regulation (EC) No 2201/2003, Regulation (EC) No 1347/2000 or a convention between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

III — International jurisdiction

1. The structure of Chapter II on jurisdiction in Regulation (EC) No 2201/2003

11. The material scope of Regulation (EC) No 1347/2000 determined that the core of the regulation was in Article 2, which based grounds of jurisdiction in matrimonial matters on the principle of a real link between the person and a given Member State. Article 3 defined the cases where the authorities of the Member State in question also had jurisdiction in matters relating to the protection of the children of both spouses following a marriage breakdown. The amendment of the scope of the convention in Regulation (EC) No 2201/2003 resulted in a change in the structure of Chapter II, which is now divided into three sections: the first on jurisdiction in matters relating to divorce, legal separation and marriage annulment, the second on jurisdiction in matters of parental responsibility, and the third on provisions common to both.

2. Grounds of international jurisdiction in matrimonial matters

12. The first point to make in relation to Chapters II and III is that the Brussels IIa Regulation was prepared on the clear understanding that no changes would be made to the provisions on divorce, separation or annulment, with the result that all earlier comments on these matters are fully applicable to the recently approved regulation [1]. The grounds of jurisdic-

[1] A. Borrás, 'Competencia judicial, reconocimiento y ejecución de decisiones en materia matrimonial: el Reglamento 1347/2000, de 29 de mayo ("Bruselas II")', *Revista Jurídica de Catalunya*, 2, 2003, pp. 361–386.

tion are exclusive, alternative and objective within the meaning given to the term 'exclusive' in Article 6 (Article 7 of Regulation (EC) No 1347/2000), which is not the same meaning as in the 1968 Brussels Convention and in Regulation (EC) No 44/2001 [1]. There is therefore no possibility of express or tacit submission.

13. There were, in fact, two possible starting points for determining jurisdiction in matrimonial matters: either to incorporate uniform rules of jurisdiction in matters of divorce, providing a limited number of alternatives without any hierarchy, or, taking the opposite approach, to incorporate no rules of jurisdiction but simply establish permissible grounds of jurisdiction. Article 3 (Article 2 of Regulation (EC) No 1347/2000) follows the first approach. The decision to include a number of specific grounds reflects their existence in the legal order of various Member States and their acceptance by the other Member States, endeavouring to reach an agreement acceptable to all.

14. The result is that there are seven different grounds of jurisdiction for divorce, separation and annulment proceedings, leading to a degree of *favor divortii* [2]. For some, that result is open to criticism [3], but, in my opinion, the grounds adopted endeavour to meet objective requirements, are in line with the interests of the parties and endeavour to be sufficiently flexible to meet the needs of individuals' mobility and finally to respond to individual requirements without sacrificing legal certainty. If there is a risk of forum shopping, the solution should not be to reduce the number of grounds of jurisdiction but to unify the Member States' conflict-of-law rules, as was done by the 1980 Rome Convention on the Law applicable to Contractual Obligations.

The actual grounds adopted are largely based on habitual residence although the mobility of people in Europe and the range of possible situations may make it difficult to identify a single place of residence for the purposes of the rule [4]. Some account has likewise been taken of nationality and of domicile within the meaning of the term as used in the United Kingdom and Ireland (paragraph 2). That rule is also perfectly acceptable since it certainly does not constitute discrimination within the meaning of Article 12 of the EC Treaty [5].

Provision is likewise made for counterclaims (Article 4, formerly Article 5) and for the conversion of legal separation into divorce, a matter which was discussed at length during the preparation of the 1998 convention given the basic difficulty arising from the fact that several Member States do not have legal separation as a stage prior to divorce and in view of the need to lay down a provision giving the authorities of the Member State which had issued a judgment on a legal separation jurisdiction to convert

[1] Points 44 and 45 of the Borrás report and recital 12 of the regulation. More fully, M. A. Sánchez, 'Procesos civiles de divorcio en la UE: el nuevo Reglamento comunitario 1347/2000, repercusión en nuestro actual sistema', in A. L. Calvo and J. L. Iriarte (eds), *Globalización y familia*, Madrid, 2001. H. Gaudemet-Tallon, 'Le règlement nº 1347/2000 du Conseil du 29 mai 2000: compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentales des enfants communs', op cit., p. 395, would have preferred the list of forums to be 'exhaustive' precisely to avoid that distinction.

[2] That can be interpreted as a demonstration of one of the characteristics of current private international law, to wit greater flexibility. See J. D. González Campos, 'Diversification, spécialisation, flexibilisation et matérialisation des regles de droit international privé — Cours général', *Collected Courses*, Vol. 287, 2000, in particular, pp. 238–239. Nevertheless, that result was achieved, as J. Pirrung puts it in 'Unification en matière familiale: la Convention de l'Union Européenne sur la reconnaissance des divorces et la question de nouveaux travaux d'Unidroit', *Revue de droit uniforme*, No 2-3, 1998, p. 633, by moving from 'compromise to compromise'.

[3] B. Ancel and H. Muir Watt, 'La désunion européenne: le règlement dit "Bruxelles I"', op cit., pp. 415–416, who would have preferred a check on indirect jurisdiction, taking the view that it was the large number of grounds that made it necessary to introduce the 'sophisticated corrective mechanism' for *lis pendens* (Article 11). See also J. Carrascosa, 'Cuestiones polémicas en el Reglamento 1347/2000', op cit., pp. 230–231.

[4] Consider, for example, the case of a married couple where the husband is Spanish, works in Spain and spends part of the week in Spain and the other part of the

the separation into a divorce, provided, of course, that the law of that Member State so provides, as set out in Article 5 (Article 6 of Regulation (EC) No 1347/2000).

15. With regard to extra-Community disputes, Article 7 (Article 8 of Regulation (EC) No 1347/2000) corresponds to Article 4 of the 1968 Brussels Convention. That obviates the need for a provision, as proposed by some States in the course of the negotiations, to the effect that the grounds in the convention would apply only if both spouses were European citizens habitually resident in the territory of the Member States and that in all other cases national law would apply ([6]). Article 7 thus deals with what is termed 'residual jurisdiction'. As stated in the explanatory report on the convention, the nature of the jurisdictions laid down in Articles 2 to 6 (now Articles 3 to 6) renders unnecessary a provision such as Article 3 of the 1968 Brussels Convention, hence some jurisdictions of that nature existing in the Member States are included purely as examples ([7]).

3. Jurisdiction regarding parental responsibility

16. Although, as stated earlier, Regulation (EC) No 2201/2003 contains significant amendments in the area of parental responsibility, there is still a need to refer to the provisions of the text currently in force (i.e. Regulation (EC) No 1347/2000 ([8]). The forums referred to in Article 2 of Regulation (EC) No 1347/2000 (Article 3 of Regulation (EC) No 2201/2003) for matrimonial proceedings have force of attraction regarding parental-responsibility issues, hence the rules of jurisdiction in Articles 3 and 4. But that force of attraction is limited in several respects. Firstly, in relation to the children affected ([9]), who can only be the children of both spouses, whether biological or adopted, but not other children, such as, for instance, the children of one or other of the spouses from a previous union. Secondly, it will affect only children habitually resident in the State whose authorities have jurisdiction for the divorce judgment and will affect those residing in another State only if the conditions laid down are met; under no circumstances will the regulation apply to a child habitually resident in a non-member State. Finally, the jurisdiction of the divorce courts in relation to parental responsibility for the children of both spouses is not unlimited (*perpetuatio jurisdictionis*); it will cease on termination of the matrimonial proceedings.

17. In the new regulation (Regulation (EC) No 2201/2003), these matters are dealt with in Section 2, where significant amendments have been introduced. The provisions here could be grouped under the following headings: the general rule, jurisdiction in cases of child abduction, jurisdiction of the authorities in the Member State of the divorce, jurisdiction based on

week in France, where his wife, a non-Community national, resides with the children of both spouses.

([5]) Conclusion disputed by A. Bonomi, 'Il Regolamento comunitario sulla competenza e sul riconoscimento in materia matrimoniale e di potestà dei genitori', *Rivista di Diritto internazionale*, 2, 2001, p. 318, and by H. Tagaras, 'Questions spéciales relatives à l'unification communautaire du droit international privé de la famille (règlement 1347/2000)', *Mélanges en hommage à Jean-Victor Louis*, Vol. 1, Brussels, 2003, pp. 460–462.

([6]) For the discussion of the scope of Article 8 (now Article 7) and its relationship with the provision in Article 7 (now Article 6), see J. Y. Carlier et al., 'Le règlement de Bruxelles II — Compétence, reconnaissance et exécution en matière matrimoniale et en matière de responsabilité parentale', op cit.

([7]) In point 47. Article 8 (now Article 7) thus creates a genuine 'European citizenship privilege', as described by S. Drouet, *L'avènement de 'Bruxelles II'*, Mémoire de DEA, Université de Nantes, 1999, pp. 118–119. For R. Baratta, 'Separazione e divorzio nel DIPr italiano', Cap. XXII del vol. II del *Trattato di Diritto di famiglia* (a cura di G. Ferrando — M. Fortino — F. Ruscello), Milan, 2002, p. 1590, Article 8 can be seen as a manifestation of the 'Eurochauvinism' with which American authors such as Juenger and von Mehren have already taxed the 1968 Brussels Convention.

([8]) On that issue, the content of the most extensive work on the subject nevertheless remains entirely valid for the moment: A. Borrás, 'La protección de los hijos comunes con motivo de la crisis matrimonial en el Convenio de 28 de mayo de 1998 sobre la competencia judicial, el reconocimiento y la ejecución de resoluciones en materia matrimonial', *Disyuntivas en los pleitos matrimoniales de separación y divorcio*, Asociación Española de Abogados de Familia, Madrid, 2000, pp. 299–325.

([9]) Points 25 and 26 of the Borrás report.

presence, residual jurisdiction and jurisdiction of the court best placed to hear the case.

(a) Under the general rule in Article 8, jurisdiction lies with the authorities of the Member State in which the child is habitually resident at the time the court is seised, fully in keeping with Article 5(1) of the 1996 Hague Convention. However, there is divergence in the event of a change of residence: whereas, under the 1996 Hague Convention, jurisdiction is automatically transferred to the authorities of the State of the child's new habitual residence (except in cases of abduction or wrongful retention), Article 9 of Regulation (EC) No 2201/2003 provides that the authorities of the Member State of the child's former habitual residence retain jurisdiction during a three-month period for the purpose of modifying a judgment on access rights issued before the child moved, where the holder of the access rights pursuant to the judgment in question continues to reside in that Member State and has not accepted the jurisdiction of the authorities of the Member State of the child's new habitual residence.

(b) The new regulation's most controversial provisions, particularly on account of their connection with the 1980 Hague Convention on the Civil Aspects of International Child Abduction, are Articles 10 ('Jurisdiction in cases of child abduction') and 11 ('Return of the child'). Article 10 retains the jurisdiction of the authorities of the Member State of habitual residence prior to removal or retention until the child has acquired a new habitual residence and certain other conditions are met. Article 11 cites Articles 12 and 13 of the 1980 Hague Convention in relation to the procedure for return in cases of wrongful removal or retention, drawing in effect on Article 36 of the convention as regards the possibility of limiting the restrictions to which the return of a child may be subject (1). The main novelty is the procedure where the return of a child is refused pursuant to Article 13 of the Hague Convention in so far as it is not the Member State to which the child has been removed that has the final word on the return but rather the authorities with jurisdiction under the regulation, with that authority's judgment being enforceable in accordance with the regulation itself (Article 11(8)), i.e. even in the Member State to which the child has been removed and whose authorities gave a non-return decision.

(c) Inappropriately entitled 'Prorogation of jurisdiction', Article 12 of the regulation contains complicated rules concerning the possible force of attraction of a court hearing a matrimonial proceeding. Clearly, it refers to cases where the child's habitual residence is not in the State whose authorities have jurisdiction in the proceeding in question. Here it should be borne in mind that Article 52 of the 1996 Hague Convention

(1) See A. Borrás, 'Les clauses de deconnexion et le droit international privé communautaire', *Festschrift E. Jayme*, Heidelberg, in press.

limits *inter se* agreements, such as a Community instrument, to those which assume habitual residence in one of the contracting States, which is why Article 12(4), on the question of children who have their habitual residence in a third State that is not a contracting party to the convention, provides in such cases that 'jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question'.

(d) Article 13 contains a rule based on child presence and Article 14 provides for residual jurisdiction in cases where jurisdiction cannot be determined from the earlier articles. In such cases, jurisdiction is determined, in each Member State, by the laws of that State.

(e) A novelty, Article 15 introduces the possibility of a competent court declining jurisdiction in favour of a court of another Member State which is 'better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child'. The other Member State must be one 'with which the child has a particular connection' as defined in paragraph 3 (i.e. new residence, former residence, nationality, residence of a holder of parental responsibility or location of property). These can therefore be regarded as alternative forums which do not clash with constitutional provisions on the requirement for a judge predetermined by law and which are consequently not *forum non conveniens* in the common law sense. This article is modelled on Articles 8 and 9 of the 1996 Hague Convention on the Protection of Children [1].

4. Application of rules of jurisdiction

18. If it is to operate correctly, the regulation requires implementing provisions on the application of the rules of jurisdiction and these measures are the subject matter of Chapter II, Section 3 entitled 'Common provisions' and comprising Articles 16 to 20.

Article 16 contains the rule for determining when a court is deemed to have been seised, reproducing the provisions set out in Article 30 of Regulation (EC) No 44/2001 (the Brussels I Regulation) for which there is a precedent in Regulation (EC) No 1347/2000 (Article 11(4)) but not in the 1998 convention. The rule introduces a 'dual-date' system, which needs to be taken into account in the case of *lis pendens* (discussed below). In any event, the separation of this provision was a positive development.

The second provision on the matter relates to examination as to jurisdiction and admissibility and is set out in Articles 17 and 18 (Articles 9 and 10 of Regulation (EC) No 1347/2000), which draw on Articles 19 and 20

[1] See points 52 to 60 of the Lagarde report on the convention.

of the 1968 Brussels Convention. It should be noted that, contrary to the situation under that convention, it does not matter whether or not the respondent appears. The obligation applies to the court. Naturally, Article 18 refers to Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents and to the 1965 Hague Convention on the same subject if the provisions of Regulation (EC) No 1348/2000 do not apply.

The third provision is a special rule on provisional measures in Article 20 (Article 12 of Regulation (EC) No 1347/2000). The rule is sound and takes account of Court of Justice case-law (1). Two restrictions apply in this instance: (i) jurisdiction applies only in urgent cases so as to prevent circumvention of other rules of jurisdiction in the regulation; (ii) jurisdiction is provisional since the provisional measures taken cease to apply as soon as the court having jurisdiction as to the substance under the regulation adopts the measures necessary to deal with the situation.

19. Worthy of special mention is Article 19 (formerly Article 11) whose provisions on *lis pendens* and dependent actions are among the most important provisions in the regulation, and, in my view, together with Article 21 (formerly Article 14) to which I shall refer later, would be sufficient in themselves to justify adoption of the regulation and the drafting amendments made to facilitate understanding.

One of the problems with matrimonial proceedings is that each of the spouses may address the court of a different State, resulting in parallel proceedings that may lead to two contradictory judgments. Hence we have *lis pendens* in the classic sense, on the one hand, and dependent actions or 'false *lis pendens*' (2), on the other, in addition to differences between legal systems on the questions concerned. Significantly simplifying Article 11 of the 1998 convention and of Regulation (EC) No 1347/2000, Article 19(1) of the new regulation covers matrimonial proceedings and Article 19(2) covers proceedings relating to parental responsibility. Matrimonial proceedings pose a number of questions, such as what happens when one of the legal systems involved has no provision for separation or annulment, or what happens when the first case filed is for annulment and the second for divorce. The only requirement in such situations is that the proceedings be 'between the same parties', in which case the court second seised stays its proceedings of its own motion until the jurisdiction of the court first seised is established. By contrast, proceedings in relation to parental responsibility must 'relate to the same child and involve the same cause of action', with the same proceeding-staying consequence as in paragraph 1.

Paragraph 3 provides that *prior temporis* applies in both cases if the jurisdiction of the court first seised is established; the court second seised is

(1) Judgments of 17 November 1998 in Case C-391/95 *Van Uden* [1998] ECR I-7091 and of 27 April 1999 in Case C-99/96 *Mietz* [1999] ECR I-2277.

(2) As it is termed in the explanatory report on the 1998 convention (point 54). For the importance of the rule, see J. Pirrung, 'Unification en matière familiale: la Convention de l'Union Européenne sur la reconnaissance des divorces et la question de nouveaux travaux d'Unidroit', op cit., p. 635.

required to decline jurisdiction in the first-seised court's favour. The innovation is that the paragraph permits the party who brought the action before the court second seised, if he or she so wishes, to bring it before the court having jurisdiction because it was first seised. That provision has, however, elicited reservations since the option is not limited. Questions remain: Which law is applicable? What will be the domestic territorial rule of jurisdiction?, etc. (1).

20. However, as already stated, in the initial stage of implementation of Regulation (EC) No 1347/2000, there were some problems regarding transitional situations which were not resolved by the transitional provisions and which could be exacerbated by the application of the new Regulation (EC) No 2201/2003. These problems have so far been of three different kinds:

(1) The first situation is one in which proceedings were brought before the court first seised before the entry into force of the regulation while proceedings before the court second seised were brought after entry into force. In such a case, it is possible to apply the interpretation given by the Court of Justice in its judgment of 9 October 1997 (2) to the effect that the *lis pendens* rule applies where both courts would have jurisdiction under the convention, that the purpose of the rule is to have only one set of proceedings within the Community and finally to allow a judgment which can be recognised in all the Member States.

(2) In my view, the same solution can be used for the second group of cases, those in which both sets of proceedings were brought before the entry into force of the regulation but since no judgment was given before entry into force, it will, of necessity, be given after entry into force. To my mind, the reasons set out in the first paragraph, as taken from Court of Justice case-law, justify application of the same rule.

(3) The third group, which is highly sensitive for a large number of European citizens, comprises cases in which the judgment was given before the regulation came into force. It is clearly impossible to apply the recognition procedure to such cases since they are excluded by Article 64 (Article 42 of Regulation (EC) No 1347/2000). That is an outcome that many European citizens obviously find difficult to accept. The situation is different from that under Article 24 of the Hague Convention of 1 June 1970 (to which some Member States are contracting parties), which provides that the convention applies regardless of the date on which the divorce or separation was obtained, although States may reserve the right to apply it only to those obtained after the entry into force of the convention.

(1) It is therefore hardly surprising that legal theorists have raised many doubts as to this provision. For instance, B. Ancel and H. Muir Watt, 'La désunion européenne: le règlement dit "Bruxelles I"', op cit., pp. 428–431, H. Tagaras, 'Questions spéciales relatives à l'unification communautaire du droit international privé de la famille (règlement 1347/2000)', op cit., pp. 462–464. In any event, H. Gaudemet-Tallon, 'Le règlement nº 1347/2000 du Conseil du 29 mai 2000: compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentales des enfants communs', op cit., pp. 399–405, stresses the effort the article represents and the ingenious nature of the solution.

(2) Case C-163/95 *Elsbeth Freifrau von Horn* v *Kevin Cinnamond* [1997] ECR I-5451.

IV — Recognition and enforcement of judgments

21. Chapter III of Regulation (EC) No 2201/2003 contains rules on recognition and enforcement of judgments. There have been a number of important innovations here with respect to Regulation (EC) No 1347/2000. Firstly, had the regulation been confined to changes to the marriage bond, judgments would normally have affected only civil-status records and no enforcement rules would have been required. It was the inclusion of provisions on parental responsibility that made enforcement provisions necessary in Regulation (EC) No 1347/2000 in the first place, which is why Regulation (EC) No 2201/2003 has a Section 1 on recognition, a Section 2 on declaration of enforceability and a Section 3 on common provisions. Secondly, new sections have been added. These are Section 4 on enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the minor (an important addition in keeping with the Tampere mandate), Section 5 on authentic instruments and agreements (necessary for some countries even if unknown in others), and Section 6 on other provisions, including the enforcement procedure (Article 47), costs (Article 49), legal aid (Article 50), exclusion of security or bond (Article 51) and legalisation or other similar formalities (Article 52).

1. Recognition of judgments

22. Firstly and as far as judgments in matrimonial cases are concerned, the decision must be positive, as emerges from Article 2(4) (formerly Article 13) [1] which makes it clear that the judgment must be one granting a divorce, legal separation or marriage annulment. That means that if the decision is negative, it is possible to bring action before the courts of the other Member State having jurisdiction under Article 3. The interpretation is therefore *favor negotii*. Moreover, it must be borne in mind that only positive decisions have the force of *res judicata*. That raises the question of whether this interpretation applies only to divorce and separation or also to annulment. In Bonomi's view [2], it could not apply to annulment since in that case the problem is *ex tunc*, i.e. it existed at the time that the marriage was contracted. In my view, there is no such distinction since, in the event of a negative decision, whether it relates to divorce or to annulment, the marriage continues to exist and there is therefore no reason not to allow further recourse.

23. As stated in connection with *lis pendens*, there is another rule which would, of itself, justify the adoption of the regulation. It is Article 21 (for-

[1] For the requirement that the decision be positive, see point 60 of the Borrás report; against this interpretation, see H. Tagaras, 'Question spéciales relatives à l'unification communautaire du droit international privé de la famille (règlement 1347/2000)', op cit., p. 466. B. Ancel and H. Muir Watt point out in 'La désunion européenne: le règlement dit "Bruxelles I"', op cit., p. 436, that this solution was adopted in response to Scandinavian pressure.

[2] A. Bonomi, 'Il Regolamento comunitario sulla competenza e sul riconoscimento in materia matrimoniale e di potestà dei genitori', op cit., pp. 338–339.

merly Article 14), which reinforces the scope of recognition. It stipulates that judgments given in a Member State are to be recognised in the other Member States without any special procedure being required, a provision based on the principle of mutual confidence. The most important point, however, is that no special procedure is required for updating the civil-status records of a Member State (paragraph 2) since that is to be done on the basis of the judgment given in matrimonial proceedings in another Member State. It is thus obvious that Article 14 (now Article 21) introduced an important change which will be appreciated by European citizens, given that updating the civil-status records is the effect most commonly sought. Following entry into force of the regulation, that provision will save time and expense since the civil-status records will be updated without requiring any further decision. Few bilateral agreements currently in force have gone so far. Nevertheless, problems arise from the fact that recognition is not judicial but is equivalent to recognition for the purposes of the civil-status records.

Recognition without the need for any further procedure would require a guarantee that it may be appealed against, in accordance with the procedure provided for in the regulation itself (Article 21(3)), which is the appeal procedure laid down for enforcement (1).

24. A specific issue for Spain, Italy and Portugal is that of concordats with the Holy See, as referred to in Article 63 (formerly Article 40). Since the regulation is confined to 'civil matters' (Article 1(1)), it would have been consistent with the secular nature of the European project to limit the scope of the regulation to civil procedures, and that would not have infringed the agreements with the Holy See but would simply have circumscribed the material scope of the regulation. But the three Member States referred to have concordats, although the content is different in each case, and this fact led to the insertion of a provision on the matter.

A matter of considerable interest is the protection of defence rights in proceedings under canon law, as referred to by Baratta (2) in relation to the judgment of the European Court of Human Rights of 20 July 2001 (3). In addition, default of appearance by the respondent in proceedings under canon law may raise questions relating to the principle of freedom of religion and the non-denominational nature of the State (4).

25. With regard to **grounds of non-recognition** or non-enforcement, Articles 22 and 23 (formerly Article 15) follow Article 27 of the 1968 Brussels Convention, although the grounds of non-recognition provided for in the 1996 Hague Convention on the Protection of Children also had to be taken into consideration in order to ensure harmonious application of that convention and the Community instrument. Article 22 sets out the

(1) In principle, necessary only for measures relating to parental responsibility. On the procedure for recognition and enforcement, see R. Wagner, 'Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung', *IPRax*, 2, 2001, pp. 73–86.
(2) R. Baratta, 'Separazione e divorzio nel DIPr italiano', op cit., 2002, p. 1586, note 171.
(3) In *Pellegrini* v *Italy*. In that connection, see M. Guzmán, 'Novedades en materia de reconocimiento de resoluciones eclesiásticas sobre nulidad matrimonial', *Aranzadi civil,* No 13, 2002, pp. 15–18.
(4) Judgment of 27 June 2002 of the Spanish Supreme Court, *Actualidad Jurídica Aranzadi,* No 540, 11 July 2002, pp. 1–6. In that connection, see R. M. Moliner, 'La rebeldía y el reconocimiento de efectos civiles a las sentencias canónicas de nulidad (a propósito de la Sentencia del Tribunal Supremo de 27 de junio de 2002)', *Boletín de Información del Ministerio de Justicia,* No 1927, 15 October 2002, pp. 3113–3132, although it does not coincide with what is stated in the note referred to.

grounds of non-recognition of judgments relating to a divorce, legal separation or marriage annulment, while Article 23 sets out the grounds of non-recognition of judgments relating to parental responsibility. The reason for the distinction is that, although both types of judgment are closely connected with the matrimonial proceedings, they may have been given by different authorities, depending on the internal distribution of jurisdiction within the State of origin. Another reason for the distinction is that the subject matter of matrimonial proceedings and the subject matter of parental-responsibility proceedings are not identical, so that the grounds for non-recognition cannot be the same in both cases.

26. Of the grounds for non-recognition of judgments in matrimonial proceedings, the first, and the one which raises sensitivities among Member States, is the fact that the judgment is contrary to public policy in the requested State. For that reason, the provision needs to examined in conjunction with Articles 24 (formerly Article 17), 25 (formerly Article 18) and 26 (formerly Article 19).

The second ground of non-recognition is default of appearance by the respondent. The text of Article 15 of the 1998 Brussels II Convention was amended on this point, following the amendment made to Article 27(2) of the Brussels I Convention (1). The earlier provision was amended to introduce some flexibility into the requirements for proper notification by replacing the words 'was not duly served' by 'was not served … in such a way'. The danger is that, in practice, there is a tendency to interpret 'was not served … in such a way' as meaning 'was not duly served' (2). It also stands to reason that that ground of non-recognition cannot be used if the respondent has accepted the judgment unequivocally, as, for instance, by remarrying.

Understanding the grounds of non-recognition set out in subparagraphs (c) and (d), which refer to irreconcilable judgments, is no easy matter. In reality, they are a response to a practical need but the solution adopted is undoubtedly open to question (3).

The first of those grounds is that the judgment in the Member State of origin is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought, regardless of whether the judgment in the latter Member State is earlier or later than the one in the State of origin. In practice, that is a purely marginal instance which will occur only if the *lis pendens* rule in Article 19 (already referred to) has not operated properly. The second ground refers to cases in which the judgment, whether given in another Member State or in a non-member State between the same parties, meets two conditions: it was given earlier and it fulfils the conditions necessary for its recognition in

(1) Now Article 34(2) of Regulation (EC) No 44/2001.
(2) That was what happened in the initial Spanish version of Article 34(2) of Regulation (EC) No 44/2001, which, unlike the other language versions, had 'de forma regular' ('duly'). As a result, a corrigendum was published in Official Journal L 176 of 5 July 2002. In that connection, see P. Jiménez Blanco, 'La redacción errónea del art. 34.2) de la versión española del Reglamento (CE) número 44/2001, relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil', *Revista Española de Derecho Internacional*, 1 and 2, 2001, pp. 742–745.
(3) Examples open to question are given in point 71 of the Borrás report and are discussed elsewhere, as in B. Ancel and H. Muir Watt, 'La désunion européenne: le règlement dit "Bruxelles I"', op cit., pp. 447–449.

the Member State in which recognition is sought. That, too, is a complex provision which may be of practical significance, particularly in relation to judgments given in third States and the conditions under which they are recognised in the Member States.

27. In relation to the grounds of non-recognition and enforcement of measures relating to parental responsibility referred to in Article 23, it should be noted that some are common while others are particular to this situation and are also aligned on the 1996 Hague Convention. Firstly, it should be emphasised that irreconcilability with public policy is attenuated by the consideration to be given to the best interests of the child. Note also that there is no general safeguard of public policy in relation to decisions on rights of access (Article 41) and return (Article 42), which are referred to below. Secondly, we should point out that a decision may not be recognised or enforced if the child has not been given an opportunity to be heard or when any person claiming that the judgment infringes his or her parental responsibility has not been given an opportunity to be heard.

28. Finally, I would add that neither the regulation in either of its versions nor the convention on which it is based contains any provision on capacity to contract a second marriage, although that was proposed by the European Parliament in its opinion, and it is something I personally supported. The European Parliament proposal was taken from Article 11 of the Hague Convention of 1 June 1970 on the Recognition of Divorces and made the necessary amendments, bearing in mind that the Hague Convention is a simple convention. Article 11 provides that 'a State which is obliged to recognise a divorce under this convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognise that divorce'.

2. Declaration of enforceability

29. The title of Section II of Chapter II of the Brussels IIa Regulation ('Application for a declaration of enforceability') is designed to clarify the purpose of the provisions, which relate to intermediate measures to permit the enforcement of a foreign judgment (i.e. 'exequatur') rather than to enforcement measures themselves in the strict sense.

There have been a number of changes in this area recently. As to the procedure for enforcement, the 1998 Brussels II Convention followed the same scheme as provided for in the 1968 Brussels I Convention and thus had considerable advantages: it was initiated at the request of one of the parties and was a fast, simple Community procedure which applied in all the Member States. Yet when the 1968 convention was being revised and

transformed into the Brussels I Regulation, the exequatur and redress system in existence up to then was simplified, in accordance with requests from law professionals. That change was taken into account when the 1998 convention was being transformed into a regulation and, although the same degree of simplification as in 'Brussels I' was not achieved, there were consequences for the Brussels II Regulation, with the trend towards simplification continuing in the Brussels IIa Regulation. In the first instance, the list of courts having jurisdiction to decide on exequatur or redress does not appear in the Community instrument itself or in the annexes thereto but rather is notified directly to the Commission, which is responsible for updating the information and making it publicly available through publication in the *Official Journal of the European Union* or any other appropriate means (Article 68). This avoids having to amend the regulation each time a Member State makes a change to its national legislation (1). Secondly, in both instruments the party seeking or contesting recognition must produce (Articles 37 and 39) a copy of the judgment and a certificate using the standard form set out in Annex I ('Judgments in matrimonial matters') or Annex II ('Judgments on parental responsibility'). For updating or making technical amendments to these standard forms, the Commission will be assisted by an advisory committee in accordance with Decision 1999/468/EC (Articles 69 and 70). Thirdly, as in the Brussels I Regulation, the redress procedures against the enforcement decision and the decision refusing enforcement have been standardised. The application is made to one of the courts specified (Article 29), which must give a decision 'without delay' without allowing the person against whom enforcement is sought to make any submissions (Article 31, formerly Article 24); the application may be refused only for one of the reasons specified in Articles 22, 23 and 24 (formerly Articles 15, 16 and 17). The decision may be appealed against before the courts which are also listed (Article 33) and the appeal is dealt with according to the rules governing procedure in contradictory matters (Article 33(b)) and may be contested only by the proceedings provided for in Article 34. The implication is that the limited reasons for refusal will have a dissuasive effect on the lodgement of appeals.

It should be stressed, however, that, unlike the Brussels I situation, the court from which exequatur is sought may refuse it on the grounds in Articles 22 and 23 and does not confine itself to formal examination of the certificate, as is the case under Article 41 of the Brussels I Regulation. The reason is that long experience in applying the 1968 Brussels Convention made it possible to take a step which would be premature on a matter for which the simplification of exequatur has only just begun.

(1) For instance, Annex I to Council Regulation (EC) No 1347/2000 was amended for the Netherlands by Commission Regulation (EC) No 1185/2002 of 1 July 2002 (OJ L 173, 3.7.2002).

3. Specific rules concerning rights of access and judgments requiring the return of the child

30. The substantive provisions of Regulation (EC) No 1347/2000 were confined to the matters discussed above. However, a new section was added to Regulation (EC) No 2201/2003 on the enforceability of certain judgments concerning rights of access and the return of a child (Article 40). A type of 'European enforcement order' has in effect been created. On the one hand, rights of access granted in an enforceable judgment given in a Member State 'shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition' provided that the judgment 'has been certified in the Member State of origin' in accordance with Article 41(2) and using the standard form in Annex III. This provision should be linked to Article 48, which provides that the courts of the Member State of enforcement 'may make practical arrangements for organising the exercise of rights of access' if no such arrangements have been made by the courts having jurisdiction and subject at all times to any arrangements which such courts may make subsequently.

The same benefit of enforceability is granted to a judgment requiring the return of a child, on the conditions set out in Article 42.

Accordingly, as far as the issuing of the relevant certificate is concerned, control in the requested State has been replaced by control in the State of origin of the judgment, with the result that in these matters the eternal obstacle of public policy in the requested State has disappeared. There is no doubt that these provisions will have a very positive effect in relation to the interest of the child by facilitating access to both parents and, in practice, preventing unlawful removal or retention. The decision to include these provisions was undoubtedly influenced by Article 35 of the 1996 Hague Convention on the Protection of Children, which also seeks to prevent removals and facilitate rights of access.

V — Cooperation between central authorities in matters of parental responsibility

31. The positive experience of the Hague conventions in the area of cooperation between authorities on matters relating to the protection of children (international removals, international adoption) was reflected during the revision of the Brussels II Regulation by the addition of a new Chapter IV

devoted to that subject. It should also be noted that the central authorities of the Member States of the European Community designated under the 1980 Hague Convention on the Removal of Children had already been holding informal and highly successful meetings.

Drawing on that experience, Regulation (EC) No 2201/2003 provides for the designation of one or more central authorities (Article 53) and for the use as required of the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC (Articles 54 and 58). The central authorities are to meet regularly (Article 58). Their general function (Article 54) is to improve the application of the regulation, but they may also assume specific functions in cases relating to parental responsibility (Article 55) and in cases of placement of a child in another Member State (Article 56).

VI — Relations with other instruments

32. The proliferation of legal instruments relating in whole or in part to the same matters creates a need for delimitation and clear disconnecting clauses. In addition to the stipulations concerning the concordats with the Holy See discussed earlier, three specific provisions were included in this connection in Regulation (EC) No 2201/2003.

The first provision (Article 59) concerns the continued existence of the Nordic Agreement. In my view, this provision was not necessary and should not have been included since Article 36 of the Brussels II Regulation was worded in identical terms and neither Finland nor Sweden made the declaration required for the Nordic Agreement to apply in their mutual relations.

The second provision provides that the regulation takes precedence over various international conventions (Article 60) to which all or some Member States are party. These are the 1961 Hague Convention on the Protection of Minors, the 1967 Luxembourg Convention on the Validity of Marriages, the 1970 Hague Convention on the Recognition of Divorces, the 1980 European Convention on Custody of Children and, lastly, the 1980 Hague Convention on Civil Aspects of Child Abduction. However, Article 62 adds that those conventions will continue to apply in matters not governed by the regulation and will 'continue to produce effects between the Member States which are party thereto, in compliance with Article 60'.

Lastly, a specific provision is devoted to the 1996 Hague Convention on the Protection of Children. It should not be forgotten that that convention

was drawn up at the same time as Regulation (EC) No 1347/2000 and that there was a constant concern for consistency during negotiations, the first fruit of which was the joint signature of the convention by all the Member States on 1 April 2003 (ratification should follow). Thus, Article 61 provides that the regulation applies when the child has his or her habitual residence in a Member State, which is in accordance with Article 52(2) of the 1996 Hague Convention. Similarly, the regulation applies to the recognition and enforcement of measures adopted in one Member State and enforceable in another Member State. This is also fully consistent with the Hague Convention, Article 26(2) of which states simply that each contracting State 'shall apply to the declaration of enforceability or registration a simple and rapid procedure' — a global convention cannot be as specific as a Community instrument.

VII — Final considerations

The Brussels IIa Regulation and its predecessor Brussels II can be deemed a success, although their material scope is limited. If we ask what added value the regulation brings, we would have to conclude that in general it brings the treatment of family matters closer to that of economic matters, thus providing credibility and legal certainty for Union citizens at a time when a large majority of marital breakdown cases are intra-European. To be more specific, two provisions should be singled out as they are, in themselves, sufficient to justify the regulation: the *lis pendens* provision (Article 19, formerly Article 11) and the provision on the effects of recognition and updating of the civil-status records (Article 21, formerly Article 14).

In relation to matrimonial issues, it is to be regretted that matters normally linked to an annulment, divorce or separation, such as maintenance and the property consequences of the marriage, remain excluded. While we have the advantage of being able to use the Brussels I Regulation for the maintenance issues [1], the matrimonial property issue remains subject to the pre-existing system, whether autonomous or contractual. Despite its limitations, the regulation does resolve essential problems relating to intra-European marriage breakdown, and for that reason the application of the Brussels II Regulation, whose provisions on these matters are unchanged in Regulation (EC) No 2201/2003, is a good thing. The work thus begun must continue and progress needs to be made on the matrimonial matters excluded from the text.

Matters relating to child protection have been given a major boost by the recently adopted Brussels IIa Regulation. Firstly, the scope of the regulation has

[1] Although here too there is scope for building on the work already done, in line with the Tampere mandate and in close cooperation with the Hague Conference on Private International Law, which is preparing an ambitious text on the subject.

been extended, with the new text covering all children regardless of their family situation. Secondly, a 'European enforcement order' has been created for judgments on rights of access and return, the importance of which is stressed in recital 23. Thirdly and lastly, a procedure for cooperation between authorities has been introduced, which will fulfil an important and ultimately preventive function.

COUNCIL REGULATION (EC) No 1347/2000

of 29 May 2000

on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) The Member States have set themselves the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures in the field of judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and simplify the free movement of judgments in civil matters.

(3) This is a subject now falling within the ambit of Article 65 of the Treaty.

(4) Differences between certain national rules governing jurisdiction and enforcement hamper the free movement of persons and the sound operation of the internal market. There are accordingly grounds for enacting provisions to unify the rules of conflict of jurisdiction in matrimonial matters and in matters of parental responsibility so as to simplify the formalities for rapid and automatic recognition and enforcement of judgments.

(5) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.

(6) The Council, by an Act [4] dated 28 May 1998, drew up a Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The content of this Regulation is substantially taken over from the Convention, but this Regulation contains a number of new provisions not in the Convention in order to secure consistency with certain provisions of the proposed regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(7) In order to attain the objective of free movement of judgments in matrimonial matters and in matters of parental responsibility within the Community, it is necessary and appropriate that the cross-border recognition of jurisdiction and judgments in relation to the dissolution of matrimonial ties and to parental responsibility for the children of both spouses be governed by a mandatory, and directly applicable, Community legal instrument.

(8) The measures laid down in this Regulation should be consistent and uniform, to enable people to move as widely as possible. Accordingly, it should also apply to nationals of non-member States whose links with the territory of a Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in the Regulation.

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[1] OJ C 247, 31.8.1999, p. 1.
[2] Opinion delivered on 17 November 1999 (not yet published in the Official Journal).
[3] OJ C 368, 20.12.1999, p. 23.
[4] OJ C 221, 16.7.1998; p. 1. On the same day as the Convention was drawn up, the Council took note of the explanatory report to the Convention, as prepared by Prof. Alegría Borrás. This explanatory report is set out on page 27 of the aforementioned Official Journal.

(9) The scope of this Regulation should cover civil proceedings and non-judicial proceedings in matrimonial matters in certain States, and exclude purely religious procedures. It should therefore be provided that the reference to 'courts' includes all the authorities, judicial or otherwise, with jurisdiction in matrimonial matters.

(10) This Regulation should be confined to proceedings relating to divorce, legal separation or marriage annulment. The recognition of divorce and annulment rulings affects only the dissolution of matrimonial ties; despite the fact that they may be interrelated, the Regulation does not affect issues such as the fault of the spouses, property consequences of the marriage, the maintenance obligation or any other ancillary measures.

(11) This Regulation covers parental responsibility for children of both spouses on issues that are closely linked to proceedings for divorce, legal separation or marriage annulment.

(12) The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States.

(13) One of the risks to be considered in relation to the protection of the children of both spouses in a marital crisis is that one of the parents will take the child to another country. The fundamental interests of the children must therefore be protected, in accordance with, in particular, the Hague Convention of 25 October 1980 on the Civil Aspects of the International Abduction of Children. The lawful habitual residence is accordingly maintained as the grounds of jurisdiction in cases where, because the child has been moved or has not been returned without lawful reason, there has been a de facto change in the habitual residence.

(14) This Regulation does not prevent the courts of a Member State from taking provisional, including protective, measures, in urgent cases, with regard to persons or property situated in that State.

(15) The word 'judgment' refers only to decisions that lead to divorce, legal separation or marriage annulment. Those documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State are treated as equivalent to such 'judgments'.

(16) The recognition and enforcement of judgments given in a Member State are based on the principle of mutual trust. The grounds for non-recognition are kept to the minimum required. Those proceedings should incorporate provisions to ensure observance of public policy in the State addressed and to safeguard the rights of the defence and those of the parties, including the individual rights of any child involved, and so as to withhold recognition of irreconcilable judgments.

(17) The State addressed should review neither the jurisdiction of the State of origin nor the findings of fact.

(18) No procedures may be required for the updating of civil-status documents in one Member State on the basis of a final judgment given in another Member State.

(19) The Convention concluded by the Nordic States in 1931 should be capable of application within the limits set by this Regulation.

(20) Spain, Italy and Portugal had concluded Concordats before the matters covered by this Regulation were brought within the ambit of the Treaty: It is necessary to ensure that these States do not breach their international commitments in relation to the Holy See.

(21) The Member States should remain free to agree among themselves on practical measures for the application of the Regulation as long as no Community measures have been taken to that end.

(22) Annexes I to III relating to the courts and redress procedures should be amended by the Commission on the basis of amendments transmitted by the Member State concerned. Amendments to Annexes IV and V should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(23) No later than five years after the date of the entry into force of this Regulation, the Commission is to review its application and propose such amendments as may appear necessary.

(24) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

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[1] OJ L 184, 17.7.1999, p. 23.

(25) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

1. This Regulation shall apply to:

(a) civil proceedings relating to divorce, legal separation or marriage annulment;

(b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a).

2. Other proceedings officially recognised in a Member State shall be regarded as equivalent to judicial proceedings. The term 'court' shall cover all the authorities with jurisdiction in these matters in the Member States.

3. In this Regulation, the term 'Member State' shall mean all Member States with the exception of Denmark.

CHAPTER II

JURISDICTION

Section 1

General provisions

Article 2

Divorce, legal separation and marriage annulment

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

— the spouses are habitually resident, or

— the spouses were last habitually resident, in so far as one of them still resides there, or

— the respondent is habitually resident, or

— in the event of a joint application, either of the spouses is habitually resident, or

— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his 'domicile' there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 3

Parental responsibility

1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.

2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have jurisdiction in such a matter if the child is habitually resident in one of the Member States and:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.

3. The jurisdiction conferred by paragraphs 1 and 2 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

or

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

or

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

Article 4

Child abduction

The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.

Article 5

Counterclaim

The court in which proceedings are pending on the basis of Articles 2 to 4 shall also have jurisdiction to examine a counterclaim, in so far as the latter comes within the scope of this Regulation.

Article 6

Conversion of legal separation into divorce

Without prejudice to Article 2, a court of a Member State which has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 7

Exclusive nature of jurisdiction under Articles 2 to 6

A spouse who:

(a) is habitually resident in the territory of a Member State;

or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 2 to 6.

Article 8

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 2 to 6, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

Section 2

Examination as to jurisdiction and admissibility

Article 9

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 10

Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [1], shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

[1] See p. 37 of this Official Journal.

3. Where the provisions of Council Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Section 3

Lis pendens *and dependent actions*

Article 11

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

4. For the purposes of this Article, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 4

Provisional, including protective, measures

Article 12

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 13

Meaning of 'judgment'

1. For the purposes of this Regulation, 'judgment' means a divorce, legal separation or marriage annulment pronounced by a court of a Member State, as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings, whatever the judgment may be called, including a decree, order or decision.

2. The provisions of this chapter shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

3. For the purposes of implementing this Regulation, documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as the judgments referred to in paragraph 1.

Section 1

Recognition

Article 14

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for up-dating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another member State, and against which no further appeal lies under the law of that Member State.

3. Any interested party may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be or not be recognised.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 15

Grounds of non-recognition

1. A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought;

or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

2. A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings as referred to in Article 13 shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

or

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 16

Agreement with third States

A court of a Member State may, on the basis of an agreement on the recognition and enforcement of judgments, not recognise a judgment given in another Member State where, in cases provided for in Article 8, the judgment could only be founded on grounds of jurisdiction other than those specified in Articles 2 to 7.

Article 17

Prohibition of review of jurisdiction of court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

Article 18

Differences in applicable law

The recognition of a judgment relating to a divorce, legal separation or a marriage annulment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 19

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 20

Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

Section 2

Enforcement

Article 21

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child of both parties given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 22

Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list in Annex I.

2. The local jurisdiction shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

Where neither of the places referred to in the first subparagraph can be found in the Member State where enforcement is sought, the local jurisdiction shall be determined by reference to the place of enforcement.

3. In relation to procedures referred to in Article 14(3), the local jurisdiction shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

Article 23

Procedure for enforcement

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.

3. The documents referred to in Articles 32 and 33 shall be attached to the application.

Article 24

Decision of the court

1. The court applied to shall give its decision without delay. The person against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 15, 16 and 17.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 25

Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

Article 26

Appeal against the enforcement decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court appearing in the list in Annex II

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 10 shall apply.

5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 27

Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in Annex III.

Article 28

Stay of proceedings

1. The court with which the appeal is lodged under Articles 26 or 27 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 29

Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

Article 30

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 22 to 25, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State addressed.

Article 31

Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

(a) that he or she is not habitually resident in the Member State in which enforcement is sought; or

(b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her 'domicile' in either of those Member States.

Section 3

Common provisions

Article 32

Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) a certificate referred to in Article 33.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:

(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document;

or

(b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 33

Other documents

The competent court or authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex IV (judgments in matrimonial matters) or Annex V (judgments on parental responsibility).

Article 34

Absence of documents

1. If the documents specified in Article 32(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the Court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 35

Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 32, 33 and 34(2) or in respect of a document appointing a representative *ad litem*.

CHAPTER IV

GENERAL PROVISIONS

Article 36

Relation with other instruments

1. Subject to the provisions of Articles 38, 42 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

(2) (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the *Official Journal of the European Communities*. They may be withdrawn, in whole or in part, at any moment by the said Member States [1].

(b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.

(c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.

(d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III.

[1] None of these Member States made this statement when the Regulation was adopted.

3. Member States shall send to the Commission:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraphs 2(a) and (c);

(b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 37

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

— the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors,

— the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages,

— the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations,

— the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,

— the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, provided that the child concerned is habitually resident in a Member State.

Article 38

Extent of effects

1. The agreements and conventions referred to in Articles 36(1) and 37 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic before the entry into force of this Regulation.

Article 39

Agreements between Member States

1. Two or more Member States may conclude agreements or arrangements to amplify this Regulation or to facilitate its application.

Member States shall send to the Commission:

(a) a copy of the draft agreements;

and

(b) any denunciations of, or amendments to, these agreements.

2. In no circumstances may the agreements or arrangements derogate from Chapters II or III.

Article 40

Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:

(a) Concordato lateranense of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;

(b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.

4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.

5. Member States shall send to the Commission:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

Article 41

Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;

(b) any reference to nationality, or in the case of the United Kingdom 'domicile', shall refer to the territorial unit designated by the law of that State;

(c) any reference to the authority of a Member State having received an application for divorce or legal separation or for marriage annulment shall refer to the authority of a territorial unit which has received such an application;

(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

CHAPTER V

TRANSITIONAL PROVISIONS

Article 42

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force.

2. Judgments given after the date of entry into force of this Regulation in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VI

FINAL PROVISIONS

Article 43

Review

No later than 1 March 2006, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, and in particular Articles 36, 39 and 40(2) thereof. The report shall be accompanied if need be by proposals for adaptations.

Article 44

Amendment to lists of courts and redress procedures

1. Member States shall notify the Commission of the texts amending the lists of courts and redress procedures set out in Annexes I to III. The Commission shall adapt the Annexes concerned accordingly.

2. The updating or making of technical amendments to the standard forms set out in Annexes IV and V shall be adopted in accordance with the advisory procedure set out in Article 45(2).

Article 45

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468 EC shall apply.

3. The committee shall adopt its rules of procedure.

Article 46

Entry into force

This Regulation shall enter into force on 1 March 2001

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. COSTA

ANNEX I

The applications provided for by Article 22 shall be submitted to the following courts:

— in Belgium, the 'tribunal de première instance'/'rechtbank van eerste aanleg'/'erstinstanzliches Gericht',

— in Germany:

  — in the district of the 'Kammergericht' (Berlin), the 'Familiengericht Pankow/Weissensee',

  — in the districts of the remaining 'Oberlandesgerichte' to the 'Familiengericht' located at the seat of the respective 'Oberlandesgericht'

— in Greece, the 'Μονομελές Πρωτοδικείο',

— in Spain, the 'Juzgado de Primera Instancia',

— in France, the presiding Judge of the 'tribunal de grande instance',

— in Ireland, the High Court,

— in Italy, the 'Corte d'apello',

— in Luxembourg, the presiding Judge of the 'Tribunal d'arrondissement',

— in the Netherlands, the presiding Judge of the 'arrondissementsrechtbank',

— in Austria, the 'Bezirksgericht',

— in Portugal, the 'Tribunal de Comarca' or 'Tribunal de Familia',

— in Finland, the 'käräjäoikeus'/'tingsrätt',

— in Sweden, the 'Svea hovrätt',

— in the United Kingdom:

  (a) in England and Wales, the High Court of Justice;

  (b) in Scotland, the Court of Session;

  (c) in Northern Ireland, the High Court of Justice;

  (d) in Gibraltar, the Supreme Court.

ANNEX II

The appeal provided for by Article 26 shall be lodged with the courts listed below:

— in Belgium:

(a) a person applying for a declaration of enforceability may lodge an appeal with the 'cour d'appel' or the 'hof van beroep';

(b) the person against whom enforcement is sought may lodge opposition with the 'tribunal de première instance'/'rechtbank van eerste aanleg'/'erstinstanzliches Gericht',

— in Germany, the 'Oberlandesgericht',

— in Greece, the 'Εφετείο',

— in Spain, the 'Audiencia Provincial',

— in France, the 'Cour d'appel',

— in Ireland, the High Court,

— in Italy, the 'Corte d'appello',

— Luxembourg, the 'Cour d'appel',

— in the Netherlands:

(a) if the applicant or the respondent who has appeared lodges the appeal: with the 'gerechtshof';

(b) if the respondent who has been granted leave not to appear lodges the appeal: with the 'arrondissementsrechtbank',

— in Austria, the 'Bezirksgericht',

— in Portugal, the 'Tribunal da Relação',

— in Finland, the 'hovioikeus'/'hovrätt',

— in Sweden, the 'Svea hovrätt',

— in the United Kingdom:

(a) in England and Wales, the High Court of Justice;

(b) in Scotland, the Court of Session;

(c) in Northern Ireland, the High Court of Justice;

(d) in Gibraltar, the Court of Appeal.

ANNEX III

The appeals provided for by Article 27 may be brought only:

— in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,

— in Germany, by a 'Rechtsbeschwerde',

— in Ireland, by an appeal on a point of law to the Supreme Court,

— in Austria, by a 'Revisionsrekurs',

— in Portugal, by a 'recurso restrito à matéria de direito',

— in Finland, by an appeal to 'korkein oikeus'/'högsta domstolen',

— in Sweden, by an appeal to the 'Högsta domstolen',

— in the United Kingdom, by a single further appeal on a point of law.

ANNEX IV

Certificate referred to in Article 33 concerning judgments in matrimonial matters

1. Country of origin _____

2. Court or authority issuing the certificate

   2.1. Name _____

   2.2. Address _____

   2.3. Tel./fax/E-mail _____

3. Marriage

   3.1. Wife

      3.1.1. Full name _____

      3.1.2. Country and place of birth _____

      3.1.3. Date of birth _____

   3.2. Husband

      3.2.1. Full name _____

      3.2.2. Country and place of birth _____

      3.2.3. Date of birth _____

   3.3. Country, place (where available) and date of marriage

      3.3.1. Country of marriage _____

      3.3.2. Place of marriage (where available) _____

      3.3.3. Date of marriage _____

4. Court which delivered the judgment

   4.1. Name of Court _____

   4.2. Place of Court _____

5. Judgment

   5.1. Date _____

5.2. Reference number _____

5.3. Type of judgment

5.3.1. Divorce ☐

5.3.2. Marriage annulment ☐

5.3.3. Legal separation ☐

5.4. Was the judgment given in default of appearance?

5.4.1. no ☐

5.4.2. yes [1] ☐

6. Names of parties to whom legal aid has been granted _____

7. Is the judgment subject to further appeal under the law of the Member State of origin?

7.1. No ☐

7.2. Yes ☐

8. Date of legal effect in the Member State where the judgment was given

8.1. Divorce _____

8.2. Legal separation _____

Done at _____, date _____ Signature and/or stamp

[1] Documents referred to in Article 32(2) must be attached.

ANNEX V

Certificate referred to in Article 33 concerning judgments on parental responsibility

1. Country of origin _____

2. Court or authority issuing the certificate

   2.1. Name _____

   2.2. Address _____

   2.3. Tel./Fax/E-mail _____

3. Parents

   3.1. Mother

      3.1.1. Full name _____

      3.2.2. Date and place of birth _____

   3.2. Father

      3.2.1. Full name _____

      3.2.2. Date and place of birth _____

4. Court which delivered the judgment

   4.1. Name of Court _____

   4.2. Place of Court _____

5. Judgment

   5.1. Date _____

   5.2. Reference number _____

   5.3. Was the judgment given in default of appearance?

      5.3.1. No ☐

      5.3.2. Yes ([1]) ☐

([1]) Documents referred to in Article 32(2) must be attached.

6. Children who are covered by the judgment [1]

6.1. Full name and date of birth _____

6.2. Full name and date of birth _____

6.3. Full name and date of birth _____

6.4. Full name and date of birth _____

7. Names of parties to whom legal aid has been granted _____

8. Attestation of enforceability and service

8.1. Is the judgment enforceable according to the law of the Member State of origin?

8.1.1. Yes ☐

8.1.2. No ☐

8.2. Has the judgment been served on the party against whom enforcement is sought?

8.2.1. Yes ☐

8.2.1.1. Full name of the party _____

8.2.1.2. Date of service _____

8.2.2. No ☐

Done at _____, date _____ Signature and/or stamp

[1] If more than four children are covered, use a second form.

Insolvency proceedings

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III

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

1. Introduction

1. In the area of cooperation with cross-border effects, Community legal action on insolvency has consisted in enacting a regulation on insolvency proceedings and two directives on the restructuring and winding-up of insurance companies and credit institutions. Although each one of these texts has a different legal basis (only the first is based on Article 65 of the EC Treaty), a common feature is that they are all private international law regulations. Their role is not to create a European bankruptcy law. The starting point is the respect for material diversity: each country keeps its own bankruptcy law. What these Community legislative acts regulate is the cross-border effects of the national proceedings: which national court or authority is competent to open insolvency proceedings or settle a given bankruptcy issue, which national law applies to such proceedings or issues, what the effects are of insolvency proceedings in other States, etc.

2. The central text of the system is Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. That regulation constitutes the **general rule** applicable to the insolvency of any natural or legal person, with the exception of insurance undertakings, credit institutions or investment undertakings (Article 1(2)). The reason for excluding them is that such undertakings usually come under special prudential control arrangements, where national supervisory authorities enjoy wide powers of intervention. These peculiarities require specific regulations. Two directives have been enacted to date: Directive 2001/17/EC of 19 March 2001 on the restructuring and winding-up of insurance companies and Directive 2001/24/EC of 4 April 2001 on the restructuring and winding-up of credit institutions. These should be followed by a directive on investment undertakings.

3. Finally, in addition to these rules regulating insolvency proceedings in general, there are Community texts that address specific problems relating to insolvency. Of particular relevance are Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems (see Articles 6 to 9), and Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements, one of the main objectives of which is to protect creditors benefiting from financial collateral from the risks of the debtor's insolvency (Article 8).

2. Origin

4. The immediate origin of Regulation (EC) No 1346/2000 is the 1995 Brussels Convention on Insolvency Proceedings, which never entered into force. That convention was accompanied by an explanatory report, which, although it had also been negotiated between the Member States, was never approved. The purpose of the report was to facilitate the interpretation of the origin and the justification of each rule in the convention. In so far as the regulation reproduces almost without any variation most of the rules in the convention, that report can be used as a complementary element in interpreting the regulation. The report has Council reference number 6500/1/96 REV1 DRS 8 (CFC).

3. Objectives

5. The proper functioning of the internal market requires cross-border insolvency proceedings to be carried out efficiently and effectively. To that effect, Regulation (EC) No 1346/2000 has three general objectives:

   (i) eliminating the uncertainty resulting from the legislative diversity between Member States by establishing a uniform system of private international law;

   (ii) promoting efficiency, by favouring simple solutions which are easy to apply in practice;

   (iii) excluding from the Community sphere any differences in treatment associated with the location of the creditor or the source of the credits.

4. The regulatory model

6. The regulation of international insolvency proceedings is usually examined by contrasting two regulatory models: the territorial model and the universal one. Regulation (EC) No 1346/2000 corresponds to an intermediate model, one of 'mitigated universality'. This is also the option followed by the Uncitral Model Law on Cross-border Insolvency, which constitutes an international standard on the matter. The starting point is the universal model, in so far as it makes it possible to open insolvency

proceedings in the State where the debtor has his centre of main interests, and it gives them universal scope both as regards the assets covered and the creditors affected. In principle, all the assets are subject to such proceedings, independently of where they are located, and all the debtor's creditors can lodge claims. This model also starts from the application of a single law, the law of the State of the opening of proceedings (*lex fori concursus principalis*), to the procedural and substantive aspects of insolvency. On the basis of that, several rules are laid down which mitigate the universality of the model. Basically, they come under two types. **On the one hand**, there are conflict rules aimed at introducing **exceptions** to the general application of the law of the State of the opening of proceedings, so that certain positions or rights are not subject to the law governing the insolvency proceedings, but to a different national law. **On the other hand**, there are rules intended to allow the opening of **territorial proceedings**, i.e. insolvency proceedings restricted in scope to the debtor's assets located in the State of the opening of proceedings. This possibility is subject to a number of clarifications aimed at preserving the basic rule (i.e. the universality of the proceedings). Consequently, territorial proceedings may be opened only in those places where the debtor has an establishment, participation is not restricted to local creditors, and the proceedings opened are subject to rules of coordination with the main proceedings.

5. Territorial scope

7. The regulation applies only to insolvency proceedings opened in a Member State against a debtor, independently of his nationality, whose centre of main interests is situated in a Member State. Furthermore, it regulates only the intra-Community effects of such proceedings (i.e. their effects with regard to the law of other Member States), with the sole exception of international jurisdiction, which necessarily functions with regard to third States in order to ensure the universality of the regulatory model adopted. For insolvency proceedings which are not included in the regulation, or for any aspects not covered by it, the private international law of each State applies.

   It should also be pointed out that, in accordance with Article 69 of the EC Treaty, Denmark did not participate in the adoption of the regulation, and is therefore not bound by it as long as it does not change its position (see recital 33 in the preamble to the regulation). As far as other Member States are concerned, Denmark should be considered for the time being as a third State.

6. Material scope of the regulation

8. The regulation applies to insolvency proceedings — reorganisation or winding up — that meet the following four conditions:

   (i) They must be collective proceedings.

   (ii) They must be based on the debtor's insolvency. The regulation does not define this situation: the exact conditions in which such a crisis would arise are determined by national law.

   (iii) They must involve the total or partial divestment of the debtor, i.e. the transfer to another person of the powers of administration and of disposal over all or part of his assets, or the limitation of these powers through intervention and control of his actions. The legal nature of such a divestment under the applicable national law is irrelevant.

   (iv) They must involve the appointment of a liquidator or equivalent figure (see Article 1(1) of the regulation). This requirement is a corollary of the previous one: divestment must entail the appointment of a liquidator. The regulation uses a very broad definition of 'liquidator': any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs (Article 2(b)).

9. However, for the regulation to apply, it is not sufficient for national proceedings to satisfy these four conditions generically. Article 2(a) and (c) requires the proceedings in question to be expressly included in Annexes A and B to the regulation. Once the proceedings have been included in these annexes, there is no further check that they satisfy the abovementioned conditions; their mere presence on the list of national proceedings included is sufficient for the regulation to be applicable.

7. Subjective scope

10. The regulation does not lay down any restrictions based on the debtor's nature. They may be natural or legal persons, independently of the form taken by the body or association, or legal entities without personality and separate assets, as long as under the applicable national law they can be the subject of insolvency proceedings. The regulation also applies independently of the personal status of the debtor, whether he is a trader or non-trader, professional or consumer, etc.

11. The regulation does not apply to insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. These undertakings are governed by specific regulations (see Section 1 above).

8. The main proceedings

12. In accordance with Article 3(1) of the regulation, the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. These proceedings are known as the main proceedings, and they have universal scope. This means that they aim at encompassing all the debtor's assets and at affecting all creditors, whatever their location, on a worldwide basis and not just on a Community basis. It is important to point out that the regulation does not restrict the international jurisdiction of the courts of the centre of main interests to the European sphere, nor does it leave this matter to national law. Of course, the regulation can only guarantee universal scope within the European Community area. Outside the Community, this universal scope depends on the existence of a treaty with the State or States in question, and on whether the legal system of such State or States allows it.

13. The centre of main interests is an **autonomous** concept, i.e. a concept specific to the regulation, with a uniform meaning independent of national law. In order to facilitate its interpretation and application, the regulation (a) provides a **definition** for the term, offering a uniform concept for all Member States and laying down the bases for realising it (see recital 13 in the preamble to the regulation): the centre of main interests means the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties; and (b) establishes a **presumption** (Article 3(1)) which simplifies the application of the rule: in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

    The regulation only determines international jurisdiction. **Territorial jurisdiction**, however, is established by the law of each State.

14. **Jurisdiction** must be **checked ex officio**. Once a first decision is adopted opening main proceedings in a Member State on the grounds that the debtor's centre of main interests is in that territory, the courts of other

Member States are obliged to acknowledge it without being able to check the jurisdiction of the court of origin; in other words, they are obliged to accept that declaration of jurisdiction. If an interested party disagrees with that jurisdiction, because it considers that the centre of main interests is in a different State, it must contest the jurisdiction before the courts of the State of origin, with the possibility of requesting a preliminary ruling from the Court of Justice of the European Communities.

9. The territorial proceedings

15. In accordance with Article 3(2) of the regulation, where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of that Member State.

16. The insolvency regulation allows the opening of territorial proceedings **before** as well as **after** the main proceedings have been opened (see Article 3(3) and (4)). The preconditions and functions are different in each case.

17. Any territorial proceedings which are opened after the main proceedings shall be **secondary** proceedings. That means that the territorial proceedings are subject to coordination rules and to a certain degree of subordination to the main proceedings. The territorial proceedings may serve two types of function. The first one is a defensive function protecting local interests or interests linked to the operations of the establishment. That protection arises from the fact that once the territorial proceedings have been opened, the effects of insolvency are not governed by the law of the State where the debtor has his centre of main interests (and where the main proceedings have been opened), but by the law of the State where the establishment is located, which is the law closest to those who have had business dealings with the debtor through that establishment. The second function is **ancillary** to the main proceedings. Territorial proceedings may be used to facilitate the administration and winding-up of the insolvent debtor's assets when those assets are complex or when the number of local creditors is very large. These two functions explain why secondary proceedings opened after the main proceedings must be winding-up proceedings (Article 3(3)).

18. Even if no principal proceedings have been opened, territorial proceedings may still be opened, and, in the absence of main proceedings with which

they should be coordinated, they will develop as autonomous or independent proceedings. The regulation views the possibility of opening independent territorial proceedings with some suspicion. In such cases, there are no main proceedings yet, and so there is no possibility of coordinating in the context of centralised Community proceedings, and consequently the risks associated with opening territorial proceedings are greater. This explains why the regulation has only seen the possibility of opening independent territorial proceedings as a mechanism for covering certain protection loopholes which could arise within a single universal model for proceedings. That is why it can be said that independent territorial proceedings fulfil a specific **supporting function**: they serve to alleviate the impossibility of requesting the opening of insolvency proceedings under the *lex fori concursus principalis* which could nevertheless be opened under the law of the State where the establishment is located. That supporting function of independent territorial proceedings explains why they may be winding up or restructuring proceedings. The regulation also allows for the direct opening of territorial proceedings prior to the opening of the main proceedings for reasons of procedural economy: they are intended to prevent creditors who would be entitled to request the opening of secondary proceedings after the opening of the main proceedings from having to request the opening of these main proceedings if nobody has already done so, and then immediately request the opening of secondary proceedings (see Article 3(4)).

If, following the opening of independent territorial proceedings, main proceedings are opened, the former are converted into **secondary** proceedings and the main liquidator may ask for their conversion into winding-up proceedings (Article 37).

19. The concept of **establishment** is an **autonomous** concept defined in the regulation itself (Article 2(h)). The regulation defines 'establishment' as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods (Article 2(h)). The definition in the regulation is relatively open, based on the conjunction of **two elements**:

    (a) the existence of an organised centre of operations, and

    (b) a certain degree of permanence in time.

20. The jurisdiction of these courts is **territorial**: it only affects the assets of the debtor situated in the territory of the corresponding State (Article 3(2) *in fine*). Whether or not these assets are linked to the economic activities of the establishment is of no relevance. That rule restricting jurisdiction holds for all territorial proceedings, be they independent or secondary

(Article 3(2) *in fine*), and is reflected in the **effects of the proceedings**, which are also limited to the assets of the debtor situated within the territory of the Member State in question (Article 27 *in fine*).

A special application of this rule can be found in Articles 17(2) and 34(2) of the regulation. The former is applicable to independent as well as to secondary territorial proceedings, and lays down that any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent. The latter applies to secondary proceedings which are closed by a rescue plan, a composition or a comparable measure, and requires the consent of all the creditors having an interest for that composition to have effect in respect of the assets situated in another Member State.

10. Applicable law

21. The starting point for the regulation is the application of the **law of the State of the opening of proceedings**. Under Article 4(1), the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, thereafter referred to as the 'State of the opening of proceedings'. That rule is valid for the main proceedings and for territorial ones (see recital 23 in the preamble and Article 28), which means that the rules of international jurisdiction have a double role: they determine directly the applicable jurisdiction and indirectly the applicable law. The application of the law of the State of the opening of proceedings (*lex fori concursus*) as a general rule constitutes one of the general principles of comparative international bankruptcy law.

22. In accordance with Article 4, save as otherwise provided in the regulation, the **law of the State of the opening of proceedings** (*lex fori concursus*) determines the conditions for all the phases of the insolvency proceedings: **their opening, their conduct and their closure**. These include the conditions for opening the proceedings, who is entitled to request that opening, the appointment of administrators or receivers, including temporary administrators, the determination of the assets and liabilities, their administration, the admission and ranking of claims, the participation of creditors, the forms of winding up, by reorganisation or liquidation and distribution, etc. Article 4(2) of the regulation contains a list of **particular matters** which are determined by the law of the State of the opening of proceedings. That list is not exhaustive. Its function is to facilitate the

interpretation of the basic rule given in Article 4(1) and to resolve any possible problems of characterisation to which its application could give rise. In accordance with this precept, the law of the State of the opening of proceedings shall determine, *inter alia*:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

11. Exceptions to the law of the State of the opening of proceedings

23. Articles 5 et seq. of the regulation contain a series of special rules which act as exceptions to the application of the *lex fori concursus*. Generally speaking, there are **two grounds** for such exceptions to the application of the *lex fori consursus*: on the one hand, protecting the rights acquired in a State other than the State of opening of proceedings against the application of foreign bankruptcy law; on the other hand, the need to reduce the complexity of insolvency proceedings (see recital 11 in the preamble). The first reason is of a substantive nature. The application of a single bankruptcy law to all the legal relations of the debtor can be very well understood as a mechanism for promoting collective action. However, the implications, namely the extension of the effects envisaged under that law to rights or relations set up under a different national law, should be borne in mind. Consequently, there is an inherent tension between establishing a single standard to govern the debtor's insolvency (which justifies the application of the *lex fori concursus*) and the introduction of an element of unpredictability and of extra cost in the transactions carried out under other legal systems. That is why the exceptions to the application of the *lex fori concursus* can be explained in terms of legal certainty and of protecting expectations in certain matters or areas which are particularly sensitive to interference from different national legislation. The example of Article 9 concerning payment systems and financial markets is paradigmatic. In addition to the substantive argument, there is also a **procedural argument**. Insolvency proceedings are relatively complex and expensive to administer. Reducing these costs may well favour certain creditors, but can end up benefiting all of them in that the total costs of administering the proceedings are reduced. As we shall see, certain exceptions, or at least certain aspects of these, are justified by the need to facilitate matters. A good example is provided by Article 5 of the regulation on rights *in rem*. The solution contained there was not adopted because it was the best solution in terms of abstract legislative policy, but because it represented the best balance between satisfying the legislative policy objectives sought and simplicity in applying the rules. Limiting the complexity that international aspects add to the debtor's insolvency and reducing the costs associated with that complexity are part of the regulation's institutional objectives.

24. The list of exceptions is closed and, under the scope of the regulation, Member States cannot extend it. The regulation lays down special rules for third parties' rights *in rem* (Article 5), set-off (Article 6), reservation of title (Article 7), contracts relating to immovable property (Article 8), payment systems and financial markets (Article 9), contracts of employment (Article 10), effects on rights subject to registration (Article 11), detrimen-

tal acts (Article 13), protection of third-party purchasers (Article 14), and effects on lawsuits pending (Article 15). Article 12 on Community patents and trade marks is more of a location rule.

12. Uniform rules regarding information to creditors and the lodging of claims

25. The regulation lays down a number of uniform substantive rules which supersede national rules on that matter. Specifically, these rules refer to the right of creditors, including tax and social security authorities, to lodge claims in writing (Article 39), the duty to inform known creditors by an individual notice with specific content (Article 40), the content of the lodgement of a claim (Article 41), and the languages to be used (Article 42).

13. Recognition of insolvency proceedings

26. The universal model which inspires the regulation implies that the main proceedings extend their effects to all Member States. The insolvency regulation guarantees the effectiveness of that model by specifying that the decisions adopted under the main proceedings must be recognised and enforced in the other Member States. That recognition has an inherent limitation in territorial proceedings. The opening of territorial proceedings acts as a shield against the effects of the main proceedings. On the other hand, the regulation lays down rules for coordinating proceedings which grant the main proceedings considerable influence over the territorial ones, and which are discussed in the next section.

27. The regulation regards insolvency proceedings as complex proceedings, through which successive decisions are adopted, each with its own effects. That is why Article 16 addresses the declaration of insolvency, which is the fundamental decision, and its typical effects (see Articles 17, 18, 20 and 24), whereas Article 25 addresses the recognition of judgments successively adopted throughout the proceedings (e.g. a decision confirming a composition) or immediately related to them (e.g. a decision annulling an act detrimental to creditors), including preservation measures, and their enforcement.

28. The system of recognition and enforcement followed by the insolvency regulation is quite similar to the model of recognition established in Regu-

lation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

29. The insolvency regulation thus distinguishes between recognition and enforcement. Whereas recognition is automatic, enforcement is subject to prior control, through a procedure of exequatur or registration. Automatic recognition means that foreign decisions are recognised *ipso jure*, without any need to resort to preliminary proceedings before having them accepted in the forum of the decision. It is sufficient for the decision to satisfy the conditions laid down in the regulation for that decision to be recognised in all Member States, without any further ado and in its own right. That ensures the effectiveness of the insolvency proceedings, since it saves the costs and delays involved in proceedings where the recognition of a judgment is raised as the principal issue. The exequatur or registration procedure is not regulated directly; instead, the regulation refers to the 1968 Brussels Convention system, which has been replaced by Regulation (EC) No 44/2001 (see Article 68(2) thereof).

30. The regulation greatly simplifies the conditions which a foreign decision must fulfil in order to benefit from its system of recognition and enforcement, because the international jurisdiction of the State of origin is not checked, and neither, of course, is the substance of the decision. The publication in other States of the opening of proceedings, or their registration in the registers of those States, is not required either for recognition in other States. Specifically, for a decision to be recognised, it must simply:

    (a) have been made by a Member State authority, within the meaning of Article 2(d), which has claimed jurisdiction in accordance with Article 3;

    (b) have been adopted in the context of one of the insolvency proceedings listed in the annexes to the regulation;

    (c) not be contrary to the public policy of the requested Member State as specified in Article 16.

31. Under that system, the decision extends its effects immediately to all Member States. Thus, for instance, the stay on individual actions by creditors, the divestment of the debtor, or the appointment of a liquidator will be effects which will apply automatically on the territory of all these States.

32. One of the main effects of recognising insolvency proceedings opened abroad is the recognition of the **appointment of the liquidator** and his **powers**. That is the aim of Article 18, which distinguishes between principal proceedings and territorial proceedings.

(a) In the case of **principal proceedings**, the liquidator may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State (Article 18(1)). At any rate, recourse to coercive measures by the liquidator is excluded. If it is necessary to use coercive measures (for instance, to take control of the assets), the liquidator must request the local authorities to impose them.

(b) On the other hand, in the case of territorial proceedings, it is exceptional for the liquidator to be able to exercise his powers outside the State of opening of proceedings. In such situations, Article 18(2) stipulates that the liquidator may in any other Member State claim through the courts or out of court that movable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors, such as challenging a detrimental act covered by Article 13.

33. The limitations to recognition fall under two categories. The first consists of territorial proceedings. The opening of territorial proceedings halts the recognition of the effects of the main proceedings. The territorial proceedings are then subject to spatial rules of coordination with the main proceedings, giving the liquidator of the main proceedings a degree of influence on the territorial proceedings. The second limitation arises from public policy. There are two important rules in relation to that second limitation. The first is that the regulation expressly states that the judgment opening proceedings shall also be recognised where insolvency proceedings cannot be brought against the debtor under the law of that State (Article 16(1), second paragraph). The second is that the regulation imposes no obligation to recognise decisions which affect personal freedom or postal secrecy (Article 25(3)).

14. Coordination of proceedings

34. The insolvency regulation makes it possible to open insolvency proceedings in two or more Member States concerning the same debtor. We have seen that the proceedings opened in the State where the debtor has his centre of main interests have universal scope and that any other proceedings which may be opened up in a Member State where the debtor possesses an establishment (Article 3(2)) have only territorial scope. The regulation does not lay down any limitation as to the number of territorial proceedings which may be opened. If the debtor possesses establishments

in several Member States, then insolvency proceedings could potentially be opened in all those States. Whether or not they are opened depends on whether those empowered to request it do so or not. For creditors, it only makes sense to open proceedings when the expected value of the assets, after deducting costs, is greater in the territorial proceedings than in the main proceedings (or if the main proceedings are not possible). There is nothing in the regulation to prevent the opening of only one set of main proceedings against a single debtor, even if he possesses establishments in different States; in many cases, that will be the most reasonable option. Multiple proceedings are merely a possibility that the regulation offers to interested parties.

35. A basic function of insolvency law is to impose on interested parties a framework for collective cooperation. Naturally, once it becomes possible to open different insolvency proceedings against a single debtor, it is essential to lay down coordination mechanisms between these proceedings in order to restore that principle of collective action. Most of the rules that the insolvency regulation devotes to such coordination are contained in Chapter III, which addresses secondary insolvency proceedings. The fact that they are there is no coincidence. It clearly indicates that, as far as the regulation is concerned, the relation between proceedings is based on a **principal/secondary scheme**, where the main proceedings play the leading role. This scheme comprises several ideas:

(a) Only one set of national proceedings may have (or in relation to non-member States, claim to have) universal scope, and they may only be opened by the State where the centre of a debtor's main interests is located (former Article 3(1)). These are the main proceedings.

(b) When the main proceedings are opened, any other territorial proceedings already opened (Article 36) or to be opened (Article 27) in the Community shall be secondary proceedings and be subject to mandatory rules of coordination with the main proceedings. These rules guarantee that the secondary proceedings give due attention to the interests of the main proceedings without renouncing their own functions.

(c) The liquidators, not the courts, play the leading role in coordination. They have the roles of supervision and, if appropriate, of initiative, granted to them under national law, but the regulation puts the liquidators at the centre of the structure for coordination between proceedings. Two very important rules are thus laid down. The first establishes a general duty for the liquidator in the main proceedings and the liquidators in the secondary proceedings to cooperate with each other (Article 31(2)), subject to the rules applicable to each of the proceedings. The insolvency regulation merely imposes the duty to cooperate,

but gives no indication as to the form in which this cooperation may be put into practice. These forms will therefore depend on national legislation. This rule allows liquidators to coordinate the administration and supervision of the debtor's assets and activities under any form permitted by the national laws of the proceedings to be coordinated, including cooperation protocols.

The second rule establishes a general duty for the liquidator in the main proceedings and those in the secondary proceedings to communicate information to each other (Article 31(1)): subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

(d) The principal/secondary scheme is also reflected in the relations between the liquidators. The regulation allocates a dominant role to the liquidator in the main proceedings, who is given special powers to intervene and influence the secondary proceedings. Thus, for instance, the main liquidator can bring about a stay of the process of liquidation in the secondary proceedings (Article 33), have restructuring proceedings converted into winding-up proceedings (Article 37), propose a rescue plan, composition or comparable measure in the secondary proceedings (Article 34(1), first paragraph), and can also veto any plan, composition or comparable measure to which he has not agreed, if that plan or composition affects the financial interests of creditors in the main proceedings (Article 34(1), second paragraph).

(e) Any creditor may lodge his claim in the main proceedings and in any secondary proceedings (Article 32(1)); the liquidators shall lodge in other proceedings claims already lodged by creditors in their proceedings, unless this is opposed by the creditors (Article 32(2)). That principle of participation is very important from the point of view of coordinating proceedings, as it makes it possible where appropriate to reproduce in all the other proceedings the majorities of shareholders achieved in the main proceedings; consequently, if, in accordance with the applicable legislation, the liquidator represents those claims, participation allows the main liquidator to impose his majority, thus obviously strengthening his powers to influence secondary proceedings. For a restructuring plan or for a composition on a global scale, that principle could turn out to be decisive. At any rate, independently of national law, the liquidators may participate in proceedings opened in

other Member States on the same basis as a creditor, in particular by attending creditors' meetings (Article 32(3)).

(f) Dividends are consolidated, and therefore those obtained in one set of proceedings are deducted from the dividends to be obtained in the other set or sets of proceedings (Article 20(2)): a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend. The regulation takes as a reference for the distribution of dividends the 'Community area' (with the exclusion of Denmark, see Section 5 above). The main objective sought here is equality of treatment between all creditors who participated in parallel insolvency proceedings against the same debtor. Naturally, since the applicable law differs between proceedings and the ranking of credits can also differ, full equality is impossible. The objective of the regulation must therefore be seen as necessarily more modest, consisting of ensuring the principle of equality between creditors in so far as it is compatible with that basic diversity.

(g) Finally, if territorial proceedings result in a surplus of assets, that surplus shall be transferred to the main proceedings, which will benefit from it (Article 35).

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1346/2000

of 29 May 2000

on insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the Economic and Social Committee [2],

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.

(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [3], as amended by the Conventions on Accession to this Convention [4].

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

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[1] Opinion delivered on 2 March 2000 (not yet published in the Official Journal).

[2] Opinion delivered on 26 January 2000 (not yet published in the Official Journal).

[3] OJ L 299, 31.12.1972, p. 32.

[4] OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [1]. For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

[1] OJ L 166, 11.6.1998, p. 45.

Article 2

Definitions

For the purposes of this Regulation:

(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) 'liquidator' shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

(c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

(d) 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) 'judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) 'the time of the opening of proceedings' shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

(g) 'the Member State in which assets are situated' shall mean, in the case of:

— tangible property, the Member State within the territory of which the property is situated,

— property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

— claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6

Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7

Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9

Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Article 10

Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13

Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

— the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

— that law does not allow any means of challenging that act in the relevant case.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

— an immoveable asset, or

— a ship or an aircraft subject to registration in a public register, or

— securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Article 15

Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18

Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21

Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).

2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22

Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.

2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26 [1]

Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

CHAPTER III

SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

[1] Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

(a) the liquidator in the main proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.

3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

Article 32

Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.

3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

— at the request of the liquidator in the main proceedings,

— of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34

Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37 [1]

Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38

Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV

PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

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[1] Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42

Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union.

2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading 'Lodgement of claim' in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V

TRANSITIONAL AND FINAL PROVISIONS

Article 43

Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44

Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:

(a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;

(b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;

(c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;

(d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;

(e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

(f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;

(g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;

(h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;

(i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;

(j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;

(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46

Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. COSTA

ANNEX A

Insolvency proceedings referred to in Article 2(a)

BELGIË—BELGIQUE

— Het faillissement/La faillite

— Het gerechtelijk akkoord/Le concordat judiciaire

— De collectieve schuldenregeling/Le règlement collectif de dettes

DEUTSCHLAND

— Das Konkursverfahren

— Das gerichtliche Vergleichsverfahren

— Das Gesamtvollstreckungsverfahren

— Das Insolvenzverfahren

ΕΛΛΑΣ

— Πτώχευση

— Η ειδική εκκαθάριση

— Η προσωρινή διαχείριση εταιρίας. Η διοίκηση και η διαχείριση των πιστωτών

— Η υπαγωγή επιχείρησης υπό επίτροπο με σκοπό τη σύναψη συμβιβασμού με τους πιστωτές

ESPAÑA

— Concurso de acreedores

— Quiebra

— Suspensión de pagos

FRANCE

— Liquidation judiciaire

— Redressement judiciaire avec nomination d'un administrateur

IRELAND

— Compulsory winding up by the court

— Bankruptcy

— The administration in bankruptcy of the estate of persons dying insolvent

— Winding-up in bankruptcy of partnerships

— Creditors' voluntary winding up (with confirmation of a Court)

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

— Company examinership

ITALIA

— Fallimento

— Concordato preventivo

— Liquidazione coatta amministrativa

— Amministrazione straordinaria

— Amministrazione controllata

LUXEMBOURG

— Faillite

— Gestion contrôlée

— Concordat préventif de faillite (par abandon d'actif)

— Régime spécial de liquidation du notariat

NEDERLAND

— Het faillissement

— De surséance van betaling

— De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Das Konkursverfahren

— Das Ausgleichsverfahren

PORTUGAL

— O processo de falência

— Os processos especiais de recuperação de empresa, ou seja:

  — A concordata

  — A reconstituição empresarial

  — A reestruturação financeira

  — A gestão controlada

SUOMI—FINLAND

— Konkurssi/konkurs

— Yrityssaneeraus/företagssanering

SVERIGE

— Konkurs

— Företagsrekonstruktion

UNITED KINGDOM

— Winding up by or subject to the supervision of the court

— Creditors' voluntary winding up (with confirmation by the court)

— Administration

— Voluntary arrangements under insolvency legislation

— Bankruptcy or sequestration

ANNEX B

Winding up proceedings referred to in Article 2(c)

BELGIË—BELGIQUE

— Het faillissement/La faillite

DEUTSCHLAND

— Das Konkursverfahren

— Das Gesamtvollstreckungsverfahren

— Das Insolvenzverfahren

ΕΛΛΑΣ

— Πτώχευση

— Η ειδική εκκαθάριση

ESPAÑA

— Concurso de acreedores

— Quiebra

— Suspensión de pagos basada en la insolvencia definitiva

FRANCE

— Liquidation judiciaire

IRELAND

— Compulsory winding up

— Bankruptcy

— The administration in bankruptcy of the estate of persons dying insolvent

— Winding-up in bankruptcy of partnerships

— Creditors' voluntary winding up (with confirmation of a court)

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA

— Fallimento

— Liquidazione coatta amministrativa

LUXEMBOURG

— Faillite

— Régime spécial de liquidation du notariat

NEDERLAND

— Het faillissement

— De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Das Konkursverfahren

PORTUGAL

— O processo de falência

SUOMI—FINLAND

— Konkurssi/konkurs

SVERIGE

— Konkurs

UNITED KINGDOM

— Winding up by or subject to the supervision of the court

— Creditors' voluntary winding up (with confirmation by the court)

— Bankruptcy or sequestration

ANNEX C

Liquidators referred to in Article 2(b)

BELGIË—BELGIQUE

— De curator/Le curateur

— De commissaris inzake opschorting/Le commissaire au sursis

— De schuldbemiddelaar/Le médiateur de dettes

DEUTSCHLAND

— Konkursverwalter

— Vergleichsverwalter

— Sachwalter (nach der Vergleichsordnung)

— Verwalter

— Insolvenzverwalter

— Sachwalter (nach der Insolvenzordnung)

— Treuhänder

— Vorläufiger Insolvenzverwalter

ΕΛΛΑΣ

— Ο σύνδικο

— Ο προσωρινός διαχειριστής. Η διοικούσα επιτροπή των πιστωτών

— Ο ειδικός εκκαθαριστής

— Ο επίτροπος

ESPAÑA

— Depositario-administrador

— Interventor o Interventores

— Síndicos

— Comisario

FRANCE

— Représentant des créanciers

— Mandataire liquidateur

— Administrateur judiciaire

— Commissaire à l'exécution de plan

IRELAND

— Liquidator

— Official Assignee

— Trustee in bankruptcy

— Provisional Liquidator

— Examiner

ITALIA

— Curatore

— Commissario

LUXEMBOURG

— Le curateur

— Le commissaire

— Le liquidateur

— Le conseil de gérance de la section d'assainissement du notariat

NEDERLAND

— De curator in het faillissement

— De bewindvoerder in de surséance van betaling

— De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Masseverwalter

— Ausgleichsverwalter

— Sachwalter

— Treuhänder

— Besondere Verwalter

— Vorläufiger Verwalter

— Konkursgericht

PORTUGAL

— Gestor judicial

— Liquidatário judicial

— Comissão de credores

SUOMI—FINLAND

— Pesänhoitaja/boförvaltare

— Selvittäjä/utredare

SVERIGE

— Förvaltare

— God man

— Rekonstruktör

UNITED KINGDOM

— Liquidator

— Supervisor of a voluntary arrangement

— Administrator

— Official Receiver

— Trustee

— Judicial factor

Rome I — Rome protocols

PAUL LAGARDE

Paul Lagarde was born in Rennes on 3 March 1934, and is Professor Emeritus of the University of Paris I Panthéon-Sorbonne, Editor of the *Revue critique du droit international privé,* and also a member of the Institute of International Law. He was co-rapporteur (with Mario Giuliano) on the Rome Convention of 19 June 1980.

Main publications

Droit international privé (collaboration with Henri Battifol), Vol. I; Eighth edition, 1993 Vol. II, Seventh edition, 1983.

La nationalité française, Third edition, Dalloz, Paris, 1997.

'Le principe de proximité dans le droit international privé contemporain', *Recueil des cours de l'Académie de droit international*, Vol. 196 (1986-I), pp. 1–237.

IV

Rome Convention of 1980 on the Law applicable to Contractual Obligations

The Rome Convention of 19 June 1980 on the Law applicable to Contractual Obligations is, after the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the second successful attempt to unify private international law within the European Union.

Moreover, in this respect, it occupies a special place in Community private international law. It is the only convention still in force, the others having been replaced by regulations, either after proving their effectiveness over many years, such as the 1968 Brussels Convention, or before even entering into force, such as the Brussels II Convention of 28 May 1998 or the Convention of 23 November 1995 on Insolvency Proceedings. It is also the only one which does not, strictly speaking, have its legal basis in the Treaty of Rome. Unlike the Brussels I Convention, which was based on Article 220 (now Article 293) of the Treaty and the Brussels II Convention, drawn up pursuant to Article K.3 of the Treaty on European Union (Maastricht), the Rome Convention is simply a convention concluded between the Member States of what was then the European Economic Community. In spirit, however, the Rome Convention is a Community convention and the question of whether to transform it into a regulation now arises.

This text refers to the origins of the convention (I), briefly analyses its content (II), introduces the protocols on its interpretation (III) and, finally, raises questions about its likely future (IV).

I — Origins of the Rome Convention

Unification of the rules on jurisdiction by the Brussels Convention of 27 September 1968 necessitated, in order to avoid the danger of **forum shopping** resulting from the many choices of jurisdiction which the convention opened up, corresponding unification of the rules on conflict of laws. Hence, as early as 1970, the Permanent Representatives Committee (Coreper) decided to follow up an initiative by the Belgian Government and to set up a working party for the purpose.

The original ambition was to unify the rules on conflict of laws in all matters to which the Brussels Convention applied, with the exception of maintenance

obligations, which were then the subject of proceedings in the Hague Conference on Private International Law. The working party's remit, therefore, initially covered not only contractual obligations, but also extra-contractual obligations and the law on property and valuable securities. After a few exploratory studies, the working party very quickly postponed the rest of its work on property *sine die*. On the other hand, in 1972, it achieved a preliminary draft convention, drawn up by the six founding States of the European Economic Community, on the law applicable to contractual and non-contractual obligations. This preliminary draft was the subject of wide discussion and many scientific colloquia. It served as the basis of discussion for further negotiations with the three new States which joined the Community in 1973: Denmark, Ireland and the United Kingdom. The negotiations were to result in 1978 in a draft convention finalised in 1980 and limited to conflicts of laws relating to contractual obligations.

Non-contractual obligations were taken out of the draft for two main reasons. It had emerged that very long negotiations, the success of which was not ensured in advance, would be necessary to bring the United Kingdom representatives to abandon the *Philipps* v *Eyre* rule unjustifiably favouring the defendant in an action relating to liability by cumulative application of the *lex loci delicti* and the *lex fori*. In addition, it had to be recognised that the unification brought about by the preliminary draft would be largely illusory since the Hague Conference had just drawn up two special conventions unifying conflicts of laws applicable to traffic accidents and accidents caused by products, and only some Member States of the European Economic Community were prepared to ratify them. This defect should be remedied in the not-too-distant future, since the Commission's Directorate-General for Justice and Home Affairs published a proposal for a regulation on the subject in May 2002.

The convention was signed in Rome on 19 June 1980 but entered into force only on 1 April 1991, after the seventh ratification. However, without waiting for the official entry into force, four signatory States had already unilaterally introduced the provisions of the convention into their national legislation: first Denmark (law of 9 May 1984), then Luxembourg (law of 27 March 1986), followed by the Federal Republic of Germany (law of 25 July 1986) and Belgium (law of 14 July 1987). Moreover, certain courts in other States, such as France and, in particular, the Netherlands, had already applied the convention in advance in the form of *ratio scripta*, although Article 17 thereof states that it is applicable only to contracts made after its entry into force. Since then, the convention has been ratified by the nine signatory States. It was extended to Greece by the Luxembourg Convention of 10 April 1984, to Spain and Portugal by the Funchal Convention of 18 May 1992, and finally to Austria, Finland and Sweden by the convention signed in Brussels on 29 October 1996.

II — Content of the convention

Basically, the convention first had to adopt a position on the two classic major issues in this area: the role of freedom of choice in determining the law applicable and how to determine the law applicable when the parties have not exercised their right of choice. In addition to general solutions, the convention set special rules for contracts in which a weaker party had to be protected. It then attempted to find solutions for particular points which were the subject of discussion. However, beforehand, it had to define its scope.

1. The scope of the convention

Article 1 of the convention amply defines its scope. It states that its rules apply 'to contractual obligations in any situation involving a choice between the laws of different countries'. This formulation saves making the hazardous attempt to define an international contract, since, for the convention to apply, it is sufficient that a question arises as to the law governing the contract. The convention applies to all contracts, with the — very limited — exception of those listed in Article 1(2) and of insurance contracts covering risks situated in the territories of Community Member States, today governed by specific directives. Article 2 furthermore affirms the universal nature of the convention, which is therefore not restricted to intra-Community contractual relations.

2. Freedom of choice

In Article 3, the convention very clearly sets out the principle of freedom of choice, while firmly upholding the other principle that the contract must be connected with the law of a certain State. The principle of freedom of choice goes hand in hand with the rule that the parties may choose the law of their contract without restriction and without the courts being able to claim any power to correct that choice based on the lack or inadequacy of a link between the contract and the State whose law has been chosen. In other words, the parties, in choosing a specific law, release themselves from the law which would have been applicable had they not made a choice, and particularly from its mandatory rules. That is the meaning of freedom of choice in private international law. Connected with the idea of freedom of choice, there is also the possibility of choosing a law after conclusion of the contract, provided that choice of law does not damage the rights of third parties (Article 3(2)), and the possibility of making a partial choice which includes a certain right to 'dépeçage.' However, the right to choose does not imply the right to evade all State law. The choice of a non-State law, such as the *lex mercatoria* or the

Unidroit principles, is not equivalent to a choice of law within the meaning of the convention and will produce an effect only within the limits authorised by the law objectively applicable where no choice has been made. The twofold consequence of the principle that the contract is necessarily governed by a body of law is, firstly, that once the choice of law has been made, the contract is subject to the mandatory rules of the law chosen, which may in some cases result in the contract being invalid and, secondly, that if the law chosen should be amended after conclusion of the contract and the new provisions are applicable to contracts in force, they will apply to the contract.

To be effective, the choice of law 'must be expressed or demonstrated [de façon certaine] by the terms of the contract or the circumstances of the case' (Article 3(1), second sentence). 'De façon certaine' is at least what the French version of the convention says and this is faithfully reproduced in the Spanish version ('de manera cierta'), but unfortunately it has been translated in different and less restrictive ways in the other languages: 'with reasonable certainty' in the English version, 'mit hinreichender Sicherheit' in the German version, 'in modo ragionevolmente certo' in the Italian version. These variations are regrettable since the threshold for moving from the conflict rule based on freedom of choice and the one based on the objective location of the contract is likely to shift according to the contracting State in which the matter is referred to the courts. The point on which major differences have already arisen is that of the scope to be given to a clause attributing jurisdiction to the courts of a certain State ('choice-of-forum clause'), unaccompanied by a clause relating to the choice of the law of that State. The English and German texts, unlike the French text, allow the interpretation that there is a tacit choice of the law of that State.

However, the convention lays down certain restrictions on freedom of choice. The first relates to purely internal contracts, i.e. those of which all the elements, except for the choice of law or tribunal, are located in one country only. Article 3(3) does not set aside the right to choose in such a case, but states that the choice cannot prejudice the application of the mandatory rules of the law of that country, defined as those which, according to that law, cannot be derogated from by contract.

A second restriction, which this time concerns all contracts, is constituted by the mandatory rules (French: 'lois de police') referred to in Article 7. One of the most striking provisions of the convention stipulates that, under certain conditions, effect may be given, concurrently with the law chosen or with the applicable law where no law has been chosen, to the mandatory rules of another legal system, if and in so far as those rules must be applied whatever the law applicable to the contract. This means in fact, as the Court of Justice had occasion to point out in its *Arblade* judgment of 23 November 1999 (Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453), 'national provisions

compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'. Provision has, however, been made for the right not to apply the mandatory rules in the case of a foreign law (Article 22).

Finally, the convention restricts freedom of choice when exercise of that freedom would have the effect of putting the weaker party at a disadvantage in certain consumer contracts (Article 5) and in employment contracts (Article 6). Rules to protect the consumer or the worker (for example, the nullity of unfair terms or the rules on dismissal) adopted in many States, including European Union Member States, would have no practical application in international relations if they could be countered by the free choice of a foreign law. Hence, in those types of contract and in the circumstances indicated below in Section 4, the convention lays down the rule that choice of law is lawful but that the consumer or worker must not thereby be deprived of the protection which he is guaranteed by the mandatory rules of the law which would be applicable to the contract if no choice has been made. It should be noted that this is close to the provisions of the Brussels I Regulation, which limits in such cases the possibility of stipulating choice-of-forum clauses.

3. Applicable law where no choice has been made

Where the parties have not chosen the law applicable, the convention has adopted a method of objectively localising the contract, by designating the law of the country with which the contract is most closely connected (Article 4(1)). In this way, it has tried to rule out any attempt to determine what might have been the implicit or hypothetical will of the parties, which is necessarily unpredictable and based on conjecture, but also any use of fixed localisation criteria, such as the place of conclusion, which often has no meaningful connection with the centre of gravity of the contractual situation. The solution adopted is based on a sound method. So as not to leave it to the court to determine the applicable law solely by its own means or bind it by fixed criteria, the convention (Article 4(2)) has chosen to give priority to a significant piece of evidence — generally speaking, the habitual residence of the party effecting the characteristic performance — while allowing the court to disregard this 'if it appears from the circumstances as a whole that the contract is more closely connected with another country' (Article 4(5)).

Subject to that exception clause, the objective connection of the contract with the law of the party effecting the characteristic performance contributes considerable legal certainty. It also corresponds to a certain economic reality. Where a person, instead of contacting a supplier from his own country, prefers to call on

a foreign supplier, that person, it is said, accepts the risk of international trade and may as a rule expect that the contract will no longer be subject to his own law, but rather to the law according to which the supplier habitually contracts, that is the law of his habitual residence or of his establishment.

In order to function, the rule presupposes that the characteristic performance can be easily determined. The report accompanying the convention indicates that the characteristic performance is generally that for which payment is due, which does not cause a problem for most named contracts. In most bilateral contracts, in fact, a price must be paid: the price of goods in the case of a sale or the price of works in a works contract, the rent in the case of a lease, the ticket in the case of a transport contract, the premium in an insurance contract, the interest in a loan agreement, the fee in a licensing agreement, etc. The obligation to pay the price is therefore not specific to a type of contract. What is specific, on the other hand, is the obligation of the seller to supply the merchandise, of the contractor to carry out the works requested, of the lessor to provide the lessee with the use of the rented property, etc. In all these contracts, it is easy to determine the characteristic performance.

However, this is not always the case. In practice, there are a number of contractual operations, even relatively simple ones, which may give rise to hesitation. Commercial distribution contracts provide an interesting example. Whatever their form, they all aim to market the products of a certain undertaking on the market entrusted to the distributor. Hence, it might appear that it is the distributor who effects the characteristic performance. This is certainly true of the sales agent or commercial agent who, moreover, receives a price (salary or commission) in payment for his services. It is much more doubtful in the case of the licensee or franchisee. In their relations with their own customers they are — obviously — the ones who effect the characteristic performance, but, in their relations with their licensor or franchisor, the roles are often inverted. The licensor or franchisor himself provides significant services, particularly in the transfer of know-how, and often himself receives a fee, at least in the franchise agreement. Moreover, it is certainly in the interest of the licensor or franchisor to organise his distribution network according to one and the same system of law. Thus, opinions are divided on this point and it is noteworthy that the French Court of Cassation, in a judgment of 15 May 2001, ruled that the characteristic performance was that of the licensor. It would be good if the Court of Justice could settle this issue one day.

Where the characteristic performance cannot be determined, it is necessary to revert to the general principle and decide on a case-by-case basis with which country the contract is most closely connected. The typical example is that of an exchange in which both services could be described as characteristic,

which amounts to saying that neither of them is. One could also mention certain compensation contracts between banks or various complex contractual operations for which it is advisable, in the interests of legal certainty, to choose an applicable law in the contract itself.

The presumption in favour of the law of the party who effects the characteristic performance is not the only one set out in Article 4 of the convention. Contracts covering a right in immovable property or a right to use immovable property are logically connected, where no choice of law has been made, with the law in which the immovable property is situated (Article 4(3)) and contracts for the carriage of goods are covered by a special, rather complicated, rule (Article 4(4)).

All the connections set out in Article 4(2), (3) and (4) are subject, as already indicated, to an exception clause (Article 4(5)). It would be preferable if this clause could continue to be used, as its name indicates, only in quite exceptional cases. It has happened that some courts have used it improperly to revert to solutions which they used before the convention entered into force, particularly with regard to the provision of securities. However, such abuses are rare. As a legitimate example of the application of the exception clause, we may quote a certain decision excluding from the law of the country in which the immovable property was situated a dispute relating to a holiday let concluded between a lessor and a tenant both having their habitual residence in the forum State, presumed to be different from that in which the immovable property was situated.

4. Special rules for consumer contracts and employment contracts

The fact that these contracts are regulated by the convention is indicated not only by the aforementioned restriction of the principle of free choice. Their special nature is also evident from the law applicable to them when no law is chosen.

For the consumer, the specification adopted is a preferential one. If the rule indicated by principle had been adopted, consumer contracts would, when no law is chosen, have been governed by the law applicable to the tradesman or professional approached by the consumer. It is that tradesman or professional that provides the service characteristic of the contract. Article 5 of the convention sets that solution aside and subjects the contract, when no law is chosen, to the law of the State in which the consumer habitually resides, which is presumed to be if not more favourable to the consumer at least more familiar to him and likely to protect him from surprises. That derogation solution may surprise the tradesman or professional, particularly when he is approached in his own country by a foreign consumer who is himself abroad. Accordingly, the convention has restricted the derogation from both the freedom of choice

and the objective specification of the law of the provider of the characteristic service to certain well-defined possibilities in which it is in fact the tradesman or professional who has taken the initiative that leads to the conclusion of a contract. That is the case (Article 5(2)): (i) where the conclusion of the contract was preceded in the country in which the consumer habitually resides by a specially made proposal or publicity; (ii) where the consumer's co-contractor received the order in the consumer's country (door-to-door selling); (iii) in the sale of goods when the consumer has gone to the seller's country in the context of a journey the seller with the aim of encouraging the consumer to conclude a sale. Those three situations are interpreted strictly and certain cases ruled on in Germany have suggested that they might perhaps be extended. Certain exclusions, such as real estate contracts and transport contracts, also restrict the scope of this article.

For the employee, it has been appreciated that the rule of principle enunciated in Article 4(2) is inappropriate, since it would result in the application of the law of the State of the employee's habitual residence at the time of the conclusion of the contract, which has no localisation value if the employer's establishment and the place where the work is performed are both in another State. Here Article 6 of the convention has more appropriately chosen a link of proximity (rather than a preferential one as in the case of the consumer) and principally opted for the law of the country in which the employee habitually performs his work. If an employee is posted to another country, the law changes only if the posting is definitive. If an employee does not habitually perform his work in a single country, the law applicable is, in principle, that of the country in which the establishment that recruited the employee is located. These specifications are subject to an exception clause framed on the same lines as that in Article 5(5).

As in the case of the restrictions on the freedom of choice, there is a degree of parallelism between the provisions of the Rome Convention and those of the Brussels I Regulation on employment contracts. The parallelism is less in the case of consumer contracts as the regulation takes account of contracts concluded by electronic means, which were unknown when the Rome Convention was negotiated.

5. Miscellaneous matters

(a) Matters relating to the scope of the law applicable

Article 10 gives a non-exhaustive list of the matters governed by the law applicable to a contract. It expresses the desire not to encroach upon the field of procedural law, in particular as regards the assessment of damages consequent upon breach (Article 10(1)). The same observation may be made regarding

the recognition of the proof of contracts or acts intended to have legal effect, which is covered by Article 14. It will be noted that Article 10(1)(e) makes the consequences of the nullity of a contract subject to the law of the contract, like the obligation to refund. That solution is understandable because the desire to be consistent results in the application of the same law both to the cause of nullity and to its consequences. Here, however, it is not strictly speaking a question of contractual obligations, precisely because there is no valid contract. For that reason, this provision is the subject of reservations on the part of certain Member States.

Special measures have been taken concerning consent and capacity. While consent and the material validity of a contract are governed by the law that would apply to it if it were valid (Article 8(1)), a party who claims not to have given his consent, for example because he kept silent, may, however, rely upon the law of the State in which he habitually resides, if the effect of his conduct cannot reasonably be determined under the law presumed to govern the contract (Article 8(2)). As regards capacity, which in most continental legal systems is a matter of personal status, the convention does not regulate it directly but restricts itself to confirming a traditional solution dating from a ruling of 16 January 1861 by the French Supreme Court of Appeal in the *Lizardi* case, based on the theory of appearance to prevent a person who has concluded a contract in one State from invoking his incapacity resulting from the law of another State vis-à-vis a co-contractor who, in good faith, was unaware of that incapacity (Article 11).

The law applicable to the forms of acts is covered by the long Article 9. That provision lays down an alternative conflict rule which is favourable to the validity of an act. For it to be valid in form, it is sufficient for a contract to comply with the formal requirements of the law that governs its form or with those of the law of the country or countries in which the intentions of one or other of the parties to the contract were expressed. An exception is made for the form of consumer contracts governed by Article 5, which remains subject to the law of the State in which the consumer is habitually resident (Article 9(5)).

(b) Voluntary assignment and subrogation

These two triangular operations are covered by Articles 12 and 13 of the convention respectively. The idea common to those articles is that the transfer of a right by voluntary assignment or subrogation is subject to its own law, but that the situation of the debtor must not be affected by the transfer. In voluntary assignment, the own law of the transfer is the law of the assignment contract, i.e. the law chosen by common accord by the assignor and the assignee, and in subrogation it is the law that governed the duty of the third party who has satisfied the creditor and claims to have taken over the creditor's rights.

The inviolability of the debtor's position means that relations between the assignor or the subrogated party, on the one hand, and the debtor, on the other hand, will be governed by the law which governed the original right, the subject of the transfer. Article 12 even provides that the law governing the right to which the assignment relates shall determine the conditions under which the assignment can be invoked against the debtor, but it leaves open the question of the law applicable to the conditions under which the assignment can be invoked against third parties.

III — Interpretation of the convention

The authors of the Rome Convention were well aware of the danger of divergent interpretations to which it was exposed. Accordingly, incorporating a provision that appeared in various United Nations conventions, they adopted an Article 18 that advised those interpreting the convention to take account of its international character and the desirability of achieving uniformity in its interpretation and application. In a joint declaration, they hoped that jurisdiction in certain matters of interpretation would be conferred on the Court of Justice of the European Communities, as was done in the case of the 1968 Brussels Convention by the protocol of 3 June 1971.

Two protocols to that end were signed on 19 December 1988 after laborious negotiations. The fact that there are two protocols requires some explanation. That fact is the result of a political compromise intended to overcome the opposition of States resolutely hostile to interpretation by the Court of Justice and States just as resolutely in favour of Community interpretation, which is the only guarantee of uniform application of the convention in the contracting States. The first protocol lays down the conditions in which the courts of a contracting State can ask the Court of Justice for its interpretation of the convention. The main difference between this first protocol and the protocol of 3 June 1971 annexed to the Brussels Convention is that it does not oblige the Member States' supreme courts to ask the Court of Justice for its interpretation of the convention if they consider interpretation necessary before they can give a decision. The Rome Convention can be applied by a Member State's courts in a case concerning only the nationals of non-member countries, who are generally not very keen to have the outcome of their cases delayed for a preliminary ruling. Like the Rome Convention, this first protocol provides for its entry into force after seven ratifications.

Why were things not left there and why was a second protocol added? The reason was the desire to associate all Community States (12 at the time), including those which at the time had no intention of ever ratifying the first

protocol, with the possibility offered to some of them of having recourse to preliminary interpretation by the Court of Justice. For that reason, the third sentence of Article 6(1) of the first protocol provides that the same first protocol, even if ratified by 7 States, shall not in any circumstances enter into force before the ratification of the second protocol by the 12 Member States. The fears aroused by this complex mechanism proved to be well based, since at the time of writing (July 2003) one signature is still missing from the second protocol and the Court of Justice therefore still has no jurisdiction to interpret the convention.

IV — The convention's prospects

The convention was well received and regarded as a real step forward with respect to the previous situation, but it has nevertheless suffered from competition from other instruments which have undermined the consistency of its solutions and might bring about its revision.

A — Competition from other instruments

Competition from other texts has to a certain extent been provoked by the convention itself, with the aim of preventing conflicts with existing instruments or future instruments, whether international conventions or Community legislation.

1. International conventions

Article 21 of the convention includes a clause on compatibility with other, existing or future conventions, to which a contracting State is or will be a party. That apparent slackness is, however, counterbalanced by the restriction on the power of the contracting States to conclude in future or even become a member of any multilateral private international law convention in the same field. That restriction, already provided for in Article 24 in the form of a conciliation procedure, is of increasing importance today because of AETR case-law (Court of Justice, 31 March 1971) which gives the Community exclusive powers to conclude treaties in the fields in which it has laid down common rules.

It does not, however, settle the problem of existing conventions, the maintenance in force of which, for those States that are party to them, disrupts the unity of the system that ought to have been produced by the Rome Convention. We have already seen that the existence of two Hague Conventions, on

the Law applicable to Traffic Accidents and on Products Liability, largely accounted for the abandoning of the provisions of the 1972 preliminary draft on extra-contractual obligations.

As regards contractual matters, the conflict between conventions above all concerns sales contracts. The Rome Convention has in fact to combine with the Hague Convention of 15 June 1955 on the Law governing Transfer of Title in International Sale of Goods and with that of 14 March 1978 on the Law applicable to Agency.

The 1955 Hague Convention concerning the sale of goods at present binds, amongst others, five States that are also party to the Rome Convention (Denmark, Finland, France, Italy and Sweden). While, theoretically, where the parties have not chosen the law of the contract, the Hague Convention uses the law of the seller's place of habitual residence and is therefore in that respect in harmony with the characteristic-service system set up by the Rome Convention, it diverges from it on various points. Considering only the most important, it includes no general exception clause, providing only for the case of very frequent application of the buyer's law, which does not necessarily correspond to the exception clause in the Rome Convention. Above all, however, the Hague Convention applies to sales to consumers and it may be supposed that in matters of sales it renders inapplicable the conflict rule protecting the consumer laid down in Article 5 of the Rome Convention.

One can only regret that in the case of a contract as fundamental as a contract of sale the Member States of the European Economic Community should not have been able to agree on a uniform conflict rule, some applying the Hague Convention and others the Rome Convention. It would be desirable for those States to adopt a common position vis-à-vis the Hague Convention, either denouncing it, as Belgium did recently, supporting it or even all ratifying the more recent Hague Convention of 22 December 1986, which is intended to replace that of 1955 but has not yet entered into force. A basic solution would be for the States party to the Hague Convention to make the declaration provided for in the Final Act of the XIVth session of the Hague Conference in 1980 to the effect that 'the Convention of 15 June 1955 on the Law applicable to International Sales of Goods does not prevent States Parties from applying special rules on the law applicable to consumer sales'. All doubt would thereby be removed regarding the uniform application of Article 5 of the Rome Convention in all the contracting States.

Similar comments can be made regarding the 1978 Hague Convention on the Law applicable to Agency, which is in force in three States of the European Union (France, the Netherlands and Portugal), to encourage the ratification of that convention by all the States of the Union.

2. Community legislation

The position of the Rome Convention vis-à-vis Community legislation, especially Community secondary legislation, is even more delicate. Article 20, which does no more than repeat a rule laid down in the second paragraph of Article 57 of the Brussels Convention as revised in 1978, recognises the precedence over the convention of 'provisions which, in relation to particular matters, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts'.

The scope of such a provision was not known at the time. Since then, a great many directives have been adopted on insurance contracts and also to protect consumers and workers who are sent to another country to perform a service, which frequently include conflict-of-law rules or at least provisions determining the scope in the space of the substantive provisions which are the main object thereof. Unfortunately, those provisions, which sometimes vary from one directive to another, are not generally in harmony with those of the Rome Convention, which produces a degree of discord, aggravated by the divergent transposition of those provisions into national law.

In addition, the great freedoms instituted by the Rome Treaty, principally the freedom of movement of persons and of goods, and the right of establishment and the freedom to provide services, are sometimes invoked to influence the results to which the law applicable leads under the Rome Convention or even sometimes against the conflict rule.

Such developments have meant that the idea that it would be appropriate to tidy up, by revising the Rome Convention, has gained some credit.

B — Revision of the Rome Convention?

On 14 January 2003, the European Commission published on its website a Green Paper on the conversion of the Rome Convention of 1980 on the Law applicable to Contractual Obligations into a Community instrument and its modernisation. That document invited answers to about 20 questions drafted in a very open fashion. It is too early to say what the result will be. It is simply known that Austria had made its accession to the Rome Convention by the convention of 29 October 1996 conditional upon the revision of Article 5 on consumer protection. It is therefore probable that if there is a revision it will, in any case, involve that article, which is also the one most threatened by the directives adopted since the entry into force of the convention. It is also probable that that possible revision will convert the convention into a regulation, like the Brussels I and II Conventions, rather than a directive, for reasons of enhanced legal certainty and uniform application in the Member States.

Convention on the law applicable to contractual obligations (consolidated version)

First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version)

Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version)

(98/C 27/02)

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome convention and of those two Protocols.

These texts are accompanied by three Declarations, one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, a second, also made in 1980, on the interpretation of the Convention by the Court of Justice and a third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

Language version of the Official Journal	1980 Convention	1984 Accession	1988 First Protocol	1988 Second Protocol	1992 Accession Convention	1996 Accession Convention
German	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
English	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Danish	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
French	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Greek	L 146, 31. 5. 1984, p. 7	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Irish	Special Edition (L 266)	Special Edition (L 146)	Special Edition (L 48)	Special Edition (L 48)	Special Edition (L 333)	Special Edition (C 15)
Italian	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10

Language version of the Official Journal	1980 Convention	1984 Accession	1988 First Protocol	1988 Second Protocol	1992 Accession Convention	1996 Accession Convention
Dutch	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Spanish	Special Edition, Chapter 1, Volume 3, p. 36 (See also OJ L 333, p. 17)	Special Edition, Chapter 1, Volume 4, p. 36 (See also OJ L 333, p. 72)	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Portuguese	Special Edition, Chapter 1, Volume 3, p. 36 (See also OJ L 333, p. 7)	Special Edition, Chapter 1, Volume 4, p. 72 (See also OJ L 333, p. 74)	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Finnish	C 15, 15. 1. 1997, p. 70	C 15, 15. 1. 1997, p. 66	C 15, 15. 1. 1997, p. 60	C 15, 15. 1. 1997, p. 64	C 15, 15. 1. 1997, p. 68	C 15, 15. 1. 1997, p. 53
Swedish	C 15, 15. 1. 1997, p. 70	C 15, 15. 1. 1997, p. 66	C 15, 15. 1. 1997, p. 60	C 15, 15. 1. 1997, p. 64	C 15, 15. 1. 1997, p. 68	C 15, 15. 1. 1997, p. 53

ANNEX

CONVENTION

on the law applicable to contractual obligations [1]

opened for signature in Rome on 19 June 1980

PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

WISHING to establish uniform rules concerning the law applicable to contractual obligations,

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

— wills and succession,

— rights in property arising out of a matrimonial relationship,

— rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(c) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European

[1] Text as amended by the Convention of 10 April 1984 on the accession of the Hellenic Republic — hereafter referred to as the '1984 Accession Convention' —, by the Convention of 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic — hereafter referred to as the '1992 Accession Convention' — and by the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden — hereafter referred to as the '1996 Accession Convention'.

Economic Community. In order to determine whether a risk is situated in those territories the court shall apply its internal law.

4. The proceeding paragraph does not apply to contracts of re-insurance.

Article 2

Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II

UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules'.

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5

Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection

afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

— if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

— if the other party or his agent received the consumer's order in that country, or

— if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6

Individual employment contracts

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.

Article 7

Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8

Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9

Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10

Scope of applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12

Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debter') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13

Subrogation

1. Where a person ('the creditor') has a contractual claim upon another ('the debtor'), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14

Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15

Exclusion of convoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16

'Ordre public'

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.

Article 17

No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18

Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19

States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20

Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

Article 21

Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22

Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:

(a) the provisions of Article 7 (1);

(b) the provisions of Article 10 (1) (e).

2. . . .[1]

3. Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III

FINAL PROVISIONS

Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.

2. Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement.

3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

[1] Paragraph deleted by Article 2 (1) of the 1992 Accession Convention.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24 (1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27 [1]

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities [2].

Article 29 [3]

1. This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

[1] Article deleted by Article 2 (1) of the 1992 Accession Convention.

[2] Ratification of the Accession Conventions is governed by the following provisions of those conventions:

— as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:

'*Article 3*

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.',

— as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:

'*Article 4*

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.',

— as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:

'*Article 5*

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.'.

[3] The entry into force of the Accession Conventions is governed by the following provisions of those Conventions:

— as regards the 1984 Accession Convention, by Article 4 of that Convention, which reads as follows:

'*Article 4*

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.',

— as regards the 1992 Accession Convention, by Article 5 of that Convention which reads as follows:

'*Article 5*

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the law applicable to contractual obligations.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29 (1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27 (2) [1].

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31 [2]

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

(a) the signatures;

(b) deposit of each instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Convention;

(d) communications made in pursuance of Articles 23, 24, 25, 26 and 30 [3];

(e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33 [4]

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.',

— as regards the 1996 Accession Convention, by Article 6 of that Convention, which reads as follows:

'*Article 6*

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the law applicable to contractual obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.'.

[1] Phrase deleted by the 1992 Accession Convention.

[2] Notification concerning the Accession Convention is governed by the following provisions of those Conventions:

— as regards the 1984 Accession Convention, by Article 5 of that Convention, which reads as follows:

'*Article 5*

The Secretary-General of the Council of the European Communities shall notify Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.',

— as regards the 1992 Accession Convention, by Article 6 of that Convention, which reads as follows:

'*Article 6*

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.',

— as regards the 1996 Accession Convention, by Article 7 of that Convention, which reads as follows:

'*Article 7*

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.'.

[3] Point (d) as amended by the 1992 Accession Convention.

[4] An indication of the authentic texts of the Accession Convention is to be found in the following provisions:

— as regards the 1984 Accession Convention, in Articles 2 and 6 of that Convention, which reads as follows:

'*Article 2*

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.'

In witness whereof the undersigned, being duly authorized thereto, having signed this Convention.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the plenipotentiaries]

'Article 6
This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.',

— as regards the 1992 Accession Convention, in Articles 3 and 7 of that Convention, which read as follows:

'Article 3
The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.
The text of the Convention on the law applicable to contractual obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.'

'Article 7
This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.',

— as regards the 1996 Accession Convention, in Articles 4 and 8 of that Convention, which read as follows:

'Article 4
1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.
2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.'

'Article 8
This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.'

PROTOCOL [1]

The High Contracting Parties have agreed upon the following provision which shall be annexed to the Convention:

'Notwithstanding the provisions of the Convention, Denmark, Sweden and Finland may retain national provisions concerning the law applicable to questions relating to the carriage of goods by sea and may amend such provisions without following the procedure provided for in Article 23 of the Convention of Rome. The national provisions applicable in this respect are the following:

— in Denmark, paragraphs 252 and 321 (3) and (4) of the "Solov" (maritime law),

— in Sweden, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "sjölagen" (maritime law),

— in Finland, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "merilaki"/"sjölagen" (maritime law).'

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

[1] Text as amended by the 1996 Accession Convention.

JOINT DECLARATION

At the time of the signature of the Convention on the law applicable to contractual obligations, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

I. anxious to avoid, as far as possible, dispersion of choice of law rules among several instruments and differences between these rules, express the wish that the institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt choice of law rules which are as far as possible consistent with those of this Convention;

II. declare their intention as from the date of signature of this Convention until becoming bound by Article 24, to consult with each other if any one of the signatory States wishes to become a party to any convention to which the procedure referred to in Article 24 would apply;

III. having regard to the contribution of the Convention on the law applicable to contractual obligations to the unification of choice of law rules within the European Communities, express the view that any State which becomes a member of the European Communities should accede to this Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

JOINT DECLARATION

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

On signing the Convention on the law applicable to contractual obligations;

Desiring to ensure that the Convention is applied as effectively as possible;

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect;

Declare themselves ready:

1. to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. to arrange meetings at regular intervals between their representatives.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

FIRST PROTOCOL [1]

on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

HAVING REGARD to the Joint Declaration annexed to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

HAVE DECIDED to conclude a Protocol conferring jurisdiction on the Court of Justice of the European Communities to interpret that Convention, and to this end have designated as their Plenipotentiaries:

[Plenipotentiaries designated by the Member States]

WHO, meeting within the Council of the European Communities, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of:

(a) the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as 'the Rome Convention';

(b) the Convention on accession to the Rome Convention by the States which have become Members of the European Communities since the date on which it was opened for signature;

(c) this Protocol.

Article 2

Any of the courts referred to below may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment:

(a) — in Belgium:

'la Cour de cassation' ('het Hof van Cassatie') and 'le Conseil d'État' ('de Raad van State'),

— in Denmark:

'Højesteret',

— in the Federal Republic of Germany:

'die obersten Gerichtshöfe des Bundes',

— in Greece:

'Τα ανώτατα Δικαστήρια',

— in Spain:

'el Tribunal Supremo',

— in France:

'la Cour de cassation' and 'le Conseil d'État',

— in Ireland:

the Supreme Court,

— in Italy:

'la Corte suprema di cassazione' and 'il Consiglio di Stato',

— in Luxembourg:

'la Cour Supérieure de Justice', when sitting as 'Cour de cassation',

— in Austria:

the 'Oberste Gerichtshof', the 'Verwaltungsgerichtshof' and the 'Verfassungsgerichtshof',

— in the Netherlands:

'de Hoge Raad',

— in Portugal:

'o Supremo Tribunal de Justiça' and 'o Supremo Tribunal Administrativo',

[1] Text as amended by the 1996 Accession Convention.

— in Finland:

'korkein oikeus/högsta domstolen', 'korkein hallinto-oikeus/högsta förvaltningsdomstolen', 'markkinatuomioistuin/marknadsdomstolen' and 'työtuomioistuin/arbetsdomstolen',

— in Sweden:

'Högsta domstolen', 'Regeringsrätten', 'Arbetsdomstolen' and 'Marknadsdomstolen',

— in the United Kingdom:

the House of Lords and other courts from which no further appeal is possible;

(b) the courts of the Contracting States when acting as appeal courts.

Article 3

1. The competent authority of a Contracting State may request the Court of Justice to give a ruling on a question of interpretation of the provisions contained in the instruments referred to in Article 1 if judgments given by courts of that State conflict with the interpretation given either by the Court of Justice or in a judgment of one of the courts of another Contracting State referred to in Article 2. The provisions of this paragraph shall apply only to judgments which have become *res judicata*.

2. The interpretation given by the Court of Justice in response to such a request shall not affect the judgments which gave rise to the request for interpretation.

3. The Procurators-General of the Supreme Courts of Appeal of the Contracting States, or any other authority designated by a Contracting State, shall be entitled to request the Court of Justice for a ruling on interpretation in accordance with paragraph 1.

4. The Registrar of the Court of Justice shall give notice of the request to the Contracting States, to the Commission and to the Council of the European Communities; they shall then be entitled within two months of the notification to submit statements of case or written observations to the Court.

5. No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.

Article 4

1. Except where this Protocol otherwise provides, the provisions of the Treaty establishing the European Economic Community and those of the Protocol on the Statute of the Court of Justice annexed thereto, which are applicable when the Court is requested to give a preliminary ruling, shall also apply to any proceedings for the interpretation of the instruments referred to in Article 1.

2. The Rules of Procedure of the Court of Justice shall, if necessary, be adjusted and supplemented in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 5 [1]

This Protocol shall be subject to ratification by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 6 [2]

1. To enter into force, this Protocol must be ratified by seven States in respect of which the Rome Convention is in force. This Protocol shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last such State to take this step. If, however, the Second Protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, concluded in Brussels on 19 December 1988 [3] enters into force on a later date, this Protocol shall enter into force on the date of entry into force of the Second Protocol.

2. Any ratification subsequent to the entry into force of this Protocol shall take effect on the first day of the third month following the deposit of the instrument of ratification, provided that the ratification, acceptance or approval of the Rome Convention by the State in question has become effective.

Article 7 [4]

The Secretary-General of the Council of the European Communities shall notify the Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the date of entry into force of this Protocol;

(c) any designation communicated pursuant to Article 3 (3);

(d) any communication made pursuant to Article 8.

Article 8

The Contracting States shall communicate to the Secretary-General of the Council of the European Communities the texts of any provisions of their laws which necessitate an amendment to the list of courts in Article 2 (a).

(1) See footnote 2 on page 41.
(2) See footnote 3 on page 41.
(3) See page 44.
(4) See footnote 2 on page 42.

Article 9

This Protocol shall have effect for as long as the Rome Convention remains in force under the conditions laid down in Article 30 of that Convention.

Article 10

Any Contracting State may request the revision of this Protocol. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

Article 11 [1]

This Protocol, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Protocol.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

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[1] See footnote 4 on page 42.

JOINT DECLARATIONS

Joint Declaration

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland,

On signing the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

Desiring to ensure that the Convention is applied as effectively and as uniformly as possible,

Declare themselves ready to organize, in cooperation with the Court of Justice of the European Communities, an exchange of information on judgments which have become *res judicata* and have been handed down pursuant to the Convention on the law applicable to contractual obligations by the courts referred to in Article 2 of the said Protocol. The exchange of information will comprise:

— the forwarding to the Court of Justice by the competent national authorities of judgments handed down by the courts referred to in Article 2 (a) and significant judgments handed down by the courts referred to in Article 2 (b),

— the classification and the documentary exploitation of these judgments by the Court of Justice including, as far as necessary, the drawing up of abstracts and translations, and the publication of judgments of particular importance,

— the communication by the Court of Justice of the documentary material to the competent national authorities of the States parties to the Protocol and to the Commission and the Council of the European Communities.

In witness whereof, the undersigned Plenipotentiaries have affixed their signature below this Joint Declaration.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

Joint Declaration

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland,

On signing the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

Having regard to the Joint Declaration annexed to the Convention on the law applicable to contractual obligations,

Desiring to ensure that the Convention is applied as effectively and as uniformly as possible,

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect,

Express the view that any State which becomes a member of the European Communities should accede to this Protocol.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Joint Declaration.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

SECOND PROTOCOL

conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations; opened for signature in Rome on 19 June 1980

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

WHEREAS the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as 'the Rome Convention', will enter into force after the deposit of the seventh instrument of ratification, acceptance or approval;

WHEREAS the uniform application of the rules laid down in the Rome Convention requires that machinery to ensure uniform interpretation be set up and whereas to that end appropriate powers should be conferred upon the Court of Justice of the European Communities, even before the Rome Convention enters into force with respect to all the Member States of the European Economic Community,

HAVE DECIDED to conclude this Protocol and to this end have designated as their Plenipotentiaries:

[Plenipotentiaries designated by the Member States]

WHO, meeting within the Council of the European Communities, having exchanged their full powers; found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

1. The Court of Justice of the European Communities shall, with respect to the Rome Convention, have the jurisdiction conferred upon it by the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, concluded in Brussels on 19 December 1988 [1]. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of the Court of Justice shall apply.

2. The Rules of Procedure of the Court of Justice shall be adapted and supplemented as necessary in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 2 [2]

This Protocol shall be subject to ratification by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 3 [3]

This Protocol shall enter into force on the first day of the third month following the deposit of the instrument of ratification of the last Signatory State to complete that formality.

Article 4 [4]

This Protocol, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory.

[1] See page 34.
[2] See footnote 2 on page 41.
[3] See footnote 3 on page 41.
[4] See footnote 4 on page 42.

In witness whereof, the undersigned Plenipotentiaries have affixed their signature below this Protocol.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

Service of documents

MARIE-ODILE BAUR [1]

Marie-Odile Baur, who is a *magistrat*, worked for a number of years in the European and International Affairs Department of the French Justice Ministry. While there, she prepared the draft Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil Commercial Matters. She took part in the Council negotiations for the adoption of the convention and subsequently for its conversion into a Community regulation.

Ms Baur is a national expert currently seconded to the Directorate-General for Justice and Home Affairs of the European Commission, with responsibility for draft Community instruments on civil law matters.

V

[1] The text that follows reflects the opinions of the author and may not in any circumstances be regarded as presenting the official position of the European Commission.

Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

I — Introduction

As a foundational stage in the creation of a European judicial area, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1) already required that a court seised of a 'Community' dispute should stay the proceedings so long as it was not shown that the defendant had been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps had been taken to this end. It also provided that the recognition and enforcement of a judgment could be refused, where it was given in default of appearance, if the defendant was not fully served with the document which instituted the proceedings in sufficient time for him to arrange for his defence.

The smooth functioning of the convention presupposes due respect for the rights of the defence, which is a fundamental principle of the law of all Member States of the European Community.

In practice, failures regularly occurred in the operation of the arrangements for transmitting judicial documents from one Member State to another for the purposes of service, and preliminary discussions on this matter started in the early 1990s.

At the time, civil judicial documents were transmitted between Member States in accordance with several Hague conventions, particularly the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, to which most of the Member States were party, or under various bilateral agreements.

There was a wide variety of procedures for transmitting documents: in addition to the six methods laid down in the 1965 Hague Convention, there were those in the bilateral agreements.

This inevitably caused uncertainty among practitioners over the choice to be made between the various possibilities open to them.

In addition, while some agreements allowed direct transmission between courts in different Member States, it was sometimes found that the competent

(1) Convention of 27 September 1968 (consolidated version) (OJ C 27, 26.1.1998, p. 1).

central administrations had not put in place any reliable means whereby those involved locally could be made aware of the contact details of their counterparts abroad.

As to the internal arrangements applied by some Member States for transmitting documents to another Member State, these sometimes involved up to three intermediate steps between the drafter of the document and the office responsible for sending it abroad. This naturally led to considerable delays, so much so that the period elapsing between the date a document was sent and the date on which the same authority received the certificate of service could extend to several years, even though the court seised and the domicile of the addressee of the document were sometimes no more than a few miles apart.

It was sometimes found that documents were being translated, as stipulated by the State addressed, even though the addressee possessed the nationality or had a perfect command of the language of the State of transmission. On the other hand, some documents transmitted without a translation were rejected when the addressee was well able to understand them — all the stages downstream of the sender having been gone through — on the grounds that the requirements of the State addressed had not been fulfilled.

The slightest mistake in the formalities for transmitting a document meant it would be returned to the sending authority, when a simple request for correction or additional information would have enabled the document to be served without delay. But no direct means of communication were made available to the locally competent authorities in the various Member States.

It is not hard to see that such malfunctions were hindering the smooth operation of the procedures and that the numerous problems encountered needed to be addressed.

Having been informed of these problems, the Council of Justice Ministers decided in October 1993 to charge a working party with drawing up an instrument to improve methods of transmitting documents between Member States.

Shortly afterwards, the Netherlands Presidency put forward draft adjustments to Article IV of the protocol to the 1968 Brussels Convention whereby, unless opposed by the State of destination, documents could be transmitted directly between public officers of the States concerned.

The Netherlands draft provided for the drawing-up of a list of public officers or other authorities who were empowered to send each other documents.

Then, at the beginning of 1995, the French Presidency presented a draft convention based on a few fundamental points: direct transmission of documents

between Member States' authorities competent for receiving them from applicants and for forwarding them to the addressees; establishment of an overall time limit for completing the process of transmitting and serving documents; introduction of modern methods of transmission; and a flexible and pragmatic solution to the problem of translations.

After two years of negotiations in the Council, the following were adopted on 26 May 1997: the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters [1], the protocol on the interpretation of that convention by the Court of Justice of the European Communities [2], and the explanatory reports concerning these two texts [3].

Article 24 of the convention provided for entry into force after ratification by all Member States but allowed Member States to declare the convention applicable among themselves before that time if they so wished.

However, the Amsterdam Treaty (Article 2 of which resulted in Article 65(a) of the EC Treaty on improving and simplifying the system for cross-border service of judicial and extrajudicial documents) came into force before the convention and its protocol were ratified by the Member States. Shortly afterwards the Commission submitted, pursuant to Article 67 of the Treaty, a draft Council directive on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, which incorporated, with the necessary adjustments, the content of the convention.

Very soon, at the request of a large majority of Member States, the discussions moved towards the preparation of a regulation, and eventually, on 29 May 2000, the Council adopted Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [4].

Thus, more than six years elapsed between the start of negotiations on the draft convention put forward by France and the entry into force of the new instrument. This is obviously a long time for what was simply a matter of drawing up and implementing practical arrangements for sending documents from one Member State to another. At least the fact that the convention was converted into a regulation meant it could come into force simultaneously in all Member States within a reasonable period of time, allowing for the practical steps that had to be taken to enable the new system to operate.

In fact, the preparation of such an instrument proved to be an especially delicate matter, since the rights of the defence have to be safeguarded in various ways and at different stages in the process of sending documents from one Member State to another, and rules of procedure — like methods of service — differ considerably from one Member State to another.

[1] OJ C 261, 27.8.1997, p. 2.
[2] Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by the Court of Justice of the European Communities, of the Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters (OJ C 261, 27.8.1997, p. 18).
[3] Explanatory report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters (OJ C 261, 27.8.1997, p. 26). Explanatory report on the protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by the Court of Justice of the European Communities, of the Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters (OJ C 261, 27.8.1997, p. 38).
[4] OJ L 160, 30.6.2000, p. 37.

The negotiators were therefore at pains to preserve the rights of the parties involved in the service of documents while at the same time ensuring that the instrument was effective.

II — Protection of parties' rights

A — Translation of documents

While it is important that the service and hence the transmission of documents — where the parties reside in the territory of different Member States — should be carried out as swiftly as possible, it is also necessary that the addressees should be able to acquaint themselves without difficulty with the documents that are sent to them. However, the translating of such documents is always an expensive process which is liable to hold up the proceedings and is not necessary in every case.

For example, where the addressee is served, in the country where he is resident, with a document from his State of origin, a translation is obviously superfluous. The same is true in the case of a dispute between two companies that regularly conduct their business in the language of the court applied to.

The 1965 Hague Convention allowed the contracting States to require documents to be translated into the official language or languages of the country concerned where service had to be effected by a method prescribed by the local law. A large number of contracting States made declarations in this connection that were sometimes hard to interpret and were consequently the cause of error.

The regulation provides for a flexible approach that allows the applicant to choose whether or not to have a translation made of the documents to be transmitted. The addressee, however, can refuse to accept them unless they are drawn up or translated in the local official language or a language of the Member State of transmission which he understands.

If the addressee of the document notifies the receiving agency that he refuses to accept the document, it must be immediately returned to the transmitting agency with a request for a translation.

In the event of a dispute on this point, it is for the court hearing the original case to assess whether or not the refusal was justified and to draw any relevant conclusions as to the regularity of the service. This will be an assessment based on the facts, and no longer a formal check carried out pursuant to the law of the State addressed or the transmitting State.

In case of doubt concerning the addressee's ability to understand a document drawn up in the language of the transmitting State, the applicant, if he wishes to guard against any problems, will, of course, have every interest in ensuring that the documents are translated into the official language of the place of service before they are transmitted.

He must in any case advance the costs of translation.

However, if he is certain that refusal by the addressee of untranslated documents would be unjustified under the regulation, he will be able to avoid, at no risk, the extra costs and delays involved in having a translation made.

B — Date of service

In the case of international service of a document, the need to transmit the document from one State to another means there is sometimes a considerable time lag between its being handed in to the competent authority of the transmitting State and actually being delivered to the addressee by the authority of the State addressed.

This raises the problem of determining the date on which the international service produces its effects — as regards, for example, an interruption of the period of limitation or the point at which interest becomes payable.

The law in some Member States stipulates that the operative date is the date on which the document is handed to the addressee. This system is unfavourable to the applicant, who has no control over the process of transmission and service abroad and may suffer significant administrative delays.

Under other States' law, only the date on which the formalities are completed in the State of transmission matters, in which case it is the addressee who might be placed in a difficult position as proceedings may be brought against him abroad, or a time limit within which to appeal may begin to run, when he has not even been informed, or is informed only very late in the day.

The regulation contains a solution to some of the problems resulting from the coexistence of these two systems and endeavours to protect the interests of both parties. Article 9(1) provides that 'the date of service of a document … shall be the date on which it is served in accordance with the law of the Member State addressed' and Article 9(2) stipulates that 'where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State'.

Some Member States opposed this solution, as they considered these provisions inadequate, in particular because they do not ensure that proceedings pending before their courts will proceed normally where service abroad is too slow, despite the entry into force of the regulation.

The convention adopted in 1997 provided that the Member States could simply state that they would not apply these provisions. The regulation is more restrictive: in Article 9(3), a derogation is allowed for a period of five years, which may be renewed. States wishing to avail themselves of that derogation must cite appropriate reasons and, if they want a renewal of the derogation, explain the circumstances justifying their position.

These provisions clearly leave States that do not wish to apply Article 9 some room for manoeuvre, but, in so far as they require them to justify their refusal to apply rules implemented in other Member States, they encourage them to reconsider their position.

Some Member States did, in fact, declare that they would not apply the first two paragraphs of the article and others that they would derogate only from paragraph 2. Some, on the other hand, announced that they intended to apply both paragraphs.

C — Non-appearance of the addressee of the document

If the procedure put in place by the regulation produces the expected results, international service of documents should be carried out swiftly.

The aim as set out in Article 7(2) is for service to be effected within a maximum of one month of the date of receipt of the act by the receiving agency.

However, delays may occur, not because information regarding the addressee's address is lacking, since Article 1 states that the regulation does not apply in such cases, but, for instance, because the addressee is momentarily absent, or certain documents have been lost.

The regulation therefore contains provisions intended to protect a defendant upon whom it has not been possible to serve a summons to appear in court, or against whom a judgment has been given without his knowledge. These provisions were taken from the 1965 Hague Convention, with the necessary adjustments.

Article 19 of the regulation therefore provides that judgment shall not be given if it has not been established that the summons has been served on the defendant in accordance with the law on service of documents within the

State addressed or using another method laid down by the regulation. Member States may, however, state that their judges may give judgment upon expiry of a minimum period of six months, if the document was transmitted in accordance with the regulation and if no certificate has been received despite efforts made to obtain it through the competent authorities of the State addressed.

In this context, it should be pointed out that the receiving agency must immediately inform the transmitting agency of the receipt of a document and then of any problems arising with it, or of the fact that it is to be forwarded to another agency, and, lastly, within one month at the latest, of any reasons which prevented it from effecting service. In no circumstances, therefore, should a transmitting agency be left without news of a document sent to a receiving agency. Also, a transmitting agency may always approach the central body provided for in Article 3 of the regulation, which is responsible for seeking solutions to any difficulties which may arise. In theory then, Article 15 of the regulation should be found to apply only in very rare cases.

A large number of Member States declared that their judges could give judgments if the conditions laid down in these provisions were met. Most set the maximum period for a stay of proceedings at six months; some, however, have refused to allow their judges to apply these provisions.

Article 19 also provides that the judge may relieve a defendant acting in good faith, who has disclosed a prima facie defence to the action on the merits, from the effects of the expiry of the time for appeal from the judgment. In the interests of legal certainty, in order to avoid judgments being challenged belatedly, the regulation also provides that Member States may declare the application for relief inadmissible after expiry of a period of not less than one year following the date of the judgment.

Several Member States declared that this period could not exceed one year, while another set it at three years. Some States wished to leave their judges to decide how long it should be.

Lastly, like the 1965 Hague Convention, the regulation states that the provisions on relief from the effects of expiry of the time for appeal do not apply in cases concerning status or capacity of persons. It did not seem reasonable that divorce judgments, which might have been followed by remarriage, for example, could be called into question because of the failure of the defendant to appear.

III — Effectiveness of the act

A — Speed of transmission

1. Decentralisation

One of the main planks of the new act appears in Article 2 of the regulation. This provides that each Member State is to designate the public officers, authorities or other persons competent for the receipt of judicial or extrajudicial documents from another Member State, or for their transmission. However, Member States remain free to entrust the tasks of these transmitting or receiving 'agencies' to central authorities for a period of five years, which may be renewed. Some of them were, in fact, unable to adopt the necessary measures for the intended decentralisation immediately.

The decentralisation advocated by this article is intended to avoid having a succession of steps to be completed within a particular State for documents coming from abroad or to be sent abroad for the purpose of service.

This is already provided for under various bilateral or regional agreements between Member States, and clearly enables documents to be transmitted rapidly. It also eliminates pointless tasks for the authorities, which no longer scrutinise the content of documents, in the past regarded as a possible threat to the sovereignty of the State, and are now reduced to the role of conveyor belt.

Several other means of transmitting documents, taken from the 1965 Hague Convention, were included.

Direct service by post, regularly used by certain Member States, is obviously the swiftest and simplest. However, it is not risk-free, in that it is not certain that the letter sent will actually be received by the addressee, nor that its content will be properly understood by him. Article 14 of the regulation therefore provides that Member States may specify the conditions under which they will accept this method of service. A very large majority of them require that letters be sent by registered post with proof of delivery. Some also require documents to be translated.

Article 15 of the regulation also enables applicants to approach the competent persons directly to effect service of foreign documents. In actual fact, the direct receipt of documents by the persons responsible for serving them is incompatible with the organisation and internal procedures of certain Member States, and they have availed themselves of the option offered by the regulation of opposing this system.

Lastly, the possibility of transmission of documents or direct service by diplomatic or consular agents already provided for in the 1965 Hague Convention, subject to fulfilment of certain conditions, was retained. However, it will probably be used only very rarely.

2. Modern methods of transmission

When work began on the drafting of the convention, the transmission of judicial documents by fax, let alone e-mail, was unknown or even prohibited in a large number of Member States. However, the negotiators had the foresight to realise that developments in communications technology would, sooner or later, affect the law and they decided to insert flexible provisions on the subject in the text of the future instrument. Article 4 of the regulation thus provides that 'the transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means', thereby ensuring that the most up-to-date means of communication can be used, as well as any subsequent technical innovations.

Article 4(5) anticipates the consequences of recourse to modern methods of communication, as it no longer requires documents to be transmitted in duplicate, but merely makes it optional for the transmitting agency.

3. Deadlines

None of the regulation's provisions sets the receiving agencies a mandatory deadline for completing the service of documents emanating from another Member State. The negotiators felt that service was subject to too many uncertainties for it to be possible to lay down mandatory rules in that respect: the addressee may have changed address at the time service is attempted, have gone away for a fairly long period or even have tried to avoid being contacted in order to evade the proceedings against him.

Receiving agencies are, however, advised to act swiftly in several of the regulation's provisions. Under Article 6, they have to send the transmitting agencies an acknowledgement of receipt 'as soon as possible and in any event within seven days', contact them if problems arise 'by the swiftest possible means', return the documents transmitted 'on receipt' if service is not feasible, or forward them to the receiving agency having territorial jurisdiction, if they have been misdirected, rather than returning them to the transmitting agency.

Article 7 stipulates that '[a]ll steps required for service of the document shall be effected as soon as possible' and that 'if it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency by means of the certificate' annexed to the regulation.

These recommendations serve to draw the receiving agencies' attention to their responsibilities. If they are not followed, transmitting agencies may be justified in requesting clarification.

B — Practical operation

1. The form

A mandatory form is annexed to the regulation, as in the case of the 1965 Hague Convention.This form, however, contains a number of original features. First of all, it includes several sections designed to facilitate the transmission of all necessary information between transmitting agencies and receiving agencies, whatever operation they are performing.

The first section covers, of course, the request for service of documents and provides all the necessary information regarding the agencies concerned, the applicant, the addressee, the requested method of service and the document itself.

Then come forms for acknowledgement of receipt, notice of return of request where service has proved impossible, notice of retransmission of request in the event of an error over the territorial jurisdiction of the receiving agency to which the document was addressed, notice of receipt by the agency having territorial jurisdiction, and, finally, a form for certifying the service or non-service of documents.

Furthermore, Article 2(4) of the regulation stipulates that each Member State must indicate the languages that may be used for completion of the form. Even if they have several official languages, Member States must select at least one foreign language.

In addition, the various items of information required, together, where appropriate, with all the possible options, are set out in the form and numbered so that even if they do not understand a foreign language the transmitting or receiving agencies can in principle comprehend virtually all the information made available to them.

Finally, Articles 17 and 18 of the regulation stipulate *inter alia* that the European Commission, assisted by a committee, shall update the form or make any technical amendments necessary.

To facilitate communication between transmitting and receiving agencies, the Commission is also required, under the same conditions, to draw up a 'glossary in the official languages of the European Union of documents which may

be served' under the regulation, along with a manual (1) containing the information which must be provided by Member States regarding their receiving agencies, the means of receipt at their disposal and the languages which may be used to complete the forms addressed to them.

The glossary and manual drawn up may be consulted at the following address:

http://europa.eu.int/comm/justice_home/fsj/civil/documents/fsj_civil_1348_en.htm#version%20fr.

2. Monitoring operation of the system

In addition to updates of the practical aspects of operating the document transmission system, the regulation provides for its implementation to be monitored, with particular reference to certain provisions adopted for a specific period.

Under Article 24, starting on 1 June 2004, and every five years thereafter, the Commission must present to the European Parliament, the Council and the European Economic and Social Committee a report on application of the regulation.

The Commission may also make proposals for adaptation of the regulation.

As already stated, special attention must be paid to the effectiveness of the transmitting agencies designated by the Member States and to the rules relating to dates of service. The Commission's findings may lead it to propose application of the general system to all Member States, including those which preferred to waive application of those provisions.

To ensure that it has the information it needs, the Commission has had a study made of the number of dossiers handled by Member States and the operation of the system.

It should thus be in a position to present a full report and make informed proposals if need be.

(1) OJ L 98, 15.12.2001, p. 1.

IV — Conclusion

Given the regulation's relatively recent entry into force, it is impossible at this stage to assess its real impact.

The subject was raised at the first meeting of 'contact points' of the European Judicial Network in civil and commercial matters (1), held on 13 February 2003, and some speakers mentioned a few problems, mainly teething troubles which should gradually disappear. The European Commission also organised a public hearing on the operation of the system on 17 July 2003, during which similar comments were made.

The report currently being prepared by the European Commission should, of course, help to highlight any malfunctions or imperfections in the system and work out ways of remedying them.

Clearly, however, the introduction of a genuinely effective system for transmitting documents in over 20 Member States whose methods of serving documents vary considerably and whose rules of procedure are very diverse represents a real challenge.

It is obviously essential to improve technology and to simplify structures. But there have also been calls for procedures for the service of documents in the Member States to be harmonised. The first step has already been taken with Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (2), Article 11(4) of which brings consistency to the different systems in place in terms of the date on which a court is deemed to have been seised.

Article 65 of the Treaty establishing the European Community moreover proposes not only improving and simplifying the system for cross-border service of judicial and extrajudicial documents but also eliminating 'obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States'.

To that end, the programme of measures on mutual recognition (3) stipulates that 'in order to increase the certainty, efficiency and rapidity of service of legal documents, which is clearly one of the foundations of mutual trust between national legal systems, consideration will be given to harmonising the applicable rules or setting minimum standards'.

This is, without question, a huge task for the Community legislator.

(1) Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).
(2) OJ L 160, 30.6.2000, p. 19.
(3) Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (OJ C 12, 15.1.2001, p. 1).

COUNCIL REGULATION (EC) No 1348/2000

of 29 May 2000

on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

(3) This is a subject now falling within the ambit of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.

(5) The Council, by an Act dated 26 May 1997 [4], drew up a Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. That Convention has not entered into force. Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The main content of this Regulation is substantially taken over from it.

(6) Efficiency and speed in judicial procedures in civil matters means that the transmission of judicial and extrajudicial documents is to be made direct and by rapid means between local bodies designated by the Member States. However, the Member States may indicate their intention of designating only one transmitting or receiving agency or one agency to perform both functions for a period of five years. This designation may, however, be renewed every five years.

(7) Speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a pre-printed form, to be completed in the language of the place where service is to be effected, or in another language accepted by the Member State in question.

(8) To secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations.

(9) Speed of transmission warrants documents being served within days of reception of the document. However, if service has not been effected after one month has elapsed, the receiving agency should inform the transmitting agency. The expiry of this period should not imply that the request be returned to the transmitting agency where it is clear that service is feasible within a reasonable period.

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[1] OJ C 247 E, 31.8.1999, p. 11.
[2] Opinion of 17 November 1999 (not yet published in the Official Journal).
[3] OJ C 368, 20.12.1999, p. 47.
[4] OJ C 261, 27.8.1997, p. 1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on page 26 of the aforementioned Official Journal.

(10) For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands.

(11) Given the differences between the Member States as regards their rules of procedure, the material date for the purposes of service varies from one Member State to another. Having regard to such situations and the possible difficulties that may arise, this Regulation should provide for a system where it is the law of the receiving Member State which determines the date of service. However, if the relevant documents in the context of proceedings to be brought or pending in the Member State of origin are to be served within a specified period, the date to be taken into consideration with respect to the applicant shall be that determined according to the law of the Member State of origin. A Member State is, however, authorised to derogate from the aforementioned provisions for a transitional period of five years, for appropriate reasons. Such a derogation may be renewed by a Member State at five-year intervals due to reasons related to its legal system.

(12) This Regulation prevails over the provisions contained in bilateral or multilateral agreements or arrangements having the same scope, concluded by the Member States, and in particular the Protocol annexed to the Brussels Convention of 27 September 1968 [1] and the Hague Convention of 15 November 1965 in relations between the Member States party thereto. This Regulation does not preclude Member States from maintaining or concluding agreements or arrangements to expedite or simplify the transmission of documents, provided that they are compatible with the Regulation.

(13) The information transmitted pursuant to this Regulation should enjoy suitable protection. This matter falls within the scope of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2], and of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [3].

(14) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [4].

(15) These measures also include drawing up and updating the manual using appropriate modern means.

(16) No later than three years after the date of entry into force of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(17) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(18) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.

2. This Regulation shall not apply where the address of the person to be served with the document is not known.

[1] Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ L 299, 13.12.1972, p. 32; consolidated version, OJ C 27, 26.1.1998, p. 1).
[2] OJ L 281, 23.11.1995, p. 31.
[3] OJ L 24, 30.1.1998, p. 1.
[4] OJ L 184, 17.7.1999, p. 23.

Article 2

Transmitting and receiving agencies

1. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as 'transmitting agencies', competent for the transmission of judicial or extrajudicial documents to be served in another Member State.

2. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as 'receiving agencies', competent for the receipt of judicial or extrajudicial documents from another Member State.

3. A Member State may designate one transmitting agency and one receiving agency or one agency to perform both functions. A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one such agency. The designation shall have effect for a period of five years and may be renewed at five-year intervals.

4. Each Member State shall provide the Commission with the following information:

(a) the names and addresses of the receiving agencies referred to in paragraphs 2 and 3;

(b) the geographical areas in which they have jurisdiction;

(c) the means of receipt of documents available to them; and

(d) the languages that may be used for the completion of the standard form in the Annex.

Member States shall notify the Commission of any subsequent modification of such information.

Article 3

Central body

Each Member State shall designate a central body responsible for:

(a) supplying information to the transmitting agencies;

(b) seeking solutions to any difficulties which may arise during transmission of documents for service;

(c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency.

A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one central body.

CHAPTER II

JUDICIAL DOCUMENTS

Section 1

Transmission and service of judicial documents

Article 4

Transmission of documents

1. Judicial documents shall be transmitted directly and as soon as possible between the agencies designated on the basis of Article 2.

2. The transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.

3. The document to be transmitted shall be accompanied by a request drawn up using the standard form in the Annex. The form shall be completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form.

4. The documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality.

5. When the transmitting agency wishes a copy of the document to be returned together with the certificate referred to in Article 10, it shall send the document in duplicate.

Article 5

Translation of documents

1. The applicant shall be advised by the transmitting agency to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.

Article 6

Receipt of documents by receiving agency

1. On receipt of a document, a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission using the standard form in the Annex.

2. Where the request for service cannot be fulfilled on the basis of the information or documents transmitted, the receiving agency shall contact the transmitting agency by the swiftest possible means in order to secure the missing information or documents.

3. If the request for service is manifestly outside the scope of this Regulation or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted shall be returned, on receipt, to the transmitting agency, together with the notice of return in the standard form in the Annex.

4. A receiving agency receiving a document for service but not having territorial jurisdiction to serve it shall forward it, as well as the request, to the receiving agency having territorial jurisdiction in the same Member State if the request complies with the conditions laid down in Article 4(3) and shall inform the transmitting agency accordingly, using the standard form in the Annex. That receiving agency shall inform the transmitting agency when it receives the document, in the manner provided for in paragraph 1.

Article 7

Service of documents

1. The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular form requested by the transmitting agency, unless such a method is incompatible with the law of that Member State.

2. All steps required for service of the document shall be effected as soon as possible. In any event, if it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency by means of the certificate in the standard form in the Annex, which shall be drawn up under the conditions referred to in Article 10(2). The period shall be calculated in accordance with the law of the Member State addressed.

Article 8

Refusal to accept a document

1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or

(b) a language of the Member State of transmission which the addressee understands.

2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.

Article 9

Date of service

1. Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.

2. However, where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State.

3. A Member State shall be authorised to derogate from the provisions of paragraphs 1 and 2 for a transitional period of five years, for appropriate reasons.

This transitional period may be renewed by a Member State at five-yearly intervals due to reasons related to its legal system. That Member State shall inform the Commission of the content of such a derogation and the circumstances of the case.

Article 10

Certificate of service and copy of the document served

1. When the formalities concerning the service of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form in the Annex and addressed to the transmitting agency, together with, where Article 4(5) applies, a copy of the document served.

2. The certificate shall be completed in the official language or one of the official languages of the Member State of origin or in another language which the Member State of origin has indicated that it can accept. Each Member State shall indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form.

Article 11

Costs of service

1. The service of judicial documents coming from a Member State shall not give rise to any payment or reimbursement of taxes or costs for services rendered by the Member State addressed.

2. The applicant shall pay or reimburse the costs occasioned by:

(a) the employment of a judicial officer or of a person competent under the law of the Member State addressed;

(b) the use of a particular method of service.

Section 2

Other means of transmission and service of judicial documents

Article 12

Transmission by consular or diplomatic channels

Each Member State shall be free, in exceptional circumstances, to use consular or diplomatic channels to forward judicial documents, for the purpose of service, to those agencies of another Member State which are designated pursuant to Article 2 or 3.

Article 13

Service by diplomatic or consular agents

1. Each Member State shall be free to effect service of judicial documents on persons residing in another Member State, without application of any compulsion, directly through its diplomatic or consular agents.

2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate.

Article 14

Service by post

1. Each Member State shall be free to effect service of judicial documents directly by post to persons residing in another Member State.

2. Any Member State may specify, in accordance with Article 23(1), the conditions under which it will accept service of judicial documents by post.

Article 15

Direct service

1. This Regulation shall not interfere with the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed.

2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to the service of judicial documents in its territory pursuant to paragraph 1.

CHAPTER III

EXTRAJUDICIAL DOCUMENTS

Article 16

Transmission

Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of this Regulation.

CHAPTER IV

FINAL PROVISIONS

Article 17

Implementing rules

The measures necessary for the implementation of this Regulation relating to the matters referred to below shall be adopted in accordance with the advisory procedure referred to in Article 18(2):

(a) drawing up and annually updating a manual containing the information provided by Member States in accordance with Article 2(4);

(b) drawing up a glossary in the official languages of the European Union of documents which may be served under this Regulation;

(c) updating or making technical amendments to the standard form set out in the Annex.

Article 18

Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

Article 19

Defendant not entering an appearance

1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

2. Each Member State shall be free to make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

(a) the document was transmitted by one of the methods provided for in this Regulation;

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.

4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and

(b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiration of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.

5. Paragraph 4 shall not apply to judgments concerning status or capacity of persons.

Article 20

Relationship with agreements or arrangements to which Member States are Parties

1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States, and in particular Article IV of the Protocol to the Brussels Convention of 1968 and the Hague Convention of 15 November 1965.

2. This Regulation shall not preclude individual Member States from maintaining or concluding agreements or arrangements to expedite further or simplify the transmission of documents, provided that they are compatible with this Regulation.

3. Member States shall send to the Commission:

(a) a copy of the agreements or arrangements referred to in paragraph 2 concluded between the Member States as well as drafts of such agreements or arrangements which they intend to adopt;

and

(b) any denunciation of, or amendments to, these agreements or arrangements.

Article 21

Legal aid

This Regulation shall not affect the application of Article 23 of the Convention on Civil Procedure of 17 July 1905, Article 24 of the Convention on Civil Procedure of 1 March 1954 or Article 13 of the Convention on International Access to Justice of 25 October 1980 between the Member States Parties to these Conventions.

Article 22

Protection of information transmitted

1. Information, including in particular personal data, transmitted under this Regulation shall be used by the receiving agency only for the purpose for which it was transmitted.

2. Receiving agencies shall ensure the confidentiality of such information, in accordance with their national law.

3. Paragraphs 1 and 2 shall not affect national laws enabling data subjects to be informed of the use made of information transmitted under this Regulation.

4. This Regulation shall be without prejudice to Directives 95/46/EC and 97/66/EC.

Article 23

Communication and publication

1. Member States shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19.

2. The Commission shall publish in the *Official Journal of the European Communities* the information referred to in paragraph 1.

Article 24

Review

No later than 1 June 2004, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the effectiveness of the bodies designated pursuant to Article 2 and to the practical application of point (c) of Article 3 and Article 9. The report shall be accompanied if need be by proposals for adaptations of this Regulation in line with the evolution of notification systems.

Article 25

Entry into force

This Regulation shall enter into force on 31 May 2001.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. COSTA

ANNEX

REQUEST FOR SERVICE OF DOCUMENTS

(Article 4(3) of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ([1]))

Reference No: ….

1. TRANSMITTING AGENCY

1.1. Identity:

1.2. Address:

1.2.1. Street and number/PO box:

1.2.2. Place and code:

1.2.3. Country:

1.3. Tel:

1.4. Fax (*):

1.5. E-mail (*)

2. RECEIVING AGENCY

2.1. Identity:

2.2. Address:

2.2.1. Street and number/PO box:

2.2.2. Place and code:

2.2.3. Country:

2.3. Tel:

2.4. Fax (*):

2.5. E-mail (*):

([1]) OJ L 160, 30.6.2000, p. 37.
(*) This item is optional.

3. APPLICANT

3.1. Identity:

3.2. Address:

3.2.1. Street and number/PO box:

3.2.2. Place and code:

3.2.3. Country:

3.3. Tel (*):

3.4. Fax (*):

3.5. E-mail (*):

4. ADDRESSEE

4.1. Identity:

4.2. Address:

4.2.1. Street and number/PO box:

4.2.2. Place and code:

4.2.3. Country:

4.3. Tel (*):

4.4. Fax (*):

4.5. E-mail (*):

4.6. Identification number/social security number/organisation number/or equivalent (*):

5. METHOD OF SERVICE

5.1. In accordance with the law of the Member State addressed

5.2. By the following particular method:

5.2.1. If this method is incompatible with the law of the Member State addressed, the document(s) should be served in accordance with the law:

5.2.1.1. yes

5.2.1.2. no

(*) This item is optional.

6. DOCUMENT TO BE SERVED

(a) 6.1. Nature of the document

6.1.1. judicial

6.1.1.1. writ of summons

6.1.1.2. judgment

6.1.1.3. appeal

6.1.1.4. other

6.1.2. extrajudicial

(b) 6.2. Date or time limit stated in the document (*):

(c) 6.3. Language of document:

6.3.1. original DE, EN, DK, EL, FI, FR, GR, IT, NL, PT, SV, others:

6.3.2. translation (*) DE, EN, DK, ES, FI, FR, EL, IT, NL, PT, SV, others:

6.4. Number of enclosures:

7. A COPY OF DOCUMENT TO BE RETURNED WITH THE CERTIFICATE OF SERVICE (Article 4(5) of the Regulation)

7.1. Yes (in this case send two copies of the document to be served)

7.2. No

1. You are required by Article 7(2) of the Regulation to effect all steps required for service of the document as soon as possible. In any event, if it is not possible for you to effect service within one month of receipt, you must inform this agency by means of the certificate provided for in point 13.

2. If you cannot fulfil this request for service on the basis of the information or documents transmitted, you are required by Article 6(2) of the Regulation to contact this agency by the swiftest possible means in order to secure the missing information or document.

Done at:

Date:

Signature and/or stamp:

(*) This item is optional.

Reference No of the receiving agency:

ACKNOWLEDGEMENT OF RECEIPT

(Article 6(1) of Council Regulation (EC) No 1348/2000)

This acknowledgement must be sent by the swiftest possible means of transmission as soon as possible after receipt of the document and in any event within seven days of receipt.

8. DATE OF RECEIPT:

Done at:

Date:

Signature and/or stamp:

NOTICE OF RETURN OF REQUEST AND DOCUMENT

(Article 6(3) of Council Regulation (EC) No 1348/2000)

The request and document must be returned on receipt.

9. REASON FOR RETURN:

9.1. The request is manifestly outside the scope of the Regulation:

9.1.1. the document is not civil or commercial

9.1.2. the service is not from one Member State to another Member State

9.2. Non-compliance with formal conditions required makes service impossible:

9.2.1. the document is not easily legible

9.2.2. the language used to complete the form is incorrect

9.2.3. the document received is not a true and faithful copy

9.2.4. other (please give details):

9.3. The method of service is incompatible with the law of that Member State (Article 7(1) of the Regulation)

Done at:

Date:

Signature and/or stamp:

NOTICE OF RETRANSMISSION OF REQUEST AND DOCUMENT TO THE APPROPRIATE RECEIVING AGENCY

(Article 6(4) of Council Regulation (EC) No 1348/2000)

The request and document were forwarded on to the following receiving agency, which has territorial jurisdiction to serve it:

10.1. Identity:

10.2. Address:

10.2.1. Street and number/PO box:

10.2.2. Place and code:

10.2.3. Country:

10.3. Tel:

10.4. Fax (*):

10.5. E-mail (*):

Done at:

Date:

Signature and/or stamp:

(*) This item is optional.

Reference No of the appropriate receiving agency:

NOTICE OF RECEIPT BY THE APPROPRIATE RECEIVING AGENCY HAVING TERRITORIAL JURISDICTION TO THE TRANSMITTING AGENCY

(Article 6(4) of Council Regulation (EC) No 1348/2000)

This notice must be sent by the swiftest possible means of transmission as soon as possible after receipt of the document and in any event within seven days of receipt.

11. DATE OF RECEIPT:

Done at:

Date:

Signature and/or stamp:

CERTIFICATE OF SERVICE OR NON-SERVICE OF DOCUMENTS

(Article 10 of Council Regulation (EC) No 1348/2000)

The service shall be effected as soon as possible. In any event, if it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency (according to Article 7(2) of the Regulation)

12. COMPLETION OF SERVICE

(a) 12.1. Date and address of service:

(b) 12.2. The document was

(A) 12.2.1. served in accordance with the law of the Member State addressed, namely

12.2.1.1. handed to

12.2.1.1.1. the addressee in person

12.2.1.1.2. another person

12.2.1.1.2.1. Name:

12.2.1.1.2.2. Address:

12.2.1.1.2.2.1. Street and number/PO box:

12.2.1.1.2.2.2. Place and code:

12.2.1.1.2.2.3. Country:

12.2.1.1.2.3. Relation to the addressee:

family employee others

12.2.1.1.3. the addressee's address

12.2.1.2. served by post

12.2.1.2.1. without acknowledgement of receipt

12.2.1.2.2. with the enclosed acknowledgement of receipt

12.2.1.2.2.1. from the addressee

12.2.1.2.2.2. another person

12.2.1.2.2.2.1. Name:

12.2.1.2.2.2.2. Address

12.2.1.2.2.2.2.1. Street and number/PO box:

12.2.1.2.2.2.2. Place and code:

12.2.1.2.2.2.3. Country:

12.2.1.2.2.2.3. Relation to the addressee:

family employee others

12.2.1.3. other method (please say how):

(B) 12.2.2. served by the following particular method (please say how):

(c) 12.3. The addressee of the document was informed (orally) (in writing) that he or she may refuse to accept it if it was not in an official language of the place of service or in an official language of the state of transmission which he or she understands.

13. INFORMATION IN ACCORDANCE WITH ARTICLE 7(2)

It was not possible to effect service within one month of receipt.

14. REFUSAL OF DOCUMENT

The addressee refused to accept the document on account of the language used. The documents are annexed to this certificate.

15. REASON FOR NON-SERVICE OF DOCUMENT

15.1. Address unknown

15.2. Addressee cannot be located

15.3. Document could not be served before the date or time limit stated in point 6.2.

15.4. Others (please specify):

The documents are annexed to this certificate.

Done at:

Date:

Signature and/or stamp:

Taking of evidence

GOTTFRIED MUSGER

Education

1983–87 Law studies at the University of Graz

1988–89 European law studies at the University of Saarbrücken

1990–92 Law Doctorate studies at Graz; dissertation entitled 'Transboundary pollution in private international law'

Professional appointments

1986–88 Research Assistant at the Institute of Civil Law at the University of Graz

1988–89 Research Assistant, Chair of Comparative Law, European Law and Commercial Law at the University of Saarbrücken

1989–92 University Assistant at the Institute of Civil Law, University of Graz

1992–95 Trainee lawyer/trainee judge in the area under the jurisdiction of the Higher Regional Court in Graz

1995–2001 District Court Judge for civil law cases in Graz and District Court Judge in Stainz

2001–02 Regional Court Judge for civil law cases in Graz

Since 2003 Higher Regional Court Judge in Graz (member of the Regional Court Civil Division)

Since 1997 In addition to his work as a judge, he has contributed to Federal Ministry of Justice projects in the field of international civil procedural law, participating, in particular, in European Union working parties (Committee on Civil Law Matters) and the Hague Conference on Private International Law

VI

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

1. General

1.1. Objective of the regulation

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (1) is based on an initiative by the Federal Republic of Germany (2). That initiative was originally simply an attempt to modernise the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (3). In particular, it was planned to introduce standard forms and considerably facilitate direct business between courts. This was designed to avoid the delays which often result from involvement of central transmitting and receiving bodies. It was, however, otherwise intended to retain the traditional approach to the taking of evidence in mutual legal assistance. The taking of evidence was to have been performed at the request of the court for whose proceedings the taking of evidence is required (requesting court) by a court of the State in which the evidence is to be taken (requested court). The requested court would, in principle, have had to apply its own procedural law. The requesting court would, however, have been entitled to be present through representatives at the taking of evidence but there was no provision for that court itself to take evidence abroad.

In the final version of the regulation, this traditional approach is retained as one of the possibilities (Articles 4 to 16). The courts of the Member States (4) are, however, in addition given the possibility, in accordance with their own procedural law, of also directly taking evidence in another Member State (Article 17). This is not just a simplification of the traditional forms of taking evidence, but constitutes the crucial improvement brought about by the regulation in comparison with the legal provisions hitherto applicable under international treaties. Such direct taking of evidence abroad had hitherto usually come to nothing because of sovereignty reservations on the part of the States concerned.

(1) OJ L 174, 27.6.2001, p. 1. Articles referred to without any further indication of the legal source from this regulation.
(2) OJ C 314, 3.11.2000, p. 2.
(3) This convention applies to all Member States with the exception of Austria, Belgium, Greece and Ireland.
(4) Owing to its special institutional status in the sphere of cooperation in civil matters, Denmark is not regarded as a Member State for the purposes of the regulation (Article 1(3)). As regards Denmark, therefore, the existing international treaties will continue to apply for the time being.

1.2. General provisions

1.2.1. Scope

According to Article 1(1) of the regulation, it shall apply in civil or commercial matters. This position is not clarified further; interpretation is to depend on the case-law of the Court of Justice of the European Communities relating to Article 1(1) of the Brussels Convention (1). That case-law does not allow any reverting to the substantive or formal law applicable; the concept should rather be interpreted independently (2). The scope of the regulation is, it is true, not entirely the same as that of the Brussels Convention or Regulation (EC) No 44/2001 (Brussels I Regulation) which replaces it (3), but, provided a civil or commercial matter is involved, also covers subjects which are excluded from the Brussels Convention and Brussels Regulation by Article 1(2) thereof.

Since the regulation makes no distinction between individual types of proceedings, it is to be applied not only in contested civil proceedings but also in all other civil court proceedings, for example voluntary jurisdiction (uncontested proceedings) and insolvency proceedings.

According to Article 1(1) of the regulation, its rules only come into play where the court (of a Member State), in accordance with the provisions of the law of that State, requests the taking of evidence in mutual legal assistance or the taking of evidence directly. Requests by parties, arbitration tribunals or authorities which are not courts are therefore ruled out. This provision further makes it clear that the regulation may not be used to interfere with the national procedural law of the State of the requesting court. That is the only law which can govern a decision as to whether or not a particular request should be made. It must not be concluded from the regulation that the courts of all Member States would henceforth be entitled irrespective of their own procedural law to take evidence directly abroad (Article 17) or to participate in the traditional taking of evidence abroad (Article 12). Such decisions will continue to be governed first by the law of the requesting court. The regulation concerns only the subsequent procedure, i.e. the transmission and execution of the request.

According to Article 1(2), a request is inadmissible if the evidence is not intended for use in judicial proceedings, commenced or contemplated. That provision is worded somewhat misleadingly. A court request — which is the only kind covered by the regulation — presupposes in every case that judicial proceedings (in the broader sense) have already been commenced. Article 1(1) makes a different point: it is not necessary for proceedings to have been commenced yet in the matter (e.g. civil proceedings), but it is sufficient that there should be, for example, evidence-taking by the court for proceedings in the

(1) Last consolidated version (OJ C 27, 26.1.1998, p. 1).
(2) See Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, Case 814/79 *Netherlands* v *Rüffer* [1980] ECR 3807, and Case C-172/91 *Sonntag* v *Waidmann* [1993] ECR I-1963.
(3) OJ L 12, 16.1.2001, p. 1.

matter that are still only being contemplated. Requests pursuant to the regulation could therefore also be made in the course of such evidence-taking. A request would only be inadmissible if it were not for the purpose of obtaining evidence for proceedings (which have been commenced or are still being contemplated) on the substance of the matter.

1.2.2. Direct transmission between the courts, central bodies

Article 2 contains a key element for speeding up the traditional approach to evidence-taking. Pursuant to that article, requests are to be transmitted not via central bodies but directly from court to court. The courts responsible for the performance of the taking of evidence are to be made known by the Member States, indicating their respective territorial jurisdiction (Article 2(2)), and to be listed by the Commission in a manual (Article 19).

It is clear from the wording of Article 2 that it is to be applied only to traditional mutual assistance requests. The provision will, however, also have to be used when it proves necessary in the direct taking of evidence abroad to contact a court assigned by the competent authority of the requested State (Article 17(4), second subparagraph).

The central bodies to be designated pursuant to Article 3(1) [1] have only limited functions. Their primary function is to supply information to the courts and seek solutions to any difficulties which may arise in respect of a request. Only in exceptional cases do they have to forward a request, for example when no competent court can be found in the Commission's manual. In addition, central bodies may also be designated by the Member States to be responsible for taking decisions on requests for direct taking of evidence. It is, however, also possible to confer that power on other authorities (including courts if necessary).

1.2.3. Language rules and means of communication

Article 5 settles the question of the language in which requests and communications pursuant to this regulation are to be drawn up. Although this provision is to be found in Section 1 of Chapter 2

('Transmission of the request'), it is of comprehensive scope. It is to be applied not only to requests for traditional evidence-taking but also to all related communications (Articles 7 et seq.), to requests to take evidence directly (Article 17) and to all communications concerning the costs of the proceedings (Article 18). This provision will also be applicable in any necessary business with central bodies.

The choice of language in any individual case is a matter for the court which draws up the request or communication concerned. There are in principle two possibilities here: on the one hand, the official language of the requested State

[1] A federal State, a State in which several legal systems apply or a State with autonomous territorial entities shall be free to designate more than one central body (Article 3(2)).

may be used. If there is more than one official language there, the language used should be that of the place where the requested taking of evidence is to be performed. On the other hand, each Member State shall indicate at least one official language of the institutions of the European Community other than its own which is acceptable to it for completion of the forms. Those languages are in turn listed in the Commission's manual (Articles 19 and 22).

The requested court (or in the case of direct taking of evidence the requested body pursuant to Article 17) is not prejudged by the choice of language made by the requesting court. Even where the request is made in another (admissible) language, it is always possible to reply in one's own official language.

In practice, this means that, if Germany accepts English as an additional language, requests to German courts (or the requested body pursuant to Article 17) may be made in English or German. The requested court (or the requested body pursuant to Article 17) may also draw up its communications and other business in English or German. There is no obligation to employ the language used in the request.

A further language rule is to be found in Article 4(3), which states that documents which it is necessary to enclose with the request shall be accompanied by a translation into the language in which the request was written. There is not, on the other hand, any ruling on the language in which the documents on performance of the requested taking of evidence (e.g. minutes of questioning of witnesses or evidence obtained from expert witnesses in mutual legal assistance) are to be drawn up. The regulation clearly assumes that in this case it is in principle the official language of the requested State that is to be employed, even when the communication concerning performance of the taking of evidence (form H) is transmitted in another admissible language. The requesting court will in any case then be able to request that the documents be drawn up in another language. That would constitute a special procedure for the taking of evidence within the meaning of Article 10(3).

2. Taking of evidence in mutual legal assistance

2.1. Bases

The taking of evidence in mutual legal assistance is initiated by a request within the meaning of Article 4. Whether and at what stage in the proceedings a request for such taking of evidence is made is determined solely by the requesting court on the basis of its procedural law.

The requested court shall in principle execute the request in accordance with the law of its Member State (Article 10(2)). But there are exceptions to this rule: the requesting court may call for use of a special procedure provided for by the law of its Member State (Article 10(3)). Moreover, the regulation includes special rules on performance of the taking of evidence, in particular by using communications technology (Article 10(4)), the presence or participation of the parties (Article 11) and the presence or participation of representatives of the requesting court (Article 12).

There is a twofold limit on such departures from the principle in Article 10(2). On the one hand, the requesting court must expressly ask for them (or communicate the intended presence). Whether such a request is admissible depends on the law of the requesting State. On the other hand, Articles 10(3) and (4), 11(3) and 12(4) offer the requested court the options — albeit very limited — of not complying with the request pursuant to the law of its Member State or of only doing so on certain conditions.

2.2. Content and transmission of the request

The request must be made using form A. The **details required** are indicated in Article 4 and correspond in the main to those in Article 3 of the 1970 Hague Convention on the Taking of Evidence.

As well as details of the requesting court and the parties and their representatives (Article 4(1)(a)

and (b)), the nature and subject matter of the case and a — brief — statement of the facts are required (Article 4(1)(c)). That includes, on the one hand, the non-contentious facts and, on the other hand, the issues in dispute between the parties. The requested court should be given as clear a picture as possible of what is actually involved in the requesting court's procedure. This facilitates performance of the taking of evidence. The requested court is thus not limited to mechanically repeating pre-formulated questions, but should — in line with the terms of the request — be able to react to developments in the course of the taking of evidence. To that end, all the details required must be provided and any necessary documents enclosed, accompanied by a translation (Article 4(3)).

The **requested taking of evidence** must therefore be described as precisely as possible

(Article 4(1)(d)). In many cases, this will involve questioning people — either parties or witnesses. However, another possibility would be to call for an expert opinion, for a local inspection to be carried out or for information to be provided (e.g. documents, information media, films, detailed records, etc.).

When **examining persons** (Article 4(1)(e)), the questions to be asked or the facts in connection with which they are being examined must be indicated,

along with their names and addresses. Above all, the requesting court must specify the reasons for taking evidence and state on which (contentious) issues further information needs to be provided. In this case, it may be helpful to supply a list of actual questions, although this should under no circumstances be regarded as definitive. In the course of taking evidence, there may be developments which could not be foreseen at the time the list was drawn up. This is why it is pointless to confine the role of the requested court to the mechanical reproduction of preformulated questions. As a matter of principle, far greater emphasis should be placed on the fact that every court in the European Union itself knows best in any given situation which questions would provide the most effective means of clarifying the facts.

Furthermore, information must be forwarded concerning any possible rights to refuse to give evidence under the law of the requesting State, given the prerogative of the person to be examined to invoke such rights (Article 14(1)(b)). This applies not only to rights to refuse to give evidence in the strictest sense. Accordingly, if a party is to be examined, as opposed to witnesses, and if the law of the requesting State also provides for such a right to refuse to give evidence, the relevant information must still be forwarded.

If an examination under oath or a sworn statement is desired, this must be requested separately and, where appropriate, the form of the oath must be indicated. It follows that, unless specifically requested, no affirmation by oath should be given. Also, if requested, in principle this must be given in accordance with the law of the requested State. If there is no provision under that law for an oath or a sworn statement or if the use of a specific form of oath is required under the law of the requesting State, then a request for compliance with a special procedure within the meaning of Article 10(3) must be submitted.

If, in the case of **any other form of taking of evidence**, there is a request for objects or documents to be inspected, these must be precisely described (Article (1)(f)). This condition applies, in particular, to requests for an expert opinion. In this case, the location of the objects or documents must also be specified, as well as whether the respective owner is obliged to allow the inspection.

If there is a request for **any special means or method of taking evidence** — either under the law of the requesting State within the meaning of Article 10(3) or pursuant to Articles 10(4), 11 or 12 — the necessary explanations must be provided.

In accordance with Article 6, **requests** and all other communications must be **transmitted** by the swiftest possible means. Each Member State must indicate which means of transmission (post, fax, electronic transmission, etc.) it will allow for requests and communications to be sent to its central body or its courts. On the basis of the wording of Article 6, such indications apply only

to requests and communications to a requested State or a requested court. The issue of which means must be used to transmit communications from the requested to the requesting court has therefore not been addressed. Logically, however, the focus of attention will be on the data provided by the State to the courts of which a communication is to be forwarded.

Naturally the transmitted documents must be legible. It must also be ensured that the received documents match those which were sent. This is particularly important in the case of electronic means of communication.

When dealing with requests, the occasional need for further enquiries will arise. While the regulation makes no specific provision for this, its overall objective generally favours the simplest and least formal arrangement possible. In addition to fax and e-mail, special consideration must be given to applications by telephone. In this case, however, it must be ensured that the competent persons in the requesting and requested courts are actually able to communicate in the languages notified by their respective States.

2.3. Execution of the request

1.1.1. Procedure on receipt of the request

Where a request to proceed with the taking of evidence is submitted to a court of a Member State, the following points must immediately be checked in accordance with Article 7:

– Is the request legible?

– Was a permitted language used?

– Is the requested court competent to take evidence?

If the answer to each of these questions is yes, an acknowledgement of receipt (form B) must be sent to the requesting court within seven days of the request arriving. If the request is illegible or not drafted in a permitted language, this must also be notified within seven days using form B; the request must be returned to the requesting court. Where the requested court does not have jurisdiction, the request must be forwarded to the competent court; the requesting court must also be notified of this by sending it a copy of form A with point 14 ('Notification of the forwarding of the request') completed.

The requested court must then ensure that the request contains all of the necessary information, in accordance with Article 8(1). Where this is not the case, the requesting court must be so informed within 30 days of receipt of the

request by means of form C. All missing information must be described as precisely as possible. Where applicable, a communication concerning any advance required for experts' fees (Article 18(3)) must also be forwarded within the same period (Article 8(2); see also Section 4.3 below).

An additional means of verification is provided for in Article 14(2)(a) and (b). Under these provisions, the execution of a request may be refused if it does not fall within the scope of this regulation or within the functions of the judiciary under the law of the requested State. The requesting court must be informed to this effect using form H within 60 days of receipt of the request.

Under Article 10(1), the request must be executed within 90 days. In principle, this time limit begins to run as soon as the request is received by the requested court. However, in the event of non-compliance within the meaning of Article 7 or Article 8(1), the time limit does not begin to run until receipt of the completed request (Article 9(1)). Where the requested court makes the request for an expert opinion conditional upon an advance towards the costs, the time limit begins to run as soon as the advance is made (Article 9(2)).

If owing to exceptional circumstances the 90-day time limit cannot be met, the requesting court must be so informed by means of form G (Article 15). This information must be forwarded as soon as it becomes clear that the deadline cannot be met. The reasons for the delay and the expected time needed to execute the request must be included.

In practice, it would be logical to connect the abovementioned steps together. As a rule, it should be possible within seven days of receiving the request to:

– check whether the court is actually competent for the execution of the request (and, if not, forward the request to the competent court);

– check that the request formally complies with Article 7 and send the acknowledgement of receipt;

– check that the content of the request complies with Articles 8 and 14(2)(a) and (b); and

– where the above conditions exist, carry out immediately all the measures required for the taking of evidence, and, in particular, set the deadline for the questioning of witnesses or parties.

In cases where the request cannot be executed within 90 days, immediate notification must be given in accordance with Article 15 and the precise date for the taking of evidence announced. It may be easier to comply with the 90-day execution period — already a highly ambitious target — by adopting this kind of concentrated approach at the beginning of the procedure rather than using up the whole of the period for checking the content.

After **execution of the request**, the files containing the evidence (minutes of questioning, expert opinions, etc.) must be returned to the requesting court together with an acknowledgement of receipt (form H) in accordance with Article 16.

2.3.2. Execution of the request under the law of the requested State

In principle, requests must be executed in accordance with the **law of the requested State** (Article 10(2)). Apart from any exceptions yet to be discussed, all issues directly concerning the taking of evidence are thus subject to that law. This applies not only to purely formal matters (e.g. the procedure and means used to document questioning), but also other provisions governing the procedure used to take evidence (such as the selection and payment of experts or the publication or non-publication of the taking of evidence).

Under the law of the requested State, consideration must also be given to any necessary **coercive measures** (Article 13). This applies, on the one hand, to the enforced appearance of witnesses and, on the other hand, to penalties for failure to comply with court orders. No special application is required for this. If under the law of the requested State coercive measures are automatically applied in an internal matter — for example, where a witness is absent or where a person obliged to conduct an inspection refuses to do so — this must also be the case for the taking of evidence in accordance with the regulation. However, under certain conditions (Article 10(3)), the requesting court could call for no coercive measures to be applied and instead for the request to be returned without having been executed. In particular, this would be appropriate in specific situations where it would be unlawful under the law of the requesting State to use constraint when taking evidence.

2.3.3. Execution of the request in a way departing from the law of the requested State

There are a number of exceptions to the principle whereby requests are executed under the law of the requested State. On the one hand, the requesting court may call for compliance with a special procedure provided for under its own law (Article 10(3)), while, on the other hand, the regulation lays down a number of autonomous rules on executing requests (Articles 10(4), 11 and 12). These provisions need only concern the requested court if there is a specific request to that effect (form A, points 9, 10 and 13.1). Whether the requesting court makes such a request or is content for the taking of evidence to be performed in accordance with the law of the requested State depends solely on the law of the requesting State. This is a purely internal question, which is in no way affected by the regulation. In particular, none of the rules in the regulation can be interpreted as meaning that the taking of evidence in ac-

cordance with the law of the requested State is always sufficient (equivalent to the internal taking of evidence) for the procedure of the requesting State.

If a procedure for evidence-taking that departs from the law of the requested State is called for, it will more often than not be necessary for the requesting and the requested courts to contact each other in order to remove any uncertainties or to find solutions should the requested court not permit the desired procedure for evidence-taking. No specific forms are provided for this. It would be sensible for contacts between the courts involved to be as informal as possible.

2.3.3.1. Execution in accordance with a special procedure (Article 10(3))

Under Article 10(3), the requesting court may call for performance of **the taking of evidence in accordance with a special procedure** based on the law of the requesting State. There are many ways of applying this provision. It is not necessary for the whole of the evidence-taking to follow the procedure laid down in the law of the requesting State. It is also conceivable that use will only be made of specific points in that law, for example a particular procedure for instructing witnesses as to their obligation to tell the truth, a particular way of drawing up minutes or a particular wording of the oath.

A special procedure for the taking of evidence may also arise in response to a call for particular provisions of the requested State not to be applied. This could occur with coercive measures: the law of the requested State might provide for means of forcing parties to testify. If that is excluded in the requesting State, the requested court would have to be informed accordingly. The latter would then have to refrain from applying coercive measures (Article 13) and in the case of a refusal to testify send back the request without having executed it.

A request to follow a special procedure provided for by the law of the requesting State may only be **refused** if such a procedure is incompatible with the law of the requested State or by reason of major practical difficulties (Article 10(3), second sentence). There is only incompatibility if the law of the requested State expressly excludes such a procedure; the fact that there is no provision for the procedure in its law is not in itself an obstacle. It may, however, be prohibited on the basis of the general principles of the law of the requested State: where, for example, the law of that State only permits coercive measures if and to the extent that an express legal basis exists, a request for application of a coercive measure that is not provided for in the law in question must be refused.

Practical difficulties must indeed be major if they are to be used to justify refusal. This can be illustrated by the following example concerning the entry of a testimony in the minutes:

> Under the law of the requested State, the judge uses a tape recorder to dictate the minutes of any questioning. Those present only sign a form to the effect that they have heard the dictation. They do not sign the minutes subsequently written up on the basis of the dictation. The request could therefore, instead of this procedure, call for the procedure in the law of the requesting State whereby the minutes are drawn up by a secretary during questioning and signed by all those present.

This undoubtedly amounts to the following of a special procedure within the meaning of Article 10(3). Even if the procedure is not provided for in the law of the requested State, one would be hard put to find a reason why it should be incompatible with that law. It might well be the case that involving a secretary — perhaps because of shortage of staff — creates practical difficulties. However, these will hardly be major difficulties within the meaning of Article 10(3). As a rule, it will always be possible to find among the staff of a court a suitable person to draw up minutes on the spot.

If the following of a special procedure is refused, the requesting court shall be informed using form E (Article 10(3), third sentence). The regulation's objective of ensuring the most efficient taking of evidence abroad as possible would be best served by not immediately notifying a refusal but informally contacting the requesting court and trying to find solutions. This might well prompt the requesting court, following informal notification of the likely refusal of a special procedure, to modify its request so that it asks for the taking of evidence in accordance with the law of the requested State.

2.3.3.2. Use of communications technology

The **use of communications technology** is cited in Article 10(4) as a separate procedure for the taking of evidence peculiar to the regulation. Here a distinction should be made between two categories.

Communications technology may first be used to record traditional taking of evidence not only by means of a written report but also by means of a picture or sound recording. In such a case, not only the report but also the picture or sound recording is made available to the requesting court once the request has been completed.

In addition, communications technology can also be used to enable the parties and/or the requesting court to observe the taking of evidence directly or even to take an active part in proceedings by means of a videoconference. More detailed provisions on this are to be found in Articles 11 and 12.

Moreover, the rules on the use of communications technology are comparable to those which also apply to compliance with a special procedure under the law of the requesting State (Article 10(3)). The first condition is a request to this end. The requested court can refuse this request if such a procedure — for example, on grounds of privacy issues — is incompatible with the law of the requested State or is not feasible as it would cause major technical difficulties. Such difficulties can also be overcome in accordance with the last subparagraph of Article 10(4) by the courts making the necessary technical means available to each other. In addition, the regulation does not make it clear that it would be inadmissible for the necessary means to be made available by the parties.

The possibilities of refusal conflict with the fact that the regulation recognises the basic admissibility of using modern communications technology. The regulation should therefore be interpreted restrictively. A Member State is not allowed to include or to maintain provisions in its legal system which completely prohibit the use of communications technology. Such a procedure would mean that Article 10(4) would be completely deprived of its practical effect in that State. This would conflict with general principles of Community law. In addition, Article 10(4) imposes an obligation on Member States to adjust the technical equipment in their courts to the requirements of the day.

2.3.3.3. Participation of the parties or their representatives

Article 11(1) to (4) governs the role of the parties and/or their representatives when the requested court takes evidence. Here a distinction should be made between presence and participation. **Presence** (Article 11(1)) is the narrower expression and means mere physical presence, while **participation** (Article 11(3)) covers every form of active involvement — for example, the questioning of witnesses. Such involvement may also take place by means of a videoconference.

The condition for the application of Article 11(1) to (4) is a request for the presence or participation of the parties or their representatives. Whether such a request is made depends in turn solely on the law of the requesting State. This is already made clear in the general instruction in Article 1(1) and is confirmed by the introductory sentence of Article 11(1) ('If it is provided for by the law of the ... requesting court …'). Article 11 does not therefore justify any of the presence or participation rights of the parties which are independent of the law of the requesting State. Rather, the provision only ensures that a right of presence or participation under that law is also respected by the requested court.

The **presence** of the parties or their representatives under Article 11(1) is **an absolute right** which may not be restricted by the requested court. The intended presence is therefore only communicated in the request, no 'request' is

actually made (in the strict sense). The requested court must not plead that under its law the parties do not have to be present at the performance of comparable taking of evidence.

In contrast, the requested court is entitled under Article 11(3) to determine **conditions** for the **active participation** of the parties or their representatives. Article 11(3) does not state what conditions could be involved here. Instead, a general reference is made to Article 10. This means the following: in principle, active participation of the parties or their representatives should take place as provided for in the law of the requested court (Article 10(2)). With regard to what is probably in practice the most important aspect of participation, the putting of questions to persons to be heard, the parties or their representatives thus have precisely the same powers as the parties or their representatives would have in internal proceedings in the requested State. If, however, the requesting State asks for a different participation procedure (for example, a right to ask more detailed questions or participation in the form of a video-conference), the request is to be complied with in accordance with Article 10(3) unless it is incompatible with the law of the requested court or is not feasible because it would cause major practical difficulties.

The **formal procedure** is laid down in Article 11(2) and (4). A condition for the presence or participation of the parties is a corresponding request (Article 11(2)). This request can be made either using form A or separately. Form A clearly shows the difference in treatment between (mere) presence and (active) participation: the intended presence is simply communicated (point 9.1), whereas participation is requested (point 9.2). In the event of participation, more details will have to be given of what form such participation should take. Since form A does not contain a separate heading for this, a description of the desired participation will have to be included in an annex.

Further on, in form F, the requested court notifies the parties or their representatives of the time and place of performance of the taking of evidence and, where appropriate, conditions under which they may participate (Article 11(4)). No particular method of transmission is laid down for this form. The requested court will therefore in principle have to proceed in accordance with its law. If the requesting court wants this form to be served on the parties in a particular way, it will have to request this in accordance with Article 10(3). No translation of the form is required; the general rule in Article 5, in fact, also covers communications in accordance with Article 11(4). For practical reasons, it would be appropriate to send the communication for documentation purposes to the requesting court as well.

While Article 11(1) to (4) governs the right provided for in the regulation of parties to be present or to participate in the taking of evidence, paragraph 5 states a self-evident truth: even if the parties are not requested to be present or

to participate, the requested court can ask the parties to be present or to participate. This already follows from Article 10(2) whereby requests are to be executed in accordance with the law of the requested State. Where that law provides for the presence or participation of the parties, the requested court can also avail itself of this law if no request is made in this connection. However, Article 11(5) sets a limit: the condition for the presence or participation of the parties is that appropriate provision is also made in the law of the requesting court. The taking of evidence abroad must not lead to a situation where the parties to specific proceedings suddenly have more rights than in purely internal proceedings. If in such a case the taking of evidence without the participation of the parties is incompatible with the law of the requested State, it could be refused (Article 10(3)).

2.3.3.4. Participation of representatives of the requesting court

The possibility of **representatives of the requesting court** being present at the taking of evidence or of taking (an active) part therein is covered by Article 12. Here, too, a special procedure for the traditional taking of evidence is involved. The requested court therefore takes charge of the taking of evidence, unlike what happens in the case of direct taking of evidence in accordance with Article 17.

Article 12(2) determines who is to be considered a representative of the requesting court solely in accordance with its law. In practice, members of that court — primarily a judge dealing with the matter — and experts will be involved. To that extent, the requested court has no powers of examination: if a person is named in the request as a representative of the requesting court, it should be assumed that this act of representation actually occurs.

Article 12 has a dual aim: firstly, it should be made possible for the representatives of the requesting court directly to observe statements made by persons being questioned. This may be of decisive importance for the evaluation of such statements. Mere (passive) presence of the representative is sufficient for this aim. Active participation has a wider significance. When evidence is taken, developments may occur which could not have been envisaged even in the most detailed of requests. If a representative of the requesting court is present, he can react to such developments and, for example, ask questions, the need for which arises only from the statements previously given by the persons being questioned. If an expert is sent as a representative, he will also be able to put additional technical questions which are of importance for the production of his report.

The structure of Article 12 scarcely differs from that of Article 11. The condition for applying this provision is therefore once again a corresponding request. The law of the requesting court determines whether such a request can

be made or, if need be, even has to be made. Article 12 thus does not provide justification for the right, which is independent of the law of the requesting State, of the representatives of the requesting State to be present or to participate. The provision applies only if this right enables representatives of the court to be present or to participate in the taking of evidence abroad or, if need be, prescribes this course of action.

The mere presence of representatives of the requesting court must, however, be permitted in the taking of evidence (Article 12(1)), whereas active participation (for example, right to put questions) is allowed only in accordance with the conditions set by the requested court (Article 12(4)). These conditions are again to be determined in accordance with Article 10. The limits on active participation are therefore incompatibility with the law of the requested court and major practical difficulties. According to general principles of Community law, the law of the requested court may not, however, be interpreted so strictly that the right to active participation guaranteed in Article 12(4) is deprived of all practical effect. In detail, this means the following: the focal point of the right to participate will be the possibility of putting questions to persons giving evidence. The exact form of this right to put questions will be determined by the law of the requested court.

In particular, this basis will have to be used to determine whether the questions are to be put directly or via the judge of the requested court who is leading the questioning. This judge will also be able to reject individual questions if they, for example, conflict with rights of a witness to refuse to give evidence under the law of the requested State. However, it would be inadmissible to preclude all rights of the representatives of the requesting State to ask questions.

Article 12(3) and (5) covers the **formal procedure**. Under Article 12(3), the requesting court can already include the information that a representative is to be present at the taking of evidence or the request for active participation in the original request for mutual assistance (form A); however, this information can also be transmitted at a later stage. The requested court therefore informs the requesting court using form F of the place and time of the proceedings and, if necessary, also indicates the conditions for such participation. Before the formal notification takes place, it will be useful for both courts to agree informally (by phone) on a date.

2.3.4. Grounds for refusal

Article 14(1) and (2) contains a summary of (completely different) grounds for **refusing to execute a request**. This provision is of a definitive nature if the request was for the taking of evidence in accordance with the law of the re-

quested State. Other grounds for refusal may not be adduced in such a case. If, on the other hand, a request for the taking of evidence is made which is not in accordance with that law, the grounds for refusal referred to in Article 10(3) and (4) are still to be observed (see Subsection 2.3.3 above).

Article 14(1) first covers the case of the right to refuse to give evidence or a prohibition from giving evidence under the law of the requesting or requested State. According to the text of the provision, account is to be taken of these restrictions only if the person to be heard — if necessary after receiving instructions on this matter from the court — invokes them. There is consequently no provision for officially recognising bans on persons giving evidence. In general, such grounds for refusal will therefore not be recognisable until questioning has been attempted. If the person being questioned invokes the right to refuse to give evidence under the law of the requesting State and if no information is available on this matter, the requested court has to ask the requesting court for clarification. There is no separate form for this. If it emerges that there were grounds for refusing to give a statement, the requesting State is to be immediately notified using form H.

Article 14(2)(a) and (b) contains grounds for refusal which must already have been noticed when the substance of the request was being examined. They are to be notified to the requesting court within 60 days of the request being received (Article 14(4)).

Under Article 14(2)(a), the execution of a request can be refused if the request does not fall within the scope of the regulation. Whether this is the case needs to be examined in accordance with criteria peculiar to this regulation (see Section 1 above).

Under Article 14(2)(b), the execution can be refused if under the law of the requested court it does not fall within the functions of the judiciary. This provision applies only to the (hardly imaginable) case where under the law of the requested State a particular type of taking of evidence was to be carried out independently of the subject matter of the proceedings not by courts but by other bodies. In contrast, there is no provision for the situation where a matter to be classified under the regulation as a civil case does not fall within the functions of the judiciary in the requested State. If a court requests that in such a case evidence be taken which because of its nature is the responsibility of the courts in the requested State as well (e.g. requests that witnesses be questioned), Article 14(2)(b) is not applicable and the taking of evidence is therefore to be carried out. This emerges, in particular, from Article 14(3) whereby a request (*inter alia*) may not be refused because there is no judicial procedure in the law of the requested State corresponding to that of the requesting State.

Article 14(2)(c) and (d) covers the legal implications of a request to complete the request (Article 8) or to pay an advance (Article 18). If such a request is

not complied with within 30 days (completion) or 60 days (advance), the execution of the request may be refused. On the expiry of the time limit, the requesting State is to be notified without delay. The fact that Article 14(4) also makes provision for a 60-day time limit for such cases from receipt of the request must be a mistake on the part of the drafter; a refusal is, of course, not possible until the time limits specified in Article 14(2)(c) and (d) have lapsed unutilised.

Other grounds for refusal are **not provided for**. This is clear from the conclusive wording of Article 14(1) and (2), first sentence. Furthermore, Article 14(3) expressly stipulates that the court may not refuse to execute the request if the requested State has exclusive jurisdiction in the proceedings underlying the request. The requested court is thus obliged by the requesting court to settle the question of jurisdiction. This constitutes a certain contradiction under the European Law on Civil Procedure. Under Article 35(1) of Regulation (EC) No 44/2001 (Brussels I Regulation), any infringement of the provisions on exclusive jurisdictions entitles the court to refuse to recognise and enforce a judgment.

3. Direct taking of evidence

The possibility for the **direct taking of evidence abroad** (Article 17) represents major progress in relation to the previous legal situation. Unlike the traditional taking of evidence by way of mutual legal assistance, the requesting court performs the taking of evidence under its own law, as a rule, without the participation of the courts of the State in which the taking of evidence is to take place (Article 17(3) and (6); for exceptions, see below).

The question of whether a court may, or, where applicable, has to make use of the possibility provided by the regulation for the direct taking of evidence abroad depends entirely on its law. This follows from Article 1(1)(b); Article 17 is only applicable if a court requests **under its own law** to take evidence directly abroad.

The law of the requesting State also determines **who** performs the taking of evidence (Article 17(3)). In practice, two scenarios, in particular, are conceivable. Firstly, the court itself — i.e. the competent judge — may take evidence abroad. Secondly, an expert may be sent, who conducts inquiries abroad and on that basis then submits an opinion to the court before which the case is pending.

In the elaboration of the regulation, the question of whether sending an **expert** also constitutes direct taking of evidence in the sense of Article 17 was contentious. Some Member States held the opinion that the expert's conduct of

inquiries was not in itself an activity of the court and therefore did not fall within the scope of the regulation anyway. As a result, the courts were in principle free to send experts abroad. Other delegations, on the other hand, regarded the activity of an expert as an activity of the **court** of the sending State (in the wider sense) and therefore, on the grounds of general international law and in the absence of an explicit authorisation, considered it inadmissible. Article 17(3) settled this dispute in favour of the stricter interpretation. Thus, sending an expert is also only possible pursuant to the procedure in Article 17.

The possibilities for the direct taking of evidence abroad are **restricted** on a number of counts. Firstly, it may only take place on a voluntary basis (Article 17(2)). Thus, a court may under no circumstances impose coercive measures of any sort abroad. All persons to be heard must be expressly informed that any statements made will be on a voluntary basis.

In addition, the competent authority of the requested State may set **conditions** for the taking of evidence (Article 17(4)). One such condition may, in particular, be the participation of a court of the requested State. In this case, however, the taking of evidence is also incumbent upon the requesting State; the court assigned by the requested State only has to ensure that Article 17 is properly applied and that any conditions set are met.

A request for evidence to be taken directly may be **refused** if the request does not fall within the scope of the regulation or does not contain all information required under Article 4 (Article 17(5)(a) and (b)). These grounds for refusal are the same as those which apply to requests for evidence to be taken by traditional means (Article 14(2)(a) and (c)). In addition, direct taking of evidence may be refused if it is contrary to fundamental principles of law in the requested State (Article 17(5)(c)).

The practical significance of the last ground for refusal may not be too great. Firstly, a general refusal of **any** form of direct taking of evidence, by the courts of other Member States on the basis of this ground for refusal, is ruled out on the grounds that the sovereignty of the State concerned would be encroached upon as a result. Indeed, the purpose of Article 17 is to **settle** precisely these questions of sovereignty, which may arise under general international law. Furthermore, Article 17 would lose all practical effectiveness if Member States were free to refuse any form of direct taking of evidence on the basis of fundamental principles of law. For this reason alone, such a broad interpretation of Article 17(5)(c) is inadmissible.

This ground for refusal may therefore only be invoked if the **direct taking of evidence envisaged in an individual case** contravenes fundamental principles of law in the State in which it is due to take place. It should be taken into account that, under Article 17(2), evidence may in any case be taken on a voluntary basis

only, with no coercive measures. As a result, Article 17(5)(c) will only come into play if the taking of evidence envisaged contravenes fundamental principles of law in the State in which it is due to take place, even when all participants are taking part on a voluntary basis. It is very difficult to imagine such a situation. It is most likely to arise when the voluntary nature of the participation is doubtful — when, for example, the hearing of children is envisaged.

The fact that the performance of direct taking of evidence may only be refused if it contravenes fundamental principles of law of the State in which it is due to take place also affects the interpretation of Article 17(4). The conditions laid down by the requested State may not be such that in reality the direct taking of evidence is refused. For example, this would be the case if the role of the court assigned by the requested State pursuant to Article 17(4) was so important that in reality performance of the direct taking of evidence was incumbent upon that court (and not the requesting court).

The **formal procedure** for the direct taking of evidence is laid down in Article 17(1) and (4). For decisions on requests for evidence to be taken directly pursuant to Article 3(3), each Member State must designate either the central body pursuant to Article 3(1) and (2), or one or more other authorities. These may also be courts. A court wishing to take evidence in another Member State must submit a request to this competent authority using form I (Article 17(1)), describing the taking of evidence envisaged in as much detail as possible. The competent authority of the State in which the taking of evidence is to take place must inform the requesting court within 30 days using form J whether, and, if so, under which circumstances, the taking of evidence is authorised (Article 17(4)). The use of communications technology should be encouraged (Article 17(4), third sentence).

There are no provisions on the legal consequences of the 30-day period lapsing without a reply. In the absence of explicit instructions, silence would probably not be taken to mean agreement. The requesting court would therefore have to wait for a decision by the competent authority even after the time limit had expired. If, however, the time limit was frequently exceeded, failure to fulfil an obligation pursuant to Article 226 of the EC Treaty would undoubtedly exist.

4. Costs

4.1. Principle

Under Article 18(1), fees or costs arising from execution of the request for evidence to be taken may not be reimbursed. Provision of mutual legal assistance must therefore be **in principle free of charge**. This rule must be applied analogously, if the requested State pursuant to Article 17(4) assigns a special court to ensure compliance with the conditions set for the direct taking of evidence. No costs may be charged for this either.

4.2. Ensuring the reimbursement of costs by the requesting court

In derogation from the basic rule in Article 18(1), Article 18(2) provides for a **reimbursement of costs** for certain measures which are potentially costly. This covers the costs of experts and interpreters, as well as expenses arising from the use of special forms (Article 10(3)) or communications technology (Article 10(4)).

Apart from the special case of experts' costs (see Section 4.3 below), Article 18(2) only takes effect **after** the taking of evidence has been performed. Under Article 18(3), the performance of the taking of evidence, other than the expert's opinion, may not be conditional on an advance on costs. The requested court must therefore also execute a request for evidence to be taken when it gives rise to costs which must be reimbursed under Article 18(2). If evidence can only be taken at the requested court by incurring costs — if, for example, an interpreter will only step in when his/her costs are paid in advance — the requested court is obliged to advance such costs. The application of provisions under the procedural law of the requested State, whereby in such cases the taking of evidence is conditional on payment of an advance by the parties, is ruled out by Article 18(3) (with the exception of the expert's opinion).

If a request for reimbursement of costs is made subsequently, the requesting court must immediately ensure reimbursement. The court may either pay these costs itself or invite the parties to pay. The question to be settled in this connection, i.e. whether, and if so, which parties are obliged to pay, is governed exclusively by the law of the requesting court (Article 18(2), last sentence). In its relations to the requested court, the obligation to ensure reimbursement lies, however, with the requesting court. If, therefore, the parties are unable or unwilling to pay, the requesting court must also bear the costs when under its law the parties are in fact obliged to pay. In

order to avoid this subsidiary liability, a request that is likely to involve costs should only be made when any or all costs have been reimbursed in advance at the requesting court by the parties liable for payment under its own law.

4.3. Advance on costs

The rule in Article 18(2) also applies to experts' fees. The requested court **may** therefore pay the costs arising from an expert itself initially and then ask the requesting court for reimbursement. However, Article 18(3) also makes it possible to make the **expert's opinion** conditional upon **payment of an advance on costs.**

To this end, the requested court may ask the requesting court by means of form C to pay an advance on costs (Article 8(2), first sentence). The requesting court may either pay this advance itself or invite the parties to do so. The question of whether the parties are obliged to pay the advance, and if so, which parties, and what the consequences are of non-payment on the proceedings of the requesting court, is once again governed by the law of that court.

Receipt of the advance on costs must be confirmed by the requested court pursuant to Article 8(2), second sentence, within 10 days by sending form D. The 90-day completion period for the request only begins at this point (Articles 9(2) and 10(1)). The level at which the expert's fees should subsequently be fixed and the question as to whether the parties to the original proceedings have a right of say in this are governed exclusively by the law of the requested court. It is obvious, and therefore did not require any special provisions, that any remainder of the advance following payment of the expert's fees must be paid back to the requesting court.

If the advance is not received within 60 days of the request, completion of the request may be refused (Article 14(2)(d); form H). Naturally, this does not prevent a repeated request from being made, if at this point the parties or the requesting court decide to pay the advance on costs after all.

The last sentence of Article 18(3) stipulates expressly that payment of an advance on costs may not be a condition for the execution of other requests. We have already referred to the consequences of this rule (see Section 4.2 above).

5. Final provisions

The regulation formally entered into force on 1 July 2001 (Article 24(1)). However, the provisions of relevance for the courts are only applicable from 1 January 2004 (Article 24(2)). Prior to this, Member States had to inform the Commission of the following by 1 July 2003 (Article 22):

– the courts competent for performing the taking of evidence, and their respective jurisdictions;

– the central authorities and the authorities competent for authorising the direct taking of evidence;

– the technical means for the receipt of requests available to the courts competent for the taking of evidence;

– the languages accepted for requests.

On the basis of this information, the Commission drew up a **manual** pursuant to Article 19(1), which also has to be available electronically and kept up to date. If any changes occur in the Member States at a later stage, the Commission must be informed of these immediately.

In relations between the Member States pursuant to Article 21(1), the regulation prevails over all relevant **bilateral and multilateral agreements**. As the most important source of law in this field to date, the Hague Convention on the Taking of Evidence allows special instruments of law to prevail (Article 32 of the Hague Convention). However, in order to simplify further the taking of evidence, Member States are free to maintain such agreements, or to conclude new ones, on the condition, however, that they are compatible with the regulation. This probably implies that such agreements may not contain any rules that are more complicated than those in the regulation. Member States had to send to the Commission, also by 1 July 2003, copies of any of the agreements maintained on this basis. With respect to any agreements concluded in the future, a copy of the draft must be made available to the Commission. Additionally, Member States must inform the Commission if these agreements are denounced or amended. The Commission must also include this information in the manual.

In addition to drawing up the manual, the Commission is obliged to update or make any technical adjustments required to the **standard forms** attached to the regulation (Article 19(2)). In accordance with Article 20, the Commission is supported in this task by an advisory committee pursuant to Articles 3 and 7 of Decision 1999/468/EC [1]. In addition, the Commission has to submit a **report on the application of the regulation** in 2007 and every five years

[1] OJ C 38, 6.2.2001, p. 3.

thereafter to the Parliament, the European Economic and Social Committee and the Council (Article 23). In order to make this possible, the courts of the Member States are required to inform either the Commission directly, or the central body of its Member State, of any problems which arise in the application of the regulation. Only in this way will it be possible to ascertain after some time how the regulation is actually working.

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1206/2001

of 28 May 2001

on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) For the purpose of the proper functioning of the internal market, cooperation between courts in the taking of evidence should be improved, and in particular simplified and accelerated.

(3) At its meeting in Tampere on 15 and 16 October 1999, the European Council recalled that new procedural legislation in cross-border cases, in particular on the taking of evidence, should be prepared.

(4) This area falls within the scope of Article 65 of the Treaty.

(5) The objectives of the proposed action, namely the improvement of cooperation between the courts on the taking of evidence in civil or commercial matters, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level. The Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives.

(6) To date, there is no binding instrument between all the Member States concerning the taking of evidence. The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters applies between only 11 Member States of the European Union.

(7) As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State, the Community's activity cannot be limited to the field of transmission of judicial and extrajudicial documents in civil or commercial matters which falls within the scope of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the serving in the Member States of judicial and extrajudicial documents in civil or commercial matters [4]. It is therefore necessary to continue the improvement of cooperation between courts of Member States in the field of taking of evidence.

(8) The efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible between Member States' courts.

[1] OJ C 314, 3.11.2000, p. 2.
[2] Opinion delivered on 14 March 2001 (not yet published in the Official Journal).
[3] Opinion delivered on 28 February 2001 (not yet published in the Official Journal).
[4] OJ L 160, 30.6.2000, p. 37.

(9) Speed in transmission of requests for the performance of taking of evidence warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. So as to ensure the utmost clarity and legal certainty the request for the performance of taking of evidence must be transmitted on a form to be completed in the language of the Member State of the requested court or in another language accepted by that State. For the same reasons, forms should also be used as far as possible for further communication between the relevant courts.

(10) A request for the performance of the taking of evidence should be executed expeditiously. If it is not possible for the request to be executed within 90 days of receipt by the requested court, the latter should inform the requesting court accordingly, stating the reasons which prevent the request from being executed swiftly.

(11) To secure the effectiveness of this Regulation, the possibility of refusing to execute the request for the performance of taking of evidence should be confined to strictly limited exceptional situations.

(12) The requested court should execute the request in accordance with the law of its Member State.

(13) The parties and, if any, their representatives, should be able to be present at the performance of the taking of evidence, if that is provided for by the law of the Member State of the requesting court, in order to be able to follow the proceedings in a comparable way as if evidence were taken in the Member State of the requesting court. They should also have the right to request to participate in order to have a more active role in the performance of the taking of evidence. However, the conditions under which they may participate should be determined by the requested court in accordance with the law of its Member State.

(14) The representatives of the requesting court should be able to be present at the performance of the taking of evidence, if that is compatible with the law of the Member State of the requesting court, in order to have an improved possibility of evaluation of evidence. They should also have the right to request to participate, under the conditions laid down by the requested court in accordance with the law of its Member State, in order to have a more active role in the performance of the taking of evidence.

(15) In order to facilitate the taking of evidence it should be possible for a court in a Member State, in accordance with the law of its Member State, to take evidence directly in another Member State, if accepted by the latter, and under the conditions determined by the central body or competent authority of the requested Member State.

(16) The execution of the request, according to Article 10, should not give rise to a claim for any reimbursement of taxes or costs. Nevertheless, if the requested court requires reimbursement, the fees paid to experts and interpreters, as well as the costs occasioned by the application of Article 10(3) and (4), should not be borne by that court. In such a case, the requesting court is to take the necessary measures to ensure reimbursement without delay. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the costs.

(17) This Regulation should prevail over the provisions applying to its field of application, contained in international conventions concluded by the Member States. Member States should be free to adopt agreements or arrangements to further facilitate cooperation in the taking of evidence.

(18) The information transmitted pursuant to this Regulation should enjoy protection. Since Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1], and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [2], are applicable, there is no need for specific provisions on data protection in this Regulation.

(19) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 [3] laying down the procedures for the exercise of implementing powers conferred on the Commission.

(20) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(21) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

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[1] OJ L 281, 23.11.1995, p. 31.
[2] OJ L 24, 30.1.1998, p. 1.
[3] OJ L 184, 17.7.1999, p. 23.

(22) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

(a) the competent court of another Member State to take evidence; or

(b) to take evidence directly in another Member State.

2. A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

3. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Direct transmission between the courts

1. Requests pursuant to Article 1(1)(a), hereinafter referred to as 'requests', shall be transmitted by the court before which the proceedings are commenced or contemplated, hereinafter referred to as the 'requesting court', directly to the competent court of another Member State, hereinafter referred to as the 'requested court', for the performance of the taking of evidence.

2. Each Member State shall draw up a list of the courts competent for the performance of taking of evidence according to this Regulation. The list shall also indicate the territorial and, where appropriate, the special jurisdiction of those courts.

Article 3

Central body

1. Each Member State shall designate a central body responsible for:

(a) supplying information to the courts;

(b) seeking solutions to any difficulties which may arise in respect of a request;

(c) forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court.

2. A federal State, a State in which several legal systems apply or a State with autonomous territorial entities shall be free to designate more than one central body.

3. Each Member State shall also designate the central body referred to in paragraph 1 or one or several competent authority(ies) to be responsible for taking decisions on requests pursuant to Article 17.

CHAPTER II

TRANSMISSION AND EXECUTION OF REQUESTS

Section 1

Transmission of the request

Article 4

Form and content of the request

1. The request shall be made using form A or, where appropriate, form I in the Annex. It shall contain the following details:

(a) the requesting and, where appropriate, the requested court;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature and subject matter of the case and a brief statement of the facts;

(d) a description of the taking of evidence to be performed;

(e) where the request is for the examination of a person:

— the name(s) and address(es) of the person(s) to be examined,

— the questions to be put to the person(s) to be examined or a statement of the facts about which he is (they are) to be examined,

— where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court,

— any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used,

— where appropriate, any other information that the requesting court deems necessary;

(f) where the request is for any other form of taking of evidence, the documents or other objects to be inspected;

(g) where appropriate, any request pursuant to Article 10(3) and (4), and Articles 11 and 12 and any information necessary for the application thereof.

2. The request and all documents accompanying the request shall be exempted from authentication or any equivalent formality.

3. Documents which the requesting court deems it necessary to enclose for the execution of the request shall be accompanied by a translation into the language in which the request was written.

Article 5

Language

The request and communications pursuant to this Regulation shall be drawn up in the official language of the requested Member State or, if there are several official languages in that Member State, in the official language or one of the official languages of the place where the requested taking of evidence is to be performed, or in another language which the requested Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the institutions of the European Community other than its own which is or are acceptable to it for completion of the forms.

Article 6

Transmission of requests and other communications

Requests and communications pursuant to this Regulation shall be transmitted by the swiftest possible means, which the requested Member State has indicated it can accept. The transmission may be carried out by any appropriate means, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible.

Section 2

Receipt of request

Article 7

Receipt of request

1. Within seven days of receipt of the request, the requested competent court shall send an acknowledgement of receipt to the requesting court using form B in the Annex. Where the request does not comply with the conditions laid down in Articles 5 and 6, the requested court shall enter a note to that effect in the acknowledgement of receipt.

2. Where the execution of a request made using form A in the Annex, which complies with the conditions laid down in Article 5, does not fall within the jurisdiction of the court to which it was transmitted, the latter shall forward the request to the competent court of its Member State and shall inform the requesting court thereof using form A in the Annex.

Article 8

Incomplete request

1. If a request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex, and shall request it to send the missing information, which should be indicated as precisely as possible.

2. If a request cannot be executed because a deposit or advance is necessary in accordance with Article 18(3), the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex and inform the requesting court how the deposit or advance should be made. The requested Court shall acknowledge receipt of the deposit or advance without delay, at the latest within 10 days of receipt of the deposit or the advance using form D.

Article 9

Completion of the request

1. If the requested court has noted on the acknowledgement of receipt pursuant to Article 7(1) that the request does not comply with the conditions laid down in Articles 5 and 6 or has informed the requesting court pursuant to Article 8 that the request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the time limit pursuant to Article 10 shall begin to run when the requested court received the request duly completed.

2. Where the requested court has asked for a deposit or advance in accordance with Article 18(3), this time limit shall begin to run when the deposit or the advance is made.

Section 3

Taking of evidence by the requested court

Article 10

General provisions on the execution of the request

1. The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.

2. The requested court shall execute the request in accordance with the law of its Member State.

3. The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court using form E in the Annex.

4. The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.

If the requested court does not comply with the requirement for one of these reasons, it shall inform the requesting court, using form E in the Annex.

If there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.

Article 11

Performance with the presence and participation of the parties

1. If it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, have the right to be present at the performance of the taking of evidence by the requested court.

2. The requesting court shall, in its request, inform the requested court that the parties and, if any, their representatives, will be present and, where appropriate, that their participation is requested, using form A in the Annex. This information may also be given at any other appropriate time.

3. If the participation of the parties and, if any, their representatives, is requested at the performance of the taking of evidence, the requested court shall determine, in accordance with Article 10, the conditions under which they may participate.

4. The requested court shall notify the parties and, if any, their representatives, of the time when, the place where, the proceedings will take place, and, where appropriate, the conditions under which they may participate, using form F in the Annex.

5. Paragraphs 1 to 4 shall not affect the possibility for the requested court of asking the parties and, if any their representatives, to be present at or to participate in the performance of the taking of evidence if that possibility is provided for by the law of its Member State.

Article 12

Performance with the presence and participation of representatives of the requesting court

1. If it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be present in the performance of the taking of evidence by the requested court.

2. For the purpose of this Article, the term 'representative' shall include members of the judicial personnel designated by the requesting court, in accordance with the law of its Member State. The requesting court may also designate, in accordance with the law of its Member State, any other person, such as an expert.

3. The requesting court shall, in its request, inform the requested court that its representatives will be present and, where appropriate, that their participation is requested, using form A in the Annex. This information may also be given at any other appropriate time.

4. If the participation of the representatives of the requesting court is requested in the performance of the taking of evidence, the requested court shall determine, in accordance with Article 10, the conditions under which they may participate.

5. The requested court shall notify the requesting court, of the time when, and the place where, the proceedings will take place, and, where appropriate, the conditions under which the representatives may participate, using form F in the Annex.

Article 13

Coercive measures

Where necessary, in executing a request the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned.

Article 14

Refusal to execute

1. A request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence,

(a) under the law of the Member State of the requested court; or

(b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court.

2. In addition to the grounds referred to in paragraph 1, the execution of a request may be refused only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1; or

(b) the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary; or

(c) the requesting court does not comply with the request of the requested court to complete the request pursuant to Article 8 within 30 days after the requested court asked it to do so; or

(d) a deposit or advance asked for in accordance with Article 18(3) is not made within 60 days after the requested court asked for such a deposit or advance.

3. Execution may not be refused by the requested court solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it.

4. If execution of the request is refused on one of the grounds referred to in paragraph 2, the requested court shall notify the requesting court thereof within 60 days of receipt of the request by the requested court using form H in the Annex.

Article 15

Notification of delay

If the requested court is not in a position to execute the request within 90 days of receipt, it shall inform the requesting court thereof, using form G in the Annex. When it does so, the grounds for the delay shall be given as well as the estimated time that the requested court expects it will need to execute the request.

Article 16

Procedure after execution of the request

The requested court shall send without delay to the requesting court the documents establishing the execution of the request and, where appropriate, return the documents received from the requesting court. The documents shall be accompanied by a confirmation of execution using form H in the Annex.

Section 4

Direct taking of evidence by the requesting court

Article 17

1. Where a court requests to take evidence directly in another Member State, it shall submit a request to the central body or the competent authority referred to in Article 3(3) in that State, using form I in the Annex.

2. Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.

Where the direct taking of evidence implies that a person shall be heard, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

3. The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court.

4. Within 30 days of receiving the request, the central body or the competent authority of the requested Member State shall inform the requesting court if the request is accepted and, if necessary, under what conditions according to the law of its Member State such performance is to be carried out, using form J.

In particular, the central body or the competent authority may assign a court of its Member State to take part in the performance of the taking of evidence in order to ensure the proper application of this Article and the conditions that have been set out.

The central body or the competent authority shall encourage the use of communications technology, such as videoconferences and teleconferences.

5. The central body or the competent authority may refuse direct taking of evidence only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1;

(b) the request does not contain all of the necessary information pursuant to Article 4; or

(c) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.

6. Without prejudice to the conditions laid down in accordance with paragraph 4, the requesting court shall execute the request in accordance with the law of its Member State.

Section 5

Costs

Article 18

1. The execution of the request, in accordance with Article 10, shall not give rise to a claim for any reimbursement of taxes or costs.

2. Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement, without delay, of:

— the fees paid to experts and interpreters, and

— the costs occasioned by the application of Article 10(3) and(4).

The duty for the parties to bear these fees or costs shall be governed by the law of the Member State of the requesting court.

3. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the requested costs. In all other cases, a deposit or advance shall not be a condition for the execution of a request.

The deposit or advance shall be made by the parties if that is provided for by the law of the Member State of the requesting court.

CHAPTER III

FINAL PROVISIONS

Article 19

Implementing rules

1. The Commission shall draw up and regularly update a manual, which shall also be available electronically, containing the information provided by the Member States in accordance with Article 22 and the agreements or arrangements in force, according to Article 21.

2. The updating or making of technical amendments to the standard forms set out in the Annex shall be carried out in accordance with the advisory procedure set out in Article 20(2).

Article 20

Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its Rules of Procedure.

Article 21

Relationship with existing or future agreements or arrangements between Member States

1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States and in particular the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in relations between the Member States party thereto.

2. This Regulation shall not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further facilitate the taking of evidence, provided that they are compatible with this Regulation.

3. Member States shall send to the Commission:

(a) by 1 July 2003, a copy of the agreements or arrangements maintained between the Member States referred to in paragraph 2;

(b) a copy of the agreements or arrangements concluded between the Member States referred to in paragraph 2 as well as drafts of such agreements or arrangements which they intend to adopt; and

(c) any denunciation of, or amendments to, these agreements or arrangements.

Article 22

Communication

By 1 July 2003 each Member State shall communicate to the Commission the following:

(a) the list pursuant to Article 2(2) indicating the territorial and, where appropriate, the special jurisdiction of the courts;

(b) the names and addresses of the central bodies and competent authorities pursuant to Article 3, indicating their territorial jurisdiction;

(c) the technical means for the receipt of requests available to the courts on the list pursuant to Article 2(2);

(d) the languages accepted for the requests as referred to in Article 5.

Member States shall inform the Commission of any subsequent changes to this information.

Article 23

Review

No later than 1 January 2007, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the practical application of Article 3(1)(c) and 3, and Articles 17 and 18.

Article 24

Entry into force

1. This Regulation shall enter into force on 1 July 2001.

2. This Regulation shall apply from 1 January 2004, except for Articles 19, 21 and 22, which shall apply from 1 July 2001.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 28 May 2001.

For the Council

The President

T. BODSTRÖM

ANNEX

FORM A

Request for the taking of evidence

(Article 4 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requesting court:
2. Reference of the requested court:
3. Requesting court:
   - 3.1. Name:
   - 3.2. Address:
     - 3.2.1. Street and No/PO box:
     - 3.2.2. Place and postcode:
     - 3.2.3. Country:
   - 3.3. Tel.
   - 3.4. Fax
   - 3.5. E-mail:
4. Requested court:
   - 4.1. Name:
   - 4.2. Address:
     - 4.2.1. Street and No/PO box:
     - 4.2.2. Place and postcode:
     - 4.2.3. Country:
   - 4.3. Tel.
   - 4.4. Fax
   - 4.5. E-mail:
5. In the case brought by the claimant/petitioner:
   - 5.1. Name:
   - 5.2. Address:
     - 5.2.1. Street and No/PO box:
     - 5.2.2. Place and postcode:
     - 5.2.3. Country:

5.3. Tel.

5.4. Fax

5.5. E-mail:

6. Representatives of the claimant/petitioner:

6.1. Name:

6.2. Address:

6.2.1. Street and No/PO box:

6.2.2. Place and postcode:

6.2.3. Country:

6.3. Tel.

6.4. Fax

6.5. E-mail:

7. Against the defendant/respondent:

7.1. Name:

7.2. Address:

7.2.1. Street and No/PO box:

7.2.2. Place and postcode:

7.2.3. Country:

7.3. Tel.

7.4. Fax

7.5. E-mail:

8. Representatives of defendant/respondent:

8.1. Name:

8.2. Address:

8.2.1. Street and No/PO box:

8.2.2. Place and postcode:

8.2.3. Country:

8.3. Tel:

8.4. Fax:

8.5. E-mail:

9. Presence and participation of the parties:

9.1. Parties and, if any, their representatives will be present at the taking of evidence: ☐

9.2. Participation of the parties and, if any, their representatives is requested: ☐

10. Presence and participation of the representatives of the requesting court:

10.1. Representatives will be present at the taking of evidence: ☐

10.2. Participation of the representatives is requested: ☐

10.2.1. Name:

10.2.2. Title:

10.2.3. Function:

10.2.4. Task:

11. Nature and subject matter of the case and a brief statement of the facts (in annex, where appropriate):

12. Taking of evidence to be performed

12.1. Description of the taking of evidence to be performed (in annex, where appropriate):

12.2. Examination of witnesses:

12.2.1. Name and surname:

12.2.2. Address:

12.2.3. Tel.

12.2.4. Fax

12.2.5. E-mail:

12.2.6. Questions to be put to the witness or a statement of the facts about which they are to be examined (in annex, where appropriate):

12.2.7. Right to refuse to testify under the law of the Member State of the requesting court (in annex, where appropriate):

12.2.8. Please examine the witness:

12.2.8.1. under oath: ☐

12.2.8.2. on affirmation: ☐

12.2.9. Any other information that the requesting court deems necessary (in annex, where appropriate):

12.3. Other taking of evidence:

12.3.1. Documents to be inspected and a description of the requested taking of evidence (in annex, where appropriate):

12.3.2. Objects to be inspected and a description of the requested taking of evidence (in annex, where appropriate):

13. Please execute the request

    13.1. In accordance with a special procedure (Article 10(3)) provided for by the law of the Member State of the requesting court and/or by the use of communications technology (Article 10(4)) described in annex:

    13.2. Following information is necessary for the application thereof:

Done at:

Date:

Notification of forwarding the request

Article 7(2) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

14. The request does not fall within the jurisdiction of the court indicated in point 4 above and was forwarded to

    14.1. Name of the competent court:

    14.2. Address:

        14.2.1. Street and No/PO box:

        14.2.2. Place and postcode:

        14.2.3. Country:

    14.3. Tel.

    14.4. Fax

    14.5. E-mail:

Done at:

Date:

FORM B

Acknowledgement of receipt of a request for the taking of evidence

(Article 7(1) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requesting court:

2. Reference of the requested court:

3. Name of the requesting court:

4. Requested court:

   4.1. Name:

   4.2. Address:

      4.2.1. Street and No/PO box:

      4.2.2. Place and postcode:

      4.2.3. Country:

   4.3. Tel.

   4.4. Fax

   4.5. E-mail:

5. The request was received on … (date of receipt) by the court indicated in point 4 above.

6. The request cannot be dealt with because:

   6.1. The language used to complete the form is not acceptable (Article 5): ☐

      6.1.1. Please use one the following languages:

   6.2. The document is not legible (Article 6): ☐

Done at:

Date:

FORM C

Request for additional information for the taking of evidence

(Article 8 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requested court:

2. Reference of the requesting court:

3. Name of the requesting court:

4. Name of the requested court:

5. The request cannot be executed without the following additional information:

6. The request cannot be executed before a deposit or advance is made in accordance with Article 18(3). The deposit or advance should be made in the following way:

Done at:

Date:

FORM D

Acknowledgement of receipt of the deposit or advance

(Article 8(2) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requesting court:

2. Reference of the requested court:

3. Name of the requesting court:

4. Name of the requested court:

5. The deposit or advance was received on ... (date of receipt) by the court indicated in point 4 above.

Done at:

Date:

FORM E

Notification concerning the request for special procedures and/or for the use of communications technologies

(Article 10(3) and (4) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requested court:

2. Reference of the requesting court:

3. Name of the requesting court:

4. Name of the requested court:

5. The requirement for execution of the request according to the special procedure indicated in point 13.1 of the request (Form A) could not be complied with because:

   5.1. the required procedure is incompatible with the law of the Member State of the requested court: ☐

   5.2. the performance of the requested procedure is not possible by reason of major practical difficulties: ☐

6. The requirement for execution of the request for the use of communications technologies indicated in point 13.1 of the request (Form A) could not be complied with because:

   6.1. The use of communications technology is incompatible with the law of the Member State of the requested court ☐

   6.2. The use of the communications technology is not possible by reason of major practical difficulties ☐

Done at:

Date:

FORM F

Notification of the date, time, place of performance of the taking of evidence and the conditions for participation

(Articles 11(4) and 12(5) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requesting court:

2. Reference of the requested court:

3. Requesting court

   3.1. Name:

   3.2. Address:

      3.2.1. Street and No/PO box:

      3.2.2. Place and postcode:

      3.2.3. Country:

   3.3. Tel.

   3.4. Fax

   3.5. E-mail:

4. Requested court

   4.1. Name:

   4.2. Address:

      4.2.1. Street and No/PO box:

      4.2.2. Place and postcode:

      4.2.3. Country:

   4.3. Tel.

   4.4. Fax

   4.5. E-mail:

5. Date and time of the performance of the taking of evidence:

6. Place of the performance of the taking of evidence, if different from that referred to in point 4 above:

7. Where appropriate, conditions under which the parties and, if any, their representatives may participate:

8. Where appropriate, conditions under which the representatives of the requesting court may participate:

Done at:

Date:

FORM G

Notification of delay

(Article 15 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requested court:

2. Reference of the requesting court:

3. Name of the requesting court:

4. Name of the requested court:

5. The request can not be executed within 90 days of receipt for the following reasons:

6. It is estimated that the request will be executed by ... (indicate an estimated date)

Done at:

Date:

FORM H

Information on the outcome of the request

(Articles 14 and 16 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requested court:

2. Reference of the requesting court:

3. Name of the requesting court:

4. Name of the requested court:

5. The request has been executed. ☐

   The documents establishing execution of the request are attached:

6. Execution of the request has been refused because:

   6.1. the person to be examined has claimed the right to refuse to give evidence or has claimed to be prohibited from giving evidence:

      6.1.1. under the law of the Member State of the requested court: ☐

      6.1.2. under the law of the Member State of the requesting court: ☐

   6.2. The request does not fall within the scope of this Regulation ☐

   6.3. Under the law of the Member State of the requested court, the execution of the request does not fall within the functions of the judiciary: ☐

   6.4. The requesting court has not complied with the request for additional information from the requested court dated ... (date of the request): ☐

   6.5. A deposit or advance asked for in accordance with Article 18(3) has not been made: ☐

Done at:

Date:

FORM I

Request for direct taking of evidence

(Article 17 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requesting court:

2. Reference of the central body/competent authority:

3. Requesting court:

   3.1. Name:

   3.2. Address:

      3.2.1. Street and No/PO box:

      3.2.2. Place and postcode:

      3.2.3. Country:

   3.3. Tel.

   3.4. Fax

   3.5. E-mail:

4. Central body/competent authority of the requested State:

   4.1. Name:

   4.2. Address:

      4.2.1. Street and No/PO box:

      4.2.2. Place and postcode:

      4.2.3. Country:

   4.3. Tel.

   4.4. Fax

   4.5. E-mail:

5. In the case brought by the claimant/petitioner:

   5.1. Name:

   5.2. Address:

      5.2.1. Street and No/PO box:

      5.2.2. Place and postcode:

      5.2.3. Country:

5.3. Tel.:

5.4. Fax

5.5. E-mail:

6. Representatives of the claimant/petitioner:

6.1. Name:

6.2. Address:

6.2.1. Street and No/PO box:

6.2.2. Place and postcode:

6.2.3. Country:

6.3. Tel.

6.4. Fax

6.5. E-mail:

7. Against the defendant/respondent:

7.1. Name:

7.2. Address:

7.2.1. Street and No/PO box:

7.2.2. Place and postcode:

7.2.3. Country:

7.3. Tel.

7.4. Fax

7.5. E-mail:

8. Representatives of defendant/respondent:

8.1. Name:

8.2. Address:

8.2.1. Street and No/PO box:

8.2.2. Place and postcode:

8.2.3. Country:

8.3. Tel.

8.4. Fax

8.5. E-mail:

9. The taking of evidence shall be performed by:

   9.1. Name:

   9.2. Title:

   9.3. Function:

   9.4. Task:

10. Nature and subject matter of the case and a brief statement of the facts (in annex, where appropriate):

11. Taking of evidence to be performed:

   11.1. Description of the taking of evidence to be performed (in annex, where appropriate):

   11.2. Examination of witnesses:

      11.2.1. First names and surname:

      11.2.2. Address:

      11.2.3. Tel.

      11.2.4. Fax

      11.2.5. E-mail:

      11.2.6. Questions to be put to the witness or a statement of the facts about which they are to be examined (in the annex, where appropriate):

      11.2.7. Right to refuse to testify under the law of the Member State of the requesting court (in annex, where appropriate):

   11.3. Other taking of evidence (in annex, where appropriate):

12. The requesting court requests to take evidence directly by use of the following communications technology (in annex, where appropriate):

Done at:

Date:

FORM J

Information from the central body/competent authority

(Article 17 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1))

1. Reference of the requesting court:

2. Reference of the central body/competent authority:

3. Name of the requesting court:

4. Central body/competent authority:

   4.1. Name:

   4.2. Address:

      4.2.1. Street and No/PO box:

      4.2.2. Place and postcode:

      4.2.3. Country:

   4.3. Tel.

   4.4. Fax

   4.5. E-mail:

5. Information from the central body/competent authority:

   5.1. Direct taking of evidence in accordance with the request is accepted: ☐

   5.2. Direct taking of evidence in accordance with the request is accepted under the following conditions (in annex, where appropriate): ☐

   5.3. Direct taking of evidence in accordance with the request is refused for the following reasons:

      5.3.1. The request does not fall within the scope of this Regulation: ☐

      5.3.2. The request does not contain all of the necessary information pursuant to Article 4: ☐

      5.3.3. The direct taking of evidence requested for is contrary to fundamental principles of law of the Member State of the central body/competent authority: ☐

Done at:

Date:

Legal aid

SALLY LANGRISH [1]

Sally Langrish obtained an LL B (Honours) at University College London in 1989, and became Barrister at Law (Middle Temple) in 1991.

She has been Assistant Legal Adviser at the Foreign and Commonwealth Office, London, since 1995.

Since 2000, she has been First Secretary at the Justice and Home Affairs Section (Civil Law) of the United Kingdom Permanent Representation to the European Union.

Previous publication

'The Treaty of Amsterdam: Selected highlights', European Law Review, Vol. 23, No 1, February 1998.

VII

(1) The views expressed in the text that follows are the author's personal views and are not to be taken in any way to represent the position of Her Majesty's Government.

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. See also the corrigenda set out at the end of the Act.

Directive 2002/8/EC on civil legal aid was adopted to fulfil a political remit from the conclusions of the 1999 Tampere European Council. In order to facilitate access to justice in civil and commercial cases, the European Council invited the Council of Ministers to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union (1).

The directive was adopted under Articles 61(c) and 67 of the EC Treaty. These articles, in conjunction with Article 65 of the Treaty, enable the adoption of 'measures in the field of judicial cooperation in civil matters having cross-border implications … in so far as necessary for the proper functioning of the internal market'. Under Article 65(c), the measures permitted include those 'eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States'. In accordance with the procedural requirements of Article 67 (as it applied before the entry into force of the Treaty of Nice on 1 February 2003 (2)), the Council acted on the basis of a proposal from the Commission of 18 January 2002 (3). The European Parliament was consulted and delivered its opinion on 25 September 2002 (4). The directive was adopted unanimously by the Member States on 27 January 2003.

The directive contains 23 articles set out in 5 chapters. Chapter I deals with scope and definitions; Chapter II sets out the right to legal aid; Chapter III determines the conditions and extent of legal aid; Chapter IV establishes the procedure for making a legal aid application under the directive; and Chapter V contains final provisions.

Chapter I: Scope and definitions

Article 1(1) sets out the central aim of the directive which is 'to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes'. This, of course, echoes the mandate from the Tampere conclusions. Article 1(2) limits the application of the directive to 'cross-border disputes'. These are defined in Article 2 of the directive. Article 2(1) and (3) defines a cross-border dispute as one where the party applying for legal aid is, at the time when he submits an application under the directive, domiciled or habitually resident in a different Member State from

(1) Presidency conclusions, Tampere European Council, 15 and 16 October 1999, paragraph 30.
(2) Following the entry into force of the Treaty of Nice, measures provided for in Article 65, with the exception of aspects relating to family law, are now adopted by the co-decision procedure under Article 251 of the EC Treaty.
(3) OJ C 103 E, 30.4.2002, p. 368.
(4) OJ C 273 E, 14.11.2003.

the Member State where the court hearing the dispute or enforcing a judicial decision is located (5). In simple terms, then, the directive applies where a party needs to litigate or enforce a decision in another Member State from the one where he normally lives. It does not, by contrast, govern cases which can be considered 'domestic' in the sense that the litigant and the relevant court are located in the same Member State, even if there may be other cross-border aspects to the case.

Article 1 contains two other elements determining the scope of the directive. The first element is the type of dispute to which the directive applies. Article 1(2) says that it applies to civil and commercial matters, whatever the nature of the court or tribunal hearing the dispute. 'Civil and commercial matters' are not defined. However, this wording echoes Article 1 of the Brussels I Regulation and so the directive is likely to be interpreted as covering disputes which would be covered by that regulation. Article 1(2) of the directive says that it will not extend, in particular, to revenue, customs or administrative matters. This, again, echoes Article 1(1) of the Brussels I Regulation.

The second element to note concerning scope is that the directive does not cover all Member States: Article 1(3) provides that the directive does not apply to Denmark. The reason for this is found in recital 34, which refers to Articles 1 and 2 of the protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community. That protocol excludes Denmark from taking part in the adoption of proposed measures pursuant to Title IV of the EC Treaty: the legal bases for the directive — Articles 61 and 67 — fall, of course, within Title IV.

By contrast to Denmark's position, the United Kingdom and Ireland were able, under the protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, to notify whether or not they wished to participate in this directive. Recital 33 in the preamble to the directive records that both those Member States gave notice of their wish to participate in the adoption of the directive, in accordance with Article 3 of the relevant protocol. Accordingly, the directive applies to all the Member States except Denmark.

(5) The rules on domicile are, according to Article 2(2), determined by reference to Article 59 of the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000). Essentially, the Member State where the court is sitting and which is seised of the application for legal aid should, under Article 59(2) of that regulation, apply the law of the Member State where the applicant claims to be domiciled in order to determine whether he is in fact domiciled there.

Chapter II: Right to legal aid

This chapter determines which persons are entitled to apply for legal aid under the directive and defines the basic concept of legal aid for the purposes of the directive.

In terms of the persons entitled to apply for legal aid, Article 3(1) provides that the rights under the directive are conferred on natural persons. By implication, legal persons such as companies or not-for-profit organisations are not covered. Article 4 makes clear that the directive covers both citizens of the European Union and third-country nationals residing lawfully in a Member State. This provision operates as a non-discrimination rule, requiring Member States to treat these two categories of persons equally.

Article 3 is the key article defining the concept of legal aid for the purposes of the directive. As a general principle, Article 3(1) gives litigants the right to receive 'appropriate legal aid in order to ensure their effective access to justice'. The article makes clear that this right is subject to conditions laid down elsewhere in the directive and that the dispute must be within the scope of the directive. Recital 11 gives a good summary of what is meant by 'appropriate legal aid'. It covers, firstly, pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, secondly, legal assistance in bringing a case before a court, and, thirdly, representation in court and assistance with or exemption from the cost of proceedings.

These three different aspects of appropriate legal aid are set out in Article 3(2). The focus is clearly on situations where cross-border court proceedings are actually under way or where there is a real prospect of such proceedings. Because pre-litigation advice under Article 3(2)(a) is limited to the purpose of reaching a settlement prior to bringing proceedings, this appears to exclude applicants from seeking legal aid for other, wider purposes or where there is no litigation in prospect. Article 3(2)(b) confers the right to legal assistance and representation in court: this comes into play at the stages of preparation of the case and presentation of the case to the court, both through written pleadings and at a court hearing.

Assistance with the costs of the case is also dealt with in Article 3(2)(b) and could involve several types of cost. One type is court fees, including fees paid by the court to persons (presumably such as court officials or expert witnesses) who perform acts during the proceedings. A second category of costs is various costs specific to the situation of the cross-border litigant, such as costs of interpretation, translation and travel to the hearing. These are dealt with in Article 7 of the directive and described further below. A third category is the costs of the opposing party. In some Member States a party who loses a case is liable to pay his opponent's legal costs. The final paragraph of Article 3(2) provides that if a recipient of legal aid under the directive loses the case and is subject to such a costs rule, those costs should be covered by his legal aid if a litigant habitually resident in the Member State where the court is situated would have been covered in this way. This is essentially a non-discrimination rule and does not require Member States automatically to grant legal aid to a cross-border applicant to cover the successful party's costs if this is not the

normal practice under their system. Recital 12 makes clear that this is to be left to the law of the Member State where the court is sitting or where enforcement is sought.

Article 3(3) contains an important limitation to the concept of 'appropriate legal aid' in the context of 'proceedings especially designed to enable litigants to make their case in person'. These proceedings might include small claims procedures of the sort which exist in several Member States or simplified court or tribunal procedures. In such types of proceedings, Article 3(3) says that Member States need not provide legal assistance or representation. This suggests, by contrast, that the right to pre-litigation advice under Article 3(2)(a) still applies in these cases. As a safeguard, Article 3(3) allows (and probably requires) legal aid to be granted if the court or other competent authority decides that legal aid is necessary to ensure equality of parties or in view of the complexity of the case.

Article 3(4) and (5) addresses another aspect of 'appropriate' legal aid by focusing on the amount received by the litigant. Article 3(4) allows a Member State to require a financial contribution towards the cost of proceedings: if it does, the legal aid recipient will be assessed according to Article 5 (described below) for his ability to contribute. Under Article 3(5), a Member State may require a legal aid recipient to refund all or part of what he has received if his financial situation has substantially improved or if the legal aid was granted on the basis of inaccurate information given by the recipient. These provisions work together with Articles 5 and 9(4) to allow Member States to allocate funds available for legal aid according to the recipient's financial need, thereby promoting good use of public funds.

Chapter III: Conditions and extent of legal aid

Following on from the broad principles in Chapter II, this chapter sets out more detailed rules governing the assessment of applications for legal aid. Articles 5 and 6 are the most important. These deal, respectively, with conditions relating to the applicant's financial resources and conditions relating to the substance of the dispute. The provisions allow Member States, to some extent, to ensure that the money which they have available for civil legal aid can be targeted at applicants and cases which most merit public funding. Although the question of what costs are borne respectively by the applicant's home Member State and the Member State where the court is situated is more fully dealt with in Articles 8 and 12 (described below), it is helpful in understanding Articles 5 and 6 to know that the majority of the legal aid costs fall to be covered by the Member State where the court is sitting. Accordingly, the

applicant is being assessed under the rules of that Member State's legal aid system, and not under the system in his home Member State.

Article 5(1) establishes the general proposition that Member States should fund persons who are 'partly or totally unable to meet the cost of proceedings … as a result of their economic situation, in order to ensure their effective access to justice'. Article 5(2) allows the Member State to assess the cross-border applicant's economic situation in the light of objective factors such as his income, his capital resources or his family situation. This assessment may also take into account the resources of persons who are financially dependent on the applicant.

Some Member States use financial thresholds above which applicants are presumed to be able to bear the cost of proceedings. Article 5(3) allows such thresholds to be used in the context of the directive so long as they are based on the objective factors mentioned in Article 5(2). However, as a safeguard against the risk that a threshold may indirectly discriminate against a cross-border applicant because of differences in the cost of living between the Member States, Article 5(4) provides that the threshold may not be used if a legal aid applicant can prove that he is unable to pay the cost of proceedings because of such differences in the cost of living. Recital 15 mentions a potentially relevant factor to be taken into account here, namely whether the applicant would satisfy the criteria for financial eligibility for legal aid in his own Member State.

Article 5(5) contains one further ground on which legal aid may be refused for financial reasons. Legal aid need not be granted to an applicant who enjoys, in the instant case, effective access to another mechanism that covers the cost of proceedings. This could include, for example, funding available from legal expenses insurance or because of the possibility which exists in certain Member States to obtain a conditional fee arrangement (sometimes called a 'no-win, no-fee' arrangement). Recital 16 makes clear that these other mechanisms are not in themselves a form of legal aid but that they can warrant a presumption that the litigant can bear the cost of legal proceedings notwithstanding his personal financial situation.

Article 6 is the second key article in determining the applicant's eligibility for legal aid. The conditions in this article deal with the strengths or merits of the applicant's case. As a first step, Article 6(1) allows a Member State to reject outright an application for legal aid for an action which appears to be manifestly unfounded. If the case cannot initially be said to be manifestly unfounded, Article 6(2) provides that, once the applicant has been offered initial pre-litigation advice, he may, so long as access to justice is still guaranteed (1), be refused further legal aid on 'grounds related to the merits of the case'. In other words, the Member State may decide that his case is in-

(1) The directive offers no definition of the terms 'manifestly unfounded' or 'access to justice is guaranteed', effectively leaving it to the Member States to apply their national law on these matters. The jurisprudence of the European Court of Human Rights relating to Article 6 of the European Convention on Human Rights may also be considered relevant in this regard.

sufficiently strong to justify the use of public funding. Any refusal of legal aid under Article 6 of the directive is subject to the appeal provisions of Article 15, described below.

The directive gives little guidance on the way in which Member States' competent authorities should assess the merits of the applicant's case, leaving it to national law and procedure in each Member State. These national systems may vary quite widely in the criteria that they use: potential criteria might include an assessment of the prospects of success, the type of case, and the potential financial and other benefits to the applicant of winning the case.

Article 6(3) implies that an approach based on a range of such criteria is valid by focusing on two criteria besides the pure prospect of winning the legal arguments in the case. First, it specifically requires Member States to consider the importance of the individual case to the applicant. Second, it allows the Member State to take into account the nature of the case in two specific categories of dispute. The first category is where the applicant claims damage to his reputation but has suffered no material or financial loss — this would cover certain types of libel actions in some Member States. The second category is where the claim arises directly out of the applicant's trade or self-employed profession; this reinforces the exclusion of commercial litigants in Article 3(1) of the directive by further excluding claims brought by an individual in the context of his business activities.

Articles 7 and 8 focus specifically on the cross-border dimension of the case, recognising that certain costs are inherent in the fact that the applicant does not live in the same Member State as the court hearing the dispute. Article 7 requires legal aid granted by the Member State where the court is sitting to cover certain costs directly related to the cross-border nature of the dispute. These are interpretation, translation of documents necessary for the resolution of the case, and travel costs for any person whose presence is required in court for the presentation of the case. Recital 19 reminds courts that they should take full advantage of the possibilities offered by Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matters ([2]). These possibilities include the use of videoconference and teleconference technology, as well as more traditional means of taking evidence from a witness outside the jurisdiction.

Article 8 counterbalances Article 7 by requiring the applicant's home Member State to bear certain other cross-border-related costs. The home Member State must provide legal aid to cover the cost of the applicant obtaining pre-litigation assistance and advice in his home Member State until his application for legal aid has been received by the Member State where the court is sitting. The home Member State also covers the cost of translating the application for legal aid and the necessary supporting documents.

([2]) Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

Article 9 of the directive reflects the fact that obtaining a court ruling on a dispute may not be the end of the story. Recital 20 says that if legal aid is granted it 'must cover the entire proceeding, including expenses incurred in having a judgment enforced'. It should also continue 'if an appeal is brought either against or by the recipient in so far as the conditions relating to the financial resources and the substance of the dispute remain fulfilled. Article 9(1) and (2) confers the right to legal aid to cover the cost of cross-border enforcement of a judgment. Article 9(3) deals with legal aid for an appeal, explicitly linking the right to continued legal aid to ongoing eligibility under Articles 5 and 6. This means, in particular, that the prospects of the applicant's success in bringing or defending an appeal may be assessed before legal aid is granted.

As a more general rule, Article 9(4) authorises Member States to re-examine eligibility for legal aid at any stage in the proceedings on grounds set out in Articles 3(3) and (5), 5 and 6 of the directive. This means that a Member State may at any time review the status of the applicant's financial resources, the merits of the case, and the appropriateness of legal aid in view of the type of court hearing the case or procedure. These checks are not limited to the moment where the applicant requests continuation of legal aid for an appeal or for enforcement proceedings.

Article 10 covers another possibility for extension of legal aid beyond the initial court proceedings, by covering extrajudicial procedures. If the law or the court requires the parties to a dispute to use extrajudicial procedures, such as mediation or arbitration, legal aid must be extended to cover these procedures, subject to the conditions defined in the directive.

Chapter IV: Procedure

This chapter sets out the procedural practicalities for an individual applying for legal aid under the directive. It covers completion of the necessary application forms, transmission of the application from the individual's home Member State to the Member State where the court is sitting or where the decision is to be enforced, language and translation issues, and rules for processing the application in the Member State granting legal aid [1].

Article 12 is the starting point. It provides, as a basic rule, that legal aid is to be granted (and, by implication, paid for) or refused by the competent authority of the Member State in which the court is sitting. In other words, apart from the limited costs covered by Article 8 (described above), cross-border legal aid is not the responsibility of the applicant's home Member State.

[1] Recital 26 in the preamble to the directive notes that the European agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, was the direct inspiration for the notification and transmission mechanism provided for in Chapter IV of the directive, although that agreement does not include the 15-day time limit provided for in Article 13(4) of the directive.

Recital 24 describes it as 'appropriate' that legal aid is granted by the competent authorities of the Member State in which the court is sitting. Recital 23 says that the Member State will apply its own legislation in compliance with the principles of the directive to determine whether or not to grant legal aid.

Article 14 requires each Member State to designate an authority or authorities competent to send and receive legal aid applications under the directive. The authority competent to send applications is called the 'transmitting authority'. The authority which may receive applications is called the 'receiving authority'. The Member States must provide the Commission with the names and addresses of their competent authorities and the geographical areas in which they have jurisdiction. This information will be published in the Official Journal.

Article 13 sets out the rules for introduction of a legal aid application by the applicant and for its transmission, if necessary, between Member States' authorities. Under Article 13(1), the applicant may choose to submit his application either to the transmitting authority in his home Member State or to the receiving authority in the Member State where the court is sitting or the decision is to be enforced. Article 16 provides for a standard form for legal aid applications under the directive (1). Recital 28 in the preamble to the directive says that the purpose of the standard form is to make application procedures easier and faster. According to recital 29, the standard application form, as well as national application forms, should be made available on a European level through the information system of the European Judicial Network (2).

Articles 13(2), 14 and 8(b) of the directive deal with language and translation issues arising out of the application for legal aid. Article 13(2) offers the applicant more than one possibility. He may complete the form in the official language (or one of the languages) of the Member State of the receiving authority, so long as this language is one of the languages of the Community institutions. Alternatively, Article 14(3) allows a Member State to notify the Commission of other Community languages in which its receiving authority is prepared to receive applications under the directive. Those other languages are to be communicated to the Commission and will be published in the Official Journal. Article 13(2) requires supporting documents accompanying the legal aid application also to be translated in accordance with these rules. We have already seen that, under Article 8(b), the applicant's home Member State must provide legal aid needed to cover the cost of translating the application and necessary supporting documents. However, Article 8(b) only applies where the application is submitted to the transmitting authority in the applicant's home Member State. This suggests that if the applicant chooses to submit his application directly to the receiving authority in the Member State where the court is sitting he must bear the costs of translation himself.

(1) Article 16 requires the form to be established by 30 November 2004. It will be drawn up by the Commission, assisted by a committee operating under the advisory procedure in Articles 3 and 7 of Decision 1999/468/EC.
(2) The wording of this recital suggests that the national application forms will continue to be available for use in applications under the directive even after the standard form is established.

The transmitting authority has a role in ensuring 'quality control' of an application before sending it to another Member State. Where the application is submitted to the transmitting authority in the applicant's home Member State, that authority may, under Article 13(3), refuse to transmit the application if it is manifestly unfounded or manifestly outside the scope of the directive. If the transmitting authority does so, its decision is subject to the provisions for review or appeal provided for in Article 15(2) and (3) (described below). The transmitting authority also has a duty to assist the applicant by ensuring that the application is accompanied by all the supporting documents required to enable the application to be determined (see Article 13(4)).

Once the transmitting authority has received the application duly completed in one of the languages authorised by the directive and the supporting documents have been translated where necessary into those languages, it must transmit the application within 15 days to the receiving authority in the Member State where the court is sitting. Article 16 provides for a standard form to facilitate transmission of legal aid application between the transmitting and receiving authorities. This form has already been established by Commission decision of 18 June 2003 [1].

No legalisation or any other such formality is needed for documents transmitted under the directive (see Article 13(5)). The Member State may not charge the applicant for services rendered in assisting him to complete the application, or for transmission of the application. However, the transmitting authority may recover translation costs from the applicant if the application is rejected by the competent authority in the Member State receiving the application.

Once the application has been received in the Member State where the court is sitting, the processing of the application is governed by Article 15 of the directive. Article 15(1) requires the national authorities which determine the application in the receiving Member State to keep the applicant fully informed of the processing of the application. If the application is totally or partially rejected, the authorities must give reasons for this.

Article 15(3) and (4) allows the applicant to seek a review of or appeal against any such rejection. However, if the request for legal aid is rejected by a court or tribunal against whose decision there is no judicial remedy under the national law of the receiving Member State or by a court of appeal in the receiving Member State, no further provision for review or appeal is necessary. Article 15(4) contains further a specific provision governing an appeal, where an application is rejected under Article 6 because it is manifestly unfounded or because of the merits of the case. If the appeal available against such a decision is of an administrative nature (for example, to a legal aid authority rather than to an independent court or tribunal), the decision of that administrative appeal must always be ultimately subject to judicial review.

[1] Commission decision of 18 June 2003 establishing a form for the transmission of legal aid applications under Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

Chapter V: Final provisions

This brief closing chapter contains a number of miscellaneous provisions, mainly linked to Member States' implementation of the directive into their national law. Article 18 aims to encourage provision of information on legal aid to the general public and professional circles. It requires the competent national authorities to cooperate to provide information on the various systems of legal aid, in particular via the European Judicial Network ([1]).

Article 19 makes clear that the Member State may adopt more favourable provisions for legal aid applicants and recipients than those required by the directive. This fits in with the overall aim in Article 1 of the directive, namely to establish minimum common rules. By definition, the Member States are free to go further in their national law if they so wish.

Article 20 governs the relationship of the directive to existing international agreements covering the same subject matter. As between the Member States, the directive takes precedence over such agreements. Article 20 mentions two agreements, in particular, which are affected by this rule. The first is the 1977 Council of Europe European agreement on the transmission of applications for legal aid amended by the 2001 additional protocol. Recital 32 in the preamble to the directive clarifies that this agreement and protocol continue to govern relations between the Member States and third countries that are party to the agreement or protocol ([2]). The second is the Hague Convention of 25 October 1980 on International Access to Justice.

Finally, in the normal way, the directive sets a deadline for its transposition into the national law of the Member States. Article 21 sets this deadline as 30 November 2004. The Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive no later than that date (the same date on which the standard form for legal aid applications is to be established under Article 16). As an exception to this transposition date, the Member States are given an extra 18 months to transpose Article 3(2)(a) into their national law. Accordingly, the right to cross-border legal aid for pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings will apply after 30 May 2006.

([1]) The website of the European Judicial Network provides easy access to basic information on the legal aid system of each Member State (http://europa.eu.int/comm/justice_home/ejn/index.htm).
([2]) The fact that the directive's procedures are based on the European agreement should maintain consistency between the system applied by Member States between themselves under the directive and that applied in relation to third States. At the time of writing, all Member States except Germany are parties to the 1977 agreement.

COUNCIL DIRECTIVE 2002/8/EC

of 27 January 2003

to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

(2) According to Article 65(c) of the Treaty, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(3) The Tampere European Council on 15 and 16 October 1999 called on the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union.

(4) All Member States are contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute.

(5) This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union.

(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.

(7) Since the objectives of this Directive cannot be sufficiently achieved by the Member States acting alone and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(8) The main purpose of this Directive is to guarantee an adequate level of legal aid in cross-border disputes by laying down certain minimum common standards relating to legal aid in such disputes. A Council directive is the most suitable legislative instrument for this purpose.

(9) This Directive applies in cross-border disputes, to civil and commercial matters.

(10) All persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive.

(11) Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.

(12) It shall be left to the law of the Member State in which the court is sitting or where enforcement is sought whether the costs of proceedings may include the costs of the opponent imposed on the recipient of legal aid.

(13) All Union citizens, wherever they are domiciled or habitually resident in the territory of a Member State, must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.

[1] OJ C 103 E, 30.4.2002, p. 368.
[2] Opinion delivered on 25 September 2002 (not yet published in the Official Journal).
[3] OJ C 221, 17.9.2002, p. 64.

(14) Member States should be left free to define the threshold above which a person would be presumed able to bear the costs of proceedings, in the conditions defined in this Directive. Such thresholds are to be defined in the light of various objective factors such as income, capital or family situation.

(15) The objective of this Directive could not, however, be attained if legal aid applicants did not have the possibility of proving that they cannot bear the costs of proceedings even if their resources exceed the threshold defined by the Member State where the court is sitting. When making the assessment of whether legal aid is to be granted on this basis, the authorities in the Member State where the court is sitting may take into account information as to the fact that the applicant satisfies criteria in respect of financial eligibility in the Member State of domicile or habitual residence.

(16) The possibility in the instant case of resorting to other mechanisms to ensure effective access to justice is not a form of legal aid. But it can warrant a presumption that the person concerned can bear the costs of the procedure despite his/her unfavourable financial situation.

(17) Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed. When taking a decision on the merits of an application, Member States may reject legal aid applications when the applicant is claiming damage to his or her reputation, but has suffered no material or financial loss or the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

(18) The complexity of and differences between the legal systems of the Member States and the costs inherent in the cross-border dimension of a dispute should not preclude access to justice. Legal aid should accordingly cover costs directly connected with the cross-border dimension of a dispute.

(19) When considering if the physical presence of a person in court is required, the courts of a Member State should take into consideration the full advantage of the possibilities offered by Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [1].

(20) If legal aid is granted, it must cover the entire proceeding, including expenses incurred in having a judgment enforced; the recipient should continue receiving this aid if an appeal is brought either against or by the recipient in so far as the conditions relating to the financial resources and the substance of the dispute remain fulfilled.

(21) Legal aid is to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court.

(22) Legal aid should also be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

(23) Since legal aid is given by the Member State in which the court is sitting or where enforcement is sought, except pre-litigation assistance if the legal aid applicant is not domiciled or habitually resident in the Member State where the court is sitting, that Member State must apply its own legislation, in compliance with the principles of this Directive.

(24) It is appropriate that legal aid is granted or refused by the competent authority of the Member State in which the court is sitting or where a judgment is to be enforced. This is the case both when that court is trying the case in substance and when it first has to decide whether it has jurisdiction.

(25) Judicial cooperation in civil matters should be organised between Member States to encourage information for the public and professional circles and to simplify and accelerate the transmission of legal aid applications between Member States.

(26) The notification and transmission mechanisms provided for by this Directive are inspired directly by those of the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, hereinafter referred to as '1977 Agreement'. A time limit, not provided for by the 1977 Agreement, is set for the transmission of legal aid applications. A relatively short time limit contributes to the smooth operation of justice.

(27) The information transmitted pursuant to this Directive should enjoy protection. Since Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2], and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [3], are applicable, there is no need for specific provisions on data protection in this Directive.

[1] OJ L 174, 27.6.2001, p. 1.

[2] OJ L 281, 23.11.1995, p. 31.

[3] OJ L 24, 30.1.1998, p. 1.

(28) The establishment of a standard form for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation will make the procedures easier and faster.

(29) Moreover, these application forms, as well as national application forms, should be made available on a European level through the information system of the European Judicial Network, established in accordance with Decision 2001/470/EC [1].

(30) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [2].

(31) It should be specified that the establishment of minimum standards in cross-border disputes does not prevent Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

(32) The 1977 Agreement and the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001, remain applicable to relations between Member States and third countries that are parties to the 1977 Agreement or the Protocol. But this Directive takes precedence over provisions contained in the 1977 Agreement and the Protocol in relations between Member States.

(33) The United Kingdom and Ireland have given notice of their wish to participate in the adoption of this Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community.

(34) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Aims and scope

1. The purpose of this Directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes.

2. It shall apply, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

3. In this Directive, 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive, a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.

2. The Member State in which a party is domiciled shall be determined in accordance with Article 59 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3].

3. The relevant moment to determine if there is a cross-border dispute is the time when the application is submitted, in accordance with this Directive.

CHAPTER II

RIGHT TO LEGAL AID

Article 3

Right to legal aid

1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.

2. Legal aid is considered to be appropriate when it guarantees:

(a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;

(b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings.

In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.

[1] OJ L 174, 27.6.2001, p. 25.
[2] OJ L 184, 17.7.1999, p. 23.
[3] OJ L 12, 16.1.2001, p. 1; Regulation as amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).

3. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.

4. Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 5.

5. Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.

Article 4

Non-discrimination

Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.

CHAPTER III

CONDITIONS AND EXTENT OF LEGAL AID

Article 5

Conditions relating to financial resources

1. Member States shall grant legal aid to persons referred to in Article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in Article 3(2) as a result of their economic situation, in order to ensure their effective access to justice.

2. The economic situation of a person shall be assessed by the competent authority of the Member State in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are financially dependant on the applicant.

3. Member States may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of proceedings set out in Article 3(2). These thresholds shall be defined on the basis of the criteria defined in paragraph 2 of this Article.

4. Thresholds defined according to paragraph 3 of this Article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of the proceedings referred to in Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.

5. Legal aid does not need to be granted to applicants in so far as they enjoy, in the instant case, effective access to other mechanisms that cover the cost of proceedings referred to in Article 3(2).

Article 6

Conditions relating to the substance of disputes

1. Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities.

2. If pre-litigation advice is offered, the benefit of further legal aid may be refused or cancelled on grounds related to the merits of the case in so far as access to justice is guaranteed.

3. When taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

Article 7

Costs related to the cross-border nature of the dispute

Legal aid granted in the Member State in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:

(a) interpretation;

(b) translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and

(c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Article 8

Costs covered by the Member State of the domicile or habitual residence

The Member State in which the legal aid applicant is domiciled or habitually resident shall provide legal aid, as referred to in Article 3(2), necessary to cover:

(a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred in that Member State until the application for legal aid has been received, in accordance with this Directive, in the Member State where the court is sitting;

(b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

Article 9

Continuity of legal aid

1. Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.

2. A recipient who in the Member State where the court is sitting has received legal aid shall receive legal aid provided for by the law of the Member State where recognition or enforcement is sought.

3. Legal aid shall continue to be available if an appeal is brought either against or by the recipient, subject to Articles 5 and 6.

4. Member States may make provision for the re-examination of the application at any stage in the proceedings on the grounds set out in Articles 3(3) and (5), 5 and 6, including proceedings referred to in paragraphs 1 to 3 of this Article.

Article 10

Extrajudicial procedures

Legal aid shall also be extended to extrajudicial procedures, under the conditions defined in this Directive, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

Article 11

Authentic instruments

Legal aid shall be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

CHAPTER IV

PROCEDURE

Article 12

Authority granting legal aid

Legal aid shall be granted or refused by the competent authority of the Member State in which the court is sitting, without prejudice to Article 8.

Article 13

Introduction and transmission of legal aid applications

1. Legal aid applications may be submitted to either:

(a) the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority); or

(b) the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).

2. Legal aid applications shall be completed in, and supporting documents translated into:

(a) the official language or one of the languages of the Member State of the competent receiving authority which corresponds to one of the languages of the Community institutions; or

(b) another language which that Member State has indicated it can accept in accordance with Article 14(3).

3. The competent transmitting authorities may decide to refuse to transmit an application if it is manifestly:

(a) unfounded; or

(b) outside the scope of this Directive.

The conditions referred to in Article 15(2) and (3) apply to such decisions.

4. The competent transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined. It shall also assist the applicant in providing any necessary translation of the supporting documents, in accordance with Article 8(b).

The competent transmitting authority shall transmit the application to the competent receiving authority in the other Member State within 15 days of the receipt of the application duly completed in one of the languages referred to in paragraph 2, and the supporting documents, translated, where necessary, into one of those languages.

5. Documents transmitted under this Directive shall be exempt from legalisation or any equivalent formality.

6. The Member States may not charge for services rendered in accordance with paragraph 4. Member States in which the legal aid applicant is domiciled or habitually resident may lay down that the applicant must repay the costs of translation borne by the competent transmitting authority if the application for legal aid is rejected by the competent authority.

Article 14

Competent authorities and language

1. Member States shall designate the authority or authorities competent to send (transmitting authorities) and receive (receiving authorities) the application.

2. Each Member State shall provide the Commission with the following information:

— the names and addresses of the competent receiving or transmitting authorities referred to in paragraph 1,

— the geographical areas in which they have jurisdiction,

— the means by which they are available to receive applications, and

— the languages that may be used for the completion of the application.

3. Member States shall notify the Commission of the official language or languages of the Community institutions other than their own which is or are acceptable to the competent receiving authority for completion of the legal aid applications to be received, in accordance with this Directive.

4. Member States shall communicate to the Commission the information referred to in paragraphs 2 and 3 before 30 November 2004. Any subsequent modification of such information shall be notified to the Commission no later than two months before the modification enters into force in that Member State.

5. The information referred to in paragraphs 2 and 3 shall be published in the *Official Journal of the European Communities*.

Article 15

Processing of applications

1. The national authorities empowered to rule on legal aid applications shall ensure that the applicant is fully informed of the processing of the application.

2. Where applications are totally or partially rejected, the reasons for rejection shall be given.

3. Member States shall make provision for review of or appeals against decisions rejecting legal aid applications. Member States may exempt cases where the request for legal aid is rejected by a court or tribunal against whose decision on the subject of the case there is no judicial remedy under national law or by a court of appeal.

4. When the appeals against a decision refusing or cancelling legal aid by virtue of Article 6 are of an administrative nature, they shall always be ultimately subject to judicial review.

Article 16

Standard form

1. To facilitate transmission, a standard form for legal aid applications and for the transmission of such applications shall be established in accordance with the procedure set out in Article 17(2).

2. The standard form for the transmission of legal aid applications shall be established at the latest by 30 May 2003.

The standard form for legal aid applications shall be established at the latest by 30 November 2004.

CHAPTER V

FINAL PROVISIONS

Article 17

Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its Rules of Procedure.

Article 18

Information

The competent national authorities shall cooperate to provide the general public and professional circles with information on the various systems of legal aid, in particular via the European Judicial Network, established in accordance with Decision 2001/470/EC.

Article 19

More favourable provisions

This Directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

Article 20

Relation with other instruments

This Directive shall, as between the Member States, and in relation to matters to which it applies, take precedence over provisions contained in bilateral and multilateral agreements concluded by Member States including:

(a) the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, as amended by the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001;

(b) the Hague Convention of 25 October 1980 on International Access to Justice.

Article 21

Transposition into national law

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004 with the exception of Article 3(2)(a) where the transposition of this Directive into national law shall take place no later than 30 May 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Entry into force

This Directive shall enter into force on the date of its publication in the *Official Journal of the European Communities*.

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 January 2003.

For the Council

The President

G. PAPANDREOU

CORRIGENDA

Corrigendum to Commission Regulation (EC) No 2031/2001 of 6 August 2001 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

(Official Journal of the European Communities L 279 of 23 October 2001)

On page 753, in Annex 2, CN code 0809 20 05, against the text 'Less than € 42,2 (1)', in the third column:

for: '12,5 + 27,4 €/100 kg/net',

read: '12 + 27,4 €/100 kg/net'.

Corrigendum to Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

(Official Journal of the European Communities L 26 of 31 January 2003)

In the contents on the cover and on page 41 in the title,

for: 'Council Directive 2002/8/EC …',

read: 'Council Directive 2003/8/EC …'.

Judicial network

ULRIKA BEERGREHN

Ulrika Beergrehn obtained a degree in law at Uppsala University in spring 1986. She worked subsequently at various ordinary courts, first as a trainee judge (*notarie*) and then as an assistant judge.

From 1998 to 2001, Ms Beergrehn was employed as a legal adviser in the Swedish Ministry of Justice, in the unit for family law and general property law, where she worked on various legislative matters. During the Swedish Presidency, Ms Beergrehn chaired the Council working party discussing the decision to establish a European Judicial Network in civil and commercial matters following a proposal from the European Commission.

Since autumn 2001, Ms Beergrehn has been a Judge of Appeal at the Svea Court of Appeal.

VIII

(1) *Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters*

1. Introduction

Our private lives are governed by many different rules, for example concerning marriage, divorce, parental responsibility, contracts, purchase and hire. These rules are commonly known as private law, to differentiate them from what is known as public law, which could, simplifying slightly, be described as governing citizens' relationship to the State. Such provisions are a central element of the legal system of a country. Their content has usually developed over a long period. There is no uniform legal system for all countries or even for all Member States of the European Union, and the legal systems in different countries are not always compatible.

Nowadays we live in an internationalised world. People move freely across the globe, and it is no longer unusual to settle or work in a country other than the one where you are a citizen. The same applies to businesses, which are increasingly trading and doing business across national borders. Within the EU, exchanges of goods and services between Member States have likewise increased in recent years.

Increasingly often, questions are arising about what rules apply when people or companies from different countries have to make various types of agreement with one another. What rules apply when two people from different countries want to get married, and therefore to agree what should happen to their property? What is the position of a person who wants compensation for a crime of which he or she has been the victim during a holiday trip abroad? To which court should a company turn, to pursue a claim for payment for goods which have been delivered to a company in another country? Is a judgment delivered in one country enforceable in another?

Against this background, there is a great need for easily accessible information on, for example, the laws and legal system in different countries. Effective and flexible cooperation between the authorities in different countries is necessary and important. A European Judicial Network in civil and commercial matters ('the Network') has therefore been established.

(1) Established logo for the European Judicial Network in civil and commercial matters.

2. Brief history

One of the EU's objectives is to maintain and develop an area of freedom, security and justice, where people can turn to the courts and authorities in any Member State as easily as in their own country.

The action plan established in 1998 by the Council of the European Union and the European Commission, and adopted by the Council the same year (1), on how best to implement the provisions of the Treaty of Amsterdam on establishing an area of freedom, security and justice, acknowledged that reinforcement of judicial cooperation in civil matters was a fundamental stage in the creation of a European judicial area, which would bring tangible benefits for every Union citizen. One measure which, according to the action plan, should be considered, was to examine the possibility of extending the concept of the European Judicial Network in criminal matters, which already existed, to embrace civil proceedings. The conclusions of the extraordinary meeting of the European Council in Tampere the following year also recommended the establishment of an easily accessible information system to be maintained and updated by a network of competent national authorities.

Given all this, and in order to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters, it was seen as necessary to establish a network cooperation structure at EU level in the area of civil and commercial matters. On 28 May 2001, a decision was therefore adopted establishing a European Judicial Network in civil and commercial matters (2).

3. Organisation of the Network

Each EU Member State has designated one or more contact points. These contact points are members of the Network, and could be described as making up its core. In some Member States, the task of being contact point has been entrusted to a particular person or authority, while in others the contact point is in the country's Ministry of Justice.

Those authorities in the Member States which have particular responsibility for cooperation on civil and commercial matters are also members of the Network. As examples of such authorities, one might mention the 'central authorities' set up in accordance with commitments under various international conventions, for example the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the

(1) OJ C 19, 23.1.1999, p. 1.
(2) Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25). Denmark does not participate in EU cooperation in this area.

1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption.

The Member States are also able to appoint other authorities as members of the Network, if the Member State believes that their involvement in the Network may be of use.

4. Tasks of the Network

As seen from the above, the Network was formed with the aim of making matters easier for those who become involved in cross-border disputes, that is disputes with links to more than one country, by providing help with practical matters. The Network's task is therefore to facilitate judicial cooperation in civil and commercial matters between Member States, and progressively to devise, establish and update an information system accessible to the public. To fulfil this task, the Network works by developing cooperation between its members. This, in turn, helps cooperation between relevant authorities in the Member States to function more effectively, which indirectly is helpful to citizens. The Network also works directly in relation to the public by providing information in information sheets on the Internet (1) regarding judicial cooperation in civil and commercial matters within the EU, relevant instruments of Community and international law (e.g. various conventions), and the national legislation of the Member States, particularly as regards the right to have one's case tried by a court. All this information is available in all the official languages of the EU (2), which also makes it possible for the public to find out in their own language the position on a particular question in all EU Member States.

The Network does not change the conditions governing the mechanisms for cooperation which already existed in various areas when the decision to establish the Network was adopted. Thus, the Network has not replaced and does not compete with the EEJ-Net in the consumer field or the FIN-Net on financial services (3). The Network functions as a complement and support to them.

(1) http://europa.eu.int/comm/justice_home/ejn/.
(2) Currently Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish.
(3) Regarding EEJ-Net and FIN-Net, see Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115, 17.4.1998, p. 31).

5. Cooperation within the Network

Cooperation within the Network is intended to bring about the smooth operation of procedures having a cross-border impact and the facilitation of requests for judicial cooperation between the Member States, in particular where no established form for such cooperation exists. The Network also works for the practical application of Community legislation and conventions in force between two or more Member States, and the facilitation of requests for judicial cooperation from one Member State to another. The Network is also responsible for ensuring that there is an effective system for information targeted directly at the public, and for producing such information.

The Network's tasks are primarily carried out by the contact points. In particular, they have to provide one another and other members of the Network with all the information necessary for effective judicial cooperation between the Member States. When requests for judicial cooperation are sent from one State to another, the contact points have to be involved as necessary and seek solutions to any difficulties which might arise, as well as contributing to the establishment of the most appropriate direct contacts. The contact points are also responsible for ensuring that the information which the Network provides for the public is produced and kept updated.

The Network is able to fulfil its tasks by regular meetings held both between the contact points and between the contact points and other members. Such meetings are the forum in which members can work out practical and desirable procedures for various situations, and also solve practical problems which may have arisen during their cooperation. They also provide members with the opportunity for a valuable exchange of information, and the chance to distribute information. At the meetings, guidelines are also established for the information to be produced for the public, and its form is decided upon. The meetings are the most important form of cooperation within the Network, but an internal communication system (Intranet) has also been established for the quick and effective exchange of information. Naturally, this facilitates and promotes cooperation between the members in the periods between the various meetings.

Besides working internally as members of the Network, the designated contact points are also available to the local judicial authorities in their respective Member States. In this context, the role of the contact points consists of producing or passing on whatever information is sought.

6. An Internet-based information system for the public

As described above, one of the Network's main tasks is to supply information to the public. For this purpose, there is an Internet-based information system, essentially consisting of a Network website on the Internet. The Commission is responsible for the actual management of the information system, and the Network's website is to be found on the Commission's homepage at the following address: http://europa.eu.int/comm/justice_home/ejn/.

The information system is being built up gradually, as it takes time to produce all the information which it is intended to make available there. The system, which is therefore reached from the Network's website, will contain information about the legislation which applies within the EU in relation to judicial cooperation in civil and commercial matters. This information will be available from the Network's website either directly or through links to the websites of other organisations.

When the information system has been fully constructed, it will contain information on all the Community legislation applicable (i.e. in force) or which is under preparation in the field of civil and commercial matters. There will also be accounts of the national measures which each Member State has adopted to implement the Community instruments listed in its own country. As an example of such instruments, the following can be mentioned:

– Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [1];

– Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2] (Brussels II Regulation);

– Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [3];

– Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [4] (Brussels I Regulation); and

– Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [5].

[1] OJ L 160, 30.6.2000, p. 1.
[2] OJ L 160, 30.6.2000, p. 19.
[3] OJ L 160, 30.6.2000, p. 37.
[4] OJ L 12, 16.1.2001, p. 1.
[5] OJ L 174, 27.6.2001, p. 1.

Outside the EU, there is also much international cooperation between States in civil and commercial matters. There is cooperation in various international forums, for example the Council of Europe, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law, Unidroit and the UN Commission on International Trade Law (Uncitral). Usually, a convention text is drawn up, and individual States can then participate in inter-State cooperation in accordance with the convention by acceding to it and ratifying it. The Member States of the EU also participate in this sort of international cooperation. The Network's website contains information about international organisations and about conventions in the field of civil and commercial law. It also provides information about whether the EU Member States have acceded to the conventions, and what declarations or reservations 3 made in relation to them.

The Court of Justice of the European Communities and its Court of First Instance are responsible for ensuring that the law is observed in the interpretation and application of the Community Treaties. ([1]). The Court of Justice considers whether the Member States are fulfilling their obligations under the Treaties. At the request of a national court, the Court of Justice also rules on the interpretation and validity of Community legislation. The Court of First Instance hears in the first instance cases brought by individuals or companies, and it is possible to appeal against its judgments on issues of law to the Court of Justice. The Network's website will provide access to judgments by the Court of Justice and the Court of First Instance affecting judicial cooperation in civil and commercial matters.

An important part of the information the Network provides for the public is found in the information sheets being drawn up by it. The aim of these information sheets is to explain how to go about getting a private legal dispute heard by a court. The information sheets are also to be available on the Network's website.

7. The information sheets

The information sheets drawn up by the Network cover questions relating to the possibility of having a dispute heard by a court in one of the EU's Member States. The information sheets contain practical information on how to go about bringing proceedings, and the possibility of obtaining legal aid (financial support from the State for one's own legal costs).

The information in the sheets is primarily intended for people without legal training. They are written in such a way that the information is easy to under-

([1]) See Articles 220 to 245 of the Treaty of Rome as amended by the Amsterdam Treaty.

stand, and they provide a good overview of the situation in key areas of civil and commercial law. The sheets may contain more detailed information for persons involved in the law, such as lawyers.

The Council decision establishing the Network lists eight particular subject areas which the information sheets should cover (1). However, it is likely that in future information sheets will also be written on other subjects.For each subject area, an account is given of the situation in all the EU Member States and where appropriate in the Union. As mentioned above, the information is available in all the official languages of the EU (2). It is constantly being updated.

The subject areas which have already been decided on are as follows:

1. *Principles of the legal system and judicial organisation of the Member States:* The EU Member States have different national legal systems and judicial organisations. 'Legal system' is a blanket term for the legal rules found in a country. Legal rules may consist of provisions (e.g. laws, regulations and administrative decrees), custom, case-law and official practice. There are various sorts of court, depending on the court's area of jurisdiction, for example family cases, claims, criminal and tax cases.

2. *Procedures for bringing cases to court, with particular reference to small claims:* To which court a party should go to bring a case, and how then to proceed, depends partly on the country involved and partly on the sort of dispute.

3. *Conditions and procedures for obtaining legal aid, including descriptions of the tasks of non-governmental organisations active in this field:* In all the EU Member States, it is considered that anyone should be able to turn to a court and that those who cannot afford it can receive legal aid. The conditions for obtaining legal aid, and what is covered by it, vary from country to country. Legal aid may mean that the State pays the costs of going to court wholly or in part, and that legal advice from a lawyer is provided for free or at low cost.

4. *National rules governing the service of documents:* Service means that a person has demonstrably been informed about a particular document. It may happen in various ways, for example by the document being sent by post and the recipient confirming receipt in writing. In court proceedings, it is important that a party is informed about the documents handed in to the court by the opposing party. There are therefore rules for ensuring that documents really do reach the parties. There are provisions about service in both national and EU law.

5. *Rules and procedures for the enforcement of judgments given in other Member States:* It stands to reason that a court judgment applies in the country of

(1) Article 15(2) of Council Decision 2001/470/EC.
(2) See footnote 2 on page 264.

the court. However, it is not equally evident that the judgment also applies in other countries. Within the EU, there are special rules on the enforcement of foreign judgments and there may also be national provisions on the extent to which such judgments may be enforced in each country.

6. *Possibilities and procedures for obtaining interim relief measures, with particular reference to seizures of assets for the purposes of enforcement:* An interim measure is a measure decided on by a court, pending the court's final judgment. The interim measure is intended to protect the rights which a party has turned to the court to have recognised. The measure does not affect the factual or legal position. The possibilities of and procedures for interim measures vary between EU Member States.

7. *Alternative dispute-settlement possibilities, with an indication of the national information and advice centres of the Community-wide network for the extrajudicial settlement of consumer disputes:* In certain circumstances, parties to a dispute can use methods of solving their dispute other than going to court. For example, the parties can agree to allow an arbitration board to decide the dispute, or submit to a mediator's decision. The alternatives to court proceedings vary in the various Member States.

8. *Organisation and operation of the legal professions:* Many different professional groups of legal staff work within the judicial system. There are judges, prosecutors and lawyers but also other staff trained in the law. The various legal professions may differ considerably between the EU Member States as regards areas of responsibility and tasks.

8. Final thoughts

The Network has been fully operational since 1 December 2002. The members of the Network are now able to communicate with one another using their own intranet. This has produced short and rapid channels of communication within the Network. The meetings of members have proved worthwhile, enabling contacts to be made and problems solved informally. The Network's homepage already includes, to an impressive extent, easily accessible information about existing legal rules and about the authorities which are active in the area of civil and commercial law within the EU.

The ambition of the Member States, when negotiating the decision to establish the Network, was that the Network should be flexible, unbureaucratic and easily accessible. Experience to date shows clearly that this ambition has been fulfilled, and that through the Network the citizens of the EU have gained a valuable new source of information.

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DECISION

of 28 May 2001

establishing a European Judicial Network in civil and commercial matters

(2001/470/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and (d), 66 and 67(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice, in which the free movement of persons is assured.

(2) The gradual establishment of this area and the sound operation of the internal market entails the need to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters.

(3) The action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [4] which was adopted by the Council on 3 December 1998 and approved by the European Council on 11 and 12 December 1998 acknowledges that reinforcement of judicial cooperation in civil matters represents a fundamental stage in the creation of a European judicial area which will bring tangible benefits for every European Union citizen.

(4) One of the measures provided for in paragraph 40 of the action plan is to examine the possibility of extending the concept of the European Judicial Network in criminal matters to embrace civil proceedings.

(5) The conclusions of the special European Council held at Tampere on 15 and 16 October 1999 recommend the establishment of an easily accessible information system, to be maintained and updated by a Network of competent national authorities.

(6) In order to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters, it is necessary to establish at Community level a network cooperation structure — the European Judicial Network in civil and commercial matters.

[1] OJ C 29 E, 30.1.2001, p. 281.
[2] Opinion delivered on 5 April 2001 (not yet published in the Official Journal).
[3] OJ C 139, 11.5.2001, p. 6.
[4] OJ C 19, 23.1.1999, p. 1.

(7) This is a subject falling within the ambit of Articles 65 and 66 of the Treaty, and the measures are to be adopted in accordance with Article 67.

(8) To ensure the attainment of the objectives of the European Judicial Network in civil and commercial matters, the rules governing its establishment should be laid down in a mandatory instrument of Community law.

(9) The objectives of the proposed action, namely to improve effective judicial cooperation between the Member States and effective access to justice for persons engaging in cross-border litigation cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the action be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

(10) The European Judicial Network in civil and commercial matters established by this Decision seeks to facilitate judicial cooperation between the Member States in civil and commercial matters both in areas to which existing instruments apply and in those where no instrument is currently applicable.

(11) In certain specific areas, Community or international instruments relating to judicial cooperation in civil and commercial matters already provide for cooperation mechanisms. The European Judicial Network in civil and commercial matters does not set out to replace these mechanisms, and it must operate in full compliance with them. This Decision will consequently be without prejudice to Community or international instruments relating to judicial cooperation in civil or commercial matters.

(12) The European Judicial Network in civil and commercial matters should be established in stages on the basis of the closest cooperation between the Commission and the Member States. It should be able to take advantage of modern communication and information technologies.

(13) To attain its objectives, the European Judicial Network in civil and commercial matters needs to be supported by contact points designated by the Member States and to be sure of the participation of their authorities with specific responsibilities for judicial cooperation in civil and commercial matters. Contacts between them and periodic meetings are essential to the operation of the Network.

(14) It is essential that efforts to establish an area of freedom, security and justice produce tangible benefits for persons engaging in cross-border litigation. It is accordingly necessary for the European Judicial Network in civil and commercial matters to promote access to justice. To this end, using the information supplied and updated by the contact points, the Network should progressively establish an information system that is accessible to the public, both the general public and specialists.

(15) This Decision does not preclude the provision of other information than that which is provided for herein, within the European Judicial Network in civil and commercial matters and to the public. The enumeration in Title III is accordingly not to be regarded as exhaustive.

(16) Processing of information and data should take place in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data [1] and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [2].

(17) To ensure that the European Judicial Network in civil and commercial matters remains an effective instrument, incorporates the best practice in judicial cooperation and internal operation and meets the public's expectations, provision should be made for periodic evaluations and for proposals for such changes as may be found necessary.

(18) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Decision.

(19) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Decision and is therefore not bound by it nor subject to its application,

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[1] OJ L 281, 23.11.1995, p. 31.
[2] OJ L 24, 30.1.1998, p. 1.

HAS ADOPTED THIS DECISION:

TITLE I

PRINCIPLES OF THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS

Article 1

Establishment

1. A European Judicial Network in civil and commercial matters ('the Network') is hereby established among the Member States.

2. In this Decision, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Composition

1. The Network shall be composed of:

(a) contact points designated by the Member States, in accordance with paragraph 2;

(b) central bodies and central authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial cooperation in civil and commercial matters;

(c) the liaison magistrates to whom Joint Action 96/277/JAI of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union [1] applies, where they have responsibilities in cooperation in civil and commercial matters;

(d) any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.

2. Each Member State shall designate a contact point. Each Member State may, however, designate a limited number of other contact points if they consider this necessary on the basis of the existence of separate legal systems, the domestic distribution of jurisdiction, the tasks to be entrusted to the contact points or in order to associate judicial bodies that frequently deal with cross-border litigation directly with the activities of the contact points.

Where a Member State designates several contact points, it shall ensure that appropriate coordination mechanisms apply between them.

3. The Member States shall identify the authorities mentioned at points (b) and (c) of paragraph 1.

4. The Member States shall designate the authorities mentioned at point (d) of paragraph 1.

5. The Member States shall notify the Commission, in accordance with Article 20, of the names and full addresses of the authorities referred to in paragraph 1, specifying:

(a) the communication facilities available to them;

(b) their knowledge of languages; and

(c) where appropriate, their specific functions in the Network.

Article 3

Tasks and activities of the Network

1. The Network shall be responsible for:

(a) facilitating judicial cooperation between the Member States in civil and commercial matters, including devising, progressively establishing and updating an information system for the members of the Network;

(b) devising, progressively establishing and updating an information system that is accessible to the public.

2. Without prejudice to other Community or international instruments relating to judicial cooperation in civil or commercial matters, the Network shall develop its activities for the following purposes in particular:

(a) the smooth operation of procedures having a cross-border impact and the facilitation of requests for judicial cooperation between the Member States, in particular where no Community or international instrument is applicable;

(b) the effective and practical application of Community instruments or conventions in force between two or more Member States;

(c) the establishment and maintenance of an information system for the public on judicial cooperation in civil and commercial matters in the European Union, relevant Community and international instruments and the domestic law of the Member States, with particular reference to access to justice.

[1] OJ L 105, 27.4.1996, p. 1.

Article 4

Modus operandi of the Network

The Network shall accomplish its tasks in particular by the following means:

1. it shall facilitate appropriate contacts between the authorities of the Member States mentioned in Article 2(1) for the accomplishment of the tasks provided for by Article 3;

2. it shall organise periodic meetings of the contact points and of the members of the Network in accordance with the rules laid down in Title II;

3. it shall draw up and keep updated the information on judicial cooperation in civil and commercial matters and the legal systems of the Member States referred to in Title III, in accordance with the rules laid down in that Title.

Article 5

Contact points

1. The contact points shall be at the disposal of the authorities referred to in Article 2(1)(b) to (d) for the accomplishment of the tasks provided for by Article 3.

The contact points shall also be at the disposal of the local judicial authorities in their own Member State for the same purposes, in accordance with rules to be determined by each Member State.

2. In particular, the contact points shall:

(a) supply the other contact points, the authorities mentioned in Article 2(1)(b) to (d) and the local judicial authorities in their own Member State with all the information needed for sound judicial cooperation between the Member States in accordance with Article 3, in order to assist them in preparing operable requests for judicial cooperation and in establishing the most appropriate direct contacts;

(b) seek solutions to difficulties arising on the occasion of a request for judicial cooperation, without prejudice to paragraph 4 of this Article and to Article 6;

(c) facilitate coordination of the processing of requests for judicial cooperation in the relevant Member State, in particular where several requests from the judicial authorities in that Member State fall to be executed in another Member State;

(d) collaborate in the organisation of, and participate in, the meetings referred to in Article 9;

(e) assist with the preparation and updating of the information referred to in Title III, and in particular with the information system for the public, in accordance with the rules laid down in that Title.

3. Where a contact point receives a request for information from another member of the Network to which it is unable to respond, it shall forward it to the contact point or the member of the Network which is best able to respond to it. The contact point shall remain available for any such assistance as may be useful for subsequent contacts.

4. In areas where Community or international instruments governing judicial cooperation already provide for the designation of authorities responsible for facilitating judicial cooperation, contact points shall address requesters to such authorities.

Article 6

Relevant authorities for the purposes of Community or international instruments relating to judicial cooperation in civil and commercial matters

1. The involvement of relevant authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters in the Network shall be without prejudice to the powers conferred on them by the instrument providing for their designation.

Contacts within the Network shall be without prejudice to regular or occasional contacts between these authorities.

2. In each Member State the authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters and the contact points of the Network shall engage in regular exchanges of views and contacts to ensure that their respective experience is disseminated as widely as possible.

3. The contact points of the Network shall be at the disposal of the authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters and shall assist them in all practicable ways.

Article 7

Language knowledge of the contact points

To facilitate the practical operation of the Network, each Member State shall ensure that the contact points have adequate knowledge of an official language of the institutions of the European Community other than their own, given that they need to be able to communicate with the contact points in other Member States.

Member States shall facilitate and encourage specialised language training for contact point staff and promote exchanges of staff between contact points in the Member States.

Article 8

Communication facilities

The contact points shall use the most appropriate technological facilities in order to reply as efficiently and as swiftly as possible to requests made to them.

TITLE II

MEETINGS WITHIN THE NETWORK

Article 9

Meetings of the contact points

1. The contact points of the Network shall meet no less of ten than once each half year, in accordance with Article 12.

2. Each Member State shall be represented at these meetings by one or more contact points, who may be accompanied by other members of the Network, but there shall be no more than four representatives per Member State.

3. The first meeting of the contact points shall be held no later than 1 March 2003 without prejudice to the possibility of prior preparatory meetings.

Article 10

Purpose of periodic meetings of contact points

1. The purpose of the periodic meetings of contact points shall be to:

(a) enable the contact points to get to know each other and exchange experience, in particular as regards the operation of the Network;

(b) provide a platform for discussion of practical and legal problems encountered by the Member States in the course of judicial cooperation, with particular reference to the application of measures adopted by the European Community;

(c) identify best practices in judicial cooperation in civil and commercial matters and ensure that relevant information is disseminated within the Network;

(d) exchange data and views, in particular on the structure, organisation and content of and access to the available information mentioned in Title III;

(e) draw up guidelines for progressively establishing the practical information sheets provided for by Article 15, in particular as regards the subject matter to be covered and the form of such information sheets;

(f) identify specific initiatives other than those referred to in Title III which pursue comparable objectives.

2. The Member States shall ensure that experience in the operation of specific cooperation mechanisms provided for by Community or international instruments is shared at meetings of the contact points.

Article 11

Meetings of members of the Network

1. Meetings open to all members of the Network shall be held to enable them to get to know each other and exchange experience, to provide a platform for discussion of practical and legal problems met and to deal with specific questions.

Meetings can also be held on specific issues.

2. Meetings shall be convened, where appropriate, in accordance with Article 12.

3. The Commission, in close cooperation with the Presidency of the Council and with the Member States, shall fix for each meeting the maximum number of participants.

Article 12

Organisation and proceedings of meetings of the Network

1. The Commission, in close cooperation with the Presidency of the Council and with the Member States, shall convene the meetings provided for by Articles 9 and 11. It shall chair them and provide secretarial services.

2. Before each meeting the Commission shall prepare the draft agenda in agreement with the Presidency of the Council and in consultation with the Member States via their respective contact points.

3. The contact points shall be notified of the agenda prior to the meeting. They may ask for changes to be made or for additional items to be entered.

4. After each meeting the Commission shall prepare a record, which shall be notified to the contact points.

5. Meetings of the contact points and of members of the Network may take place in any Member State.

TITLE III

INFORMATION AVAILABLE WITHIN THE NETWORK, AND INFORMATION SYSTEM FOR THE PUBLIC

Article 13

Information disseminated within the Network

1. The information disseminated within the network shall include:

(a) the information referred to in Article 2(5);

(b) any further information deemed useful by the contact points for the proper functioning of the Network.

2. For the purpose of paragraph 1, the Commission shall progressively establish a secure limited-access electronic information exchange-system in consultation with the contact points.

Article 14

Information system for the public

1. An Internet-based information system for the public, including the dedicated website for the Network, shall be progressively established in accordance with Articles 17 and 18.

2. The information system shall comprise the following elements:

(a) Community instruments in force or in preparation relating to judicial cooperation in civil and commercial matters;

(b) national measures for the domestic implementation of the instruments in force referred to in point (a);

(c) international instruments in force relating to judicial cooperation in civil and commercial matters to which the Member States are parties, and declarations and reservations made in connection with such instruments;

(d) the relevant elements of Community case-law in the area of judicial cooperation in civil and commercial matters;

(e) the information sheets provided for by Article 15.

3. For the purposes of access to the information mentioned in paragraph 2(a) to (d), the Network should, where appropriate, in its site, make use of links to other sites where the original information is to be found.

4. The site dedicated to the Network shall likewise facilitate access to comparable public information initiatives in related matters and to sites containing information relating to the legal systems of the Member States.

Article 15

Information sheets

1. The information sheets shall be devoted by way of priority to questions relating to access to justice in the Member States and shall include information on the procedures for bringing cases in the courts and for obtaining legal aid, without prejudice to other Community initiatives, to which the Network shall have the fullest regard.

2. Information sheets shall be of a practical and concise nature. They shall be written in easily comprehensible language and contain practical information for the public. They shall progressively be produced on at least the following subjects:

(a) principles of the legal system and judicial organisation of the Member States;

(b) procedures for bringing cases to court, with particular reference to small claims, and subsequent court procedures, including appeal possibilities and procedures;

(c) conditions and procedures for obtaining legal aid, including descriptions of the tasks of non-governmental organisations active in this field, account being taken of work already done in the Dialogue with Citizens;

(d) national rules governing the service of documents;

(e) rules and procedures for the enforcement of judgments given in other Member States;

(f) possibilities and procedures for obtaining interim relief measures, with particular reference to seizures of assets for the purposes of enforcement;

(g) alternative dispute-settlement possibilities, with an indication of the national information and advice centres of the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes;

(h) organisation and operation of the legal professions.

4. The information sheets shall, where appropriate, include elements of the relevant case-law of the Member States.

5. The information sheets may provide more detailed information for the specialists.

Article 16

Updating of information

All information distributed within the Network and to the public under Articles 13 to 15 shall be updated regularly.

Article 17

Role of the Commission in the public information system

The Commission shall:

1. be responsible for managing the information system for the public;

2. construct, in consultation with the contact points, a dedicated website for the Network on its Internet site;

3. provide information on relevant aspects of Community law and procedures, including Community case-law, in accordance with Article 14;

4. (a) ensure that the format of the information sheets is consistent and that they include all information considered necessary by the Network;

   (b) thereafter arrange for them to be translated into the other official languages of the Institutions of the Community, and install them on the site dedicated to the Network.

Article 18

Role of contact points in the public information system

Contact points shall ensure that

1. the appropriate information needed to create and operate the information system is supplied to the Commission;

2. the information installed in the system is accurate;

3. the Commission is notified forthwith of any updates as soon as an item of information requires changing;

4. the information sheets relating to their respective Member States are progressively established, according to the guidelines referred to in Article 10(1)(e);

5. the broadest possible dissemination of the information sheets installed on the site dedicated to the Network is arranged in their Member State.

TITLE IV

FINAL PROVISIONS

Article 19

Review

1. No later than 1 December 2005, and at least every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Decision on the basis of information supplied by the contact points. The report shall be accompanied if need be by proposals for adaptations.

2. The report shall consider, among other relevant matters, the question of possible direct public access to the contact points of the Network, access to and involvement of the legal professions in its activities, and synergy with the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes. It shall also consider the relationship between the contact points of the Network and the competent authorities provided for in Community or international instruments relating to judicial cooperation in civil and commercial matters.

Article 20

Establishment of the basic components of the Network

No later than 1 June 2002, the Member States shall notify the Commission of the information required by Article 2(5).

Article 21

Date of application

This Decision shall apply from 1 December 2002, except for Articles 2 and 20 which shall apply from the date of notification of the Decision to the Member States to which it is addressed.

This Decision is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 28 May 2001.

For the Council

The President

T. BODSTRÖM

Council of the European Union

Civil law — European judicial cooperation

Luxembourg: Office for Official Publications of the European Communities

2005 — 275 pp. — 17.6 x 25 cm

ISBN 92-824-3123-1