IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COUNCIL

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

signed in Lugano on 30 October 2007

EXPLANATORY REPORT

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CHAPTER I

GENERAL CONSIDERATIONS

1. Preliminary observations and history of the revision

1. The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed by the contracting parties in Lugano on 30 October 2007 ('the Lugano Convention' or 'the Convention'), is concluded between the European Community, the Kingdom of Denmark [1], the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation. It replaces the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988 ('the Lugano Convention of 1988' or 'the 1988 Convention'), which was concluded between the Member States of the European Community and certain Member States of the European Free Trade Association (EFTA) [2]. The Lugano Convention of 1988 was a 'parallel convention' to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ('the Brussels Convention'), which was concluded between the six original Member States of the European Community in application of Article 220 (now 293) of the EC Treaty, and was amended several times thereafter to extend its application to new States that had acceded to the Community [3]. After 1988, several States that were parties to the Lugano Convention acceded to the European Community, and became parties to the Brussels Convention, so that they were now participating in the Lugano Convention in a different capacity [4]. In 1997, when the work of revising the Lugano Convention began, the contracting parties were the fifteen States that were members of the European Community at that time and Iceland, Norway and Switzerland.

2. In 1997 the Council of the European Union initiated a simultaneous revision of the Brussels Convention and of the Lugano Convention of 1988, with the aim of fully harmonising the two Conventions and incorporating changes to resolve

[1] Denmark signed the Convention in Brussels on 5 December 2007.
[2] OJ L 319, 25.11.1988.

[3] Unless stated otherwise, references are to the text of the Brussels Convention published in OJ C 27, 26.1.1998, setting out the Convention as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland ('the Accession Convention of 1978'), by the Convention of 25 October 1982 on the accession of the Hellenic Republic ('the Accession Convention of 1982'), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic ('the Accession Convention of 1989') and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden ('the Accession Convention of 1996').

[4] Finland, Sweden and Austria, which became Member States of the Community on 1 January 1995 but had been parties to the Lugano Convention since 1 April 1993.

certain problems that had emerged in the course of the interpretation of the Conventions by the Court of Justice. It was felt that the two Conventions ought to be revised together in order, among other things, to keep them abreast of developments in international life and in technology, in particular with regard to electronic commerce; to expedite the enforcement of judgments, a need later underlined by Article 65 of the Treaty of Amsterdam of 2 October 1997 ([1]), which was not yet in force when the work began; to simplify aspects of jurisdiction and coordination between jurisdictions; to clarify points which were imprecise or which had been found problematic on application; and, finally, to adapt certain of the Conventions' provisions to the case-law of the Court of Justice, though subsequently such adaptation has not always proved necessary.

3. At a meeting on 4 and 5 December 1997, the Council of the European Union set up an *ad hoc* working party of experts, composed of representatives of the Member States and representatives of the EFTA States that were parties to the Lugano Convention (Switzerland, Norway and Iceland); the working party was to examine amendments to the Brussels and Lugano Conventions that would be proposed by the Member States and by the European Commission, taking into account the case-law of the Court of Justice and certain decisions made by national courts referred to in Protocol 2 to the Lugano Convention of 1988, with the aim of drawing up a draft convention that would improve on the current texts and harmonise them. The working party's terms of reference indicated the priorities to be followed, namely examination of the practical aspects of the two Conventions, modernisation of a number of provisions, correction of certain technical aspects, alignment with the Rome Convention of 19 June 1980, and finally certain aspects specific to the Lugano Convention that were regulated differently in the Brussels Convention; other proposals for revision could be considered once the articles given priority had been examined.

The *ad hoc* working party, whose terms of reference were founded on Article 220 of the EC Treaty, conducted its work on the basis of proposals put forward by the Commission and of working papers submitted to it by the Council and by the State delegations, taking full account of the Court of Justice's case-law and of the opinions expressed in legal literature and by academic associations ([2]). The working party held nine meetings, in Brussels; the meetings were chaired by the Finnish delegate Gustaf Möller, with the Swiss delegate Monique Jametti Greiner as deputy chair, while the Italian delegate Fausto Pocar acted as rapporteur. The European Commission was fully associated with the working party's proceedings ([3]). At the last meeting, which took place from 19 to 23 April 1999, the working party reached general agreement on a revised text for the two Conventions, Brussels and Lugano ([4]).

4. On 1 May 1999, however, the Amsterdam Treaty entered into force; this gave the European Community new powers with regard to judicial cooperation in civil matters, and prevented the draft proposed by the *ad hoc* working party from becoming a new version of the Brussels Convention and, in parallel, of a new Lugano Convention. The draft was 'frozen' by the Council on 12 May 1999, pending presentation by the Commission, under Article 61 of the EC Treaty, of a draft Community act which would replace the Brussels Convention in the Community framework. At a meeting on 27 and 28 May 1999 the Council gave approval in principle to the agreement reached by the *ad hoc* working party.

5. On 14 July 1999, the Commission submitted to the Council a proposal for a Community regulation broadly based on the text drawn up by the *ad hoc* working party, with the adjustments made necessary by the new legal form that the instrument was to take, and with new provisions regarding consumers ([5]). This proposal was examined by the Council's committee for civil law. On 22 December 2000 the Council approved the proposal as Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation') ([6]). The Regulation, subsequently amended to include the new States joining the European Community, came into force on 1 March 2002, and replaced the Brussels Convention in relations between the Member States of the Community, with the exception of Denmark, which under Article 69 of the EC Treaty does not participate in acts adopted on the basis of Title IV. On 19 October 2005, in Brussels, the Community signed an Agreement with Denmark which provides for the application of the provisions of the Brussels I Regulation and their subsequent amendments to the relations between the Community and Denmark ([7]).

6. The new powers conferred on the European Community by the Amsterdam Treaty gave rise to the question whether the new Lugano Convention should be negotiated and concluded by

([1]) Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ C 340, 10.11.1997).

([2]) Particular mention should be made of the European Group for Private International Law (EGPIL/GEDIP), which on 7 April 1997 presented to the Secretary of the Standing Committee for the Lugano Convention and to the Secretary-General of the Council of the European Union a document containing a series of proposals for the revision of the Brussels and Lugano Conventions; it was circulated to delegates as a Council working document on 15 April 1997 (hereinafter referred to as the 'the proposals of the European Group for Private International Law').

([3]) Poland participated in the working party's meetings as an observer, after all contracting parties to the Lugano Convention had given their agreement to its accession to the Convention. Other observers at the working party's meetings were the Court of Justice, EFTA, and the Hague Conference on Private International Law.

([4]) Council document 7700/99, 30.4.1999.

([5]) COM (1999) 348 final, 14.7.1999.

([6]) OJ L 12, 16.1.2001.

([7]) OJ L 299, 16.11.2005.

the Community alone or by the Community together with the Member States. On 25 March 2002 the Commission submitted a recommendation for a Council decision authorising the Commission to open negotiations for the adoption of a convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the Community and Denmark, of the one part, and Iceland, Norway, Switzerland and Poland (which had not yet acceded to the Community), of the other, to replace the Lugano Convention of 16 September 1988 ([1]). Meeting on 14 and 15 October 2002, the Council authorised the Commission to begin negotiations for the adoption of a new Lugano Convention, but left open the question whether the conclusion of the new convention fell within the Community's exclusive competence, or within the shared competence of the Community and the Member States. Attached to the Council's decision were negotiating directives and a joint statement by the Council, the Commission and the Member States to the effect that the Council's decision did not have any legal implications for the question of the respective responsibilities of the Community and the Member States. On that question the Council agreed to ask for the Court of Justice's opinion in accordance with Article 300(6) of the EC Treaty.

7. On 7 March 2003, the Council submitted a request for an opinion to the Court of Justice, describing the purpose of the prospective agreement as being to align as far as possible the substantive provisions of the new agreement on those of the Brussels I Regulation, and formulating the following question: 'Does the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of this memorandum, fall entirely within the sphere of exclusive competence of the Community or within the sphere of shared competence of the Community and the Member States?' On 7 February 2006, the full Court delivered its opinion as follows: 'The conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of the request for an opinion, reproduced in paragraph 26 of this Opinion, falls entirely within the sphere of exclusive competence of the European Community' ([2]).

8. Following the delivery of the Court's opinion, a diplomatic conference took place in Lugano from 10 to 12 October 2006 to finalise the new Lugano Convention, with the participation of representatives from the European Community, Denmark, Iceland, Norway and Switzerland, and various Community institutions and Member States present as observers. The meeting was chaired by the Swiss delegate Monique Jametti Greiner, with Fausto Pocar as rapporteur; it considered all of the provisions diverging from the text on which the *ad hoc* working party had reached agreement in 1999 – on many of which informal negotiations had already taken place in the Standing Committee set up under Article 3 of Protocol 2 to the Lugano Convention of 1988 – and formally adopted the text of a new Convention. But it was not possible to reach agreement on all of the points under discussion, and some further negotiation was required, following which the text of the new Convention was initialled in Brussels on 28 March 2007, and signed by the contracting parties in Lugano on 30 October 2007.

([1]) SEC(2002) 298 final, 22.3.2002.
([2]) Court of Justice, Opinion 1/03, operative part.

2. **Nature and purpose of this explanatory report**

9. In the negotiating directives it approved at its meeting of 14 and 15 October 2002, authorising the Commission to begin negotiations for the adoption of a new Lugano Convention, the Council specified that an explanatory report should be drawn up on the revised Convention, as had been done for the Lugano Convention of 1988. The present explanatory report therefore follows on from the report that accompanied the Lugano Convention of 1988 (the 'Jenard-Möller report') ([3]). An advantage of such an explanatory report is that, in the system of the Convention, unlike the system of which the Brussels I Regulation forms part, there is no Court of Justice to resolve uncertainties of interpretation that may arise in cases before national courts, so that it is desirable that the courts should be provided with a point of reference to clarify the meaning of the Convention and facilitate uniform application, not least in view of the possibility that other countries might accede to the Convention in future.

10. Regarding the content, the Council's negotiating directives indicated that the report was to cover all of the matters contemplated by the Convention and by its associated protocols. During the negotiations the delegations specified that the explanatory report should comment on all of the provisions of the Convention, and should give an account of the way that negotiations had actually progressed and of the growing case-law of the Court of Justice in relation to the parallel provisions of the Brussels Convention and the Brussels I Regulation. As has been explained, the new Lugano Convention is part of a long and complex process of development that has lasted several decades, beginning with the Brussels Convention concluded in 1968 between the six original Member States of the European Community and progressing in a series of subsequent acts, one of which is the Lugano Convention of 1988. The text of the Convention reflects this development, and many of its provisions reproduce clauses that had already appeared in previous instruments, sometimes with no change or with amendments that are only formal.

Each of these instruments, with the exception of the Brussels I Regulation, is accompanied by an explanatory report that comments on the individual provisions. When a provision is

([3]) Report on the Lugano Convention of 16 September 1988 (OJ C 189, 28.7.1990).

not new, or when the amendments made are merely formal or linguistic in nature, it will be enough merely to refer back to the earlier explanatory reports. The present report therefore frequently refers, without repeating what was said there, to the reports on the Brussels Convention of 1968 (the 'Jenard report') ([1]), the Accession Convention of 1978 (the 'Schlosser report') ([2]), the Accession Convention of 1982 (the 'Evrigenis-Kerameus report') ([3]), the Accession Convention of 1989 (the 'Almeida Cruz-Desantes Real-Jenard report') ([4]), and the Jenard-Möller report, already mentioned, which accompanied the Lugano Convention of 1988. There is no report of this kind attached to the Brussels I Regulation, but an express explanation of its provisions can sometimes be found in the introductory recitals, to which reference will therefore be made wherever necessary.

11. The present explanatory report has to consider all of the provisions of the Lugano Convention in the light of the judicial precedents not only regarding the preceding Convention but also the Brussels I Regulation, whose content is substantially identical; but it should be borne in mind that the report is concerned only with the Lugano Convention, and does not in any way reflect the position of the States or of the Community with regard to the Brussels I Regulation. The absence of an explanatory report on the Brussels I Regulation does not mean that this report is intended to fill the supposed gap. In other words, the present report is not intended to offer clarification of the Regulation, or to give indications as to its interpretation or the application of the rules it lays down: its sole purpose is to explain the rules of the Lugano Convention as they stand after revision.

CHAPTER II

STRUCTURE AND SCOPE OF THE CONVENTION

1. **Structure**

12. The preamble states that the aim of the Convention is to strengthen in the territories of the contracting parties the legal protection of persons therein established, and for this purpose to determine the international jurisdiction of the courts, to facilitate the recognition of judgments, authentic instruments and court settlements, and to introduce an expeditious procedure for securing their enforcement. With this objective the Convention, taking into account the development of international and Community rules that has been described above, sets out to extend to the contracting parties the principles of the Brussels I Regulation, and substantially reproduces its provisions. The parallelism with the Brussels I Regulation is referred to once again in the introduction to Protocol 2 to the Convention, which stresses the substantial link that exists between the two acts despite the fact that they remain distinct from one another. The structure of the Convention is consequently based on the principles of the Regulation, which in their turn are those that formed the basis of the Brussels Convention.

This Convention is thus a dual convention governing, within its field of application, direct jurisdiction of the courts in the States that are bound by the Convention, coordination between courts in the event of competing jurisdiction, conditions for the recognition of judgments, and a simplified procedure for their enforcement. On each of these points the text of the new Convention diverges from that of the 1988 Convention, either because it has been aligned on the Brussels I Regulation, or because specific provision has been made to take account of subsequent developments in the case-law of the Court of Justice or to regulate the relationship between the Convention and the Regulation.

13. Among the principles upon which the Convention is based, attention should be drawn to the principle that the rules it lays down on jurisdiction are comprehensive, meaning that the system of the Convention includes even the rules that regulate jurisdiction by referring a matter to the national law of the States bound by the Convention, as happens, with some exceptions, in the case where a defendant is domiciled in a country outside the Convention. In Opinion 1/03, already cited, the Court of Justice took the view that the clause assigning jurisdiction to the national courts in Article 4 of the Brussels I Regulation was an exercise of the Community's powers, rather than a recognition that the Member States had powers that restricted the scope of the rules on jurisdiction in the Regulation. The rules on jurisdiction in the Convention are comprehensive, and the fact that a defendant is domiciled within or outside a State bound by the Convention is not a criterion delimiting the scope of the Convention in terms of jurisdiction (see also paragraph 37 below).

2. **Material scope (Article 1(1) and (2))**

14. The material scope of the Convention has not been changed in any way with respect to the Lugano Convention of 1988, and the new wording is identical to that of the Brussels Convention and the Brussels I Regulation. Like the previous texts, the new Convention is confined in its scope to proceedings and judgments regarding international legal relationships, including relationships that involve not two

([1]) Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ C 59, 5.3.1979).
([2]) Report on the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom (OJ C 59, 5.3.1979).
([3]) Report on the Convention of 25 October 1982 on the accession of Greece (OJ C 298, 24.11.1986).
([4]) Report on the Convention of 26 May 1989 on the accession of Portugal and Spain (OJ C 189, 28.7.1990).

Contracting States, but one Contracting State and one non-contracting State ([1]); it applies automatically, whether or not it is invoked by the parties; and it applies only to civil and commercial matters, irrespective of the nature of the court. The Convention does not concern revenue, customs or administrative matters, but it may apply to disputes between public administrative authorities and individuals, in so far as the authorities have not acted in the exercise of their public powers ([2]). The Convention's material scope is also delimited by means of a list of matters excluded from it, which has remained unchanged, and which is discussed more fully in the reports on earlier conventions (Jenard report, pages 10-13; Schlosser report, paragraphs 30-65; Evrigenis-Kerameus report, paragraphs 24-37).

15. The *ad hoc* working party discussed whether the material scope of the Convention should be widened by reducing the number of excluded matters. The Commission suggested that the Convention should include rights in property arising out of a matrimonial relationship, in view among other things of their connection with maintenance matters, which were already included in the Convention ([3]). But in view of the significant differences in national legislation, and the desirability of remaining within the context of a revision of the existing text, it was decided to postpone the possible inclusion of matrimonial property rights in the Convention to some future date. The working party also examined a proposal that the Convention should include social security: social security had originally been excluded because of the diversity of national systems, which make it sometimes a public and sometimes a private matter. The working party preferred not to try to explore further an issue on which no agreement had been reached at the time of the adoption of Regulation No 1408/71 ([4]), although it recognised that the matter was not totally excluded from the Convention, as might appear from the text of Article 1, since the Convention does cover legal proceedings brought by a social security body (for example) that is acting on behalf of one or more of its beneficiaries to sue a third party responsible for injury (see also the Schlosser report, paragraph 60). It also encompasses an action under a right of recourse by which a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of ordinary (private) law in regard to maintenance obligations. It does not cover, on the contrary, an action under a right of recourse that is founded on provisions by which the legislature conferred on the public body a prerogative that places that body in a legal situation which derogates from the ordinary law ([5]).

([1]) Court of Justice, Case C-281/02 *Owusu* [2005] ECR I-1383, paragraphs 25-26.

([2]) Court of Justice, Case C-266/01 *Préservatrice Foncière TIARD* [2003] ECR I-4867, paragraph 36.

([3]) See for some guidance for the interpretation of the exclusion of matrimonial property from the Convention, Court of Justice, Case 143/78 *de Cavel* [1979] ECR 1055, and Case C-220/95 *Van den Boogaard* v *Laumen* [1997] ECR I-1147.

([4]) Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ L 149, 5.7.1971).

3. **The parties subject to the obligations imposed by the Convention (Article 1(3))**

16. The 1988 Convention, in defining the parties to whom the obligations imposed by the Convention were to apply, used the expression 'Contracting States'. The Treaty of Amsterdam gave the Community exclusive power to conclude such a convention, which meant that the Convention would no longer be an agreement between the Member States of the European Community and other States, but would instead become an agreement in which the Community itself acted as the contracting party on behalf of its Member States (with the exception of Denmark); the expression 'Contracting States' is thus unsatisfactory, and it has therefore been replaced in Article 1(3) by the term 'States bound by the Convention', which is new as compared to the preceding Convention. The new formula designating the parties subject to the obligations imposed by the Convention is also based on the realisation that the application of the Convention, both in relation to jurisdiction and to the recognition and enforcement of judgments, is normally the responsibility of the Community's Member States, rather than of the Community as such. A simple reference to the contracting parties to the Convention would not therefore be appropriate or sufficient to ensure the Convention's correct implementation. With the new wording, paragraph 3 covers both the States that are contracting parties to the Convention – that is, the non-Community States of Iceland, Norway and Switzerland plus Denmark – and the Community Member States which are bound to apply the Convention in their respective national legal systems.

17. The provision specifies, however, that the expression may also mean the European Community as a party to the Convention in its own right, since certain of the Convention's obligations may apply directly to the Community itself, or may concern the recognition and enforcement of judgments delivered by the Court of Justice or by other Community courts associated with it, such as the Court of First Instance or the Civil Service Tribunal.

In the light of the discussion on Article 70(1)(c), it was finally agreed not to include regional economic integration organisations among the parties bound by the Convention's obligations, although they may also become contracting parties.

([5]) Court of Justice, Case C-271/00 *Gemeente Steenbergen* [2002] ECR 10489

4. **The relationship between the Convention and the Brussels I Regulation (Article 64)**

18. In consideration of the close links it has with the Brussels I Regulation, the Convention seeks to provide a precise delimitation of the scope of the two instruments, in a specific provision in Article 64. This article largely reproduces the contents of the provision in the 1988 Convention that governed the relationship between that Convention and the Brussels Convention (Article 54B) ([1]), taking account of developments in Community legislation in the meantime. As before, the first two paragraphs of the provision are essentially addressed to the courts of Member States of the Community bound by the Brussels I Regulation, which are the courts that may find themselves having to apply both instruments, since courts of States bound only by the Lugano Convention are obliged to apply the Lugano Convention in any event. Paragraph 3 is broader, since it is also addressed to courts in States that are bound only by the Lugano Convention. But the provision can offer clarification to any court, particularly on matters of *lis pendens* and related actions as well as the recognition of judgments.

19. Article 64(1) states that the Convention does not prejudice the application by European Community Member States of the Brussels I Regulation, the Brussels Convention and its Protocol of Interpretation of 1971, or the EC-Denmark Agreement ([2]). This means that the scope of these instruments remains unaltered, and is not in principle limited by the Lugano Convention. Thus the jurisdiction of the courts of States bound by the Brussels I Regulation or by the EC-Denmark Agreement continues to be exercised in accordance with the Regulation with regard to persons domiciled in the States referred to, and also with regard to persons domiciled in other States that are not party to the Lugano Convention. Likewise, any judgments delivered in one State bound by the Regulation must be recognised and enforced in accordance with the terms of the Regulation in any other State bound by the Regulation.

20. However, according to paragraph 2, the Lugano Convention is applicable in certain situations in any event, whether by the courts of a State bound both by the Brussels I Regulation and by the Lugano Convention, or by the courts of a State bound only by the Lugano Convention.

In matters of jurisdiction, the Lugano Convention is to be applied in all cases, by the courts of any State bound by the Convention, including the courts of States bound by the Brussels I Regulation, if the defendant is domiciled in the territory of a State where the Convention applies and the Regulation does not. The same occurs when jurisdiction is conferred on the courts of such a State by Article 22 or Article 23 of the Convention, as these are exclusive jurisdictions which must always be respected.

Furthermore, in relation to *lis pendens* and related actions regulated by Articles 27 and 28, the Lugano Convention is to be applied in all cases where the proceedings are brought in a State where the Convention applies and the Brussels I Regulation does not, as well as in a State where both the Convention and the Regulation apply. From the standpoint of the coordination of jurisdiction, therefore, the States bound by the Lugano Convention are treated as a single territory.

Finally, in matters of the recognition and enforcement of judgments, the Lugano Convention is to be applied in all cases where either the State of origin or the State addressed does not apply the Brussels I Regulation. Consequently, the Convention applies when both States are parties to the Lugano Convention alone or when only one of the States is a party to the Convention and the other is bound by the Regulation.

21. The Convention also takes over the provision in paragraph 3 of the corresponding article in the 1988 Convention, under which the court seised, having jurisdiction under the Lugano Convention, may refuse to recognise or enforce a foreign judgment if the ground of jurisdiction on which the original court based its judgment differs from that resulting from the Convention, and recognition or enforcement is sought against a defendant domiciled in a State where the Convention applies but the Brussels I Regulation does not. This rule is not applicable when the judgment may otherwise be recognised or enforced under the law of the State addressed. The *ad hoc* working party discussed the advisability of retaining this rule, which is clearly inspired by a lack of confidence in the States bound by the Regulation among the States party to the Convention. But although the rule will most probably never be applied, and despite the solid mutual trust that exists between the States bound by the Convention, the rule may nevertheless provide a useful guarantee, given that the States bound by the Brussels I Regulation are free to amend their rules on jurisdiction through the Community procedures for the amendment of Community legislation, without the consent of the States that are party only to the Lugano Convention.

22. Finally, it should be pointed out that everything said so far about the relationship between the Lugano Convention and the Brussels I Regulation also applies, *mutatis mutandis*, to the relationship between the Lugano Convention and the Brussels Convention and between the Lugano Convention and the EC-Denmark Agreement.

([1]) Jenard-Möller report, pp. 14-17.

([2]) It has to be recalled that the Brussels I Regulation will be replaced, as far as its provisions on maintenance obligations are concerned, by Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement, and cooperation in matters of maintenance obligations (OJ L 7, 10.1.2009) (see Article 68 of the Regulation).

CHAPTER III

JURISDICTION

1. ***General provisions***

1. **The general rule of jurisdiction (Article 2)**

23. The general rule of jurisdiction in the new Convention is the same as it was in the 1988 Convention. It is based on the principle of *actor sequitur forum rei*, and remains anchored to the domicile of the defendant in a State bound by the Convention. It confirms that the defendant's nationality plays no role in jurisdiction (for reasons explored in detail in the Jenard report, pp. 14 ff.). Persons domiciled in a State bound by the Convention must therefore be sued in the courts of that State, whether they are citizens of that State or not (paragraph 1). As paragraph 2 reaffirms, persons who do not have the citizenship of the State in which they are domiciled are subject to the same jurisdiction as citizens of that State. It should be noted that, as in the 1988 Convention, the general rule assigns jurisdiction to the State in whose territory the defendant is domiciled without prejudice to the determination of a specific court with jurisdiction in that State on the basis of the national law of that State.

24. In the light of the Commission proposal ([1]), the *ad hoc* working party re-examined the question whether rather than domicile it would be preferable to look to the habitual residence of the defendant, as is done in many conventions, in particular those drawn up within the framework of the Hague Conference on Private International Law, and in Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and the enforcement of judgments in matrimonial matters and the matters of parental responsibility ('the Brussels II *bis* Regulation') ([2]). The working party concluded that the criterion of domicile should be retained, for several reasons: because of the difficulties that would have been faced by some States, such as the United Kingdom, which had adopted a specific definition of domicile in their domestic law for the purposes of applying the Brussels and Lugano Conventions; because habitual residence was considered by some experts to be more appropriate to personal and family relationships rather than to those of a commercial nature; because habitual residence did not appear to be an appropriate connecting factor in the case of companies and legal persons; and because habitual residence would in any event have needed an independent definition, on which it might have been difficult to reach agreement.

25. The possibility that the place of habitual residence might have been added to the notion of domicile, as an alternative criterion for establishing jurisdiction, was also discarded, because it would have multiplied the possible jurisdictions in cases where domicile and habitual residence were located in two different States ([3]). It was also pointed out that the use of domicile as the principal criterion for establishing jurisdiction had not met with any particular difficulties in the practical application of the Brussels and Lugano Conventions, notwithstanding the different interpretations of domicile offered by national laws, at least in proceedings in which the defendant was a natural rather than a legal person.

a) *The domicile of natural persons (Article 59)*

26. The *ad hoc* working party considered the possibility of providing an independent definition of 'domicile' in the Convention, instead of referring the matter to national law, as had the Brussels Convention and the Lugano Convention of 1988. Some experts had suggested that a common definition of the domicile of natural persons might be based in particular on the length of time the defendant had been present in the State of the court before which the case was brought; but in view of the fact that the existing Conventions had been working well, the working party did not think it advisable to provide such a definition. While it recognised the potential benefits of a common definition, the working party preferred to leave to national laws the task of defining the meaning of domicile in terms of the length of time the defendant had been in the territory, if such a definition was found to be necessary. The provision of Article 59 is therefore unchanged from the corresponding provision of Article 52 of the 1988 Convention, and the domicile of natural persons continues to be determined by the domestic law of the State in which they are domiciled.

b) *The domicile of companies and other legal persons (Article 60)*

27. The case of companies and legal persons is different, since the determination of their 'seat', treated as its domicile for this purpose, was entrusted by Article 53 of the 1988 Convention to the rules of private international law of the State of the court hearing the case. Reference to the domestic rules on conflict of laws, which are based on widely varying criteria, has not given rise to many problems in practice, but it may nevertheless create difficulties in the future. The Commission therefore proposed the adoption of a common definition of domicile for companies, which would be the place of their central management or, failing that, their registered office ([4]), so that a company could be linked to one legal system on the basis of factual elements. The arrangement set out in the new Article 60 of the Convention takes account of the Commission's proposal, but ensures that the courts of the States bound by the Convention have jurisdiction even if the company's seat is not located in any State bound by the Convention, provided that the central administration is within one of those States, and vice versa. This solution thus goes further than the Commission's proposal.

([1]) COM(97) 609 final, 26.11.1997. Similarly, in favour of habitual residence, proposals of the European Group for Private International Law, paragraph 26.

([2]) OJ L 338, 23.12.2003. The Regulation replaces the previous Regulation No 1347/2000, which also based jurisdiction on the criterion of habitual residence.

([3]) Jenard report, pp. 15-16.

([4]) COM(97) 609 final, Article 2.

28. The new definition lists as alternatives the statutory seat, the central administration, or the principal place of business of the company or other legal person. The fact that these are listed as alternatives means that if just one of them is in a State bound by the Convention the company can be sued before the courts of that State, even if the others are in a State outside the Convention altogether or in another State bound by the Convention. In the latter case, under the system of the Convention, there will be competing jurisdictions, and the choice of the forum will be left to the plaintiff. This definition is open to a degree of forum shopping, which is also possible to some extent in relation to the domicile of natural persons. In justification it may be pointed out that if a company decides to keep its central administration in a place separate from its principal place of business, it chooses to expose itself to the risk of being sued in both places.

29. Above all, however, the definition answers the need for a connecting factor that will ensure that if a company is incorporated in a State bound by the Convention, or does business there, any dispute regarding its activities will fall within the jurisdiction of the States bound by the Convention, so that the plaintiff will not be deprived of a 'Convention' court. It also offers the plaintiff the possibility of suing in the courts of the place where the judgment will probably have to be enforced. None of the criteria considered would have answered these needs on its own. The statutory seat does offer a significant degree of certainty, since it is easy to identify, but it is often situated somewhere other than the location of the company's assets, and does not lend itself to the enforcement of a judgment; it would, moreover, allow a company to have its central administration in a State bound by the Convention, or to carry on its principal business there, while having its statutory seat elsewhere, and thereby escape the jurisdiction of the States bound by the Convention. In turn, the central administration provides a link with a place that is useful for the purpose of enforcing judgment, but it is a factor internal to the company, often not immediately identifiable, which makes it harder to determine the court with jurisdiction; and if the central administration is located in a State outside the Convention, this criterion would not allow the company to be sued in a State bound by the Convention even if it had its statutory seat or its principal place of business there. Finally, the principal place of business is certainly easier to identify and verify, but if taken as the only connecting factor it would not allow jurisdiction to be exercised against a company which had its principal place of business outside the States bound by the Convention, even if that company had its statutory seat and central administration inside one of these States and conducted a significant amount of business there.

30. These considerations taken together underpin the choice of a broad definition that allows a company or other legal person to be summoned before a court in the State bound by the Convention with which it has a significant connection, in the shape of its central administration, its principal place of business, or its statutory seat. The concept of the 'statutory seat', however, is not an appropriate connecting factor for a company or legal person in the United Kingdom or Ireland, where the legal systems refer instead to the place where a company is entered in the register that exists for the purpose, or to the place in which it was incorporated. The registration criterion allows for the fact that the rule concerns not just companies or firms as such but also any body that is not a natural person, so that a registered office is of greater relevance than a 'seat' indicated in the founding documents. Article 60(2) therefore specifies that for purposes of those two countries the term 'statutory seat' means the registered office or, if there is no registration, the place of incorporation, or, if there is no place of incorporation, the place under the laws of which the formation took place. This last reference to the law applied to determine the place of formation that is treated as the statutory seat takes account in particular of the case of a partnership in Scottish law, where the only criterion looked at is the law under which the partnership was formed, regardless of the place of formation.

31. The working out of the concept of the domicile of companies and legal persons in Article 60 was also guided by the desirability of harmonising the general criterion of jurisdiction regarding companies with the connecting factors used in Article 48 of the EC Treaty for the purpose of recognising the right of establishment of companies or firms in the territory of the Community: Article 48 lists the 'registered office', the 'central administration' and the 'principal place of business' within the Community. Even if the need addressed by Article 48 is different – its purpose is to identify the companies or firms entitled to operate in all Member States - it appeared justified to use the same connecting factors to allow companies or firms to be sued in the courts of one of the States bound by the Convention. In other words, if one of the connecting factors referred to in Article 48 is enough to make a company a Community company, enjoying the advantages conferred by that status, it should be treated as a Community company for all purposes, and should therefore be subject to the civil jurisdiction of the Member States in which it operates and is entitled to operate.

32. The concept of domicile under consideration here relates to the *forum generale* of companies and legal persons, without prejudice to the definition of the domicile of a company for purposes of the *forum speciale* for particular categories of dispute, such as those which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons having their seat in a State bound by the Convention, or the validity of the decisions of their organs, which are the subject of Article 22(2) of the Convention (and which will be discussed below). For disputes relating to insurance contracts, consumer contracts and individual contracts of employment, Articles 9, 15 and 18 of the Convention make specific provision, unchanged from the 1988 Convention. Nor does the concept explained above affect jurisdiction in disputes arising out of the operations of a branch, agency or other establishment of a company, which are covered by Article 5(5) of the Convention (where the rules likewise remain unchanged).

33. The new text of the Convention also leaves unchanged the determination of the domicile of a trust, which it refers to the private international law of the court seised. While the application of this provision does not present particular problems in States whose legal systems recognise the trust as an institution, difficulties can arise in States in which this institution is unknown; in the absence of appropriate conflict rules for determining the domicile of trusts in the legal system of the court seised, the question may be made to depend on the law to which the trust is subject (Schlosser report, paragraphs 109-120).

2. **The inapplicability of national rules on jurisdiction (Article 3)**

34. As in the 1988 Convention, the general rule of jurisdiction founded on the domicile of the defendant may be departed from only in accordance with the rules of jurisdiction set out in the Convention, specifically in Sections 2 to 7 of Title II. This means that it is only by virtue of those rules that a person domiciled in a State bound by the Convention, whether a natural or legal person, can be sued in the courts of another State bound by the Convention. It should be observed that, though Article 3(1) refers in general terms to the 'courts' of another State bound by the Convention, this reference does not necessarily leave the internal jurisdiction of the courts of that State untouched: in many cases, the rules of jurisdiction set out in Title II have implications not only for the jurisdiction of a particular State, but also for the distribution of territorial jurisdiction among its courts, and may confer jurisdiction on a specific court.

35. As this is an exception to the general rule, the reference to the rules of jurisdiction set out in the Convention must be taken as definitive, and exclusive of any other national rules of jurisdiction, whether they are exorbitant or not (for example, a national rule of jurisdiction that refers to the defendant's place of residence, if different from the domicile). The system of the Convention is based on the unification of the rules of jurisdiction, rather than the mere exclusion of exorbitant jurisdictions, even though the national rules whose application is excluded are in fact often of this nature.

36. In this context, Article 3(2), together with Annex I, to which it refers and in which national rules that cannot be invoked are listed (for the reasons for moving the list of national rules from Article 3 to an annex, see below, in the discussion of Article 77), is intended merely as a description and guide for operators indicating the main national rules whose application is not permitted. Paragraph 1 provides that proceedings cannot be brought in courts other than those referred to in Sections 2 to 7 of Title II, and it follows that any other criterion of jurisdiction is excluded, whether or not the rule that provides for it is listed in Annex I. Thus, it appears to be irrelevant that not all the linguistic versions of paragraph 2 reproduce the words 'in particular' that preceded the list of national rules in the 1988 Convention ([1]). The list in Annex I is exemplary only, and does not restrict the effect of paragraph 1, according to which all national rules that do not comply with the rules of the Convention must be considered inapplicable.

3. **Defendant not domiciled in a State bound by the Convention (Article 4)**

37. If the defendant is not domiciled in a State bound by the Convention, jurisdiction, according to the system of the Convention, is governed by national law, and this is confirmed in Article 4 of the new Convention. Here the Convention does not furnish its own rules of jurisdiction, but regulates the matter only indirectly, by referring it to the legal system of the State of the court seised. Thus the defendant's domicile is also a criterion delimiting the scope of the rules in the Convention that govern jurisdiction directly and independently, but it is not a general criterion delimiting the regulation of jurisdiction by the Convention.

The correctness of this understanding of the matter, which had already been asserted in the literature on the 1988 Convention, was confirmed by the Court of Justice in Opinion 1/03, where the Court, speaking of Regulation No 44/2001, said that 'That regulation contains a set of rules forming a unified system which apply not only to relations between different Member States … but also to relations between a Member State and a non-member country', and in particular that 'Article 4(1) … must be interpreted as meaning that it forms part of the system implemented by that regulation, since it resolves the situation envisaged by reference to the legislation of the Member State before whose court the matter is brought' ([2]).

38. This reference to the national law of the court seised also encounters a limit in the rules laid down directly by the Convention which apply irrespective of the defendant's domicile. These are the rules on exclusive jurisdiction in Article 22 and the rules on the prorogation of jurisdiction in Article 23, which are now also mentioned in Article 4, though they already restricted the reference to national law in the past. Leaving these two provisions aside, the reference to national law means that where the defendant is domiciled in a State not bound by the Convention, the rules of jurisdiction listed in Annex I may be applied even if they constitute exorbitant jurisdiction. It is worth pointing out, lastly, that Article 4(2) confirms that foreign plaintiffs have the same entitlement as nationals of the State of the court seised to avail themselves of the rules of jurisdiction there in force, the only condition being that they be domiciled in that country (see the Jenard report, pp. 21-22).

([1]) See in particular the Italian version of the Convention; the same applies to the Italian version of the Brussels I Regulation.

([2]) Court of Justice, Opinion 1/03, paragraphs 144 and 148.

2. ***Special jurisdiction***

1. **General**

39. Alongside and as an alternative to the general rule of the domicile of the defendant in a State bound by the Convention, the Convention keeps unchanged the existing structure that provides for special jurisdictions which, at the plaintiff's choice, allow the plaintiff to bring the action in another State bound by the Convention. These jurisdictions are governed by Articles 5 to 7 of the Convention (corresponding to Articles 5, 6 and 6A of the 1988 Convention). While the general rule hinges on a factor connecting the defendant to the court, the special rules recognise a link between the dispute itself and the court which may be called upon to hear it. These jurisdictions reflect a principle of the efficacious conduct of proceedings, and will be justified only when there is a sufficient connection in terms of the proceedings between the dispute and the court before which the matter is to be brought, from the point of view of the gathering of evidence or the conduct of the proceedings ([1]), or in order to secure better protection of the interests of the parties against which the proceedings are directed. Given the comprehensive system of jurisdiction in the Convention, these rules apply whether or not they correspond to jurisdictions provided for by the national laws of the States bound by the Convention ([2]).

40. In part, the special jurisdictions provided for by the 1988 Convention remain as they were, although the wording sometimes undergoes minor changes of a purely editorial nature. The changes considered in what follows, therefore, are those that go beyond purely editorial modification, those where an editorial modification in fact reflects a substantive issue, and those where the development of the case-law of the Court of Justice requires further comment.

There is no significant change, and no need for further comment here over and above what was said in the reports on previous Conventions, regarding the rules on the jurisdiction of the courts of a State in which a trust is domiciled when a settlor, trustee or beneficiary of the trust is sued (Article 5(6), see the Schlosser report, paragraphs 109-120), or on the jurisdiction of a court arresting cargo or freight to hear disputes regarding the payment of remuneration for assistance or salvage, if it is claimed that the defendant has an interest in the cargo or freight and had such an interest at the time of the salvage (Article 5(7), see the Schlosser report, paragraphs 121-123).

41. The same can be said of the special rules conferring jurisdiction on the court in which the original claim is pending in the case of a counter-claim arising from the same contract or facts on which the original claim was based (Article 6(3), see the Jenard report, p. 28), or conferring jurisdiction in matters relating to a contract on the courts of the State bound by the Convention in which the property is situated, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property (Article 6(4), see the Jenard-Möller report, pp. 46-47, and the Almeida Cruz-Desantes Real-Jenard report, paragraph 24).

2. **Contracts (Article 5(1))**

42. Of the special jurisdictions provided for in Articles 5 to 7 which allow the plaintiff to bring an action in a State bound by the Convention other than the State of the domicile of the defendant that would be called for by the general rule, the one that has given rise to most discussion is certainly the jurisdiction in matters of contract. Article 5(1) of the Lugano Convention of 1988, like the corresponding provision in the Brussels Convention, permits a person domiciled in a State bound by the Convention to be sued in another State bound by the Convention 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'; it has been the source of a number of problems of interpretation, regarding the definition of 'matters relating to a contract', the determination of the obligation to be performed, and the determination of the place of performance. These problems have generated a large body of case-law of the Court of Justice, which has arrived at independent solutions or referred the matter back to national law as appropriate, without overcoming all the difficulties generated by the Convention.

43. On the definition of 'matters relating to a contract', the national laws of the Contracting States differ, and the Court has taken the approach that the concept is an independent one; it has not provided any general or abstract definition, but in individual cases has given pointers indicating when there is a contractual obligation and when there is not ([3]). The existence or validity of a contract is a matter relating to a contract ([4]). If an action relates both to breach of a contractual obligation and to non-contractual liability, there is no accessory jurisdiction: for the first claim jurisdiction is to be determined in accordance with Article 5(1), and for the second it is to be determined in accordance with Article 5(3), on liability arising out of a tort or delict, even if that might face the plaintiff with the prospect of separate actions before different courts ([5]), a prospect that can always be avoided by falling back on the general rule of the domicile of the defendant.

([1]) Court of Justice, Case 21/76 *Bier* [1976] ECR 1735.
([2]) Jenard report, p. 22.
([3]) Case 34/82 *Martin Peters* [1983] ECR 987; Case C-26/91 *Jacob Handte* [1992] ECR I-3697.
([4]) At least when the challenge is put forward in objection to an action for breach of contract (Case 38/81 *Effer* [1982] ECR 825).
([5]) Court of Justice, Case 189/87 *Kalfelis* [1988] ECR 5565.

44. Concerning the determination of 'the obligation in question', Article 5(1) expressly allows a number of jurisdictions in respect of one and the same contract, preferring a genuine connection between the court and the specific dispute over a single method of treatment of the contract. The search for a fair balance between the two requirements – a genuine link with the dispute and the unity of the contract – has led the Court of Justice to hold that the expression 'the obligation in question' refers to the contractual obligation on which the action is based, the obligation on whose non-performance the plaintiff's action relies, rather than to the obligation whose performance is expressly sought by the plaintiff ([1]).

In the same way the Court has held that where several obligations arising out of one contract are relied upon in the application, the court before which the matter is brought can determine whether it has jurisdiction by referring to the principal obligation ([2]); the question whether obligations are accessory or equivalent is a question to be determined by the court hearing the case, ordinarily on the basis of the law applicable to the contract ([3]). Despite these judgments, it is still regularly the case that one contract will be subject to more than one jurisdiction, particularly when claims are based on obligations arising out of the same contract that are equal in rank ([4]). It has been pointed out that this situation is not always satisfactory, especially since an obligation to pay can be severed from the rest of the contract and the matter brought before the court of the place where that obligation is to be performed, which is often the forum of the plaintiff.

45. Regarding the determination of the place of performance of the obligation in question, though other solutions might have been possible – an independent solution, or a reference to the *lex fori* – the Court of Justice has opted for reference to the *lex causae* of the disputed obligation, determined according to the rules of conflict of laws of the court before which the matter is brought ([5]), even in cases where the parties themselves decide the place in a clause which is valid according to the law applicable to the contract ([6]). This interpretation, which did not initially offer any uniform solution to the lack of harmonisation of the rules of conflict of laws of the Contracting States, and which left open the possibility of forum shopping, was subsequently underpinned by the Rome Convention of 19 June 1980 on the law applicable to contractual obligations: although the Rome Convention uses a flexible, objective connecting factor, nevertheless the law applicable to the contract, and hence the place of performance of the obligations arising under it, can as a rule be foreseen by the parties. But reference to the applicable law, as a means of determining the place of performance of the obligation, leaves intact the considerable disparity between national laws on financial obligations, and does not solve the problem that when the obligation relied on before the court is the obligation of payment, the place of performance frequently coincides with the forum of the plaintiff, thus providing scope for forum shopping.

46. Notwithstanding the interpretation provided by the case-law, which has smoothed out some of the difficulties, the rules described above have been judged unsatisfactory by many, and numerous proposals have been put forward for their amendment by the Commission and by the Contracting States. The proposals are varied, but all move in the direction of reducing the role of the reference to the place of performance of the obligation, safeguarding the unity of jurisdiction over the contract at least to some extent, and making it easier to ascertain and foresee the place of performance which is to serve as the basis of jurisdiction in the case. The proposals and the debate to which they gave rise in the *ad hoc* working party are described below to the extent that may be useful for an understanding of the origins of the present text.

47. The most radical proposal, which also has authoritative support in the literature ([7]), was that the forum of performance of the obligation should be removed, so that contractual matters would be left to the ordinary forum of the defendant, or alternatively the jurisdiction chosen by the parties. This solution was rejected by the *ad hoc* working party on the grounds that the forum of the defendant may not be the most appropriate if inspections have to be carried out in the place where goods were to be delivered or services provided, and that the parties may fail to select a forum for their disputes. The working party therefore turned to other proposals that would retain a forum of the contract, while avoiding, or at least limiting, the difficulties of the existing text.

48. Among these was a proposal to refer to the place of enforcement of the obligation characteristic of the contract, the intention being to avoid the fragmentation of jurisdiction over the contract, and to prevent jurisdiction based on the

([1]) Case 14/76 *De Bloos* [1976] ECR 1497, paragraph 13: on a claim for damages for breach of contract, the Court found that the obligation to be taken into account was not the payment of damages but rather the obligation whose breach the plaintiff relied upon in support of the claim for damages.

([2]) Case 266/85 *Shenavai* [1987] ECR 239.

([3]) Court of Justice, Case C-440/97 *Groupe Concorde* [1999] ECR I-6307, paragraph 26.

([4]) Court of Justice, Case C-420/97 *Leathertex* [1999] ECR I-6747.

([5]) Case 12/76 *Tessili* [1976] ECR 1473; Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 26 (where it is specified that the applicable law can include an international convention laying down a uniform law); Case C-440/97 *Groupe Concorde* [1999] ECR I-6307.

([6]) Case 56/79 *Zelger* v *Salinitri* [1980] ECR 89.

([7]) Droz, 'Delendum est forum contractus?', *Rec. Dalloz*, 1977, chron. p. 351.

obligation to make payment, unless, of course, the financial debt was the characteristic obligation of the contract. The proposal was not accepted, on several grounds: international contracts are often complex, and it is not always easy to identify the characteristic obligation; establishing the characteristic obligation requires an overall evaluation of the contract which is premature at the stage when jurisdiction is being determined; the determination of the place of performance of the characteristic obligation depends on the applicable law, so that it does not avoid the need to refer to the rules on conflict of laws; and, lastly, the characteristic obligation does not necessarily represent a sufficient connecting factor between the dispute and a particular court if the dispute turns on a different contractual obligation. It may be pointed out that it is one thing to determine the applicable law by seeking to define an overall contractual relationship in a homogeneous manner, even though some parts may be clearly less closely linked and jurisdiction may be fragmented, and quite another to define the connecting factor between a dispute and the court in the best position to decide it.

49. Having discarded the possibility of reference to the characteristic obligation of the contract, the *ad hoc* working party considered the possibility of restricting the scope of Article 5(1) to certain contracts only, more specifically to contracts of sale, as the Commission had proposed, with the place of performance being the place where the delivery was or should have been carried out, except in cases where the goods were delivered, or deliverable, to more than one place; this would deny any relevance to the obligation of payment ([1]). Against a restricted solution of this kind it was pointed out that a forum of the contract was desirable not only in the case of contracts of sale but also, and just as strongly, in the case of contracts for the provision of services. On the other hand it was in contracts of these kinds that the obligation to make payment was in most cases not the significant aspect on which jurisdiction could be based, except of course in the case of contracts for money services.

After mature reflection, the *ad hoc* working party decided not to make any radical change to the existing text, but to adjust it so as to indicate, in the case of a contract of sale or a contract for the provision of services, which obligation was the one whose place of performance could provide a basis for a jurisdiction alternative to the forum of the defendant, and to exclude any reference to the place of payment under such contracts, while leaving the existing provision unchanged for all other contracts and for cases in which the specific rules described proved inapplicable ([2]).

([1]) COM(97) 609 final, Article 5.

([2]) Along the same lines, in favour of laying down objective criteria indicating the actual place of delivery or actual place of provision of services, see for example the proposals of the European Group for Private International Law, paragraph 9; but those proposals suggested that if the objective criteria were inapplicable in a particular case the rule applied would be the general rule that jurisdiction vested in the courts of the defendant's domicile, rather than falling back on the place of performance of the obligation in question, as in Article 5(1)(a) of the present text.

50. Article 5(1)(a) of the new Convention takes over the corresponding provision of the 1988 Convention, conferring jurisdiction on the court of the place of performance of the obligation in question. The scope of the rule is not left entirely to the interpretation of whoever is called upon to apply it, as it was before: for the application of point (a), point (b) specifies that in the case of contracts for the sale of goods or the provision of services the place of performance of the obligation in question is to be the place - in a State bound by the Convention – where, under the contract, the goods were delivered or should have been delivered, or the services were provided or should have been provided. Thus point (b) identifies the obligation whose place of performance serves as a basis for establishing jurisdiction in respect of such contracts independently, irrespective of the obligation whose performance is the subject of the dispute. Without using the word, it adopts the principle of the characteristic obligation, and consequently excludes a reference to the obligation to make payment, even when that obligation is relied upon in the application.

The *ad hoc* working party did not incorporate into the text the Commission's initial proposal that point (b) should expressly exclude cases where under a contract of sale the goods were delivered, or deliverable, to more than one place. In such a case, if all the obligations to deliver are relied upon in the application at the same time, various solutions may be suggested in appropriate cases, without prejudice to any future interpretation this provision will be given by the Court of Justice, such as a reference to the principal place of delivery, a plaintiff's choice as to the place of delivery where to bring his action entirely or limited to the partial delivery in that place, or even a reference to the place of performance of the monetary obligation, if that obligation is relied upon in the application. The Court of Justice has already pronounced on the parallel provision enshrined in Article 5(1)(b) of the Brussels I Regulation, and has ruled that, 'where there are several places of delivery within a single Member State', 'the court having jurisdiction to hear all the actions based on the contract for the sale of goods is that in the area of the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of his choice' ([3]). The questions that arise, and the solutions that may be the more appropriate ones, where there are several places of delivery in different Member States have been deliberately left open by the Court of Justice ([4]). It goes without saying that similar problems will also arise where there are several places of provision of services in different States.

51. For the determination of the place of performance, point (b) adopts a factual test intended to avoid recourse to private

([3]) Court of Justice, Case C-386/05 *Color Drack* [2007] ECR I-3699.

([4]) See point 16 of the judgment.

international law, stating that unless the parties have agreed otherwise the place of delivery of the goods or of provision of the services must be identified 'under the contract'. It has to be pointed out that this provision applies 'unless otherwise agreed' by the parties; under these terms, party autonomy is explicitly preserved also as concerns the determination of the place of performance. The question remains open whether this provision may entirely prevent the rules of conflict of laws of the court hearing the dispute from coming into play where the parties have not indicated with sufficient precision the place of delivery or of provision of the service, and this may be established with the help of the law applicable to the contract, or where the subject of the dispute is in fact the place where the goods were delivered or should have been delivered, or the place where the services were provided or should have been provided.

Point (b), then, acts as a special rule, limited to contracts of sale and contracts for the provision of services, for the application of the general principle of the place of performance of the obligation in question laid down in point (a). It does not apply to contracts that do not fall into either of those categories, and it does not apply even to those categories when the place of performance of the contract is in a State not bound by the Convention. Whenever point (b) is found to be inapplicable, point (a) applies; this is in fact stated in point (c), which clarifies and confirms a conclusion that could be drawn from points (a) and (b) even without it. In the case, for example, of a sales contract where the obligation to deliver the goods is to be performed in a State bound by the Convention, the place of performance of an obligation to make payment cannot be made the basis for establishing jurisdiction; but if the obligation of delivery is to be performed in a State not bound by the Convention, the plaintiff could invoke the place where payment was to be made, always supposing that that place was located in a State bound by the Convention, as point (a) would then be applicable, and it allows the specific obligation relied upon to be taken into account.

52. Regarding jurisdiction over individual contracts of employment, which figure in Article 5(1) of the 1988 Convention, several proposals for amendment were put forward; the *ad hoc* working party chose to deal with this matter separately in Title II (see below, in connection with Section 5).

3. **Maintenance obligations (Article 5(2))**

53. The first limb of the provision, in (a) and (b), remains unchanged with respect to the provision in the 1988 Convention, which in its turn was identical to the provision in the Brussels Convention following the Accession Convention of 1978. For commentary, therefore, please refer to the previous reports (Jenard report, pp. 24-25; Schlosser report, paragraphs 90-108).

54. The Court of Justice has considered this provision on a number of occasions, and has clarified several aspects. The Court has held that the concept of a maintenance obligation is to be interpreted broadly, to include any obligation designed to enable a person to provide for himself or herself, whether or not payments are periodic and whether or not the obligation is determined on the basis of resources and need. It may, therefore, consist of the payment of a lump sum, if the amount of the capital has been arrived at in order to guarantee a predetermined level of income, or the transfer of ownership of property intended to enable a person to provide for himself or herself. Where such a provision is designed to enable one spouse to provide for himself or herself, or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the payment relates to a maintenance obligation, and not to rights in property arising out of a matrimonial relationship, which would be outside the scope of the Convention [1]. If these characteristics of a maintenance obligation are present, the obligation is governed by Article 5(2), and falls within the scope of the Convention, even if it is ancillary to a proceeding, such as a divorce proceeding, which is itself excluded [2].

55. The concept of 'maintenance creditor' is an independent concept that has to be determined in the light of the purpose of the rules of the Convention, without reference to the national law of the court seised. Article 5(2) does not make it possible to distinguish between a person whose right to maintenance payments has been recognised and a person whose right has not yet been established, and the concept consequently covers not only a person whose right to maintenance has already been established by a previous judgment, but also a person who is applying for maintenance for the first time, irrespective of whether national law restricts the notion of maintenance creditor to persons in the first category [3]. In the light of the Court's case-law, the *ad hoc* working party felt that there was no need to change Article 5(2) by replacing the expression 'maintenance creditor' with the expression 'applicant for maintenance', as the Commission had suggested [4].

The concept of 'maintenance creditor' does not include a public body that brings an action to recover sums it has paid to the maintenance creditor, to whose rights it is subrogated against the maintenance debtor, since in that case there is no need to deny the maintenance debtor the protection offered by the general rule in Article 2 of the Convention [5].

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(1) Court of Justice, Case C-220/95 *Van den Boogaard* v *Laumen* [1997] ECR I-1147, paragraph 22; earlier, Case 120/79 *de Cavel* [1979] ECR 731, paragraph 11.

(2) See in particular Court of Justice, Case 120/79 *de Cavel* [1979] ECR 731, paragraph 7.

(3) Court of Justice, Case C-295/95 *Farrell* v *Long* [1997] ECR I-1683.

(4) COM(97) 609 final, Article 5(2).

(5) Court of Justice, Case C-433/01 *Blijdenstein* [2004] ECR I-981, paragraphs 31 and 34.

56. There is a new provision in point (c), which concerns matters relating to maintenance that are ancillary to proceedings concerning parental responsibility: it confers jurisdiction on the court which, according to its own law, has jurisdiction to entertain the proceedings concerning parental responsibility, unless that jurisdiction is based solely on the nationality of one of the parties. But it should be noted that this does not in any way modify the provision of Article 5(2) as it currently stands in the 1988 Convention and in the Brussels I Regulation ([1]). The aim of point (c) is only to ensure parallelism between European Community law and the Lugano Convention. Recital No 11 to the Brussels II *bis* Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003) ([2]), in particular, clarifies the meaning of the rule of jurisdiction for maintenance claims where the maintenance claims are ancillary to parental responsibility proceedings, stating that jurisdiction with regard to such claims should be determined on the basis of Article 5(2) of the Brussels I Regulation. In order to avoid any doubt in the Lugano Convention, it was thought opportune to insert a provision clarifying the issue.

4. **Tort, delict and quasi-delict (Article 5(3))**

57. In matters of 'tort, delict or quasi-delict', the jurisdiction of 'the courts for the place where the harmful event occurred', provided for in Article 5(3) of the 1988 Convention (and earlier in the Brussels Convention), has given rise to a large body of Court of Justice case-law, prompted in part by the Jenard report, which limited itself to saying that the committee of experts for which Mr Jenard served as rapporteur 'did not think it should specify where the event which resulted in damage or injury occurred, or whether it is the place where the damage or injury was sustained. The Committee preferred to keep to a formula which has already been adopted by number of legal systems' ([3]), leaving open the meaning to be to be ascribed to the formula itself. The question came before the Court of Justice, which held that the wording of Article 5(3) must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, and that the defendant could be sued, at the option of the plaintiff, in the courts of either of the two places ([4]).

This interpretation does not choose between the different solutions accepted under national laws, which in order to determine where unlawful acts committed 'remotely' are deemed to have occurred base themselves sometimes on the theory of the place of the act and sometimes on the theory of the place of the result; it thus increases the scope for forum shopping. It should be noted, however, that reference exclusively to the place of the act would in many cases have removed any significance from this special jurisdiction for the place of the tort, given that the place of the act frequently coincides with the domicile of the defendant liable for the tort, while reference exclusively to the place where the damage occurred would in any event not have prevented a fragmentation of the legal action in many cases.

58. The Commission proposed that the case-law of the Court of Justice should be confirmed in the wording of Article 5(3), which should refer both to 'the place where the event giving rise to the damage occurred' and to 'the place where the damage or part thereof was sustained' ([5]). The *ad hoc* working party did not accept this proposal: it felt that to confirm clear and uncontested case-law in a legislative act was unnecessary, and perhaps dangerous, since the words used, if they were inserted into a legislative text, might lend themselves to new interpretations. Furthermore, from the standpoint of reference to the place where the damage occurred, the proposal to confer jurisdiction on the courts of 'the place where the damage or part thereof was sustained' had several drawbacks. It did not incorporate into the legislation the clarification supplied by the Court of Justice in judgments subsequent to the initial ruling. In these, the Court made clear that the place of the damage was the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who was the immediate victim of that event ([6]), and did not cover the place where the victim claimed to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State; so that it could not be construed so extensively as to encompass any place where the adverse consequences could be felt of an event which had already caused damage actually arising elsewhere ([7]). To codify part of the Court's case-law, but not all of its later developments, might have raised doubts regarding the legislature's intention as to the scope of the rule.

59. Furthermore, to confer jurisdiction on the court of 'the place where the damage or part thereof was sustained' would have meant that if there was damage in more than one State, the plaintiff could sue for the total damage in each of these States, which was contrary to the case-law of the Court: in a case of libel by a newspaper, the Court resolved the problem of plurality of damage caused by the same act by giving the courts of each of the States in which injury was suffered jurisdiction to rule on the harm caused in that State: the only courts with jurisdiction to rule on all the harm caused were those of the domicile of the defendant ([8]).

([1]) It has to be borne in mind that Article 5(2) will be replaced by Regulation No 4/2009 on maintenance obligations: see paragraph 19 above.

([2]) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003).

([3]) Jenard report, p. 26.

([4]) Court of Justice, Case 21/76 *Bier* [1976] ECR 1735.

([5]) COM(97) 609 final.

([6]) Court of Justice, Case C-220/88 *Dumez* [1990] ECR I-49.

([7]) Court of Justice, Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 21; Case C-168/02 *Kronhofer* [2004] ECR I-6009, paragraphs 19-21.

([8]) Court of Justice, Case C-68/93 *Shevill* [1995] ECR I-415, paragraph 33.

It is true that the solutions offered by Court of Justice oblige plaintiffs who suffer damage in several States to bring multiple proceedings, and given the different laws that are applicable this may lead to contradictory rulings regarding the same causal act [1]. Conferring jurisdiction over the entire damage on the court in each place where part of the damage occurred, on the other hand, would increase the scope for forum shopping and favour the plaintiff excessively. The *ad hoc* working party examined the alternative proposal that jurisdiction should be attributed to the court of the State in which the major part or a decisive part of the damage occurred. However, this solution was also eventually rejected, in view of the risk that a test of this nature might lead to frequent disputes regarding the determination of the major or decisive part of the damage, obliging the parties and the court to resolve questions of substance at the stage at which jurisdiction was being determined.

60. Having decided not to amend Article 5(3) in the manner proposed by the Commission, the *ad hoc* working party gave lengthy consideration to the possibility of clarifying the provision's scope with regard to its applicablity not only to claims for injury that had already occurred, as a literal reading of the 1988 Convention might suggest, but also to claims based on the threat of injury in the future.

The *ad hoc* working party had in mind in particular those cases in which an action brought by a public or private consumers' organisation led to an injunction protecting the collective interests of consumers, since such an action concerned behaviour likely to cause harm, and would otherwise be outside the objective scope of Article 5(3).

Actions of this nature are common practice in Scandinavian countries, and especially in Swedish law, and require uniform treatment in terms of jurisdiction and the enforcement of judgments in order to ensure that commercial operators who engage in fraudulent practices to the detriment of consumers in Member States of the Community – such as misleading marketing practices or unfair terms in standard contracts – are not beyond the reach of any action or remedy once their firm is based in a State other than the State where they are actually operating.

The *ad hoc* working party noted that this situation was covered by Article 31, which allowed application to be made to a court for provisional or protective measures available under national law, because that rule applied even where the measures in practice had final effect [2]. It also considered the protection extended to consumers by Community directives, such as Directive 93/13/EEC on unfair terms in consumer contracts, Article 7(1) and (2) of which oblige Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers, and specify that the means referred to must include provisions whereby persons or organisations, having a legitimate interest in protecting consumers, may take action according to the national law concerned, before the courts or before competent administrative bodies, for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms [3], or Directive 98/27/EC on injunctions for the protection of consumers' interests, Article 2 of which obliges Member States to designate courts or administrative authorities competent to require the cessation or prohibition of any infringement of a series of Directives on consumer protection listed in the Annex, and, where appropriate, to order measures such as the publication of the decision or the publication of a corrective statement, with a view to eliminating the continuing effects of the infringement, and the payment of fines to ensure compliance with the decisions [4].

61. Notwithstanding the possibility of resorting to these various legal provisions, the *ad hoc* working party also took account of the fact that these directives contained no rules of jurisdiction and that their application in the various Member States might not be uniform, the possibility that doubts might arise as to whether certain actions for cessation under national law were covered, and, lastly, the fact that such actions might be brought in cases that did not concern consumer protection, for example where a plaintiff sought to prevent a defendant from infirnging the plaintiff's intellectiual property rights; these considerations led the working party to include a specific provision in Article 5(3) conferring jurisdiction on the courts of the place of the harmful event in respect of threatened future harm as well.

The amendment is intended to clarify the scope of the law, and not to change it substance, as the inclusion of actions for cessation can clearly be derived by interpretation from the previous wording [5]. It should be remembered in this regard that the rationale for the special jurisdiction of the court of the place of a harmful event lies in the fact that that court is usually best placed to decide the case, owing to its proximity to the dispute and the ease with which evidence can be produced, and that this rationale applies not only to claims for compensation for damage already sustained but also to actions aimed at preventing damage from occurring. The Court of Justice subsequently took this view with regard to the Brussels Convention, though its reasoning was guided partly by the amendment made to Article 5(3) of the Brussels I Regulation, which was in the same terms as those now inserted into the Lugano Convention [6].

[1] Only a partial solution is provided by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007).

[2] In support of this view see also Schlosser report, paragraph 134.

[3] Council Directive 93/13/EEC of 5 April 1993 (OJ L 95, 21.4.1993).

[4] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 (OJ L 116, 11.6.1998).

[5] As in Schlosser Report, paragraph 134.

[6] Court of Justice, Case C-167/00 *Henkel* [2002] ECR I-8111, paragraphs 49-50.

62. The provision conferring jurisdiction in respect of harmful events that may occur in the future means that they are governed by the findings of the Court of Justice allowing the plaintiff to bring proceedings either in the place where the action generating the harm is to be avoided or in the place where the harmful event itself is to be prevented. Determining the place where the harm 'may occur' is essentially a matter of fact, and thus a matter for the court hearing the case. In line with the approach taken by the Court of Justice, however, it must be the place where there is a danger of immediate damage, and not a place where there may be indirect financial damage. The existence of a danger that may justify the grant of an injuction depends on the law of the State in which the injunction is sought: the rule here merely regulates jurisdiction, and does not specify the injunctions that may be issued, so that their character and content, the conditions on which they may be granted, and the persons entitled to seek them are to be determined by the law of the court seised or by Community provisions aimed at harmonising the relevant national laws.

63. As mentioned earlier, the special jurisdiction to issue injunctions that is under consideration here is concerned only with claims relating to conduct likely to cause damage which is not a breach of a contractual obligation; in the case of a breach of a contractual obligation, a remedy may be sought, as an alternative to the forum of the defendant, in the forum of the contract, as provided in Article 5(1). It should be borne in mind that the concept of 'tort, delict or quasi-delict', like that of 'matters relating to a contract', is to be interpreted independently, primarily by looking at the system and scope of the Convention, and is not a question that is referred to national law. In particular, the Court of Justice has held that the concept of 'matters relating to tort, delict or quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a contract with an obligation freely assumed by one party towards another ([1]).

5. **Actions arising out of a crime (Article 5(4))**

64. The provision conferring jurisdiction on the criminal court to hear actions for compensation or recovery arising out of a crime has been retained in the new Convention. The *ad hoc* working party discussed whether this provision should remain in the same terms, or should be amended or even deleted. It would indeed have been deleted by a proposal that criminal courts should be able to hear civil actions only if civil courts of the same place could hear actions originating from the same crime under the Convention. The working party decided to retain the rule, in view of the usefulness of the special jurisdiction conferred on criminal courts where national law allowed civil actions to be brought in the context of a criminal trial, which did not necessarily coincide with the jurisdiction for the place of a tort under Article 5(3).

65. The proposal for the amendment of Article 5(4) was in part connected to a redrafting of the other provision regarding the bringing of civil actions within a criminal context, in Article II of Protocol 1 to the 1988 Convention, which allows persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals, for an offence which was not intentionally committed, to be defended by a lawyer without having to appear in person. If the court orders their appearance, and they fail to appear, a judgment in the civil action given in the criminal trial need not be recognised in the other States bound by the Convention ([2]). It was proposed, on the one hand, that this rule should be extended to include intentional offences, and on the other hand that it should be restricted, so that it would say only that if the criminal court was also hearing the civil action, the defendant was entitled to be represented with respect to the civil action without appearing in person, without the provison specifying the implications of this provision for the recognition of the judgment. These proposals were rejected, partly in order to avoid forceful interference in the criminal law of the States in a Convention dealing with civil and commercial matters.

66. Article II of the Protocol thus remained unchanged ([3]), and in view of the parallelism with the Brussels I Regulation was transferred to the text of the Convention, now becoming Article 61. However, it should be noted that the decision not to extend the rule to intentional offences has been tempered by the Court of Justice, which has held that Article II of the Protocol is not to be interpreted as preventing the court of the State in which enforcement is sought from taking account, in relation to the public policy clause in Article 34(1), of the fact that in an action for compensation founded on an intentional criminal offence the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person ([4]). Which is the equivalent of saying that the provision in the present Article 61, which expressly refers to unintentional offences, applies to intentional ones as well, failing which recognition of judgments may be refused on the ground that they are contrary to public policy ([5]).

6. **Company branch offices (Article 5(5))**

67. The provision regulating the forum of a branch, agency or other establishment for disputes arising out of their operations has not undergone any modification. Article 5(5) confers special and terrritorial jurisdiction on the courts of the place where they are situated, with the aim of avoiding reference to national law. The concept of a branch, agency or

([1]) Court of Justice, Case C-334/00 *Tacconi* [2002] ECR I-7357, paragraphs 21-23, with reference to the Brussels Convention, in a case of pre-contractual liability.

([2]) Jenard report, p. 63.

([3]) This footnote only applies to the Italian version of the explanatory report. It describes a purely editorial change in the Italian version (the words *violazione involontaria* have been replaced by *violazione non dolosa*.

([4]) Court of Justice, Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 44-45.

([5]) In contrast to the findings of the Court of Justice in an earlier judgment, Case 157/80 *Rinkau* [1981] ECR 1391, paragraph 12.

other establishment is thus an independent one, which is common to the States bound by the Convention and ensures legal certainty. The Court of Justice has indicated that the concept of a branch, agency or other establishment implies a place of business which presents itself as the extension of a parent body, and has a management and is materially equipped to negotiate business with third parties, so that the latter know that they can establish a legal relationship with the parent body abroad without having to deal directly with it [1]. These characteristics are present even where the place of business is run by a company independent of the parent from the point of view of national company law, which has the same name and identical management, and which negotiates and conducts business as an extension of the parent, because third parties must be able to rely on the appearance thus created [2]. Protection of third parties in such a case requires that the appearance be deemed equivalent to the existence of a branch without legal independence.

On the basis of the concept described, it falls to the court to verify the evidence for the existence of a genuine secondary establishment in the case before it.

68. The disputes that have arisen regarding branches, agencies and other establishments, for which this Article provides a special jurisdiction that may replace the ordinary forum of the defendant, have been concerned with contractual and extra-contractual rights and obligations related to the management of the establishment (rent, relationships with staff, etc.), contractual obligations which have been entered into by the establishment in the name of the parent company and which are to be performed in the State in which the place of business is situated, and non-contractual obligations arising out of the activities engaged in by the establishment in the place in which it is situated on behalf of the parent [3].

Here too it is for the court before which the matter is brought to verify and classify the relationship relied upon, in the light of the concept of a dispute arising out of the operations of a branch, agency or other establishment as described here.

7. **More than one defendant and action on a warranty or guarantee (Article 6(1) and(2))**

69. Of the various situations where jurisdiction may be founded on a connection between the action brought and another action where jurisdiction is regulated by the Convention, the need has been felt for clarification of the case where there is more than one defendant, allowing the plaintiff to bring proceedings in the court of the domicile of any of them, as the effective scope of the provision has been considered uncertain. In the absence of any indication in the original text of the Brussels Convention, the Jenard report pointed out that jurisdiction that derived from the domicile of one of the defendants had been adopted because it made it possible to obviate the handing down in the Contracting States of judgments which were irreconcilable with one another, and was not justified where the application was brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant was domiciled [4].

The Court of Justice has held that Article 6(1) requires that the actions brought by the plaintiff be related in such a way that dealing with them separately might result in irreconcilable judgments [5]. The *ad hoc* working party considered it advisable to codify the case-law on this point, and to define what the relationship between the actions should be if it was to confer jurisdiction with respect to all the defendants on the courts of the domicile of one of them. It may be noted that the concept of relatedness accepted coincides with that in Article 28(3), although the premisses and purposes of that provision are different: it is aimed at coordinating the jurisdiction of the States bound by the Convention, rather than identifying the court or courts of one of those States that has jurisdiction.

70. Contrary to the view put forward by the Commission [6], the *ad hoc* working party did not believe it necessary to codify the other principle stated in the Jenard report, according to which jurisdiction is justified only if the claim does not have the exclusive purpose of removing one of the defendants from their proper court. It felt that the close relation that must exist between the claims, together with the requirement that the court before which the matter was brought be the court of the domicile of one of the defendants [7], was sufficient to avoid the misuse of the rule [8]; this was not the case with an action on a warranty or guarantee or other third party

[1] Court of Justice, Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183.

[2] Court of Justice, Case 218/86 *Schotte* v *Parfums Rothschild* [1987] ECR 4905, paragraph 17.

[3] Court of Justice, Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183.

[4] Jenard Report, p. 26.

[5] Court of Justice, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 12; and Case C-98/06 *Freeport* [2007] ECR I-8319.

[6] COM(97) 609 final, Article 6.

[7] Court of Justice, Case C-51/97 *Réunion européenne* [1998] ECR I-6511.

[8] This consideration is not meant to imply that Article 6(1) may be interpreted in such a way that it would allow a plaintiff to bring an action against a plurality of defendants in the court competent for one of them with the sole purpose of removing the other defendants from their proper court: see Court of Justice, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 32. See also Court of Justice, Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 54.

proceedings regulated by Article 6(2), where the principle was expressly referred to in order to prevent a third party from being sued in an unsuitable court. It may be pointed out that where there is more than one defendant, jurisdiction is based objectively on the close link between the actions, which has to be shown by the plaintiff, whereas in the case of an action on a warranty or guarantee or other third party proceedings no such close link is required. In its place, 'the related nature of the main action and the action on a warranty or guarantee' [1] is enough, irrespective of the basis on which the court has jurisdiction in the original proceedings, and this makes it advisable that there should be a provision safeguarding the defendant's right to be sued in the court which would be competent in his case, even though it places on the defendant himself the burden of proving that he has been removed from it.

71. Nor did the *ad hoc* working party consider it necessary to include a provision in Article 6(1) aimed at preventing the provision from being applied to defendants who have agreed a choice of forum clause with the plaintiff in accordance with Article 23 of the Convention. The Commission had made a proposal to this effect, but the exclusive jurisdiction provided for in Article 23 has precedence over any other jurisdiction regulated by the Convention, subject only to the provisions indicated in Article 23(5), so that there is no room for doubts of interpretation, and there is no reason to repeat the principle in a specific rule conferring jurisdiction. The fact that the report refers to such precedence only in the comment on Article 6(2) is no evidence to the contrary, as this rule of jurisdiction takes precedence over all the rules of jurisdiction in the Convention, with the exception of those listed in Article 23 itself. Of course this does not apply to a choice of forum clause to which the parties did not intend to give an exclusive character (for which see below, in connection with Article 23).

72. It should be noted, finally, that the pecularities in matters of actions on a warranty or guarantee of some States bound by the Convention, which had been made subject to a special rule under which Article 6(2) of the Brussels Convention was declared inapplicable, a rule repeated in Article V of Protocol 1 to the 1988 Convention, are treated in the same way once again in the new Convention, and specifically in Article II of Protocol 1. That Article provides that the jurisdiction specified in Articles 6(2) and 11 may not be fully resorted to in the States bound by the Convention referred to in Annex IX to the Convention (Germany, Austria, Hungary and Switzerland [2]), while persons domiciled in another State bound by the Convention may be sued in the courts of those States pursuant to the rules on third party proceedings there provided for. But decisions taken in other States under Articles 6(2) and 11 will be recognised and enforced in the States concerned under the special provision in Title III of the Convention (for comment on the reasons for this special provision for some States, see the Jenard report, pp. 27-28; the Schlosser report, paragraph 135; and the Jenard-Möller report, paragraph 105) [3]. Article II of Protocol 1 adds a new paragraph (paragraph 2) which provides that at the time of ratification the European Community may declare that proceedings referred to in Articles 6(2) and 11 may not be resorted to in some other Member States, and in that event is to provide information on the rules that are to apply instead [4]. The inapplicability of Articles 6(2) and 11 in Germany, Austria and Hungary is also recognised in the Brussels I Regulation (Article 65).

3. ***Protective jurisdictions***

1. **Insurance (Articles 8 to 14)**

73. In matters of insurance, the Convention maintains an independent and complete scheme, with the exception of a reference to Articles 4 and 5(5); Article 9(2) gives more extensive scope to the forum of a branch, agency or other establishment, which makes it possible to base jurisdiction on the existence of a branch, agency or other establishment even when the insurer is not domiciled in a State bound by the Convention. In order to protect the weaker party in an insurance relationship, the Convention keeps the previous structure, distinguishing between the position of the insurer on one side, and that of the policyholder, the insured or a beneficiary, on the other, and providing various criteria for jurisdiction depending on whether one or other assumes the position of plaintiff or defendant (see the Jenard report, pp. 30-33, and the Schlosser report, paragraphs 136-152).

74. Under the 1988 Convention, the insurer could be sued not only in the courts of the State of domicile – and other courts in particular cases – but also in the courts of the policyholder's domicile, on an action brought by the policyholder; but the insurer could sue the policyholder, the insured or a beneficiary only in the courts of their State of domicile. This rule of jurisdiction gave a distinctive position to the policyholder, who enjoyed greater protection than the insured or the beneficiary: They could likewise be sued only in the courts of the State in which they were domiciled, but as plaintiffs they could not sue the insurer before the courts of their own domicile, which was a right reserved to the policyholder. The Jenard report explained

[1] Court of Justice, Case C-365/88 *Hagen* [1990] ECR I-1845.

[2] According to the Draft Ratification Act approved by the Swiss Federal Council on 18 February 2009 (BBl 2009 1777, FF 2009 1497; FF 2009 1435), Switzerland will withdraw its declaration in respect of Article II of Protocol I, with effect as of the entry into force of the Convention.

[3] The States concerned by the provision are Germany, Austria, Hungary and Switzerland.

[4] By the Decision of the EC Council concerning the conclusion of the new Lugano Convention, adopted on 27 November 2008 (OJ L 147, 10.6.2009), the Council decided that the Community would make a declaration, in accordance with Protocol I, Article II, paragraph 2 of the Convention, whereby the proceedings referred to in Articles 6(2) and 11 may not be resorted to in Estonia, Latvia, Lithuania, Poland and Slovenia, besides the Member States already mentioned in Annex IX to the Convention.

that the distinction was motivated by the consideration that only the policyholder was in a business relationship with the insurer and that 'it would be unreasonable to expect the insurer to appear in the court of the insured or of a beneficiary, since he will not necessarily know their exact domicile at the time when the cause of action arises' ([1]).

The *ad hoc* working party took the view that this argument no longer reflected the needs of the insurance business as it had developed in recent decades, with greater competition, new forms of insurance, and above all a higher level of legislative harmonisation as a result of the adoption of Community single market directives, which made it less difficult for an insurer to appear before a court of another country in the single market. Despite the development of European judicial cooperation, on the other hand, it is still quite difficult for a private person to sue a company in a different country, in the courts of the company's State of domicile. These considerations have led to the removal of the distinction described, and the insertion of the insured and the beneficiary alongside the policyholder in Article 9(1)(b), thus putting them on an equal footing ([2]).

75. In addition to the entitlement given them to sue the insurer in the courts of their own domicile, policyholder, insured and beneficiary are protected by restricting the general principle that allows the parties to depart from the rules of jurisdiction of the Convention except in the case of exclusive jurisdiction. Article 13 states that an agreement on jurisdiction can be entered into only in specified and limited circumstances, which include that of an insurance contract covering one or more of the risks listed in Article 14, essentially connected with sea, air and combined transport of goods and passengers. This restriction on choice of forum clauses in contracts ensures a high level of protection, and applies to insurance contracts entered into not just by private consumers, but also by businesses and professionals. There was some doubt, however, whether such wide protection was justified with respect to commercial insurance contracts.

The *ad hoc* working party, therefore, looked at the option of increasing the role of the freedom of the parties by distinguishing between insurance contracts concluded by consumers and contracts entered into in the course of industrial, commercial or professional activities, and allowing the latter a choice of forum. The preferred option, however, was that the contracts in respect of which the parties could be allowed greater freedom should be identified by reference not to the policyholder, but to the risks covered by the contract, with additional risks being added to those that already appeared in Article 12A of the 1988 Convention. This solution has the advantage that it does not modify the structure of the Convention, so that the section on insurance remains separate from the section on consumer contracts. Furthermore, it avoids any reference to a policyholder who is a consumer, so that it continues to offer protection not just to consumers but to individual entrepreneurs, to small and medium-sized enterprises, and to professionals who, even though they carry on an industrial, commercial or professional activity, deserve the same protection in matters of insurance as that given to consumers.

76. By a cumulative approach, therefore, the risks already listed in Article 14 (to which reference is made in Article 13(5)) remain as they are, and to these the new Convention adds 'all large risks'. The expression used to define the risks which, when they are covered by an insurance contract, allow the parties to depart from the otherwise compulsory provisions of the section, differs from the corresponding Article 14(5) of the Brussels I Regulation. The latter speaks of all large risks 'as defined in Council Directive 73/239/EEC, as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended', and thus refers to Community legislation both present and future. The wording is different here because it would not have been appropriate to make a precise reference to Community rules in a Convention to which States that are not members of the European Community are party. Effectively, however, the general reference to 'large risks' in Article 14(5) of the Convention is to be understood to designate the same risks as those referred to in the Directives listed.

These large risks are defined in Article 5 of Directive 1988/357/CEE ([3]), which refers to point A in the Annex to Directive 73/239/EEC ([4]), and specifically to risks classified under classes 4 to 7 (damage to or loss of railway rolling stock, aircraft, sea, lake and river and canal vessels, and goods in transit or baggage, irrespective of the form of transport), and under classes 11 and 12 (aircraft liability and liability for sea, lake and river and canal vessels including carrier's liability); risks classified under classes 14 and 15 (credit and suretyship), where the policyholder is engaged professionally in an industrial or commercial activity or in one of the liberal professions, and the risks relate to such activity; and risks classified under classes 8 and 9 (fire and natural forces and other damage to property), 13 (general liability) and 16 (miscellaneous financial loss), in so far as the policyholder exceeds the limits of at least two of three criteria relating to balance-sheet total, net turnover and average number of employees during the financial year.

([1]) Jenard report, p. 31, which adds that the domicile of the policyholder which is relevant for the purpose of determining jurisdiction is the domicile existing at the time when the proceedings are instituted.

([2]) See also Court of Justice, Case C-463/06 *FBTO Schadeverzekeringen* [2007] ECR I-11321, paragraph 24.

([3]) Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (OJ L 172, 4.7.1988).

([4]) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 228, 16.8.1973).

Of the risks classified under point A of the Annex, therefore, those considered 'large risks' are essentially those where the policyholder is a business of a certain size, or at any rate one that is engaged in an industrial, commercial or professional activity, and exclude the risks classified under the classes accident, sickness, motor vehicles and legal expenses, where the policyholder is usually acting as a private individual. Thus although it does not do so expressly, as the Brussels I Regulation does, the Convention establishes a connection between jurisdiction and the freedom to provide services, for firms and for the classes of insurance other than life assurance covered by the First Directive, even in the States bound by the Convention that are not members of the European Community.

77. As has been pointed out, the Brussels I Regulation defines large risks by making an express reference to Community directives which includes potential future amendments. There is no such reference in the Convention, but the bare words 'all large risks' in Article 14(5) have to be interpreted in the light of the Community rules, present and future, at least in so far as the Community rules do not make radical changes to the approach to the handling of large risks. This view is supported by the recital in the preamble that states that the Convention is based on the extension of the principles laid down in the Brussels I Regulation to the contracting parties, and by Protocol 2, which seeks to arrive at as uniform an interpretation as possible of the Convention and of the Brussels I Regulation. Any problems that may emerge as a result of changes in the Community rules are to be considered within the context of the Standing Committee set up under Protocol 2 (paragraph 203 below).

2. **Consumer contracts (Articles 15 to 17)**

78. In matters of consumer contracts, the Convention confirms the preceding rules protecting the weaker party to a contract in the same terms as the 1988 Convention, and lays down an independent scheme, without prejudice to Articles 4 and 5(5). While the consumer may sue the other party to the contract not just before the court of the State in which the other party is domiciled, but also before the court of the consumer's own domicile, the other party may bring an action only in the courts of the State bound by the Convention in whose territory the consumer is domiciled (Article 16). The Convention permits an agreed choice of forum, but only after the dispute between the parties has arisen, or if it allows the consumer to bring proceedings in other courts, or if the choice of forum agreement conferes jurisdiction on the courts of a State in which the consumer and the other party both have their domicile or habitual residence at the time of the conclusion of the contract, provided that such an agreement is not contrary to the law of that State (Article 17). For these provisions, therefore, please refer to the earlier reports (Jenard report, pp. 33-34; Schlosser report, paragraphs 159-161).

79. While the system of protection does not change, the Convention further widens the range of the contracts falling under it. The 1988 Convention, which took over the wording of the Brussels Convention then in force, provided that the protection offered by the Convention covered the sale of goods on instalment credit terms, loans repayable by instalments, or any other form of credit made to finance the sale of goods, and any other contract for the supply of goods or contract for the supply of services, if in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and the consumer took in that State the steps necessary for the conclusion of the contract (Article 13(1)). This last part of the provision considerably broadened the scope of the protection provided by comparison with that in the original Brussels Convention, which was confined to sales on instalment credit terms and loans repayable by instalments, but nevertheless it was not considered sufficient to guarantee adequate protection of consumers by the courts, parallel to the substantial protection offered by the Community directives. The 1988 Convention lacks a definition of the parties to a consumer contract, and in particular a definition of the other contracting party, it does not cover all consumer contracts, and its wording does not make it certain that it covers contracts concluded in non-traditional and especially digital formats.

80. Regarding the definition of the consumer, Article 15 of the Convention essentially reproduces the definition in the 1988 Convention, under which the consumer is a natural person who concludes a contract 'for a purpose which can be regarded as being outside his trade or profession'. This corresponds to the definition used in other Community legislation [1], in particular in the Regulation on the law applicable to contractual obligations (Rome I) [2]. But the 1988 Convention lacks a definition of the other party to a consumer contract, which has given rise to doubt whether a contract which is concluded for a purpose outside the trade or profession of both contracting parties falls under the special rules on consumer contracts or the general rules of the Convention. It should be observed that the application of the special rules in Articles 15 to 17 is justified only where there is an imbalance between the positions of the parties such as to require that steps be taken to reduce or to eliminate it so as to protect the weaker party. This is the case only when the other party is engaged in a commercial or professional activity. Nevertheless, in order to avoid doubts of interpretation, Article 15(1)(c), which applies to most consumer contracts, expressly states that it is applicable to contracts concluded by the consumer with 'a person who pursues commercial or professional activities'. This clarification was not considered necessary in the specific cases of contracts for the sale of goods on instalment credit terms or for loans repayable by

[1] In particular Article 2 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, (OJ L 372, 31.12.1985); and, though with slightly different wordings, in other directives on consumers, for example Article 2 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993), and Article 2 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997).

[2] See Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008). See also Article 5 of the Rome Convention of 19 June 1980 (OJ C 334, 30.12.2005).

instalments, where it is difficult to imagine that the seller or lender is acting outside the scope of a trade or profession.

81. Article 15 of the Convention also considerably widens the range of consumer contracts to which it refers. While Article 13(1)(3) of the 1988 Convention speaks of 'any other contract for the supply of goods or a contract for the supply of services', Article 15(1)(c) of the new Convention uses the words 'in all other cases', referring to any contract, other than a contract for the sale of goods on instalment credit terms or for a loan repayable by instalments, which is concluded with a person who pursues commercial or professional activities, provided the contract falls within the scope of such activities. This broad concept of consumer contracts extends the scope of the protection offered, and simplifies the determination of the contracts covered, in line with the protection provided by the Community directives on consumer protection. It encompasses all the contracts regulated as consumer contracts by the Community directives, including contracts whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, in so far as they are regulated by Directive 87/102/EEC on consumer credit ([1]).

There is no longer any doubt that the concept includes contracts relating to the purchase of the right to use immovable properties on a timeshare basis, which are the subject of Directive 94/47/EC ([2]); it would not otherwise have been certain that these were to be classified with consumer contracts, rather than with contracts for the purchase of rights *in rem* in immovable property, which are the subject of Article 22(1), given the disparity among the various national laws of the States bound by the Convention. This conclusion has been confirmed by the Court of Justice, which has held that timeshare contracts that are subject to Directive 94/47/EC are also covered by Directive 85/577/EC if the conditions for the application of that directive are otherwise fulfilled ([3]), and that that interpretation must be taken into account for the purposes of the interpretation of the Convention, given the link between the Convention and the Community legal order ([4]).

82. The Convention also extends the scope of the rules on consumer contracts as regards the connection with the State in which a consumer is domiciled. It does not innovate with regard to the sale of goods on instalment credit terms or loans repayable by instalments, where there is no need for proximity between the contract and the State in which the consumer is domiciled. For other contracts, however, the extension of protection to all consumer contracts, and the extension of the *forum actoris* that that brings with it, would not be justified without a factor connecting the other contracting party and the State of domicile of the consumer. The 1988 Convention required certain links in the case of contracts for the supply of goods or services – the requirement that in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising, and the requirement that the consumer took in that State the steps necessary for the conclusion of the contract – but the *ad hoc* working party considered that these were insufficient, and unsuited to the present requirements of consumer protection. The new Convention therefore requires that the commercial or professional activities of the person with whom the consumer concludes a contract be pursued in the State of the consumer's domicile, or that they be directed to that State or to several States including that State.

83. The new connection with the State of domicile of the consumer can be applied to a contract of any kind, and is intended in particular to meet the need for protection arising out of electronic commerce ([5]). It does not depend on the place where the consumer acts, or on the place where the contract is concluded, which may be in a country other than that of the consumer's domicile: it attaches importance only to the activities of the other party, which must be pursued in the State of the consumer's domicile, or directed to that State, perhaps by electronic means. In the case of an Internet transaction, for example, the fact that the consumer has ordered the goods from a State other than the State of his own domicile does not deprive him of the protection offered by the Convention if the seller's activities are directed to the State of his domicile, or to that State among others; in that case too the consumer may bring proceedings in the courts of his own domicile, under Article 16 of the Convention, regardless of the place where the contract was concluded and regardless of the place where a service supplied electronically was enjoyed.

The connection exists only if the commercial or professional activities are indisputably directed towards to the State where the consumer is domiciled. Whether a website is considered active or passive is irrelevant here. As the EU Council and the EU Commission have stated on Article 15 of the Brussels I

([1]) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987), subsequently replaced by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008).

([2]) Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994).

([3]) Court of Justice, Case C-423/97 *Travel Vac* [1999] ECR I-2195, paragraph 22.

([4]) Court of Justice, Case C-73/04 *Klein* [2005] ECR I-8667, paragraphs 22 *et seq*.

([5]) As defined in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000), Article 1(4) of which expressly provides that it does not 'deal with the jurisdiction of Courts', which is consequently left to the Brussels I Regulation and, in parallel, to the Lugano Convention.

Regulation, 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet. In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor' ([1]).

84. The sphere of application of the rules of jurisdiction protecting consumers has been further expanded to include contracts of transport, which were excluded from it by the 1988 Convention, where they were made subject to the general rules on contracts. The exclusion of all contracts of transport appeared unjustified given the practice of concluding contracts for a combination of travel and accommodation for an inclusive price. To continue to exclude contracts of transport here would also have meant that different rules of jurisdiction would have to be applied to the different services combined in a single contract which in economic terms represents a single commercial transaction. Article 15(3) therefore limits the exclusion from the rules in Section 4 of Title II to contracts of transport that do not provide for a combination of travel and acommodation for an inclusive price; this provision is thereby aligned on the provision for consumer contracts in the Convention on the law applicable to contractual obligations ([2]).

3. **Individual contracts of employment (Articles 18 to 21)**

85. Individual contracts of employment were completely ignored in the original Brussels Convention, and were consequently subject to the general rules and to the special rule on contractual obligations in Article 5(1), without any special restriction on the choice of forum; they were made the subject of special rules in the 1988 Convention (the second part of Article 5(1) and Article 17(5)); and they are now dealt with by special rules in Section 5 of Title II, which comes after the sections on insurance and consumer contracts, completing the rules protecting the weaker party to a contract. The new section follows the same scheme and the same solutions as the others, departing in some respects from the arrangements in the 1988 Convention.

86. Like the provisions in the other sections, Article 18(1) affirms the independent and comprehensive nature of the rules of jurisdiction for individual contracts of employment contained in the section, without prejudice to Article 4 if the defendant is domiciled in a State not bound by the Convention, and without prejudice to Article 5(5) for disputes concerning a branch, agency or other establishment. Like Article 9(2) and Article 15(2), Article 18(2) treats the existence of a branch, agency or establishment in a State bound by the Convention as equivalent for questions arising out of their operation to a domicile of the employer in that State, even if the employer is domiciled in a State not bound by the Convention.

87. Jurisdiction in proceedings against an employer domiciled in a State bound by the Convention is governed by Article 19, which, for the most part, reproduces the provision in the second part of Article 5(1) of the 1988 Convention. This means that an employer can be sued not only in the courts of the State where he is domiciled, but also in the courts of the place where the employee habitually carries out his work or the last place where he did so (paragraph 2(a)). The last phrase was missing from the 1988 Convention, and has been inserted because it has frequently been observed that proceedings are brought by an employee against an employer only after the employment relationship comes to an end or the employee is no longer working. It would not be appropriate to deprive the employee of the alternative forum of his place of work in such cases. There is also the fact that in the place of his employment, whether during the employment relationship or after it has ended, the employee can usually turn to a trade union that can help him to assert his rights before the courts.

If an employee works or has worked habitually in different countries, an action may be brought in the courts of the place where the business which engaged the employee is or was situated (paragraph 2(b)). The solution adopted corresponds to that of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations ([3]). It should be noted that this solution is necessary only when it is not possible to determine a country of reference meeting the two requirements that a significant link be established between the dispute and a place whose courts are in the best position to decide the case in order to afford proper protection to the employee as the weaker party to the contract, and that multiplication of the courts having jurisdiction be avoided. Even when the employee works in more than one State, if he actually performs the essential part of his duties vis-à-vis his employer in one place, it is in that place that he must be judged habitually to carry out his work, and Article 19(2)(a) of the Convention will consequently apply ([4]).

([1]) The Declaration of the Council and the Commission is available on the website of the European Judicial Network, in particular at http://ec.europa.eu/civiljustice/docs/Reg_44-2000_joint_statement_14139_en.pdf.

([2]) Article 5(5) of the Convention of 19 June 1980; see also Articles 6(3) and 6(4)(b) of the Rome I Regulation.

([3]) Article 6(2)(b) of the Convention (OJ C 27, 26.1.1998); see also Article 8(3) of the Rome I Regulation.

([4]) See, with reference to Article 5(1) of the Brussels Convention, Court of Justice, Case C-37/00 *Weber* [2002] I-2013, paragraphs 49-58.

88. The *ad hoc* working party examined a proposal to add a jurisdiction to those provided for in Article 19 so as to allow an employee who has been posted for a limited period in another State bound by the Convention, for the purpose of work, to bring legal proceedings concerning the work and the conditions under which it is carried out in the courts of that State. The proposal was considered in the light of Directive 1996/71/EC on the posting of workers ([1]), Article 6 of which provides that 'In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State'. Obviously this provision, interpreted in the context of the Directive, has a scope different from that of a provision in the Convention conferring general jurisdiction, in favour of the employee, on the courts of the State in which he is posted.

The Directive gives a series of definitions of the terms used – such as 'posted employee', 'terms and conditions of employment', etc. – which would need to be referred to in interpreting the provisions of the Convention. Furthermore, the jurisdiction of the court of the employee's place of posting is limited by the Directive to 'the terms and conditions of employment guaranteed in Article 3' of the Directive, and is not of a general nature. To confer general jurisdiction on this court would not include all of the matters covered by Article 3 of the Directive, since the terms and conditions of employment it refers to cover such subjects as health, safety and hygiene at work, which are matters of public law, and could not be included in the Lugano Convention, confined as it is to civil and commercial matters. Lastly, an additional forum inserted into the Convention would be available exclusively to employees, while Article 6 of the Directive does not distinguish between the positions of the parties, and also provides a basis for jurisdiction over proceedings brought by an employer. So to confer jurisdiction on the courts of a State in which a worker is posted would not regulate jurisdiction in the same way as the Directive, and would create two systems subject to different rules of interpretation and application, which might undermine legal certainty in areas where protection ought to be ensured.

These considerations persuaded the *ad hoc* working party not to accept the proposal to confer general jurisdiction on the court of the place where a worker is posted, and not to amend the rules of jurisdiction regarding employment, though the Directive continues to operate within its own sphere of application, and in any event allows proceedings to be brought under existing international conventions on jurisdiction, among them the Lugano Convention, whose sphere of application remains unchanged.

89. As with the other protective jurisdictions, actions may be brought by an employer against an employee only in the courts of the State bound by the Convention in which the employee is domiciled, except in the case of a counter-claim before the court dealing with the principal claim under the rules in the section on contracts of employment. In providing accordingly, Article 20 follows the same criterion as that adopted for insurance and consumer contracts, and thus modifies Article 5(1) of the 1988 Convention, which also allows the employer to bring proceedings before the court of the place where the employee habitually carries out his work, and, if he works in more than one country, the place of the business which engaged the employee. The decision to remove the employer's option here was taken after careful evaluation of the role played by this criterion of jurisdiction. The reference to the place where the work is carried out is intended to offer the employee an alternative forum if the employee takes the view that it will be easier to prove his claim there, even after the relationship of employment has ended, and not to offer the employer an expedient *forum actoris* for disputes with an employee.

90. The rules on choice of forum are also aligned on the system for insurance and consumer contracts. In line with what is provided in Article 5(1) of the 1988 Convention, Article 21(1) states that a different jurisdiction can be agreed only after the dispute has arisen, so that the employee is in a position to assess whether it is desirable. Article 21(2) adds that a choice of forum clause may also depart from the general rules if it allows the employee to bring proceedings in courts other than those indicated in Article 19. By contrast with the other sections, however, there is no reference to the validity of a clause conferring jurisdiction on the courts of a State where both the employer and the employee have their domicile or habitual residence, as this would conflict with Article 3 of the abovementioned Community Directive on the posting of workers in the framework of the provision of services.

4. ***Exclusive jurisdictions***

1. **General**

91. For some classes of subject-matter the jurisdiction provided for is exclusive, for reasons that require no particular comment, all related to the special closeness between the court and the type of situation. In certain matters the sound administration of justice suggests that exclusive jurisdiction should be conferred on the courts that are best placed to consider the dispute and to apply the local rules and customs. The new Convention confirms the characteristics of exclusive jurisdiction: exclusive jurisdiction applies regardless of where the parties are domiciled in the States bound by the Convention (Article 22); it cannot be departed from by agreement between the parties (Article 23) or implied submission to jurisdiction (Article 24); a court before which the main proceedings in a dispute are brought must decline jurisdiction of its own motion if exclusive jurisdiction vests in the courts of another State bound by the Convention (Article 25); and judgments will not be recognised if they conflict with the provisions on exclusive jurisdiction (Article 35), and may not be enforceable (Article 45).

([1]) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997).

Only the exclusive jurisdictions referred to in Article 22(1), (2) and (4) have been modified and require specific comment. Those in Article 22(3) and (5) are unchanged from the 1988 Convention, and the reader is asked to refer to previous reports (Jenard report, pp. 35-36).

2. **Immovable property (Article 22(1))**

92. There is no change to the rule that rights *in rem* in immovable property or tenancies of immovable property are within the exclusive jurisdiction of the courts of the State bound by the Convention in which the property is situated, for reasons which have already been explained with regard to the 1988 Convention (Jenard-Möller report, paragraphs 49-54) and the Brussels Convention (Jenard report, pp. 34-35; Schlosser report, paragraphs 162-165), and need not be gone into here.

Nor is it necessary to specify the scope of the provision in relation to the other rules of jurisdiction in the Convention, which has been the subject of repeated examination in the Court of Justice's case-law with regard to the Brussels Convention. Let us merely note that the Court has accepted that the exclusive jurisdiction in respect of tenancies is confined to disputes which are clearly concerned with the rental of property, and fall within the raison d'être of the exclusive jurisdiction conferred on the courts of the country of the property. A contract that concerns a range of services provided in return for a lump sum paid by the customer is not a tenancy within the meaning of the provision ([1]). The provision does apply, however, to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual has rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property ([2]).

Finally, the question whether and to what extent a time-sharing interest in property should be subject to the exclusive jurisdiction over matters of immovable property has been resolved by the *ad hoc* working party in accordance with the Community rules and their interpretation by the Court of Justice, without the need for any special provision (see paragraph 81 above).

93. At the Commission's suggestion, the *ad hoc* working party examined the question whether Article 22(1) should be considered to have a reflex effect by which the courts of the States bound by the Convention would also be deprived of jurisdiction if the property was located in a State outside the Convention. As indicated in the Jenard-Möller report ([3]), Article 16(1) of the 1988 Convention 'applies only if the property is situated in the territory of a Contracting State'; if the property is situated in a non-Convention State, Article 2 of the Convention, and possibly the special jurisdictions which the Convention provides for, apply if the defendant is domiciled in a Contracting State, and Article 4 applies if the defendant is domiciled in a State outside the Convention.

After close examination, the *ad hoc* working party decided that it would not be advisable to modify this reading of the scope of exclusive jurisdiction in matters of property, or to clarify the point in the text of the Convention, even taking into account the fact that in cases where the property was located in a non-Convention country Article 4 would probably be invoked frequently, and that there were significant differences in the relevant national laws ([4]). Following the observations of the Court of Justice in its Opinion 1/03 ([5]), the question whether Article 22(1) has a reflex effect, and the implications of any such effect, can best be reconsidered if the national provisions on jurisdiction in property cases where the defendant is domiciled in a non-Community country were to be unified within the European Community.

94. Particularly close attention was paid to the question of conferring jurisdiction on the courts of the State of domicile of the defendant, as an alternative to the courts of the State in which the property was located, for tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months. In this regard the Brussels Convention differs from the 1988 Convention. The Brussels Convention makes the possibility dependent on two conditions, namely that both parties must be natural persons and both must be domiciled in the same State, but the 1988 Convention makes the concurrent jurisdiction of the courts of the State of the defendant's domicile wider, the conditions here being only that one of the parties, the tenant, must be a natural person and that neither of them be domiciled in the country in which the property is situated, regardless of whether or not they are domiciled in the same State. As the *ad hoc* working party's terms of reference called upon it to align the texts of the two

([1]) Court of Justice, Case C-280/90 *Hacker* [1992] ECR I-1111, paragraph 15 (with reference to Article 16(1) of the Brussels Convention).

([2]) Court of Justice, Case C-8/98 *Dansommer* [2000] ECR I-393, paragraph 38 (with reference to Article 16(1) of the Brussels Convention).

([3]) Jenard-Möller report, paragraph 54.

([4]) To which attention was drawn in the Jenard report, p. 35, and the Schlosser report, paragraphs 166-172.

([5]) See point 153 of Opinion 1/03: 'However, whilst the fact that the purpose and wording of the Community rules and the provisions of the agreement envisaged are the same is a factor to be taken into account in determining whether that agreement affects those rules, that factor alone cannot demonstrate the absence of such an effect. As for the consistency arising from the application of the same rules of jurisdiction, this is not the same as the absence of such an effect since the application of a rule of jurisdiction laid down by the agreement envisaged may result in the choice of a court with jurisdiction other than that chosen pursuant to Regulation No 44/2001. Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country'.

Conventions as far as possible, the working party considered whether the Lugano Convention should be aligned on the Brussels Convention in this respect or vice versa. The solution adopted – which was also followed in the Brussels I Regulation – takes something from both: it requires that only the tenant need be a natural person, but that the contracting parties must be domiciled in the same State.

In support of that solution, it should be pointed out in particular that it would have been excessive to require both contracting parties to be natural persons, since the purpose of the provision is to also to provide protection in the very frequent cases where holidaymakers rent accommodation from a company which owns property abroad. Moreover, the requirement that the contracting parties must be domiciled in the same State covers most cases in which it is appropriate to abandon the exclusive jurisdiction of the State in which the property is situated, without extending the scope of the exception too far.

95. Article Ib of Protocol 1 to the 1988 Convention allowed a State to declare that it would not recognise a judgment on a tenancy of immovable property if the property was situated in its territory, even if the tenancy was of a kind contemplated by the rule, and the jurisdiction of the court of the State of origin was based on the domicile of the defendant; this provision was no longer felt to be necessary, and it has not been included in the new Convention.

3. **Companies (Article 22(2))**

96. There is no change to the provision in the 1988 Convention regarding exclusive jurisdiction 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 the decisions of their organs' – or more precisely 'the validity of the decisions of their organs', as the new wording puts it, confirming the interpretation that the reference to 'the decisions of their organs' was intended to be linked to the first part of the preceding phrase. The provision, in Article 16(2) of the old Convention, conferred jurisdiction on the courts of the seat of the company, legal person or association, in line with the provision that made the seat the equivalent of the domicile.

The new provision has maintained the connection with the 'seat', but the link is no longer necessarily the same as the one in the general rule. In the new Convention the domicile of a company is in fact defined by reference to the statutory seat, or the central administration or the principal place of business. That definition is an independent one that makes it easier to bring proceedings before a court of a State bound by the Convention against a company that has some significant link with the States to which the Convention applies, but it was not felt to be a proper basis for exclusive jurisdiction over disputes in the areas considered here. The jurisdictions referred to in Article 22 are exclusive, and this is difficult to reconcile with a definition of domicile that applies alternative tests, which might create uncertainty surrounding the law applicable to the validity of the constitution of companies. In other words, the ordinary forum for companies can properly be based on a broad concept of domicile, but for the validity of the constitution of companies the concept applied has to be a narrow one, based on just one connecting factor.

The working party opted to maintain the reference simply to the 'seat', as in the 1988 Convention, to be determined, as it was under that Convention, by reference to the rules of private international law of the court before which the matter is brought. It should be emphasised, therefore that the 'seat' of the company here is not an independent concept, as the 'statutory seat' is in Article 60. A reference simply to the 'statutory seat' might have avoided the possibility that where the 'statutory seat' and the real seat were situated in different countries there might be more than one court with supposedly exclusive jurisdiction; but it was decided that for the resolution of that problem the provisions in the Convention on the coordination of jurisdictions would be enough.

97. The agreed solution will as a rule ensure that *forum* and *jus* will coincide, and is motivated by the desirability of ensuring that when the validity of the constitution of a company is at issue there is a single jurisdiction that is predictable and certain. It was pointed out in the working party that the desirability of such a jurisdiction was less evident when the dispute was concerned with decisions of a company's governing bodies. But the working party decided to keep the exclusive jurisdiction of the court of the seat of the company here too, on the ground that that court is usually best placed to decide on the validity of such decisions. To prevent the possibility that this jurisdiction might be widened by interpretation, the new Convention, as we have seen, refers explicitly to the 'validity' of decisions, rather than, as in the previous wording, to the 'decisions' themselves, thus making it quite clear that the exclusive jurisdiction does not extend to the decisions' substance or effects.

4. **Intellectual property rights (Article 22(4))**

98. On the subject of the validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the rule governing jurisdiction is generally the one laid down in the 1988 Convention. Exclusive jurisdiction is conferred on the courts of the State bound by the Convention in whose territory the deposit or registration has been applied for, has taken place or is deemed to have taken place under the terms of an international convention or, as the new wording makes clear, a Community instrument. This last point has been added to remove any doubt about the equivalence of Community law concerning intellectual and industrial property rights with the law of the international conventions in force.

99. Exclusive jurisdiction also applies with respect to patents granted on the basis of the Convention on the grant of European patents, signed in Munich on 5 October 1973. The rule according to which the courts of each State bound by the Convention are to have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that State, without prejudice to the jurisdiction of the European Patent Office, which was contained in Article Vd of Protocol 1 to the 1988 Convention, has now been incorporated into Article 22(4). The last part of the provision as it stood in the Protocol has been omitted: it made an exception to the exclusive jurisdiction of the courts of the States bound by the Convention where the patent was a Community patent under Article 86 of the Convention for the European patent for the common market, signed in Luxembourg on 15 December 1975 ([1]).

The Luxembourg Convention, amended by a subsequent Agreement relating to Community patents signed in Luxembourg on 15 December 1989, provided for the grant of a Community patent similar to national patents, but independent of them and with equivalent effects in all Contracting States. It declared the Brussels Convention to be applicable to all actions concerning Community patents, while establishing a special jurisdiction for disputes concerning validity and infringement. The Luxembourg Convention never came into force, and no reference has been made to it in the new Lugano Convention.

100. The question of an exception to the exclusive jurisdiction conferred by Article 22(4) on the courts of the Member States has remained a live issue, however, as a result of efforts to pursue the creation of a Community patent by means of Community legislation; the Commission presented a proposal for a Council Regulation on the Community patent in 2000 ([2]), followed by the Commission's 2003 proposals for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent and a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance ([3]). The general approach is to give broad jurisdiction to the Court of Justice, more especially in disputes concerning infringement, including declarations of non-infringement, disputes concerning the validity of a Community patent, whether challenged in the main action or by way of counter-claim, and disputes concerning the use of the invention after publication of the Community patent application or regarding rights based on prior use of the invention, with exclusive jurisdiction to order provisional measures in cases within these areas, leaving the courts of the States with exclusive jurisdiction under Article 22(4) only in cases not expressly reserved to the Community court.

([1]) Schlosser report, paragraph 173.
([2]) COM(2000) 412 final, 1.8.2000.
([3]) COM(2003) 827 final and COM(2003) 828 final, 23.12.2003. According to the 2003 proposals, jurisdiction would be conferred on the Court of Justice and a Community Patent Court would be set up within the Court of Justice framework, with an appeal to the Court of First Instance.

101. The diplomatic conference held from 10 to 12 October 2006 discussed whether it would be advisable to append to the Lugano Convention a protocol conferring exclusive jurisdiction on the Court of Justice in matters of Community industrial property rights ([4]). Such a protocol would have the advantage of assigning to a single court disputes on the validity of patents and disputes on infringement, which under the Lugano Convention would otherwise have to be brought before different courts. But against the proposed protocol it was argued that it did not circumscribe the disputes concerned with sufficient precision, leaving their definition to Community legislation to be enacted later, and that to include actions for infringement was a major departure from the rules of jurisdiction in the Lugano Convention and would compromise its overall harmony. It proved impossible to arrive at a satisfactory formulation, and the diplomatic conference consequently preferred to defer consideration of such a protocol to a later date, when a Regulation on the Community patent had been adopted.

102. The protocol conferring exclusive jurisdiction on the Court of Justice in industrial property matters drew attention to certain needs which have in fact been at least partially satisfied by the subsequent case-law of the Court of Justice: before the signature of the new Convention, the Court found itself called upon to decide the question whether the rule of exclusive jurisdiction over registration or validity of a patent applied irrespective of whether the issue was raised by way of an action or a plea in objection ([5]). The Court held that it did: in the light of the position and objective of the provision within the scheme of the Brussels Convention, the view had to be taken that the courts of the State of registration of the patent had exclusive jurisdiction 'whatever the form of proceedings in which the issue of a patent's validity is raised, be it by way of an action or a plea in objection, at the time the case is brought or at a later stage in the proceedings' ([6]). The Court of Justice thus held that where an action was brought for infringement, the court seised could not find indirectly that the patent at issue was invalid, even if the effects of the judgment were limited to the parties to the proceedings, as happened under the national laws of some of the States bound by the Convention ([7]).

([4]) Under the protocol proposed by the European Commission (Protocol 4), the Court of Justice would have had exclusive jurisdiction over disputes concerning Community industrial property rights to the extent that such exclusive jurisdiction was conferred on it under the Treaty establishing the European Community. Titles III and IV of the Lugano Convention would have been applicable to the recognition and enforcement of the judgments delivered in such proceedings.
([5]) Court of Justice, Case C-4/03 *GAT* [2006] ECR I-6509 (with reference to Article 16(4) of the Brussels Convention).
([6]) Judgment in *GAT*, paragraph 25.
([7]) The Court said expressly that the jurisdiction of the courts of a State other than the State that issued the patent to rule indirectly on the validity of a foreign patent could not be limited only to those cases in which, under the applicable national law, the effects of the decision to be given were limited to the parties to the proceedings. In several countries a judgment annulling a patent had effect *erga omnes*, and a limitation of this kind would lead to distortions, thereby undermining the uniformity of rights and obligations for the States bound by the Convention and for the persons concerned (paragraph 30 of the *GAT* judgment).

In view of that precedent, a court called upon to hear an action for infringement of a patent in which the question arises whether the patent is valid must, unless it has exclusive jurisdiction to decide the validity of the patent under Article 22(4), of its own motion declare that it lacks jurisdiction to determine the point under Article 25 of the Convention; and depending on the procedures allowed by the national law applicable, it may have to suspend the infringement proceedings, pending judgment by the court with exclusive jurisdiction, before reaching a decision on the substance. Consequently, the wording of Article 22(4) of the new Convention was modified compared both to the corresponding provision in the 1988 Lugano Convention and Article 22(4) of the Brussels I Regulation, in order to incorporate the *GAT* ruling of the Court of Justice ([1]).

The position adopted by the Court of Justice largely satisfies the intended purposes of the proposal for a protocol on the exclusive jurisdiction of the Court of Justice, by requiring a single exclusive jurisdiction for actions challenging validity or alleging infringement, which prevents rulings on the validity of a patent from being delivered by more than one court, even if they are considering quite different aspects of the matter, and thus avoids the danger of conflicting decisions. If the European Community were to adopt a Regulation on the issue of a Community patent, and to confer exclusive jurisdiction over the registration and validity of patents on the Court of Justice, a court of a State bound by the Convention which was called upon to hear an action for infringement of a Community patent could not rule even indirectly on the validity of the patent, and for that question would have to recognise the exclusive jurisdiction of the Court of Justice, and treat that court as it would another national court ([2]).

5. *Prorogation of jurisdiction*

1. General (Article 23)

103. The system governing the parties' freedom to determine which court has jurisdiction over their relationship is a particularly delicate issue, as can be seen from the abundant case-law of the Court of Justice from the Brussels Convention onward, which has required major modifications over the years in order to cater adequately for the needs of international business ([3]). The 1988 Convention itself was the outcome of such development in case-law and legislation. It therefore comes as no surprise that the *ad hoc* working party found itself confronted with various problems here, some of which concerned questions that had already been discussed previously, while others arose out of the need to find solutions to more recent questions raised by international business practices.

With reference to Article 23, on choice of forum clauses in contracts, the difficulties arose first of all from the connection with a State bound by the Convention that must exist if the rules in the Convention are to apply. The working party then considered whether the jurisdiction agreed by the parties should be exclusive or not. In the third place it examined the formal requirements for a choice of forum clause, and in particular how such a clause could meet the requirements of electronic commerce. Lastly, it discussed a number of problems relating to the different positions of the parties with respect to the clause, jurisdiction to rule on the validity of the clause, and the relationship between Article 23 and the rest of the Convention.

2. Connection with a State bound by the Convention

104. Article 23 applies exclusively to relationships with an international element, which cannot consist merely of a choice of the courts of a particular State ([4]), and applies only if at least one of the parties is domiciled in a State bound by the Convention. If neither of the parties is domiciled in such a State, a court of a State bound by the Convention which has been designated in a choice of forum clause may appraise the validity of the clause on the basis of its national laws, and the courts of the other States bound by the Convention are obliged to refrain from dealing with the case until such time as the court or courts designated in the choice of forum clause have declined jurisdiction. The working party discussed the advisability of continuing to require that at least one of the parties must be domiciled in a State bound by the Convention, the purpose being to simplify the rules and to give equal effect to all clauses conferring jurisdiction on a court or courts of a State bound by the Convention.

Even when account was taken of these arguments, however, it was not felt advisable to expand the scope of the Convention by amending Article 23 in the way suggested. Above all, it was felt that it would not be justified to change the view that there was no need to lay down in the Convention the conditions under which a court was to accept jurisdiction if it was designated by parties who were all domiciled outside the territory to which the Convention applied ([5]), although once the court stipulated in a choice of forum clause had accepted that the departure from the ordinary rules was valid, it was agreed that the clause should have effect in all States bound by the Convention. Consequently, the wording of Article 23(1) is the same in this respect as the corresponding provision in the 1988 Convention, except that the second part of the paragraph, concerning the treatment of the clause in cases in which neither party is domiciled in a State bound by the Convention, has now been put into a separate paragraph, paragraph 3.

([1]) See also the Decision of the Council concerning the conclusion of the new Lugano Convention adopted on 27 November 2008 (OJ L 147, 10.6.2009), where the European Community expresses its intention to clarify the scope of Article 22(4) of the Brussels I Regulation in the same sense, thereby ensuring its parallelism with Article 22(4) of the Lugano Convention while taking into account the results of the evaluation of the application of the Brussels I Regulation.

([2]) Article 1(3) of the Convention.

([3]) Schlosser report, paragraph 179.

([4]) Schlosser report, paragraph 174.

([5]) Schlosser Report, paragraph 177.

105. The *ad hoc* working party examined the question of the date on which one of the parties must be domiciled in a State bound by the Convention in order for Article 23(1) to apply, in the light of Articles 13(3) and 17(3), which specify that in the cases they refer to the relevant domicile is the parties' domicile at the time of conclusion of the contract. It was agreed that that was the decisive date for purposes of Article 23 too, but it was not deemed necessary to add an explanation to that effect in the text. This was because the relevant time had to be the time of conclusion of the contract, for the sake of legal certainty and the confidence of the parties who agreed the clause. If the date of reference were to be the date on which the proceedings were brought, one party would be able to transfer his own domicile to a State bound by the Convention after signing the contract and before bringing the proceedings, thereby rendering Article 23(1) applicable, and changing the context in which the court designated in the clause was to verify its own jurisdiction.

3. **The exclusive or non-exclusive nature of the prorogation clause**

106. The 1988 Convention lays down that a prorogation clause that meets the requirements of the Convention always confers exclusive jurisdiction on the designated court or courts. But under the laws of some of the States bound by the Convention - under English law in particular - the parties will often agree a choice of forum clause on a non-exclusive basis, leaving other courts with concurrent jurisdiction, and permitting the plaintiff to choose between several forums; and English case-law has accepted that a non-exclusive clause constitutes a valid choice of forum under the Convention ([1]). On a proposal from the United Kingdom delegation, the *ad hoc* working party re-examined the question of the exclusive effect of a choice of forum clause, and reached the conclusion that, since a clause conferring jurisdiction was the outcome of an agreement between the parties, there was no reason to restrict the parties' freedom by prohibiting them from agreeing in the contract between them that a non-exclusive forum should be available in addition to the forum or forums objectively available under the Convention.

A similar possibility was in fact already provided for, though within certain limits, by the 1988 Convention, Article 17(4) of which allowed a choice of forum clause to be concluded for the benefit of only one of the parties, who then retained the right to bring proceedings in any other court which had jurisdiction by virtue of the Convention, so that in that case the clause was exclusive only as far as the other party was concerned. That provision was obviously to the advantage of the stronger party in the negotiation of a contract, without producing any significant gain for international commerce. The 1988 Convention has now been amended to give general recognition to the validity of a non-exclusive choice of forum clause, and at the same time the provision in the 1988 Convention that allowed a clause to be concluded for the benefit of one party only has been deleted.

([1]) See, with reference to the Brussels Convention, *Kurz* v *Stella Musical* [1991] 3 WLR 1046.

107. Article 23 does still give preference to exclusivity, saying that the agreed jurisdiction 'shall be exclusive unless the parties have agreed otherwise.' A choice of forum clause is therefore presumed to have exclusive effect unless a contrary intention is expressed by the parties to the contract, and not, as was initially proposed, treated as a non-exclusive clause unless the parties agree to make it exclusive.

4. **Formal requirements for the prorogation clause**

108. The rules governing the formal requirements for a prorogation of jurisdiction clause which were laid down in the 1988 Convention reflected significant developments in the case-law regarding the corresponding provision in the Brussels Convention, in its original form, whose formal rigour the judgments sought to attenuate in various ways. The 1988 Convention took account of the case-law, and incorporated the major change made to the Brussels Convention by the Accession Convention of 1978 regarding the formal validity of clauses that accorded with usage in international trade or commerce ([2]), adding a reference to forms that accorded with practices which the parties had established between themselves ([3]).

The interpretation by the courts of the rule in the 1988 Convention has not necessitated any radical changes in the drafting of the new Lugano Convention. The new Convention confirms that a choice of forum clause is not considered to be in a valid form unless it is in writing or, if concluded verbally, evidenced in writing, or else in a form which accords with practices which the parties have established between themselves, or in a form which accords with a usage in international trade or commerce of the kind defined in Article 23(1)(c).

With regard to the written evidence of a verbal clause, doubts were raised as to whether it was sufficient for the evidence to come from one of the parties, or whether it should come from both. The decision must be for the first possibility. A clause concluded verbally is frequently proposed by one of the parties, with the other party reserving the right to set down the verbal agreement in writing, and confirmation given by that other party is enough to demonstrate the existence and the terms of the agreement. This interpretation corresponds more closely to the wording of Article 23(1)(a) in some of the language versions, particularly the English version, which is more explicit in requiring the written form as evidence of the verbal agreement, rather than for its conclusion ([4]). To interpret the rule otherwise would also make the reference in other

([2]) Schlosser report, paragraph 179. On the evidence for the existence of a usage in international trade or commerce, and the assessment of its relevance, see in particular Court of Justice, Case C-159/97 *Trasporti Castelletti* [1999] ECR I-1597.

([3]) That reference was then taken over by the Brussels Convention, in the version of Donostia-San Sebastián of 1989, and thereafter by the Brussels I Regulation. Jenard-Möller report, paragraph 58.

([4]) The English version of point (a) speaks of an agreement 'evidenced in writing', whereas other versions use words literally meaning 'concluded verbally with written confirmation'.

language versions to 'written confirmation' in the second part of point (a) practically superfluous, since written confirmation that had to be given by both parties would ultimately be a clause 'in writing' within the meaning of the first part of the provision.

109. The main problem that the *ad hoc* working party focused on in relation to the formal requirements for a prorogation clause was the question whether or not Article 23 could accommodate the development of electronic communications, bearing in mind that e-commerce should not be obstructed by inappropriate formal requirements. There can be no doubt that points (b) and (c) of paragraph 1 are indeed capable of applying to electronic communications, because they refer to practices established by the parties and usage in international trade or commerce.

It is more problematic to determine whether point (a) can apply, that is to say whether the written form it requires is present in the case of electronic communications. To resolve any doubt that might arise, it was felt advisable to adopt an express rule. Article 23(2) therefore now states that any communication by electronic means is equivalent to 'writing' if it 'provides a durable record of the agreement'. The test of whether the formal requirement in Article 23(1) is met is therefore whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way. The working party here based itself on the formal requirements for arbitration agreements in the UNCITRAL Model Law on International Commercial Arbitration, which states that an agreement that has been concluded orally, by conduct or by other means is 'in writing' if it is recorded in any form, and an electronic communication is considered to satisfy the requirement that it be 'in writing' if the information contained therein is accessible so as to be usable for subsequent reference; it then provides express definitions of what is meant by 'electronic communication' and a 'data message' ([1]).

The rule excludes only such electronic communications as do not provide a durable record. Those communications consequently cannot be used to conclude a choice of forum clause that is formally valid for purposes of point (a), though they may be relevant for purposes of points (b) and (c) if the requirements of those provisions are met. Article 23(2) merely indicates that electronic communication is considered to be in writing 'if it provides a durable record', even if no such durable record has actually been made, meaning that the record is not required as a condition of the formal validity or existence of the clause, but only if the need arises for evidence of it, which of course it would be difficult to furnish in any other way.

5. **Implied prorogation of jurisdiction (Article 24)**

110. There is implied prorogation of jurisdiction in favour of a court that would not otherwise have jurisdiction under the Convention if the plaintiff brings the matter before it and the defendant enters an appearance without contesting its jurisdiction; this provision is distinguished from the prorogation of jurisdiction contemplated by Article 23, in that it does not presuppose an agreement between the parties, and does not oblige the court to examine whether the clause conferring jurisdiction upon it was in fact the subject of a meeting of minds, which must be clearly and precisely demonstrated, the purpose of the formal requirements in Article 23 being to provide proof ([2]). Article 24 confers jurisdiction by virtue of the mere fact of the appearance in court of a defendant who does not contest the jurisdiction of the court before which the case has been brought, and defends himself on the merits, so that there is no need to establish whether there was any agreement between the parties.

The *ad hoc* working party considered the question whether the jurisdiction was conferred only if the defendant was domiciled in a State bound by the Convention ([3]), or also when the defendant was domiciled in a State outside the Convention, but it did not consider it necessary to add any clarification of the wording. Despite the apparent ambiguity of the first sentence of Article 24, which refers generically to cases in which jurisdiction does not derive from the Convention, a comparison of the systems of Article 23 and Article 24 leads to the conclusion that if the domicile of the defendant did not have to be in a State bound by the Convention, implied prorogation of jurisdiction might have a broader scope than express prorogation, which does require that at least one of the parties be domiciled in such a State (a requirement that the Group decided not to remove).

111. The wording of Article 24 has raised difficulties of interpretation with reference to the corresponding provision in the Brussels Convention, particularly regarding the possibility of contesting jurisdiction and entering a defence on the merits at the same time, and regarding the point at which jurisdiction must be challenged.

([1]) Article 7(3) and (4) of the UNCITRAL Model Law on International Commercial Arbitration, as amended by UNCITRAL on 7 July 2006, UN document A/61/17, annex I, according to which '(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data messages" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'.

([2]) Court of Justice, Case 24/76 *Estasis Salotti* [1976] ECR 1831; Case 25/76 *Galeries Segoura* [1976] ECR 1851.

([3]) In support of that view see Jenard report, p. 38.

The first issue, whether the prorogation of jurisdiction in favour of the court seised can be prevented by a challenge to jurisdiction if the defendant also defends himself on the merits, arises out of divergences between the language versions of the Brussels Convention (and subsequently of the Lugano Convention): some language versions, such as the English and Italian versions, stated that the rule on implied prorogation did not apply where appearance was entered '*solely* to contest the jurisdiction', rather than simply 'to contest the jurisdiction'. Under the laws of some countries all pleas in defence, including pleas on the merits, must be put forward in the first act of defence; this made it difficult to apply the rule literally, as it would have prevented the defendant from defending himself on the merits if his plea of lack of jurisdiction was rejected, and would have been incompatible with the protection of the rights of the defence in the original proceedings, which is one of the guarantees provided by the Convention.

The doubt has been removed by the Court of Justice, which has interpreted the provision to mean that the defendant's appearance in court does not have the effect of conferring jurisdiction if the defendant as well as contesting the jurisdiction also makes submissions on the substance ([1]), and that a defendant who at the same time submits in the alternative a defence on the substance of the claim does not thereby lose his right to raise an objection of lack of jurisdiction ([2]). In order to dispel any further doubt, and to confirm the Court's interpretation, the wording of Article 24 has been harmonised in the various language versions by deleting the word 'solely', thereby making it clear that it is enough that the defendant should contest the jurisdiction, even if at the same time he makes submissions in his defence on the substance.

112. The time at which jurisdiction must be challenged in order to prevent implied prorogation of jurisdiction depends on the national law of the court seised, whose rules of procedure will also determine what is meant by the defendant 'entering an appearance' ([3]). The reference to national law here has been upheld by the Court of Justice, which has nevertheless given an independent interpretation of the provision by holding that 'if the challenge to jurisdiction is not preliminary to any defence as to the substance it may not in any event occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised' ([4]). If the challenge is presented before any defence on the substance, on the other hand, the question of the time by which it must be presented is determined only by national law.

([1]) Court of Justice, Case 150/80 *Elefanten Schuh* [1981] ECR 1671, paragraph 17.
([2]) Court of Justice, Case 27/81 *Rohr* v *Ossberger* [1981] ECR 2431, paragraph 8.
([3]) Jenard report, p. 38.
([4]) Court of Justice, Case 150/80 *Elefanten Schuh* [1981] ECR 1671, paragraph 16.

6. ***Examination as to jurisdiction***

1. **Exclusive jurisdiction of another court (Article 25)**

113. There was no change needed to the provision that requires a court of a State bound by the Convention to declare of its own motion that it lacks jurisdiction whenever exclusive jurisdiction is conferred by Article 22 on a court of another State bound by the Convention ([5]). That obligation remains in effect even if the defendant appears in court and does not contest the jurisdiction, since exclusive jurisdiction cannot be waived by the parties under either Article 23 or Article 24. The *ad hoc* working party debated whether the obligation in the provision requiring a court to decline jurisdiction of its own motion should be extended beyond exclusive jurisdiction under Article 22, to include a jurisdiction chosen by the parties under Article 23, though only where the choice of forum clause conferred jurisdiction on an exclusive basis, and also to include a jurisdiction conferred by an arbitration clause. The working party concluded that it should not be so extended, in the light of the fact that Article 25 dealt with a situation where the parties had appeared in court. A failure to contest jurisdiction should therefore be deemed to be an amendment of the choice of forum clause in Article 24, while a challenge entered would, if the court agreed, lead to a decision on the part of the court that had not been taken of its own motion. The case of a defendant who did not appear in court was contemplated in Article 26. As regards jurisdiction deriving from an arbitration clause, it was pointed out that arbitration fell outside the scope of the Convention, and it was not felt advisable that the working party should consider it.

2. **Defendant does not appear (Article 26)**

114. As with Article 25, there was no need for any major change to Article 26, which deals with the examination as to jurisdiction where the defendant fails to appear in court ([6]). The provision distinguishes between a situation where the court seised lacks jurisdiction under the Convention and a situation where it does indeed have jurisdiction under the Convention, but in either case the provision requires the court to verify its own jurisdiction ([7]) on the basis of the plaintiff's presentation of his claim.

Under paragraph 1, if the court finds that it lacks jurisdiction over a defendant domiciled in a State bound by the Convention, it will declare of its own motion that it has no jurisdiction, either because there is nothing to confer jurisdiction on it under the Convention or because the parties have excepted themselves from its jurisdiction by agreeing a choice of forum clause in favour of another jurisdiction. In other words, the defendant's failure to appear cannot be deemed to constitute submission to the jurisdiction, and to make up for the absence of other criteria conferring jurisdiction. The fact that Article 24 is an independent criterion of jurisdiction means that the court must verify that everything has been done to notify the defendant of the claim in accordance with Article 26(2), so as to permit him to enter an appearance and submit to the jurisdiction if he thinks it advisable.

([5]) Jenard report, p. 38.
([6]) Jenard report, p. 39.
([7]) Schlosser report, paragraph 22.

The second situation described is broader in scope. When the court does have jurisdiction under the Convention, it will have to proceed in default of appearance, if and to the extent that its national law so permits in cases in which the defendant fails to appear. Before continuing the trial, however, Article 26(2) requires the court to 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.

115. This provision must be applicable to all cases in which the court seised has jurisdiction within the meaning of the Convention, regardless of whether or not the defendant is domiciled in a State bound by the Convention ([1]). Otherwise, cases of exclusive jurisdiction would not be covered if the defendant was domiciled in a State outside the Convention. The requirement that everything possible be done to ensure that the defendant has received the document instituting the proceedings is linked to the recognition of the decision in the other States bound by the Convention, which is independent of the domicile of the defendant in the original proceedings, but which may depend on the question whether everything possible was done to inform the defendant in advance that the proceedings were being brought ([2]).

116. As in the 1988 Convention, if the document instituting the proceedings was transmitted pursuant to the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters, the provisions of Article 26(2) of the Lugano Convention are replaced by Article 15 of the Hague Convention ([3]). An additional paragraph has been inserted as a result of the adoption of Regulation (EC) No 1348/2000 of 29 May 2000 ([4]), and the subsequent Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, signed in Brussels on 19 October 2005 ([5]); in the mutual relations between States bound by the Regulation or by the Convention, when the document instituting the proceedings was transmitted pursuant to the Regulation or the Agreement, this new paragraph replaces the reference to Article 15 of the Hague Convention by a reference to Article 19 of the Regulation. It has to be pointed out that Regulation No 1348/2000 has been replaced by the new Regulation (EC) No 1393/2007 ([6]), which is applied since 13 November 2008. In accordance with Article 25(2) of the Regulation, the reference in the Lugano Convention to Regulation 1348/2000 should be constructed as a reference to Regulation 1393/2007.

([1]) For a contrary view, see Jenard report, p. 40.
([2]) See below in connection with Article 34(2).
([3]) See Article 26(3) of the Convention.
([4]) OJ L 160, 30.6.2000.
([5]) OJ L 300, 17.11.2005.
([6]) Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, and repealing Council Regulation No 1348/2000 (OJ L 324, 10.12.2007).

117. To satisfy the requirements of certainty and rapidity of service, it was decided to preserve the provision on the transmission of documents contained in Article IV of Protocol 1 to the 1988 Convention, which has now become Article I of Protocol 1 to the new Convention. That provision states that documents are to be transmitted in accordance with the procedures laid down in the conventions and agreements applicable between the States bound by the Convention. Unless the State applied to has objected, a document may also be sent by public officers of the State in which it was drawn up directly to public officers of the State in which the addressee is to be found, to be forwarded to the addressee in the manner specified by the law of the State applied to. The forwarding is to be recorded by a certificate sent directly to the officer of the State of origin. This form of transmission corresponds to what is provided for in Article 10(b) of the Hague Convention of 15 November 1965.

Article I of Protocol 1 adds a new provision stating that in their mutual relations Member States of the European Community bound by Regulation No 1348/2000 ([7]), or by the Agreement between the European Community and the Kingdom of Denmark of 19 October 2005, are to transmit documents by the methods laid down in the Regulation or the Agreement, which give preference to direct transmission ([8]) but do not rule out other forms of transmission ([9]).

7. *Lis pendens — related actions*

1. **Lis pendens (Articles 27, 29 and 30)**

118. The fact that alternative forums are available for disputes governed by the Convention makes it possible that the same case may be brought before the courts in different States bound by the Convention, with the danger that the decisions that are taken may be incompatible with one another. To ensure proper operation of the system of justice within a common judicial area, that risk should be minimised by avoiding, whenever possible, parallel proceedings going ahead at the same time in different States. The authors of the 1988 Convention, and indeed of the Brussels Convention before it, wanted a clear and effective mechanism to resolve cases of *lis pendens* and related actions, and had to take into account the profound differences between the internal laws of different countries: to start with, certain States look at the order in which the proceedings are brought, while others apply the rule of *forum non conveniens*. The 1988 Convention did not refer to the *forum non conveniens* rule, and was based on the criterion of the prior jurisdiction of the court first seised: any court before whom the matter was brought thereafter was to stay the proceedings until such time as the jurisdiction of the first court had been established, and if it was so established was to decline jurisdiction in favour of that court.

([7]) Now by Regulation No 1393/2007, see above paragraph 116.
([8]) Articles 4-11 of Regulation No 1348/2000.
([9]) Articles 12-15 of Regulation No 1348/2000.

That arrangement was better than the original solution in the Brussels Convention, under which any court subsequently seised was required to stay the proceedings before it only if the jurisdiction of the other court was contested, and otherwise to decline jurisdiction immediately, thereby creating a substantial danger of a negative conflict of jurisdiction ([1]); but the new solution nevertheless posed quite a few problems of its own. In particular, its formulation, according to the interpretation given it by the Court of Justice, failed to establish an independent concept of *lis pendens* covering every aspect of the matter. On the one hand, it laid down a number of substantive conditions as components of a definition of *lis pendens* – e.g., that the cases pending simultaneously must have the same parties, cause of action, and subject-matter – thereby permitting the Court to affirm that the terms used in order to determine whether a situation of *lis pendens* arose must be regarded as independent ([2]). On the other hand, however, the rule failed to give an independent, uniform indication of how it was to be determined which court was addressed previously, i.e. at which moment an action should be considered to be pending before the court ([3]). Noting that an independent definition was lacking, the Court of Justice held that the conditions under which a dispute could be said to be pending before a court were to be appraised in accordance with the national law of each court ([4]).

One consequence of referring to national law in order to determine the moment at which a court should be considered to have been seised of a case is that the question will be decided in significantly different ways depending on the court seised. The laws of the States bound by the Convention show significant differences in that regard, sometimes even with respect to different types of proceedings within their own legal systems. Yet even if we confine ourselves to the case of an ordinary action, in certain countries, such as Italy and the Netherlands, a court is considered to be seised for the purposes of *lis pendens* at the time that the writ initiating the proceedings is served on the defendant by a bailiff. In those countries, the service of the writ on the defendant takes place before the writ is delivered to the court. In other countries, however, a situation of *lis pendens* arises when the application is lodged with the appropriate court: this is the case in Denmark, Spain, Ireland, Finland, Norway, most cantons of Switzerland ([5]), and Sweden. The same is true of France and Luxembourg, except that there the writ of summons is served on the defendant before the case is entered on the court's register, and the decisive moment is not the time of delivery to the court but rather the time of service of the writ of summons on the defendant. In certain other countries, finally, the case must have been entered on the court's register and the writ must have been served on the defendant, and only then does a situation of *lis pendens* arise. This is the case in Austria, Belgium, Germany, Greece ([6]), Portugal, and the United Kingdom.

The situation is further complicated when the decisive moment for *lis pendens* depends on the time at which the defendant was notified of the action, since that moment varies from one State to another and may also depend on the procedure followed. In that respect, it is important to bear in mind the Community Regulation on the service of judicial and extrajudicial documents ([7]), Article 9 of which – as a follow-up to the provisions of the European Convention on the same subject ([8]) – provides common rules on the date of service, under which the date of service of a document is the date on which it is served in accordance with the law of the Member State addressed; however, where a document must 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 is the date fixed by the law of that Member State, unless the State concerned has declared that it will not apply that provision.

119. These differences in national laws may give rise to serious problems, not only because they can encourage forum shopping, which is an inevitable possibility given the existence of courts with concurrent jurisdiction, or a race to litigation, owing in some measure to the fact that Article 27 gives priority to the court first seised ([9]), but also because they encourage parallel actions before the courts of different States bound by the Convention, in some cases permitting a defendant to lodge an application based on the same cause of action as an application brought against him and to have his own application given priority under the laws of the court considering it.

([1]) Jenard-Möller report, paragraph 64.

([2]) Court of Justice, Case 144/86 *Gubisch* v *Palumbo* [1987] ECR 4861, with special reference to the identical cause of action of the pending cases.

([3]) The Jenard report, p. 41, indicates that 'The Committee [that drafted the Brussels Convention] decided that there was no need to specify in the text the point in time from which the proceedings should be considered to be pending, and left this question to be settled by the internal law of each Contracting State.'

([4]) Court of Justice, Case 129/83 *Zelger* v *Salinitri* [1984] ECR 2397.

([5]) In certain cantons, the relevant time is the starting date of the conciliation proceedings, before the commencement of the judicial proceedings.

([6]) Except that in Greece the decisive time for *lis pendens* is retroactive to the date of lodging of the application at the court.

([7]) Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 (OJ L 324, 10.12.2007), which replaced Council Regulation No 1348/2000: see supra, paragraph 116.

([8]) 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), which the *ad hoc* working party had before it in the course of the review of the Brussels and Lugano Conventions.

([9]) See, for example, Court of Justice, Case C-406/92 *Tatry* v *Maciej Rataj* [1994] ECR I-5439, in which the Court held that an action seeking to have the defendant held liable for causing loss and ordered to pay damages had the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he was not liable for that loss.

To avoid such situations, the new Convention adopts an independent concept of the time at which a court is considered to be seised for the purposes of *lis pendens*, which takes into account the differences among the laws of the various countries, and in order to determine certain aspects refers to some extent, but in a more restricted manner than the previous arrangement, to the national rules of procedure. Article 30 expressly lists the two main criteria followed by the States bound by the Convention in order to establish when a court is deemed to be seised, namely the time when the document instituting the proceedings is served on the defendant and the time when the complaint is lodged with the court, and sets out to use those criteria in such a way as to establish a time which takes account of the different systems but is as convergent as possible.

The rule distinguishes between cases in which, according to the national law, the document instituting proceedings or the equivalent document is lodged with the court, and cases in which the document must be served before being lodged with the court. If the time at which the court is deemed to be seised is determined by the lodging of the document instituting proceedings with the court, the court is considered to be seised at that moment, provided that the plaintiff has not subsequently failed to take the steps that he was required to take to have service effected on the defendant; if, on the other hand, the time at which the court is deemed to be seised is determined by service on the defendant, the court is considered to be seised when the authority responsible for service receives the document instituting proceedings, provided that the plaintiff has not subsequently failed to take the steps that he was required to take to have the document lodged with the court.

The solution appears complicated, but only because it requires an additional verification beyond what is normally required by national laws. It makes it possible to identify a time at which the court is deemed to be seised that is largely convergent, but nevertheless consistent with and in compliance with the national systems of procedure, which specify moments that are quite different and far apart in time. When the point at which the court is seised depends on serving notice on the defendant, the solution adopted also satisfies the need for certainty, by avoiding the difficulty of ascertaining the date of service, which is often not easy to determine when service is not made to the recipient personally ([1]). In any event the rule will reduce the advantage or disadvantage to either party that might result from simply referring to national law.

([1]) In this respect the solution agreed is preferable to that suggested by the European Group for Private International Law, which in order to determine the moment at which the action is definitively considered to be pending referred cumulatively to the time at which the court has been notified of the application and the time at which notice is served on the defendant: proposals of the European Group for Private International Law, paragraphs 10-12.

120. In Article 29, the Convention reproduces without modification the provision that provides for the rare case ([2]) in which actions between which there is a situation of *lis pendens* come within the exclusive jurisdiction of different courts: in that event any court seised subsequently is to decline jurisdiction in favour of the court seised first. Here too the determination of which court was seised first is to be based on the criteria laid down in Article 30. Article 29, unlike Article 25, does not specify the legal basis of the exclusive jurisdiction that may lead the court to decline jurisdiction in favour of the court first seised. The rule therefore also applies where exclusive jurisdiction is conferred by a choice of forum clause within the meaning of Article 23, but only in the event that it is concurrent with the exclusive jurisdiction conferred on another court by virtue of the same Article ([3]). In contrast, if the exclusive jurisdiction based on Article 23 is concurrent with another based on Article 22, the latter will prevail, regardless of the moment at which the court is deemed to be seised, by virtue of Article 25.

The cases regulated by the provision on *lis pendens* do not include the case in which only the court subsequently seised has exclusive jurisdiction, because in that case the other court continues to be obliged to declare of its own motion that it lacks jurisdiction under Article 25 of the Convention, regardless of the moment at which the matter was brought before it.

2. **Related actions (Article 28)**

121. The provision on related actions represents an important aspect of the coordination of jurisdiction in the States bound by the Convention. When several non-identical actions are so closely connected that it is expedient to hear and determine them together, in order to avoid the risk of irreconcilable judgments that would not be mutually recognised by the States concerned, the Convention provides for coordination of the proceedings of the courts of the different States before which such actions are pending. Article 28 does not make the relation between the actions a general criterion of jurisdiction, as is done in certain national legal systems, and in particular does not confer jurisdiction on a court hearing an action that has come before it according to the rules of the Convention to rule on another action that is related to the first ([4]); instead, it establishes procedures intended to facilitate the handling of related cases in a single set of proceedings or in coordinated proceedings.

([2]) Which the case-law of the Court of Justice seems to have made still more rare. In a case concerning a lease of immovable property situated partly in Belgium and partly in the Netherlands, the Court held that each of the two States had exclusive jurisdiction over the part of the property situated in its territory, and thus ruled out the applicability of the provision on the conflict of exclusive jurisdiction, though only in the circumstances of the case, and not generally: Court of Justice, Case 158/87 *Scherrens* [1988] ECR 3791.

([3]) For an example see Court of Justice, Case 23/78 *Meeth* v *Glacetal* [1978] ECR 2133.

([4]) Court of Justice, Case 150/80 *Elefanten Schuh* [1981] ECR 1671.

122. Provided that the tests of Article 28(3) are satisfied, therefore, a court seised subsequently is entitled – but not obliged – to stay the proceedings and await the decision of the court first seised before deciding the case before it. The new wording of Article 28(1) no longer requires, as the previous version did, that the related actions be pending at first instance. The reason given for that requirement, namely that 'otherwise, the object of the proceedings would be different and one of the parties might be deprived of a step in the hierarchy of the courts' ([1]), does not appear convincing. The stay of the proceedings by the court subsequently seised has no effect whatever on the proceedings in that court, which it is free to resume once the proceedings on the related action pending before the foreign court have been concluded. That is the appropriate time at which to appraise whether the foreign judgment respected the rights of the defendant guaranteed by the Convention and can be taken into account for the purposes of the proceedings before the court seised subsequently.

But the requirement that both sets of proceedings be pending at first instance is nevertheless essential, and has been maintained and specifically formulated in Article 28(2), where the court subsequently seised decides – and here again it is a right, not an obligation – to refuse the case by declining jurisdiction in favour of the court previously seised of the related action. Otherwise, if the case before the court first seised were at the appeal stage, one of the parties would indeed be deprived of a step in the hierarchy of the courts. If, on the other hand, the case before the court seised subsequently were at the appeal stage, it would not be expedient for that court to decline its own jurisdiction in favour of a fresh trial at first instance, for reasons of economy of procedure.

In any case, it is not possible for the court seised subsequently to decline jurisdiction unless one of the parties so requests, unless the court first seised has jurisdiction to hear the case, and unless that court's laws allow for consolidation of the actions. The expression used in the provision – 'consolidation thereof', i.e. 'of *the* related actions', rather than '*of* related actions' as in the 1988 Convention – means that the laws of the court first seised must allow the consolidation of the related actions pending in that particular case, and not the consolidation of actions in general. Before declining jurisdiction, therefore, the court must be satisfied that the other court will accept it.

123. The *ad hoc* working party discussed whether Article 28 ought to be made more flexible by granting the court first seised the right to decline jurisdiction in favour of the court seised subsequently, where the circumstances of the case would make that advisable, but it decided against this course. Providing such a right would have introduced into the Convention a further application of the doctrine of *forum non conveniens* that is alien to the legal tradition of most of the States bound by the Convention.

([1]) Jenard report, p. 41.

8. ***Provisional, including protective, measures***

124. The rule on provisional and protective measures in the new Convention makes only formal changes to the wording of 1988 (see the reports by Jenard, p. 42; Schlosser, paragraph 183; and Jenard and Möller, paragraph 65). In its concise formulation, Article 31 merely indicates that if such measures are available under the law of a State bound by the Convention, they may be sought in the courts of that State even if, under the Convention, the courts of another State bound by the Convention have jurisdiction as to the substance of the matter. According to the Jenard report, the corresponding rule of the Brussels Convention (Article 24) implies that the competent authorities adjudicate 'without regard to the rules of jurisdiction laid down in the Convention'. The provision, then, is merely a reference to the national laws of the court seised, which will apply the *lex fori* both with respect to the determination of the measures to be ordered and with respect to its own power to order them.

125. The *ad hoc* working party discussed very thoroughly the question whether the rule in the Convention was satisfactory, on the basis of various proposals put forward by the Commission and by the delegations of national experts. In the course of the debate, particular emphasis was placed on the desirability of a uniform definition of 'provisional, including protective, measures', which might include the French measure known as the *référé provision*. In the absence of an express definition in the Convention, the Court of Justice has defined 'provisional, including protective, measures' as measures which 'are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter' ([2]). But such connections with the proceedings on the substance of the matter, it was observed, did not lead to satisfactory results in every case: when a protective measure amounted to pre-empted enforcement, regardless of the outcome of the trial on the merits, the rules laid down in the Convention regarding jurisdiction in actions on the merits could in practice be circumvented. It was argued, therefore, that the granting of enforceable measures might have to be made subject to restrictions, such as a requirement of urgency or a need for protection. It was also argued that the wording should be amended to make it clear that provisional orders for payment were outside the scope of the specific rule in the Convention, and could be issued only by the court with jurisdiction to decide on the merits; otherwise, the rules of jurisdiction in the Convention would be subverted and the case resolved before there was any full hearing.

([2]) Court of Justice, Case C-261/90 *Reichert* [1992] ECR I-2149, paragraph 34.

It was therefore suggested that Article 31 should be interpreted not as a referral to the *lex fori* but as a substantive rule, whose scope was limited to measures that could actually be enforced in the State in which they were sought, without going through another enforcement procedure ([1]). The court of the State in which a measure was to be enforced should have exclusive jurisdiction to order that measure. In favour of the jurisdiction of the court of the State in which the measure can and must be enforced, it was observed that leaving it to national law to determine the nature of such measures and the circumstances under which they might be granted opened up the possibility of a jurisdiction based on an exorbitant forum, which should be barred by the Convention.

126. Before the conclusion of the work of the *ad hoc* working party, these topics were dealt with in a judgment of the Court of Justice, which touched upon various aspects of the matter ([2]). The Court found that the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention also had jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions ([3]). The relevant provision of the Convention adds a further rule of jurisdiction whereby a court may order provisional or protective measures that are available under its national law even if it does not have jurisdiction as to the substance of the case, provided that the subject-matter of the dispute falls within the scope *ratione materiae* of the Convention ([4]). The mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a State bound by the Convention does not deprive a court of another State bound by the Convention of its jurisdiction ([5]). Such jurisdiction does not depend on the rule of jurisdiction under the Convention and may also be based on one of the rules of exorbitant jurisdiction referred to in Article 3 of the Convention. Regarding the conditions set out by the Convention for the granting of a provisional or protective measure within the meaning of the relevant provision of the Convention, the granting of such measures is conditional on, *inter alia*, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the State of the court before which the measures are sought ([6]).

The definition of provisional and preventive measures depends on the national law of the court, but the national law is to be interpreted in keeping with the concept stated by the Court, which, as we have seen, defines such measures as those intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the court having jurisdiction as to the substance of the matter. In the light of that concept, a measure ordering interim payment of a contractual consideration is, by its very nature, such that it may pre-empt the decision by the court having jurisdiction to rule on the substance of the case, and does not constitute a provisional measure within the meaning of the provision of the Convention, unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction to which application is made ([7]).

127. In consideration of that judgment by the Court of Justice, the *ad hoc* working party discussed whether it was necessary for Article 31 to codify the principles set out there, and concluded that it was not, among other things because of the further clarification that they might require if incorporated into a legislative text, particularly with respect to the nature of the factor connecting the subject-matter of the measure and the territorial jurisdiction of the court, which in the judgment was defined exclusively with reference to the specific case at issue.

A further problem concerns recognition by the other States bound by the Convention of measures ordered under Article 31. Measures ordered by the court having jurisdiction as to the substance of the case by virtue of the Convention are undoubtedly decisions that must be recognised under Title III of the Convention, but it seems natural that the decisions taken on the basis of the jurisdiction provided for by Article 31 should not, in principle, give rise to recognition and enforcement abroad. Here again, the *ad hoc* working party preferred not to insert express provisions into the Convention.

CHAPTER IV

RECOGNITION AND ENFORCEMENT

1. ***General***

128. The simplification of the procedures for the recognition and enforcement of judgments that fall within its scope is a fundamental aspect of the Lugano Convention, as it was of the Brussels Convention, where it was the stated primary objective. The purpose of Title III is to establish a procedure that facilitates the free movement of judgments as much as possible, and further reduces the obstacles that still exist, though the rules for the recognition and enforcement of decisions could already be regarded as extremely liberal in the Brussels Convention of 1968 ([8]).

There is no doubt that in a single judicial area, such as the one which is called for by the EC Treaty and which lends itself so well to extension to the EFTA countries referred to in the

([1]) See also proposals of the European Group for Private International Law, paragraph 13.
([2]) Court of Justice, Case C-391/95 *Van Uden* [1998] ECR I-7091.
([3]) *Van Uden*, paragraph 22.
([4]) *Van Uden*, paragraphs 20 and 28.
([5]) *Van Uden*, paragraph 29, and, regarding the possibility that proceedings on the substance of the case are to be conducted before arbitrators, paragraph 34.
([6]) *Van Uden*, paragraph 40.
([7]) *Van Uden*, paragraphs 43-48. For a similar finding see also Court of Justice, Case C-99/96 *Mietz* [1999] ECR I-2277, paragraph 47.
([8]) Jenard report, p. 42.

Lugano Convention, a free circulation of judgments would be achieved by abolishing any *exequatur* proceeding in States bound by the Convention for judgments coming from other States bound by the Convention, so that such judgments could be enforced directly, without any need for verification. The *ad hoc* working party carefully considered this possibility, but decided that it was premature, in the light of the prerogatives of national sovereignty that still characterise the European States, an important element of which is the administration of justice, at least for the great body of judgments on civil and commercial matters ([1]).

The changes made to the rules on the recognition and enforcement of decisions are nevertheless based on the view that the intervention of the authorities of the State of enforcement can be scaled down further, and that the declaration of enforceability of a judgment can be reduced to little more than a formality. This conclusion is supported by an examination of the national case-law on the previous conventions, which shows that appeals filed against declarations of enforceability under the Brussels and Lugano Conventions are so small in number as to be almost negligible.

129. Title III of the Convention is accordingly founded on the principle that the declaration of enforceability must be in some measure automatic, and subject to merely formal verification, with no examination at this initial stage of the proceedings of the grounds for refusal of recognition provided for in the Convention. At this stage, therefore, the State of origin is trusted to act properly, an approach that also finds expression in other areas of the rules governing the European common market. Examination of the grounds for refusal of recognition is deferred until the second stage, at which a party against whom a declaration of enforceability has been obtained, and who decides to challenge it, must show that such grounds exist. This simplification of the procedure for the declaration of enforceability is accompanied by a review of the grounds for refusal, which are narrowed by comparison with the 1988 Convention, without however eroding the principle whereby the proceeding in the State of origin must be in keeping with the requirements of due process and the rights of the defence.

130. Regarding the judgments to be recognised and enforced, no change has been considered necessary, and Article 32 reproduces the corresponding provision in the 1988 Convention ([2]). Thus all decisions given by a court or tribunal, whatever they may be called, are 'judgments', and the term also includes orders on costs or expenses made by an officer of the court, as happens in some European systems. It should be pointed out that the broad definition of 'court' in Article 62 means that Article 32 is likewise to be interpreted broadly with regard to the classification of the authority that has taken the decision submitted for recognition and enforcement. Thus the definition covers decisions taken by a court or tribunal, or a body or person acting in a judicial role, irrespective of whether the person taking the decision is formally described as a 'judge', as is the case with payment orders made by a clerk or registrar. The *ad hoc* working party did not consider it necessary to amend Article 32 in order to permit a broad interpretation that would take account of the proliferation of national procedures motivated by a desire to speed up legal proceedings.

Provisional and protective measures also fall within the definition of 'judgments' if they are ordered by a court, provided that in the State of origin both parties were first given the opportunity to be heard. The Court of Justice has held that it is because of the guarantees given to the defendant in the original proceedings that the Convention is liberal in regard to recognition and enforcement, so that the conditions imposed by Title III are not fulfilled in the case of provisional or protective measures which are ordered or authorised by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party ([3]).

It should be pointed out, lastly, that the decisions referred to in Title III include the judgments of the Court of Justice or of other European Community law courts ([4]), since Article 1(3) specifies, as we saw above, that the term 'State bound by this Convention' may also mean the European Community.

2. ***Recognition***

131. There is no change with respect to the 1988 Convention in the structure of the section on the recognition of judgments, either as the principal issue or as an incidental question before any court of a State bound by the Convention (Article 33, see the Jenard report, pp. 43-44). It need only be added here that by virtue of the clarification in Article 1(3), the rules of the section on recognition also apply to the judgments of the Court of Justice of the European Communities when the question arises of their recognition in States that are not members of the European Community. The only changes that have been made in order further to reduce verification of foreign judgments are those that concern the grounds for refusal of recognition.

([1]) After the *ad hoc* working party had completed its work, *exequatur* proceedings were abolished within the Community for certain types of judgment: Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.4.2004) as amended by Regulation (EC) No 1869/2005 (OJ L 300, 17.11.2005); Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006); and Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007).

([2]) Regarding which see Jenard report, p. 42, and Schlosser report, paragraph 188.

([3]) Court of Justice, Case 125/79 *Denilauler* v *Couchet* [1980] ECR 1553.

([4]) See, e.g. the Office of Harmonization in the Internal Market (OHIM), which issues, within the European Community, decisions in relation to revocation or invalidity of certain types of Community intellectual property rights such as Community trademarks and registered designs, or national courts designated by EU Member States as Community Courts in relation to invalidity of certain types of Community intellectual property rights such as Community trademarks, registered and unregistered designs.

1. **Public policy (Article 34(1))**

132. The European Commission proposed that the reference to the public policy of the State addressed as a ground for refusal of recognition should be deleted, as it had been applied only very rarely in the judgments of national courts with regard to the Brussels and Lugano Conventions, and the Court of Justice had never been asked to clarify its scope. Despite some support, this proposal did not secure sufficient backing in the *ad hoc* working party, where it was objected that the State addressed had to be able to protect its fundamental interests by invoking a principle such as public policy, even if the principle was rarely applied. In order to emphasise the exceptional nature of recourse to this ground for refusal, the provision now specifies that recognition may be refused only when it would be 'manifestly' contrary to public policy.

133. The concept of public policy is defined essentially by the national law of the State addressed. However, the Court of Justice has held that it has jurisdiction to review the limits within which a national court may invoke public policy to refuse recognition to a foreign judgment, and has ruled that recourse to the concept of public policy within the meaning of Article 34(1) can be envisaged only where recognition would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought, inasmuch as it infringes a fundamental principle; the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of that State ([1]). But if the infringement of the legal order is not of this nature, recourse to public policy would ultimately conflict with the prohibition of review of a foreign decision on the merits which is laid down in Article 36 of the Convention ([2]).

The question here arises whether the concept of public policy in the Convention is a matter only of substantive public policy, or whether it also includes what is termed procedural public policy, or whether procedural public policy is relevant only to the extent that it falls under the guarantee of the right to a fair hearing in Article 34(2). The issue was thoroughly discussed by the *ad hoc* working party, and has also been the subject of considerable attention in the literature, where different positions have been taken. Here again it is worth recalling the findings of the Court of Justice: after observing that the right to be defended was one of the fundamental rights deriving from the constitutional traditions common to the Member States, and that it was guaranteed by the European Convention on Human Rights, the Court concluded that a national court was entitled to hold that a refusal to hear the defence of an accused person constituted a manifest breach of a fundamental right ([3]). That judgment, however, was given in the circumstances of the case at issue, which involved a civil judgment requiring the payment of damages which was accessory to a criminal conviction in default of appearance, and cannot be interpreted to allow a party to rely under Article 34(1) on any infringement whatsoever of the rights of the defence, even an infringement that is not manifestly contrary to the public policy of the State addressed along the lines discussed by the Court in the same judgment.

2. **Infringement of the rights of a defendant in default of appearance (Article 34(2))**

134. According to the 1988 Convention, a judgment given in default of appearance is not to be recognised if the application or equivalent document instituting the proceedings before the original court was not 'duly' served on the defendant 'in sufficient time to enable him to arrange for his defence' ([4]). This provision lays down two conditions, the first of which, that service should be duly effected, entails a decision based on the legislation of the State of origin and on the conventions binding on that State in regard to service, whilst the second, concerning the time necessary to enable the defendant to arrange for his defence, implies appraisals of a factual nature, as it has to be ascertained whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence ([5]). Establishing that these tests are satisfied has given rise to some difficulties in practice, and has repeatedly necessitated the intervention of the Court of Justice, especially as regards the second test and the cumulative effect of the two of them.

The Court has clarified several aspects of the provision in a positive manner, as will be seen, but it has also shown up deficiencies that might allow abuse by a debtor in bad faith. In particular, as regards the question whether the document was duly served, the Court has held that the two conditions have a cumulative effect, with the result that a judgment given in default of appearance may not be recognised where the document instituting the proceedings was not served on the defendant in due form, even though the defendant had sufficient time to enable him to arrange for his defence ([6]), and has implied that for this purpose the court addressed may have regard to any irregularity of service, which is to be evaluated in the light of the law of the original court, including any international conventions that may be relevant. In relation to the timeliness of service, the Court has ruled that the fact that the defendant may have become aware of the proceedings is irrelevant if that happened after the judgment was given, even if legal remedies were available in the State of origin and the defendant did not avail himself of them ([7]).

([1]) Court of Justice, Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 23 and 37, with reference to the right to be defended.
([2]) Court of Justice, Case C-38/98 *Renault* v *Maxicar* [2000] ECR I-2973, paragraph 30, with reference to proper application by the courts of the State of origin of the Community principles of free movement of goods and free competition.
([3]) Court of Justice, Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 38-40.
([4]) Jenard report, p. 44; Schlosser report, paragraph 194.
([5]) Court of Justice, Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, paragraphs 15-19.
([6]) Court of Justice, Case C-305/88 *Lancray* v *Peters und Sickert* [1990] ECR I-2725, paragraphs 15, 18 and 23.
([7]) Court of Justice, Case C-123/91 *Minalmet* v *Brandeis* [1992] ECR I-5661, paragraph 22; Case C-78/95 *Hendrikman* [1996] ECR I-4943, paragraphs 18-21.

These judgments of the Court are based on a literal interpretation of the rule, with the evident intention of safeguarding the debtor, and have been the subject of some debate in the literature, which has emphasised that the creditor also needs to be protected, and that a debtor in bad faith should not be allowed to take advantage of merely formal and insignificant irregularities of service, or of a delay in service, to do nothing, trusting that when recognition of the judgment is sought he will be able to rely on the grounds for refusal laid down in the Convention. The debate was taken up by the *ad hoc* working party, which paid particular attention to this topic, seeking a solution that would balance the interests of the creditor and those of the debtor, and would not allow a debtor who was aware of proceedings against him to remain inactive and then to invoke a provision that would lead to refusal of recognition of the judgment on formal grounds.

135. For this reason Article 34(2) no longer expressly requires service in due form, but treats the question in connection with the opportunity given to the defendant to arrange for his defence, in the same way as the time that may be needed. Service must now be effected on the defendant 'in such a way as to enable him to arrange for his defence'. This wording no longer requires merely that it be ascertained whether service was effected in accordance with the law applicable, but instead requires an assessment of fact, in which compliance with the rules governing service will play a role that is certainly important, but not decisive: the court in which recognition is sought will have to consider any other factors that may help it to establish whether, despite one or other irregularity, service was effected in such a way as to enable the defendant to arrange for his defence. Irregularity of service is consequently a ground for refusal under Article 34(2) only if it injured the defendant by preventing him from defending himself [1], and is not relevant if the defendant could have appeared in court and conducted his defence, conceivably even pleading the irregularity, in the State of origin.

This assessment of fact is to be accompanied, as in the 1988 Convention, by another assessment of fact to establish whether the time allowed to the defendant to arrange for his defence was sufficient, for which purpose the court may consider any relevant circumstances, even if they arose after service was effected [2], and also the provision in Article 26(2), which the court of the State of origin is required to comply with in any event [3]. Article 34(2) does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant, but only that the period reckoned from the date on which service was effected was sufficient for the defendant to arrange for his defence [4].

136. The protection given to a debtor by Article 34(2) in the event that service was irregular has been restricted in another way too: even if service was not effected in sufficient time and in such a way as to enable the defendant to arrange for his defence, the judgment is to be recognised if the defendant did not challenge it in the State of origin when it was possible for him to do so. The protection of a defaulting defendant in the event of defects in the notification should not extend to cases where the defendant remains inactive, and the rule seeks to overcome the problem by requiring him, if he can, to raise any objection in the State of origin, and to exhaust all remedies there, rather than keeping them in reserve for the following stage when the judgment has to be recognised in another State bound by the Convention. The exception thus made in Article 34(2) clearly excludes the interpretation given previously by the Court of Justice to the corresponding provision of the 1988 Convention [5].

137. Article 34(2) has a general scope, and is intended to guarantee that the judgments admitted to free movement in the States bound by the Convention have been delivered in observance of the rights of the defence. The article consequently applies regardless of the defendant's domicile, which may be in another State bound by the Convention, or in a State outside the Convention, or in the same State as the court of origin [6].

It should be noted, however, that Article III(1) of Protocol 1, inserted at the request of Switzerland, provides that Switzerland reserves the right to declare upon ratification that it will not apply the part of Article 34(2) which refers to the debtor's failure to challenge the judgment in the State of origin when it was possible for him to do so. The Swiss delegation took the view that this exception was not sufficiently respectful of the defendant's right to a fair hearing. Article III of Protocol 1 also provides, as is natural, that if Switzerland makes such a declaration, the other contracting parties will apply the same reservation in respect of judgments rendered by the courts of Switzerland. Contracting parties may make the same reservation in respect of a non-Convention State that accedes to the Convention under Article 70(1)(c).

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[1] For a similar approach see proposals of the European Group for Private International Law, paragraphs 14-16.

[2] Court of Justice, Case 49/84 *Debaecker* v *Bouwman* [1985] ECR 1779, operative part.

[3] The *ad hoc* working party preferred not to incorporate the words of Article 26(2) expressly into Article 34(2), as the Commission had initially suggested, so as not to impose a further mandatory verification of the actions of the court that delivered the judgment.

[4] Court of Justice, Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, paragraph 19.

[5] In the *Minalmet* and *Hendrikman* judgments, see paragraph 134 above. With reference to the corresponding provision in the Regulation Brussels I, the Court of Justice has further clarified that the possibility for the defendant to challenge the default judgment in the State of origin implies that he has been informed of that judgment and had sufficient time to prepare a defence and initiate proceedings against it: see Case C-283/05 ASML [2006] ECR I-12041.

[6] Court of Justice, Case 49/84 *Debaecker* v *Bouwman* [1985] ECR 1779, paragraphs 10-13.

3. **Irreconcilability between judgments (Article 34(3) and (4))**

138. No change was needed in Article 34(3), which sets forth the principle that a judgment delivered in a State bound by the Convention is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State addressed. The provision will apply only rarely, given the rules of coordination of jurisdiction in respect of *lis pendens* and related actions; it has a broad scope, and is intended to safeguard the rule of law in the State addressed, which would be disturbed by the existence of two conflicting judgments ([1]). Judgments can thus be irreconcilable even if the disputes concerned have only the parties in common, and not the same subject-matter or the same cause of action ([2]). Nor is it necessary, in order to prevent recognition, that the judgment in the State addressed must have been delivered prior to the foreign judgment.

The question which of two judgments came first has got be considered, however, in order to decide which of two irreconcilable foreign judgments is to be recognised in the State addressed ([3]). The 1988 Convention (Article 27(5)) dealt only with the recognition of a judgment given in a State bound by the Convention that was irreconcilable with an earlier decision delivered in a non-Convention State; Article 34(4) of the new Convention adds the case of a judgment given in a State bound by the Convention that is irreconcilable with an earlier judgment delivered in another State bound by the Convention, and puts it on the same footing. In cases of this kind the fact that the judgments are irreconcilable prevents recognition of the later one, but only if the judgments were delivered in disputes between the same parties and have the same subject-matter and the same cause of action, always provided of course that they satisfy the tests for recognition in the State addressed. If the subject-matter or the cause of action are not the same, the judgments are both recognised, even if they are irreconcilable with one another. The irreconcilability will then have to be resolved by the national court before which enforcement is sought, which may apply the rules of its own system for the purpose, and may indeed give weight to factors other than the order in time of the judgments, such as the order in which the proceedings were instituted or the order in which they became *res judicata*, which is not a requirement for recognition under the Convention.

4. **Jurisdiction of the court of origin (Article 35)**

139. As in the 1988 Convention, judgments delivered in a State bound by the Convention are generally to be recognised in the State addressed without any review of the jurisdiction of the court of origin. Article 35 repeats that there is to be no such review, and no application of the test of public policy to the rules on jurisdiction, but it also reproduces the exceptions that previously existed to the rule against review of the jurisdiction of the court of origin. It was proposed that the exceptions should be removed altogether, so as to eliminate any review of jurisdiction whatsoever ([4]), but after careful consideration the *ad hoc* working party decided that this would be premature. There are exceptions, therefore, for infringement of the rules of jurisdiction in matters of insurance and consumer contracts or the rules of exclusive jurisdiction (Sections 3, 4 and 6 of Title II), for the case provided for in Article 68, and for the cases provided for in Article 64(3) and Article 67(4) ([5]). It was discussed whether infringement of the rules of jurisdiction on the subject of individual contracts of employment should be added to these exceptions. It was decided that they should not, on the ground that in labour disputes the action is normally brought by the employee, with the result that the review, being an impediment to recognition, would in the majority of cases be an advantage to the employer in his position as defendant.

5. **Abolition of review of the law applied by the court of origin**

140. Article 27(4) of the 1988 Convention allowed recognition to be refused if the court of origin, in order to decide a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession (all matters outside the scope of the Convention), had applied a rule different from the rule of private international law of the State in which the recognition was sought; it was felt that this rule was now superfluous, not least because of the progress made in the harmonisation of private international law in these areas in the European Community, and in particular the fact that the provision was absent from the Brussels II Regulation. It has not been included in the new Convention, so that it will not be possible in future to rely on this ground of refusal, which was a vestige of the review of the merits of a foreign judgment.

Review as to substance is entirely excluded by Article 36 of the Convention, which reproduces the wording of the corresponding provision in the earlier Convention ([6]).

6. **Appeal against the foreign decision for which recognition is sought (Article 37)**

141. No change has been made to the rule that allows the court in which recognition is sought for a judgment delivered in another State bound by the Convention to stay the proceedings if an appeal has been lodged against the judgment in the other State. Article 37 reproduces Article 30 of the 1988 Convention, and does not require special comment (see the Jenard report, p. 46, and the Schlosser report, paragraphs 195-204).

([1]) Jenard report, p. 45.
([2]) Court of Justice, Case 145/86 *Hoffmann* v *Krieg* [1988] ECR 645, paragraph 25, with reference to a foreign judgment between spouses on the subject of maintenance which was irreconcilable with a decree of divorce in the State addressed.
([3]) Schlosser report, paragraph 205.
([4]) Proposals of the European Group for Private International Law, paragraph 28.
([5]) Jenard-Möller report, paragraphs 67, 14-17, 79-84.
([6]) Jenard report, p. 46.

3. ***Enforcement***

142. Section 2 of Title III of the Convention, on enforcement, comprises a set of rules which, as already mentioned [1], have been greatly changed by the revision, in order further to simplify the procedures on the basis of which judgments are declared enforceable in the State addressed - and also recognised, if recognition is raised as the principal issue under Article 33(2), which refers to the procedures provided for in Sections 2 and 3 of Title III. The principle whereby enforcement is subject to a declaration of enforceability nevertheless remains unchanged, and is stated in Article 38 in the same terms as in Article 31 of the 1988 Convention. A declaration of enforceability can therefore be given only for a judgment already enforceable in the State in which it was delivered, and only upon application by an interested party [2]. Once declared enforceable, the judgment can be enforced in the State addressed; in the United Kingdom, however, a judgment must be registered for enforcement [3]. Article 1(3) makes it clear that the section on enforcement also applies to judgments of the Court of Justice of the European Communities when they are to be enforced in countries that are not Community Member States. Judgments of the Court of Justice are therefore to be enforced in those States in the same way as national judgments delivered in States bound by the Convention.

1. **Declaration of enforceability: first stage (Articles 39-42 and 53-56)**

(a) *Court or competent authority (Article 39)*

143. As previously, the Convention expressly indicates the courts or authorities competent in the States bound by the Convention to receive applications to have foreign judgments declared enforceable. They are now listed in an annex (Annex II), rather than in the body of the Convention, a change which simplifies the presentation of the procedure (regarding the reasons for moving the list of competent courts or authorities to an annex, see also the discussion of Article 77 below). It should be pointed out that Article 39(1) refers to a 'court or competent authority'. The States bound by the Convention are therefore free to entrust the handling of this first stage of the proceedings to an authority that is not a court of law. All of them have in fact generally designated courts, but it may be noted that in the case of application for a declaration of enforceability of a notarial authentic instrument France and Germany have designated a notarial authority (the *président de la chambre départementale des notaires*) or a notary, while in the case of a maintenance judgment Malta has designated the court registry (*Reġistratur tal-Qorti*). These examples could well be followed by other countries, given the non-adversarial character of the proceeding and the merely formal nature of the checks that have to be carried out.

144. As regards the local jurisdiction of the courts designated, the 1988 Convention made reference to the place of domicile of the party against whom enforcement was sought, and, if he was not domiciled in the State in which enforcement was sought, to the place of enforcement. This arrangement offered the creditor the advantage that where there were several places of enforcement he could apply for just one declaration of enforceability, although he then had to go before several courts for enforcement. But it had the disadvantage that if the debtor's domicile and the place of enforcement were not the same it obliged the creditor to go before two courts, first the court of the domicile and then the court of the place of enforcement. The *ad hoc* working party considered the issue, and despite some opinions to the contrary reaffirmed the desirability of defining internal jurisdiction directly in the Convention, so as to make it easier for a creditor to identify the appropriate court [4]. It considered that the best way to determine territorial jurisdiction with regard to each specific case was to give the creditor a choice between the place of the debtor's domicile and the place of enforcement, allowing him to go directly before the court of the place of enforcement.

Article 39(2) reflects this approach, and states that the local jurisdiction is to be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement. The wording means that it is no longer necessary to provide expressly for the case in which the debtor is domiciled in a non-Convention State, although of course in that case the creditor will have only the place of enforcement available.

It was also suggested that for cases in which enforcement was requested against more than one party Article 39 should reproduce the rule of jurisdiction in Article 6(1), and provide for the local jurisdiction of the courts for the place where any one of them is domiciled. The *ad hoc* working party took the view, however, that where internal jurisdiction was involved it was better not to make rules for every specific aspect. The question of what is to be done where enforcement is sought against more than one party is consequently to be determined on the basis of the national law of each State bound by the Convention.

(b) *The application (Articles 40 and 53-56)*

145. As in the 1988 Convention, the procedure for making the application is to be governed by the national law of the State addressed, taking account, however, of the rules laid down directly in the Convention. The Convention continues to provide that the applicant must give an address for service of process within the area of jurisdiction of the court applied to, and that if the law of the State in which enforcement is sought does not provide for the furnishing of such an address, he must appoint a representative *ad litem* [5].

[1] Paragraph 128 above.
[2] Jenard report, p. 47.
[3] Schlosser report, paragraphs 208-213, and Jenard-Möller report, paragraphs 68-69.
[4] It was also pointed out that it would be desirable to have a manual providing the practical information needed in order to identify the court or competent authority, information which obviously could not be supplied in the body of the Convention itself or in an annex.
[5] See Jenard Report, pp. 49-50.

The list of documents to be appended to the application has changed, however. Articles 46 and 47 of the 1988 Convention listed a number of documents which were intended to show that the judgment satisfied the requirements for recognition; but the new Article 40(3) refers to the documents listed in Article 53, which confines itself to calling for the production of a copy of the judgment which satisfies the conditions necessary to establish its authenticity, and a certificate regulated in the succeeding Article 54. Article 54 requires the competent authority of the State in which the judgment was delivered, at the request of any interested party, to issue a certificate using a form shown in Annex V to the Convention.

146. There was a great deal of discussion regarding the advisability of requiring the applicant to produce a certificate rather than actual documents. This arrangement is motivated by the general approach in favour of excluding any review of the foreign judgment at this first stage. The certificate meets the two objectives of simplifying the position of the creditor, who has to produce a single document, and of enabling the court addressed rapidly to pick out the information regarding the judgment that it needs in order to deliver the declaration of enforceability. It not infrequently happens that it is difficult for the court addressed to extract certain information rapidly and reliably from the judgment of the court of origin, in view of the language of the judgment and the different ways in which judicial documents are drafted in the various judicial systems of the States bound by the Convention.

The certificate, as will be seen from the form in Annex V, must indicate the State of origin of the judgment, the court or other authority issuing the certificate, the court that delivered the judgment, the essential particulars of the judgment (date, reference number, parties, and, where judgment was given in default of appearance, date of service of the document instituting the proceedings), the text of the judgment (in the strict sense, i.e. only the full text of the operative part of the judgment), the names of any parties to whom legal aid has been granted, and a statement that the judgment is enforceable in the State of origin. The certificate will normally be issued by the court that delivered the judgment, but not necessarily so. The certificate merely states facts, without giving any information with regard to the grounds for refusal of recognition set out in Article 34 and 35 of the Convention, so that the certificate could well be issued by another person at the court, or by another authority authorised to do so in the State of origin ([1]).

147. The purpose of the certificate is to simplify the proceedings, and a creditor should not be required to produce a certificate when the judgment can be declared enforceable quickly even without it. The Convention therefore restates in relation to the certificate the provision previously laid down in Article 48 of the 1988 Convention in relation to the documentary evidence in support of the application that was provided for in that article ([2]). Article 55(1) of the new Convention accordingly provides that if the certificate is not produced, the court addressed 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. From this provision it is clear that the court may accept an incomplete certificate, or if necessary set a deadline for the production of a form completed in full. If there is no certificate, of course, or if the certificate is incomplete, the court addressed may also decide to refuse the application.

There is no change to the previous rule governing the translation of the certificate, which is necessary only if the court requires it (Article 55(2)), and the exemption from any legalisation of all documents, including a document appointing a representative *ad litem* (Article 56) ([3]).

(c) *Decision completing the first stage and declaration of enforceability (Articles 41-42)*

148. The court or competent authority must decide without delay on an application lodged under the Convention, and if the formalities referred to in Article 53 are met, that is to say if the certificate and a copy of the judgment which satisfies the conditions necessary to establish its authenticity have been produced, it must declare the judgment enforceable. The wording of Article 41 leaves no doubt in this regard: it states that the judgment is to be declared enforceable 'immediately' on completion of these formalities. It appeared preferable to use the adverb 'immediately' rather than to lay down a precise deadline, as it would have been difficult to impose a penalty for delay in meeting the deadline; the formulation is therefore similar to that of the 1988 Convention, which for the first stage of the proceedings provided that the court addressed was to give its decision 'without delay', but did not lay down a definite time ([4]).

149. Article 41 does not allow the court addressed to carry out any review to establish whether there are grounds for refusing recognition under Articles 34 and 35. The information that must be shown on the certificate is not designed for such a review, but is intended merely to facilitate the work of the court addressed in deciding whether or not to declare enforceability. Even the indication of the date on which the document instituting the proceedings was served, in the event of a judgment in default of appearance, is intended only to establish that the proceedings in default were preceded by service of the document instituting the proceedings, which is the indispensable minimum if cognisance is to be taken of a judgment

([1]) The authority that issues the certificate must assemble the necessary information from the judgment to which the certificate refers, but it may need the assistance of the interested party. Thus, for example, if according to the law of the State of origin the document instituting the proceedings has to be served not by the court but by the plaintiff, the plaintiff will have to provide the authority issuing the certificate with proof that service was effected, so that the date can be entered in the certificate.

([2]) Jenard report, pp. 55-56.

([3]) Jenard Report, p. 56.

([4]) The only consequence of any delay, therefore, is that the authority addressed may incur liability, if that is provided for under national law or Community law, as the Convention will become part of the acquis communautaire. Repeated delays may be considered by the Standing Committee provided for in Protocol 2.

in default, and is not designed to enable the court addressed to check whether the conditions in Article 34(2) have been complied with. It may be pointed out that if the document instituting the proceedings was not served, no date of service can be indicated in the certificate. But also in that event a question may only arise as to the consequences of the lack of the mention relating to the date of service in the certificate, without any finding that service was not effected. Here too, therefore, the examination by the court is purely formal.

The prohibition of any review on the basis of Articles 34 and 35 also precludes refusal of the application on grounds other than those laid down in those articles, which are the only grounds for refusal of recognition of a judgment given in another State bound by the Convention. Thus the application may not be refused on the ground that the court addressed finds that the judgment does not fall within the scope of the Convention. The fact that the court of origin has issued the certificate provided for in Annex V certifies that the judgment does fall within the scope of the Convention. To verify the correctness of the certificate would be contrary to the principle that the first stage of the procedure should be confined to a formal examination. Verifying the correctness of the certificate would require a legal assessment of the judgment, and should be reserved for the second stage of the proceedings.

Nor can it be objected at this first stage that the judgment is contrary to public policy, despite the fact that this ground of refusal of recognition is in the general interest. The *ad hoc* working party had lengthy discussions on whether it might not be advisable to maintain the verification of public policy at the first stage, and opinions in favour of doing so were not lacking, but the view ultimately prevailed that it should not, owing in part to the fact that public policy had rarely been invoked in the practical application of the previous Convention, and in part to the delay this might have caused in the issue of the declaration of enforceability. As with the other grounds for refusal, any submission that the judgment is contrary to public policy will have to be raised at the second stage of the proceedings.

150. The only exception to these rules is provided for in Article III(2)(b) of Protocol 1, where, in respect of judgments rendered in an acceding State referred to in Article 70(1)(c), a contracting party has made a declaration reserving the right to permit the court with jurisdiction for the declaration of enforceability to examine of its own motion whether any of the grounds for refusal of recognition and enforcement of a judgment is present. The possibility of a reservation of this type is contrary to the principle that there should be no review at the first stage of a proceedings, which is fundamental in the system of the Convention, but it has been cautiously allowed. Such a reservation is valid for five years, unless the contracting party renews it (Article III(4)). This clause can be taken to suggest that the reservation should be reconsidered, and if not indispensable should be ended.

151. Given the merely formal nature of the verification carried out at this stage by the court addressed, the debtor's active participation is not necessary. Article 41 therefore reiterates that the party against whom enforcement is requested cannot make submissions at this stage.

The decision on the application for a declaration of enforceability is to be brought to the notice of the applicant immediately, in accordance with the procedure laid down by the law of the State in which enforcement is sought. If the decision declares enforceability, it must also be served on the party against whom enforcement is sought. It may happen that the declaration of enforceability is issued before the foreign judgment is served on that party. Article 42(2) provides that in that case the foreign judgment decision must be served together with the declaration of enforceability.

2. **Declaration of enforceability: second stage (Articles 43-46)**

(a) *Appeals against the decision on the declaration of enforceability (Articles 43-44)*

152. The decision on the application for a declaration of enforceability may be appealed against by either party, to the court listed in Annex III to the Convention. Appeals against the decision closing the first stage of proceedings have thus been unified. The 1988 Convention, like the Brussels Convention, provided for two different kinds of appeal, one against a decision granting enforcement, which was available to the party against whom enforcement was sought (Articles 36-39), the other against a decision refusing the application, which was available to the applicant creditor (Articles 40-41). As the first stage has now been reduced to a formality, the *ad hoc* working party considered the suggestion that the appeal against refusal should be eliminated, as the application was unlikely to be rejected. If there was any irregularity in the certificate, the court addressed would in general require that it be corrected, or, if information had been omitted, that the certificate be completed. But however unlikely it might be, it was still possible that the application might be rejected, and that in order to protect the rights of the applicant the decision would need to be reviewed, and it was accordingly decided to maintain the possibility of appeal, though without a specific set of rules distinct from those on appeals against a declaration of enforceability.

153. Article 43 provides that 'either party' may lodge an appeal, regardless, therefore, of whether the decision allows or rejects the application. In practice, however, only the party against whom enforcement is sought will have an interest in challenging a declaration of enforceability, and only the applicant will have an interest in challenging a rejection of the application. Furthermore, in this latter case, a decision rejecting the application has to be brought to the notice only of the applicant, as provided in Article 42(1), so that the debtor is not formally notified of it and consequently is not in a position to appeal. While they may be unified in terms of legislative drafting, therefore, the two kinds of appeal remain distinct in substance, as in the 1988 Convention.

They are also distinct in terms of the time within which they must be brought. The Convention lays down no time-limit for an applicant's appeal against an application for a declaration of enforceability. This is an appeal in the applicant's interest against a decision that has not even been notified to the debtor, and it is therefore left to the applicant to choose the time of the appeal, which in practice amounts to a resubmission of the application, this time with the debtor being heard. In the case of an appeal against a declaration of enforceability, on the other hand, there has to be a time-limit beyond which, if the party against whom enforcement is sought has not appealed, the judgment can be enforced. Article 43(5) therefore sets a time-limit of one month from the date of service of the declaration of enforceability. If the party against whom enforcement is sought is domiciled in a State bound by the Convention other than the one in which the declaration of enforceability is issued, the time-limit is increased to two months from the date of service on him, in person or at his residence. The time allowed is longer because of the difficulty the defendant may have in arranging for his defence in a State other than the one in which he is domiciled, where he may have to find a lawyer and will probably have to have documents translated. Article 43(5) states that no extension of the time indicated in the Convention may be granted on account of distance, and that rule takes the place of any national provisions there may be to the contrary. No time-limit is indicated in the Convention in the event that the party against whom enforcement is sought is domiciled in a State not bound by the Convention. In the absence of any such indication, the determination of the time allowed is left to the national law of the State addressed.

154. Both kinds of appeal are to be dealt with in adversary proceedings. Article 43(3) merely specifies 'the rules governing procedure in contradictory matters'. In the absence of any further indication, the procedure to be followed is the ordinary one provided for by the national law of the court addressed, provided that it is such as to ensure that both parties are heard. If the party against whom enforcement is sought fails to appear in the appeal proceedings brought by the applicant, the court must apply Article 26(2)-(4), even where the party against whom enforcement is sought is not domiciled in any of the States bound by the Convention ([1]). The purpose of this last provision is to safeguard the rights of the defence, which require protection especially because the proceedings on the applicant's appeal against the refusal of a declaration of enforceability are the debtor's last chance to defend himself and to try to show that the requirements for recognition of the foreign judgment are not met ([2]).

(b) *Scope of review on an appeal under Article 43 (Article 45)*

155. The court hearing an appeal against a decision on a declaration of enforceability has to consider the judgment in the light of the grounds that would prevent it from being recognised and consequently declared enforceable. At this stage too there is a presumption in favour of recognition, in that the court does not rule on whether conditions for recognition are met, but rather on whether any of the grounds for refusal laid down in Articles 34 and 35 is present.

In the case of an appeal by the creditor who lodged the application at the first stage of the proceedings, since the application must have been rejected after a purely formal verification of the certificate, the creditor will inevitably have to raise all the grounds for refusal at the appeal stage, seeking to show that they are not present in the case, and the court will have to rule on all of them, since the presence of even one would entail the rejection of the appeal.

If the appeal is lodged by the party against whom enforcement is sought, on the other hand, that party may rely on the presence of one or more grounds of refusal without necessarily raising them all. This poses the problem of the extent to which the court hearing the appeal is confined to the pleas raised by the appellant.

156. When it drew up the new procedure for the enforcement of judgments, the *ad hoc* working party discussed at some length the question whether the appeal court might consider all or any of the grounds for refusing recognition of a foreign judgment of its own motion, especially where recognition might be manifestly contrary to public policy. Many experts took the view that where recognition would be contrary to public policy, refusal of recognition pursued a public interest that could not be left entirely at the disposal of the parties, and that the removal of any consideration of it at the first stage of the proceedings should be counterbalanced by allowing the court to consider it at the second stage of its own motion, even if the debtor had omitted to plead it. Likewise in order to counterbalance the removal of consideration of the grounds for refusal at the first stage, a number of experts felt that at the second stage the verification of what is termed procedural public policy should be strengthened beyond what was specifically provided in Article 34(2), by having the court review it of its own motion.

This debate did not ultimately find expression in any of the provisions governing the powers of courts deciding on appeals. Article 45(1) limits itself to stating that the court 'shall reject [if the appeal is brought by the applicant] or revoke [if the appeal is brought by the party against whom enforcement is sought] a declaration of enforceability only on one of the grounds specified in Articles 34 and 35'. The article indicates the purpose of the review by the court, and the grounds in which it is to take its decision, but does not indicate how that review is to be carried out. The absence of any indication in the Convention means that the question whether the court may consider the grounds for refusal of its own motion, or at the initiative of a party, will have to be resolved by the court itself, in the light of the public interest which in the legal order to which the court belongs may justify intervention in order to prevent the recognition of the judgment. If there is no such public interest, and the ground for refusal is essentially a matter

([1]) Article 43(4) thus takes over the provision in Article 40(2) of the 1988 Convention.

([2]) See also Jenard report, p. 53.

of the interests of the party against whom enforcement is sought, the burden of raising the question will be left to the interested party. An assessment of this kind can be carried out only on the basis of national law.

157. Some doubt also arose whether it could be argued at the second stage that the foreign judgment did not fall within the scope of the Convention. It has already been said that the fact that the court of origin has issued the certificate by itself certifies that the judgment does fall within the Convention. In so far as the certificate is the outcome of a legal assessment, it may be challenged at the appeal stage, and any problem of interpretation of the Convention would then have to be resolved in the light of the case-law of the Court of Justice, and, if the doubt persisted and the conditions were met, by referring the question to the Court of Justice for a preliminary ruling under the Treaty establishing the European Community. Article 45(2) of the Convention in any event expressly prevents this channel from being used to review the substance of the foreign judgment.

158. Given the review it involves, the second stage may last longer than the first, but at the second stage too the court must conclude without delay, in the shortest time permitted by national law, in deference to the principle that the free movement of judgments should not be hindered by obstacles such as delays in proceedings for enforcement.

(c) *Further appeals (Article 44)*

159. The judgment concluding the second stage, given on an appeal by the applicant or by the party against whom enforcement is sought, may be contested only by the appeal referred to in Annex IV to the Convention, which for each State bound by the Convention specifies a form of appeal to a higher court or indeed precludes any such appeal entirely ([1]). Article 44 of the Convention gives no indication of how this further appeal available to the parties is to proceed. It may be inferred that the appeal is governed by the national law of the particular State, and is to be conducted in the manner that that law provides, governing such things as the time within which an appeal must be brought, and that it is available within the limits that that law permits, such appeals usually being confined to points of law. Here too, in accordance with Article 45 of the Convention, the court's review is confined to the grounds for refusal in Articles 34 and 35. Since national law usually confines appeals at this level to points of law, the review of the judgment of the court below with regard to the grounds for refusal in Articles 34 and 35 will be limited to correcting findings of law, and will not involve findings of fact.

([1]) As in the case of Malta, where no further appeal lies to any other court, except in proceedings regarding maintenance.

Once again, foreign judgments are not under any circumstances to be reviewed as to substance, and the courts must rule without delay.

(d) *Appeal against the foreign judgment whose enforcement is sought (Article 46)*

160. No amendment was needed to the rule allowing a court hearing an appeal under Articles 43 or 44 to stay the proceedings if an appeal against the original judgment is pending in the State of origin. Article 46 reproduces Article 38 of the 1988 Convention, and does not require any further comment ([2]).

4. ***Provisional and protective measures (Article 47)***

161. Article 47 contains an important and significant innovation with respect to the corresponding provision of the 1988 Convention, Article 39 of which stated that during the time specified for an appeal and until any such appeal had been determined, no measures of enforcement could be taken other than protective measures against the property of the party against whom enforcement was sought. That provision, which allows protective measures to be taken only once the first stage of the issue of a declaration of enforceability has been concluded, has been retained in Article 47(3), but Article 47(1) makes it clear that protective measures may be ordered before the declaration of enforceability is served and until such time as a decision has been taken on any appeals. The *ad hoc* working party agreed that a provision of this kind was needed, but discussed at some length where it should be positioned, that is to say whether it should appear in the section on enforcement or rather, as the Commission had initially proposed, immediately following the rule that foreign judgments are to be recognised without any special procedure being required (Article 33) ([3]).

162. The matter of the positioning of the new provision was in part bound up with the question whether, if a judgment appeared to satisfy the tests for enforceability, enforcement could begin before the declaration of enforceability was made, so that enforcement measures could be taken if they were not of a definitive nature. But it was pointed out that there is a difference between protective measures and provisional enforcement, and that there might be difficulties if enforcement were to begin in a State and then to be interrupted because no declaration of enforceability was issued. In some legal systems protective measures are taken as the first step in the process of enforcement, but a generalisation of this approach might have interfered with national procedural law, departing from the principle usually followed, which was that enforcement was left to the law of the individual States and was not changed by the Convention ([4]).

([2]) See Jenard report, p. 52.

([3]) COM(97) 609 final proposed the insertion of a new article after the present Article 33, reading as follows: 'Judgments given in a Contracting State shall, where a final order is issued, generate an entitlement on the grounds of which provisional protective measures may be ordered in accordance with the law of the State applied to, even where they are not enforceable or have not been declared enforceable in the State applied to'.

([4]) Court of Justice, Case 148/84 *Deutsche Genossenschaftsbank* v *Brasserie du Pêcheur* [1985] ECR 1981, paragraph 18.

For these reasons, and in order to prevent the new provision from being interpreted as modifying national law, it was decided to include it in the article regarding provisional and protective measures taken in connection with the declaration of enforceability of the judgment. Article 47(1) states that when a judgment must be recognised nothing prevents the applicant from availing himself of provisional, including protective, measures, without a declaration of enforceability being required, and thus prior to the issue of the declaration, allowing it to be understood that the application for such measures implies that the creditor intends to have the judgment enforced.

Article 47(1) therefore departs from the previous text by allowing provisional or protective measures to be taken once the foreign judgment is enforceable in the State of origin, always supposing it satisfies the tests for recognition in the State addressed, whether or not a declaration of enforceability has been issued. For the measures that may be taken, Article 47 leaves it to the domestic law of the State addressed to determine their classification, the type and value of the goods in respect of which they may be adopted, the conditions to be satisfied for such measures to be valid, and the detailed provisions for implementing them and ensuring that they are legitimate ([1]). It should also be borne in mind that the national law to which the Convention refers must not in any circumstances lead to frustration of the principles laid down in that regard, whether expressly or by implication, by the Convention itself, and must therefore be applied in a manner compatible with the principles in Article 47 ([2]), which entitle the applicant to request provisional or protective measures from the moment that the judgment becomes enforceable in the State of origin.

163. The two remaining paragraphs of Article 47 reproduce, inverting the order, the second and first paragraphs of Article 39 of the preceding Convention, and thus leave intact the possibility of taking protective measures against the property of the party against whom enforcement is sought during the time specified for an appeal against the declaration of enforceability pursuant to Article 43(5), and until any such appeal has been determined, and thus at a time subsequent to the issue of the declaration of enforceability. As in the 1988 Convention, since a declaration of enforceability carries with it the power to proceed to protective measures, the creditor may proceed directly to such measures, without obtaining specific authorisation, even if that would otherwise be required by the domestic procedural law of the court addressed ([3]). Here again the application of national law cannot frustrate the principles laid down by the Convention according to which the right to proceed to provisional and protective measures derives from the declaration of enforceability, so that there is no justification for a second national decision providing a specific and distinct authorisation. Nor can national law make the creditor's entitlement to proceed to protective measures conditional upon the lodging of a guarantee, as this would impose an additional condition for the taking of the measures themselves, which would be contrary to the clear wording of the Convention; the *ad hoc* working party considered a proposal to amend Article 47 to this effect, but rejected it.

164. The insertion of the new provision means that the Convention now covers provisional or protective measures taken in three distinct situations: the first, of a general nature, is governed by Article 31, which relates essentially, though not only, to the period in which the main court proceedings are taking place in the State of origin; the second arises in the State addressed, when the declaration of enforceability of the foreign judgment is being issued, and up to the point where it is issued (Article 47(1)); the third arises after the declaration of enforceability is issued, during the time allowed for appeal, and until the courts have determined the appeal (Article 47(3)). For the classes of measures that can be taken in these situations and for the rules governing them and their mechanisms and admissibility, the Convention refers extensively to national law, but national law applies only subject to the principles laid down in the Convention itself, and as we have seen cannot lead to results incompatible with those principles. This is of special relevance to the conditions that justify the taking of protective measures in the particular case. The conditions are a matter of national law, but when in order to apply them the national court considers whether the fundamental conditions of a prima facie case (*fumus boni juris*) and urgency (*periculum in mora*) are satisfied, it must do so in the light of and in compliance with the purposes of the rules of the Convention in the three situations outlined above.

A court ordering a measure under Article 31 can freely assess whether or not there is a prima facie case and whether or not there is urgency, while under Article 47(1) the existence of a prima facie case follows from the judgment for which recognition is sought, and for the court to make its own assessment would be incompatible with the principle that the applicant is entitled to seek protective measures on the basis of the foreign judgment; the court's own assessment is therefore limited to the question of urgency. And when protective measures are taken under Article 47(3), there can be no assessment either of the presence of a prima facie case or of urgency, because the declaration of enforceability carries with it the power to proceed to any protective measures, and an assessment of whether they are necessary distinct from the assessment of the requirements for the issue of a declaration of enforceability is not permitted by the Convention.

([1]) Court of Justice, Case 119/84 *Capelloni and Aquilini* v *Pelkmans* [1985] ECR 3147, paragraph 11.
([2]) Court of Justice, *Capelloni and Aquilini* v *Pelkmans*, paragraph 21.
([3]) Court of Justice, *Capelloni and Aquilini* v *Pelkmans*, paragraphs 25-26.

5. ***Other provisions concerning enforcement***

(a) *Enforcement in respect of certain matters only; partial enforcement (Article 48)*

165. Article 48(1) provides that enforceability may be declared only for one or more of the matters in respect of which the foreign judgment has been given; it is identical to Article 42 of the 1988 Convention, except for the editorial changes necessitated by the new procedure, in which the court no longer 'authorises' enforcement, but simply 'gives' the declaration of enforceability. The most likely instances of a declaration of enforceability of this kind are those where a section of the judgment might be contrary to public policy, or where the applicant seeks a declaration of enforceability only for one or more sections of the judgment because he has no interest in the others, or more frequently where the foreign judgment deals with some matters that fall within the scope of the Convention and others that do not. It should be pointed out that for the application of this provision the matters dealt with in the judgment need not be formally distinct. If a judgment imposes several obligations only some of which are within the scope of the Convention, it may be enforced in part, provided that it clearly shows the aims to which the different parts of the judicial provision correspond ([1]).

166. Also unchanged, apart form editorial adaptation, is the rule in paragraph 2, which permits the applicant to request a partial declaration of enforceability, even within a single heading of the judgment where it is not possible to distinguish different parts by their purposes. The *ad hoc* working party considered whether this provision should be removed, given the automatic character of the first stage of the proceedings and the effect of Article 52, which prohibits the levying of any charge, duty or fee calculated by reference to the value of the matter at issue ([2]). But the provision is not motivated by considerations of a financial order, and its removal might have suggested that the creditor was always obliged to request the enforcement of the entire provision in the judgment. By virtue of this paragraph 2, which consequently remains unchanged, an applicant whose claim has been partially extinguished since the foreign judgment was delivered may therefore ask the authority issuing the certificate to indicate that enforcement is requested only up to a certain amount, and may also make that request at the second stage of the procedure, when an appeal is brought by the applicant himself or by the party against whom enforcement is sought.

(b) *Judgments ordering periodic penalty payments (Article 49)*

167. This provision reproduces word for word the corresponding provision in the 1988 Convention, which provides that a foreign judgment which orders a periodic payment by way of a penalty (for example for delay) is enforceable in the State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the State of origin ([3]). It has been pointed out that this provision leaves open the question whether it covers financial penalties imposed for disregarding a court order that accrue not to the creditor but to the State ([4]). During the work of revision it was suggested that the wording could usefully be clarified to that effect. The *ad hoc* working party preferred, however, not to change the wording so as to include penalty payments to the State expressly, because a judgment in favour of the State may have a criminal character, so that a change here might introduce a criminal aspect into a Convention devoted to civil and commercial matters. The provision can therefore be taken to contemplate penalty payments to the State only if they are clearly of a civil character, and provided that their enforcement is requested by a private party in the proceedings for a declaration of enforceability of the judgment regardless of the fact that the payments are to be made to the State.

(c) *Legal aid (Article 50)*

168. There is no change to the principle followed in this provision, according to which an applicant who in the State of origin has benefited from complete or partial legal aid, or exemption from costs or expenses, is entitled to the most favourable legal aid, or the most extensive exemption from costs or expenses, provided for by the law of the State addressed (see the Jenard report, p. 54, and the Schlosser report, paragraphs 223-224). Its application has however a wider scope, as it covers the entire procedure provided for in Section 2 on enforcement, including the appeal proceedings ([5]). The grounds for legal aid or exemption from costs or expenses are irrelevant: they are determined by the law of the State of origin, and are not subject to review. It will be remembered that the certificate issued by the authority that gave the judgment for which recognition and enforcement is sought has to indicate whether or not the applicant has benefited from legal aid, and this is sufficient to allow the applicant to qualify in the State addressed.

Article 50(2) is motivated by the need to take account of the role played in maintenance matters by the administrative authorities of some States, which act free of charge; the same necessity has been noted in the case of Norway, and Norway consequently joins Denmark and Iceland, which were already listed in the corresponding provision in the 1988 Convention.

(d) *Securities for costs, taxes, fees or duties (Articles 51-52)*

169. Article 51 reproduces the corresponding provision of the 1988 Convention ([6]). The *ad hoc* working party discussed whether for persons with their habitual residence in a State bound by the Convention the prohibition of the requirement of a *cautio judicatum solvi* should be extended to the original

([1]) Court of Justice, Case C-220/95 *Van den Boogaard* v *Laumen* [1997] ECR I-1147, paragraphs 21-22, with reference to an English judgment which in the same decision on an action for divorce regulated both the matrimonial relationships of the parties and matters of maintenance.

([2]) See paragraph 169 below.

([3]) Jenard report, pp. 53-54.

([4]) Schlosser report, paragraph 213.

([5]) Article 44 of the Lugano Convention of 1988 restricted its application to the 'procedures provided for in Articles 32 to 35'.

([6]) Jenard report, p. 54.

proceedings. But this would have introduced a uniform rule that was not strictly necessary in order to ensure the freedom of movement of judgments, and the working party preferred not to intervene in the national systems. It should also be borne in mind that in a number of States bound by the Convention, the requirement of security by reason of foreign nationality or lack of domicile or residence in the country is already prohibited by the Hague Convention of 1 March 1954 on civil procedure (Article 17) and the subsequent Hague Convention of 25 October 1980 on international access to justice (Article 14), and that in Member States of the European Community, security based upon nationality is prohibited in any event.

Article 52 reproduces Article III of Protocol 1 to the 1988 Convention, and in proceedings for the issue of a declaration of enforceability prohibits the levying in the State in which enforcement is sought of any charge, duty or fee calculated by reference to the value of the matter at issue.

CHAPTER V

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

1. ***Authentic instruments (Article 57)***

170. Article 57 substantially reproduces, with some modifications to adapt it to the new Convention, the corresponding provision in the 1988 Convention (Article 50; for commentary see the Jenard report, p. 56, and the Schlosser report, paragraph 226) ([1]). The Court of Justice has clarified the objective tests to be applied to determine when there is an instrument that may be declared enforceable under this provision. The Court has held that the authentic nature of the instrument must be established beyond dispute, and that since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments ([2]). The Court's interpretation here is supported by the report on the 1988 Convention, according to which the authenticity of the instrument should have been established by a public authority, and should relate to the content of the instrument and not only the signature ([3]). Naturally, acts are to be declared enforceable only if they are enforceable in the State of origin.

According to Article 57(2), arrangements relating to maintenance obligations that are concluded with administrative authorities or authenticated by them are also to be regarded as authentic instruments. This provision is included to allow for the fact that in certain States maintenance questions are dealt with not by courts of law but by administrative authorities authorised to receive agreements between parties, and to certify them, thereby rendering them enforceable.

171. Authentic instruments are subject to the new procedure for the declaration of enforceability laid down in Articles 38 ff. of the Convention. At the second stage, the court can refuse or revoke a declaration of enforceability only if enforcement of the instrument would be manifestly contrary to public policy in the State addressed. The restriction under which public policy is the only ground for refusal takes over the corresponding provision in the 1988 Convention. As in the case of judgments, the procedure for the declaration of enforceability begins with the issue of a certificate by the competent authority of the State bound by the Convention in which the instrument itself was drawn up or registered, on the basis of a form provided in Annex VI to the Convention. The form has to indicate the authority which has given authenticity to the instrument; the authority may have been involved in its drafting or may merely have registered it. The designation of the authority empowered to issue such a certificate is a matter for the Member State concerned, and where the profession of notary exists, the authority may even be a notary.

The application of the procedure leading to a declaration of enforceability may require some adaptation for authentic instruments, and must make allowance for the different nature of the document to be enforced. Thus, for example, the reference in Article 46 to a stay of the proceedings in the event that an ordinary appeal has been lodged in the State of origin may in the case of authentic instruments include proceedings at first instance, if these are the proceedings followed in the State of origin to challenge the validity of an authentic instrument.

2. ***Court settlements (Article 58)***

172. Article 58 confirms that court settlements approved by a court in the course of proceedings and enforceable in the State of origin are treated in the same way as authentic instruments for purposes of the declaration of enforceability, as they were in the 1988 Convention (see the Jenard report, p. 56). But the procedure for the declaration of enforceability is based not on the certificate for authentic instruments but on the certificate for court judgments in Annex V.

([1]) It has to be noted that in the Italian version of the Convention the earlier term 'atti autentici' ('authentic instruments') has been replaced by the term 'atti pubblici' ('public instruments'). This change is intended to reflect the case-law of the Court of Justice, as explained in the text.

([2]) Court of Justice, Case C-260/97 *Unibank* v *Christensen* [1999] ECR I-3715, paragraph 15, with reference to Article 50 of the Brussels Convention.

([3]) Jenard-Möller report, paragraph 72.

CHAPTER VI

GENERAL AND TRANSITIONAL PROVISIONS

1. ***General provisions (Articles 59-62)***

1. **Domicile (Articles 59-60)**

173. Articles 59 and 60 concern the definition of the concept of domicile of natural and legal persons. The subject was discussed earlier in connection with the general rules on jurisdiction (paragraphs 26-33 above).

2. **Unintentional offences in criminal courts (Article 61)**

174. Article 61 takes over the provision in Article II of Protocol 1 to the 1988 Convention, and was considered earlier in connection with Article 5(4) (paragraphs 64-66 above).

3. **Definition of the term 'court' (Article 62)**

175. The Convention repeatedly speaks of a 'court', indicating the court's jurisdiction, its powers regarding the recognition and enforcement of judgments, and in general its role in the system of judicial cooperation that the Convention provides for and regulates. In some systems, if the term were to be understood in the narrower sense of an authority formally integrated into the judicial structure of the State, it might not include all of the authorities that perform one or other of the functions that the Convention assigns to a 'court'. Examples might be the powers in relation to maintenance obligations that Norwegian and Icelandic law confer on administrative authorities, whereas the Convention regards maintenance obligations as a matter for courts, or the powers that Swedish law gives to regional administrative authorities, which sometimes perform judicial functions in summary enforcement proceedings.

That these authorities were deemed to be 'courts' was stated in the 1988 Convention in Article Va of Protocol 1 ([1]). The Convention now adopts a more general rule, giving a broader meaning to the term 'court', which is to include any authority in a national system having jurisdiction in the matters falling within the scope of the Convention. In this formulation the 'courts' that are to apply the Convention are identified by the function they perform, rather than by their formal classification in national law. Unlike the specific provision in Article Va of Protocol 1 – and the parallel provision in Article 62 of the Brussels I Regulation ([2]) - the new Article 62 has a general character which will cover even administrative authorities other than those that currently exist in States bound by the Convention, and which avoids the necessity of amending the Convention in the event of the accession of other States. It also allows the concept of a 'court' to include authorities or offices set up in the European Community framework, such as the Office for Harmonisation in the Internal Market (Trade Marks and Designs), based in Alicante, which has certain judicial functions in respect of industrial property.

2. ***Transitional provisions (Article 63)***

176. Article 63 reproduces the corresponding provision in the 1988 Convention (Article 54): paragraph 1 states that the Convention applies only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed. Paragraph 2 reaffirms that if the proceedings were instituted before the Convention entered into force and the judgment is given after that date, the judgment is to be recognised under Title III if the rules on jurisdiction in Title II were complied with or if jurisdiction is founded upon a convention in force between the State of origin and the State addressed. Paragraph 2 gives precedence over this rule, however, to a provision stating that there is no need to verify jurisdiction if the proceedings in the State of origin were instituted after the entry into force of the 1988 Convention both in the State of origin and in the State addressed. Judgments on applications lodged while the 1988 Convention was in force, therefore, are treated in the same way as judgments given after the new Convention entered into force.

The old third paragraph of Article 54, which concerned the jurisdiction of the courts of Ireland and the United Kingdom in cases where the law applicable to a contract had been chosen before the entry into force of the 1988 Convention, has been deleted as obsolete.

The new text no longer contains the provision in the old Article 54A, which stated that for a period of three years from the entry into force of the 1988 Convention jurisdiction in maritime matters would be determined in accordance with paragraphs 1 to 7 of the Article in the case of Denmark, Greece, Ireland, Iceland, Norway, Finland and Sweden, except where for the particular State the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, entered into force before the end of that time. This provision is now superseded, both because the three years have expired and because the 1952 Convention referred to is in force for most of the States concerned ([3]).

([1]) Jenard-Möller report, paragraphs 106-107.

([2]) Which expressly states that in summary proceedings concerning orders to pay, the expression 'court' includes the Swedish enforcement service (*kronofogdemyndighet*).

([3]) The Convention has been ratified by Denmark (2 May 1989), Norway (1 November 1994) and Finland (21 December 1995), and Ireland (17 October 1989) and Sweden (30 April 1993) have acceded to it. In accordance with Article 15 of the Convention, the Convention came into force six months after deposit of the instrument of ratification or receipt of the notification of accession. Greece had already ratified on 27 February 1967, before the 1988 Convention. Only Iceland would appear not to have acceded to the Convention.

CHAPTER VII

RELATIONSHIP WITH OTHER LEGAL ACTS

177. The relationships between the Lugano Convention and the Brussels I Regulation, the Brussels Convention and the Agreement between the European Community and Denmark were considered earlier (paragraphs 18-22 above). The relationships with other conventions are dealt with below.

1. Conventions covering the same matters (Articles 65 and 66)

178. Article 65 reproduces, with the editorial changes required by the Convention following revision, the corresponding provision of the 1988 Convention (Article 55), and thus reaffirms the principle that, as between the States bound by the Convention, the Convention supersedes conventions concluded between two or more of them that cover the same matters as those to which the new Convention applies. This does not affect the references to other conventions of this kind in Article 63(2), Article 66 and Article 67; the last of these references has been added, as it was not in the corresponding provision in the 1988 Convention [1]. Article 65 also differs from the earlier text in that it does not itself list the conventions superseded, but instead refers to Annex VII.

Article 66 also remains unchanged with respect to the corresponding provision of the 1988 Convention (Article 56): it states that the conventions superseded continue to have effect in relation to matters to which the Lugano Convention does not apply.

2. Conventions in relation to particular matters (Article 67)

179. The provision in the 1988 Convention dealing with relationships with conventions on particular matters (Article 57) was considered by some to be obscure and difficult to interpret, and therefore in need of re-examination in order to prevent uncertainty in its interpretation. However, the *ad hoc* working party considered that it should not make any major change to the wording, as it felt that the clarification provided in the reports on the 1978 version of the Brussels Convention and the Lugano Convention of 1988 were sufficient to prevent the majority of uncertainties that might arise in the application of the provision. (For commentary see the Schlosser report, paragraphs 238-246, and the Jenard-Möller report, paragraphs 79-84).

There is thus no change to the principle that existing and future conventions on particular matters prevail over the Lugano Convention (paragraph 1), or to the possibility of founding jurisdiction on the special convention even if the defendant is domiciled in another State bound by the Lugano Convention which is not a party to the special convention, though Article 26 must be complied with (paragraph 2); but it should be noted that that principle applies only to the extent provided for in the special convention. The rule giving primacy to conventions on particular matters is an exception to the general rule that it is the Lugano Convention that has primacy over other conventions between the States on questions of jurisdiction, and the exception has to be interpreted strictly, so that it precludes the application of the Lugano Convention only in questions expressly dealt with in a special convention [2].

180. Article 67 also imposes a restriction on the conclusion of future conventions that was not in the 1988 Convention: the Lugano Convention does not prevent the conclusion of such conventions, but this is now stated to be without prejudice to obligations resulting from other agreements between certain contracting parties. It should be remembered that the Brussels I Regulation (Article 71) does not provide for the conclusion of conventions in relation to particular matters, and refers only to existing conventions that are to continue to apply. This provision is in line with the fact that it is the Community, rather than the Member States, that has power to conclude conventions on jurisdiction and the recognition of judgments that might encroach on the Brussels I Regulation, a power upheld by the Court of Justice in Opinion 1/03, where it found that in matters within the scope of the Regulation this power was exclusive [3]. It must therefore be concluded that the Member States of the European Community may not conclude other agreements on particular matters, except in the unlikely event that they are outside the competence of the Community, or where the Community authorises the Member States to conclude them.

181. A change has been made regarding the recognition and enforcement of judgments that is to some degree related to this point. There is no amendment to the rule that judgments given in a State bound by the Lugano Convention in the exercise of a jurisdiction provided for in a convention on a particular matter are to be recognised and enforced in accordance with Title III of the Lugano Convention (paragraph 3), or to the ground for refusal added to those in Title III, allowing refusal if the State addressed is not a party to the special convention and the party against whom recognition or enforcement is sought is domiciled in that State (paragraph 4). But a further ground for refusal is now added in paragraph 4, namely that the party is domiciled in a Member State of the European Community, if the State addressed is a Community Member State and the special convention should have been concluded by the Community, that is to say that the conclusion of the convention is within the competence not of the Member States

[1] Jenard report, p. 59; Jenard-Möller Report, paragraph 77

[2] Court of Justice, Case C-406/92 *Tatry* v *Maciej Rataj* [1994] ECR I-5439, paragraphs 24-25 and 27, with reference to the application of the Brussels Convention to *lis pendens* and related actions where those aspects were not regulated by the special convention, which confined itself to certain rules of jurisdiction (the special convention involved was the Brussels Convention of 1952 relating to the arrest of sea-going ships).

[3] Paragraph 7 above.

but of the Community itself. This rule is intended to prevent judgments being recognised and enforced in the European Community if they are founded on rules of jurisdiction whose substance ought to have been negotiated by the Community institutions.

This change means, for example, that if a Swiss court founds its jurisdiction on a convention on a particular matter, its judgment will be recognised by the other States bound by the Lugano Convention on the basis of Title III. If the party against whom recognition or enforcement is sought is domiciled in the State addressed, recognition may be refused. This applies whether the State addressed is outside the European Community (such as Norway) or is a Member State (such as France). If the State addressed is a Community Member State, however, it may also refuse to recognise and enforce a judgment against a defendant domiciled in another Community Member State (such as Italy), if the special convention on which the Swiss court founded its jurisdiction concerns a matter that falls within the competence of the Community. The judgment may nevertheless be recognised on the basis of the national laws of the State addressed.

182. Lastly, there is no change to the provision in paragraph 5 which states that where conditions for the recognition or enforcement of judgments are laid down in a convention on a particular matter to which both the State of origin and the State addressed are parties, those conditions are to apply, though the Lugano Convention may be applied to the procedures for recognition and enforcement.

Community acts which govern jurisdiction or the recognition or enforcement of judgments in relation to particular matters are to be treated in the same way as conventions in relation to particular matters, as provided in Protocol 3 (on which see paragraph 206 below).

3. **Conventions concerning obligations not to recognise (Article 68)**

183. Article 68 largely reproduces, with some editorial changes, the corresponding provision in the 1988 Convention (Article 59): it recognises the continued applicability of agreements by which States bound by the Lugano Convention undertook not to recognise judgments given in other States bound by the Convention against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction as specified in Article 3(2). This rule was laid down in the Brussels Convention in order to lessen the effects, within the Community, of recognition of judgments given on the basis of rules of exorbitant jurisdiction [1]; it was subsequently reproduced in the Lugano Convention, together with a restriction of the possibility of concluding agreements of this kind with non-Convention countries, which are precluded by paragraph 2 in certain cases in which the court of the State of origin of the judgment based its jurisdiction on the presence within that State of property belonging to the defendant or the seizure by the plaintiff of property situated there [2].

184. The scope of the provision is further narrowed in the new Convention. While the 1988 Convention recognised the applicability of current and future agreements of this type, thus leaving the States free to conclude new ones, Article 68(1) in the new Convention makes a general reference only to agreements prior to its entry into force, and allows future agreements to be concluded only provided they do not conflict with obligations resulting from other agreements between certain contracting parties. It should be remembered here that the Brussels I Regulation (Article 72) does not mention the possibility of concluding future agreements, and speaks only of agreements prior to its entry into force, implicitly prohibiting the Member States from concluding new agreements of this kind. As has already been said of Article 67 [3], this provision is in line with the fact that it is the Community, rather than the Member States, that has power to conclude conventions on jurisdiction and the recognition of judgments that might encroach on the Brussels I Regulation, a power upheld by the Court of Justice in Opinion 1/03, where it found that in matters within the scope of the Regulation this power was exclusive [4]. Thus only those States bound by the Convention that are not Member States of the European Community are now entitled under Article 68 to conclude agreements with States outside the Convention that contain non-recognition obligations.

The fact that States may in future still conclude non-recognition agreements with non-Convention States persuaded the *ad hoc* working party not to take up a proposal that would have removed the second paragraph of Article 68, so as to align the Article on the corresponding provision in the Brussels I Regulation (which obviously does not contain a similar paragraph, as the paragraph will operate only if States are free to conclude future agreements of this kind), and instead to keep the restriction on the freedom of States which the paragraph already imposed.

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[1] Jenard report, p. 61.

[2] This limitation was inserted into the Brussels Convention by the Accession Convention of 1978: Schlosser report, paragraphs 249-250.

[3] Paragraph 180 above.

[4] Paragraph 7 above.

CHAPTER VIII

FINAL PROVISIONS

1. ***Signature, ratification and entry into force (Article 69)***

185. The Convention is open for signature by the European Community, Denmark, and the States which, at time of signature, are members of EFTA. As already mentioned (paragraph 8), the Convention was signed on 30 October 2007 by the European Community, Switzerland, Norway and Iceland, and on 5 December 2007 by Denmark. The Convention is subject to ratification and, as with the 1988 Convention, the depositary is the Swiss Federal Council, which is to conserve it in the Federal Archives (Article 79). It is to enter into force on the first day of the sixth month following the date on which the Community and one EFTA member deposit their instruments of ratification. This period is twice as long as the period that was allowed for the entry into force of the 1988 Convention, and was decided upon in view of the time required to adapt the domestic laws of the States bound by the Convention. For States that ratify or accede thereafter, however, the Convention enters into force on the first day of the third month following the deposit of the instrument of ratification or accession.

As of the date of its entry into force, for the contracting parties between whom it enters into force, the new Convention replaces the 1988 Convention. An exception is made for Article 3(3) of Protocol 2, which, as will be seen (paragraph 201 below) maintains the system for the exchange of information on national judgments established by Protocol 2 to the 1988 Convention, until it is replaced by a new system. Once that is done the replacement will be complete: Article 69(6) states that any reference to the 1988 Convention in other instruments is to be understood as a reference to the new Convention.

186. The non-European territories of Member States, to which the Brussels Convention did apply, were excluded from the territorial scope the Brussels I Regulation in accordance with Article 299 of the EC Treaty (Article 68 of the Brussels I Regulation); the Convention supplied an opportunity to resolve this problem. Article 69(7) provides that in relations between the Community Member States and those territories the new Convention is to replace the Brussels Convention (and the 1971 Protocol on its interpretation) as of the date of its entry into force with respect to those territories in accordance with Article 73(2).

2. ***Accession (Articles 70-73)***

187. The Convention has modified and simplified the procedure for accession to the Convention by other States, which previously provided for 'sponsorship' by a Contracting State, and an active role for the Depositary in assembling the information necessary to establish the suitability of the State wishing to accede ([1]). This system was not felt to be very effective, among other things because it could lead to the refusal of an applicant State even though that State was sponsored by a Contracting State, and because it could prompt competition to sponsor an applicant State. It was also argued that the role of the depository State should be neutral, and that the accession procedure should not be based on an invitation to accede issued by that State. A different procedure has accordingly been laid down, in which a positive declaration of acceptance of an application is given after proper examination of the judicial and procedural system of the applicant State.

The Convention distinguishes between States that become members of EFTA after signing the Convention (Article 70(1)(a)); Member States of the European Community acting on behalf of certain non-European territories that are part of their territory, or for whose external relations they are responsible (Article 70(1)(b)) ([2]); and other States outside the Convention, including non-European States (Article 70(1)(c)). In each case, the accession procedure begins with a request made to the Depository – accompanied by a translation into English and French, in order not to impose the cost of translation on the Depository – but the procedure that follows is different: for the States referred to in points (a) and (b), it is regulated by Article 71; for the States referred to in point (c), it is regulated by Article 72.

Article 71 provides that the applicant State has merely to communicate the information required for the application of the Convention, which is laid down in Annexes I to IV and VIII, and to submit any declarations it wishes to make in accordance with Articles I and III of Protocol 1. This information is to be sent to the Depositary and to the other Contracting Parties. Once this has been done the applicant State can deposit its instrument of accession.

Article 72 lays down a different procedure for the other applicant States referred to in point (c). In addition to the information required for the application of this Convention and any declarations under Protocol 1, other States wishing to accede to the Convention must provide the Depositary with information on their judicial system, their internal law concerning civil procedure and enforcement of judgments, and their private international law relating to civil procedure. The Depositary transmits this information to the other Contracting Parties, whose consent to the accession is needed; they undertake to endeavour to give it at the latest within one year. Once the agreement of the Contracting Parties has been obtained, the Depositary is to invite the applicant State to accede by depositing its instrument of accession. The

([1]) Article 62 of the 1988 Convention; see Jenard-Möller Report, paragraphs 89-90.

([2]) At the request of Denmark it was made clear in the negotiations that the current position of the Faroe Islands and Greenland with respect to the 1988 Convention would continue under the new Convention. See Jenard-Möller report, paragraph 95.

Contracting Parties nevertheless remain free to raise objections to accession before the accession enters into force, which is on the first day of the third month following the deposit of the instrument of accession. If they do so the Convention enters into force only between the acceding State and the Contracting Parties that have not made any objection.

188. The procedure described applies not only to other States but also to regional economic integration organisations other than the European Community, which is already a party to the Convention and for whose participation the Convention already makes the necessary provision. The Diplomatic Conference of October 2006 discussed whether specific mention of such organisations should be made alongside the words 'any other State' in Article 70(1)(c). It was pointed out that an express mention would allow such organisations to accede without requiring an amendment of the Convention, and that the prospect of such accessions was a real one, as negotiations with such organisations were already under way in the framework of the Hague Conference on Private International Law. These advantages were diluted, however, by the flexibility of the new Convention, which would make it easier to make the amendments necessary for the accession of such organisations on the basis of the characteristics of each one of them. A consensus was finally reached that it would not be necessary to make express mention of regional economic integration organisations at present or in the immediate future, though it should be clear that the Convention was indeed open to accession by organisations of this kind.

189. Regarding the accession procedures laid down by Article 71 and Article 72, it was also discussed whether it would be advisable to insert a 'federal clause' into the Convention in order to allow the accession of States in which there were two or more systems of law in operation in different territorial units, without having to amend the Convention to take account of the requirements of such States with regard to the implementation of the obligations imposed by it. Some federal States have no central power to accept a convention on behalf of their federated units, so that some rules would have to be adapted for the purpose, and a federal clause would allow this to be done without amending the Convention. But on the other hand it was doubted whether such a clause was needed, given that the Convention made accession subject to a specific procedure that would allow examination of any possible reservations made necessary by a structure of the federal type. The idea of a federal clause was finally abandoned, and the Convention makes no mention of States that apply different legal systems in different territorial units. The possibility of agreeing suitable procedures for accession to the Convention by federal States naturally remains open.

3. *Denunciation, revision of the Convention and amendment of the Annexes (Articles 74-77)*

190. Article 74 states that the Convention is concluded for an unlimited period, and may be denounced at any time, with effect at the end of the calendar year following the expiry of a period of six months from the date of notification of denunciation to the Depositary.

191. Article 76 states that any contracting party may request the revision of the Convention. The revision procedure provides for the convening of the Standing Committee referred to in Article 4 of Protocol 2 (for which see paragraph 202 below), made up of representatives of the contracting parties, which is to carry out the necessary consultations on the revision, to be followed if necessary by a diplomatic conference to adopt amendments to the Convention. This procedure applies to the Convention and the three Protocols annexed to it, which are listed in Article 75 and declared an integral part of the Convention.

It should be pointed out that the draft convention submitted to the diplomatic conference of 2006 listed two other Protocols, a Protocol 4 on Community industrial property rights, which has been discussed here in connection with Article 22(4) ([1]), and a Protocol 5 on the relationship between the Lugano Convention and the 2005 Hague Convention on choice of court agreements ([2]). This draft Protocol 5 made provision for the application by courts in the States bound by the Convention of the rules in Article 26(2) and (3) of the Hague Convention ([3]), which explain when the Hague Convention does not affect the application of other conventions, and thus also of the Lugano Convention. According to the draft protocol, a court of a State bound by the Lugano Convention would have to stay the proceedings before it under Article 6 of the Hague Convention if the defendant contested its jurisdiction by reason of the existence of a choice of court clause in favour of a court in another State bound by the Convention, and would have to decline jurisdiction if the court chosen by the parties accepted jurisdiction under Article 5 of the Hague Convention. The diplomatic conference ultimately decided not to include this Protocol, on the grounds that the Hague Convention was not yet in force, that the arrangement proposed in the Protocol would affect with the system of *lis pendens* in the Lugano Convention where there was a choice of court clause, and that in most cases no conflict could be expected to arise in the application of the two international instruments, so that specific rules of coordination were not strictly necessary.

192. The procedures are different for the nine Annexes to the Convention, which have been referred to many times in the course of this explanatory report. Here the process of revision is simplified: and in order to allow amendment without the complexity and formality of the regular revision procedure, various details of the application of the Convention, and the forms for the certificates called for in certain provisions, are given in annexes rather than in the body of the Convention, as they were in the 1988 Convention.

([1]) See above paragraph 101.

([2]) Convention of 30 June 2005 on Choice of Court Agreements, adopted by the 20th Session of the Hague Conference on Private International Law.

([3]) See the Explanatory Report by T. Hartley and M. Dogaouchi on the Hague Convention, paragraphs 271-282.

Article 77 lays down two different procedures for revision of the annexes, depending on their content, with two levels of simplification.

The first procedure applies to annexes that provide information on the application of the Convention which is to be supplied by the States bound by it: the rules of jurisdiction referred to in Articles 3(2) and 4(2) of the Convention (Annex I); the courts or competent authorities to which the application referred to in Article 39 may be submitted (Annex II); the courts with which appeals referred to in Article 43(2) may be lodged (Annex III); the appeals which may be lodged pursuant to Article 44 (Annex IV); and the conventions superseded pursuant to Article 65 (Annex VII). This information is to be communicated to the Depositary by the States, within reasonable time before the entry into force, and thereafter in the event of amendment, additions or deletions. The annexes are to be adapted accordingly by the Depositary, after consulting the Standing Committee in accordance with Article 4 of Protocol 2.

There are different arrangements for the other annexes, which lay down the forms for the certificate on judgments and court settlements referred to in Articles 54 and 58 (Annex V); the certificate on authentic instruments referred to in Article 57(4) (Annex VI); the languages of the Convention referred to in Article 79 (Annex VIII); and the application of Article II of Protocol 1 (Annex IX). Here any request for amendment is submitted to the Standing Committee, in accordance with Article 4 of Protocol 2, and adopted directly by it without the need for a diplomatic conference of the contracting parties.

4. *Notifications by the Depositary, languages of the Convention (Articles 78 and 79)*

193. These are routine clauses in conventions and do not require particular comment.

CHAPTER IX

PROTOCOLS ANNEXED TO THE CONVENTION

1. *Protocol 1 on certain questions of jurisdiction, procedure and enforcement*

194. This protocol has been considerably simplified by comparison with the corresponding Protocol 1 to the 1988 Convention, owing in part to the related revision of the Brussels Convention that led to the Brussels I Regulation, in which differentiated treatment of similar situations is reduced to a minimum, reflecting the need for uniformity that characterises European Community legislation. Gone is the clause, for example, that provided for special treatment for a defendant domiciled in Luxemburg, under which such a defendant was not subject to Article 5(1) on contractual obligations, and an agreement conferring jurisdiction was to be valid with respect to a person domiciled in Luxembourg only if that person had expressly and specifically so agreed (Article I of the earlier protocol). This special treatment was in fact maintained in the Brussels I Regulation (Article 63), but only for a period of six years from the entry into force of the Regulation, so that it no longer applies.

The Protocol no longer mentions disputes between the master and a member of the crew of a sea-going ship registered in one of several States (Article Vb of the earlier protocol), which the Brussels I Regulation kept in force for a period of six years, but only in the case of Greece (Article 64 of the Brussels I Regulation). Other provisions have been incorporated with or without change into the body of the Convention. For example, the provision on the jurisdiction of the European Patent Office in Article Vd of the earlier protocol has been inserted, with changes, in Article 22(4) (see paragraph 99 above).

195. The provisions remaining in the Protocol have already been commented upon elsewhere in this explanatory report: in particular, Article I, on the service of judicial and extrajudicial documents, has been discussed in connection with Article 26; Article II, on actions on a warranty or guarantee or other third party proceedings, has been discussed in connection with Article 6(2); and Article III, on reservations in respect of Article 34(2) or in respect of countries acceding to the Convention, has been discussed in connection with Article 34 and Article 41 respectively. Reference should be therefore be made to the commentary in those places.

It is necessary only to add that Article IV of the Protocol expressly states that the declarations referred to in the Protocol may be withdrawn at any time by notification to the Depositary. The withdrawal takes effect on the first day of the third month following notification. This provision merely describes an entitlement that the contracting parties would have had in any event, and is intended to draw attention to the desirability of reviewing such declarations and withdrawing them when they are no longer strictly indispensable, thereby improving the uniformity of the rules laid down by the Convention.

2. *Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee*

1. General

196. As in the 1988 Convention, Protocol 2 concerns the uniform interpretation of the Convention and also, as its title adds, the Standing Committee, which was set up by the earlier protocol. However, the rules on interpretation and the role of the Standing Committee have been substantially modified. The changes are to a great extent designed to take account of the participation of the European Community in the Convention in place of its Member States, which makes it advisable to provide for a broader role for the Court of Justice, and to establish a mechanism that is as flexible and rapid as possible for any revision of the Convention aimed at adapting it to the development of Community law.

The approach is already clear from the preamble, which does not confine itself to noting the substantial link between the Convention and the instruments referred to in Article 64, and the consequent jurisdiction of the Court of Justice to give rulings on the interpretation of those instruments, but considers that the Convention itself is to become part of Community law, and that therefore the Court of Justice has jurisdiction to give rulings on the interpretation of the Convention itself as regards its application by the courts of the Member States. The preamble goes on to say that the parallel revision of the Lugano and Brussels Conventions led to a common revised text, based on the rulings of the Court of Justice and the national courts, and that that text was incorporated in the Brussels I Regulation, which in turn constituted the basis for the new Lugano Convention, and concludes that it is desirable to prevent divergent interpretations and to arrive at an interpretation as uniform as possible of the various legislative instruments; this is indeed a necessary condition for a judicial area that is common to the Member States of the Community and the States that are contracting parties to the Lugano Convention.

2. **The obligation to have regard to precedent (Articles 1 and 2)**

197. On the basis of the principles set out in the preamble, Article 1 of the Protocol requires the courts to take due account not only of the judgments of the courts of the other States bound by the Convention, as in the corresponding provision of Protocol 2 to the 1988 Convention, but also of the judgments of the Court of Justice regarding the Convention itself, the earlier Convention of 1988, and the instruments referred to in Article 64(1), first and foremost among which is the Brussels I Regulation.

This obligation is motivated by the fact that the provisions of the Convention and the Regulation are the same, and applies to the extent that they are fully parallel. When the two texts are different, the courts of the States bound by the Convention will have to take account only of judgments applying the Convention that are delivered by national courts.

For the courts of the Member States of the European Community, this obligation is subordinate to their obligations under the Treaty establishing the European Community and the 2005 Agreement between the Community and Denmark. Although the Convention is an instrument formally separate from the Brussels I Regulation and independent of it, the courts of Member States may refer provisions of the Convention to the Court of Justice, for preliminary rulings on their interpretation under Articles 234 and 68 of the EC Treaty, since they are an integral part of Community law. Preliminary rulings can also be sought on the interpretation of the Brussels I Regulation, however, and the provisions at issue may be identical to those of the Convention; so that even in that case the interpretation of the Court of Justice will inevitably have implications for the clarification of the meaning and scope of the provisions of the Convention.

When the Court is asked to give an interpretation, its interpretation is binding in the particular case, which means that the referring court is obliged not merely to take account of it but to apply it in deciding the dispute. The obligation resting on courts of Community Member States is therefore a more stringent one than that resting on the courts of the non-Community States that are party to the Lugano Convention, which are bound by the less specific obligation to 'pay due account to' the principles laid down by any relevant decision of the Court of Justice.

198. It should be borne in mind that the Protocol sets out to prevent divergent interpretations and to arrive at an interpretation as uniform as possible of the Convention, the Brussels I Regulation, and the other instruments referred to in Article 64. When the Court of Justice is called upon to give its interpretation, therefore, it ought to be able to take into consideration the views of the States that are not members of the European Community. The courts of the non-Community States cannot seek preliminary rulings for this purpose, and Article 2 of the Protocol therefore allows those States to submit statements of case or written observations where a reference for a preliminary ruling is made by a court or tribunal of a Community Member State. Submissions of this kind are governed by Article 23 of the Protocol on the Statute of the Court of Justice [1], and may be made not only with regard to the Convention, but also to legislative instruments under Article 64(1), in view of the implications their interpretation may have for the provisions of the Convention, which are usually identical.

3. **Exchange of information on national and Community judgments (Article 3)**

199. If the courts of the States bound by the Convention are to take account of the judgments of the Court of Justice and of national courts, as they are required to do, there must be an effective system of information on the judgments delivered in application of the Convention, the earlier Convention of 1988, the Brussels I Regulation, and the other instruments referred to in Article 64. The need for an effective mechanism is particularly evident in the case of judgments delivered by national courts, given the great number of States bound by the Convention, which have different procedural systems and use different languages which all the national courts cannot possibly be expected to know.

Protocol 2 of the 1988 Convention set up a system of exchange of information based essentially on transmission by each Contracting State to a central body, which it was decided should be the Registrar of the Court of Justice, of judgments delivered under the Lugano Convention and the Brussels Convention; classification of those judgments by the central body; and communication of the relevant documents by the central body to the competent national authorities of the Contracting States and to the European Commission. A Standing Committee composed of representatives of the Contracting States (discussed further below) could be convened in order to exchange views on the case-law communicated to the States by the central body.

[1] Protocol (No 6) annexed to the Treaty on the European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community.

Under these provisions the Standing Committee has been convened by the Swiss Federal Government, the Depositary of the 1988 Convention, once a year. In the early years there was a straightforward exchange of information, but from the fifth meeting, held in Interlaken on 18 September 1998, the Committee worked on the basis of a report on judgments over the preceding year, drawn up by representatives chosen in rotation, which it discussed with a view to highlighting any differences in interpretation by national courts that might have emerged, and identifying those that might arise again in future, with the aim of resolving them beforehand.

200. This system of exchange of information is greatly changed by Article 3 of the new Protocol. The European Commission is given the task of setting up a new system, for which several criteria are laid down: the system is to be accessible to the public, and is to contain judgments delivered by courts of last instance and by the Court of Justice, and any other judgments of particular importance which have become final, delivered pursuant to the new Convention, the 1988 Lugano Convention, or the instruments referred to in Article 64(1) of the new Convention, and thus in the first place the Brussels I Regulation. The judgments are to be classified and provided with an abstract. Unlike the earlier protocol, Article 3 does not mention translations, but it is obvious that the classified judgments will have to be translated at least partly, if not into all the languages of the States bound by the Convention, at least into a few languages that make them accessible to the ordinary courts that are required to take them into account in applying the Convention.

The obligation to institute a system of information accessible to the public is of particular importance, and is a departure from the earlier system, in which information had to be given only to the States and to their representatives on the standing Committee, though in practice the Registrar of the Court of Justice allowed access to the information to a wide public of legal professionals (lawyers, judges, notaries, university lecturers, etc.). The new arrangement is intended to provide more structured access to judgments for anyone with an interest, so that easier and fuller use can be made of the case-law that has developed with regard to the Convention.

The States bound by the Convention continue to be under an obligation to communicate judgments to the Commission. The Registrar of the Court of Justice will have the task of selecting cases of particular interest for the working of the Convention, and presenting them for consideration by a meeting of experts in accordance with Article 5 of the Protocol (see below).

201. Until the Commission has set up the new system, the previous system entrusted to the Court of Justice will continue to be applied. There may, however, be immediate application of the arrangement whereby information on judgments is to be assembled by the Registrar and communicated to the States by the meeting of experts under Article 5 of the Protocol, rather than by the Standing Committee of representatives of the contracting parties referred to in Article 3 of the earlier Protocol, to which Article 4 of the new Protocol gives other tasks.

4. **The Standing Committee of representatives of the contracting parties (Article 4)**

202. Protocol 2 to the 1988 Convention provided that a Standing Committee was to be set up, composed of representatives of the Contracting States, whose meetings could be attended in an observer capacity by the European Communities (Commission, Council and Court of Justice) and EFTA, to examine the development of the case-law which was the subject of the exchange of information system just described and the relationship between the Convention and other conventions on particular matters, and on the basis of that examination to consider whether it might be appropriate to initiate a revision of the Convention on particular topics and to make recommendations for the purpose.

Article 4 of the new Protocol retains the institution of the Standing Committee, though since it is limited to the contracting parties it is a smaller body than the previous one, since the Member States of the European Community are now replaced by the Community itself. This means that the composition of the new Committee is not ideal for the exchange of information and discussion of national judgments that took place under the 1988 Convention, and the Committee has been given other and more important tasks in connection with the operation and revision of the Convention.

203. The functions assigned to the Committee are functions of consultation and revision. The Committee is to carry out consultations regarding the relationship between the Convention and other international instruments, regarding the application of Article 67, including intended accessions to instruments on particular matters and proposed legislation according to Protocol 3, regarding a possible revision of the Convention pursuant to Article 76, and regarding amendments to Annexes I through IV and Annex VII pursuant to Article 77(1). The Committee is also to consider the accession of new States, and may put questions to acceding States referred to in Article 70(1)(c) about their judicial systems and the implementation of the Convention, and consider possible adaptations to the Convention necessary for its application in the acceding States. In all of these areas the Committee's task is to discuss aspects of the operation of the Convention, and if necessary to prepare the way for a conference to revise the Convention.

204. In connection with the revision of the Convention, the Standing Committee has functions that are broader than just discussion and the preparation of decisions. The Committee itself has to decide certain issues requiring amendment of the Convention and its Annexes. It must accept new authentic language versions pursuant to Article 73(3), and make the necessary amendments to Annex VIII. It may also make amendments to Annexes V and VI pursuant to Article 77(2). Lastly, it may be convened to discuss the withdrawal of declarations and reservations made by the contracting parties pursuant to Protocol 1, and decide on the consequences of such withdrawals, making the necessary amendments to Annex IX. These are important functions which under the 1988 Convention would have required the convening of a diplomatic conference of the Contracting States in order to amend the Convention, but which have now been made the subject of a simplified revision procedure, a procedure made easier by the fact that a substantial amount of information has been inserted not in the body of the Convention but in the annexes.

The procedure is further simplified by empowering the Committee to establish the procedural rules concerning its functioning and decision-making, which are to provide for the possibility of both consulting and deciding by written procedure, without the need for a meeting of the contracting parties. Despite that provision in the rules of procedure, of course, any contracting party must remain free to request the convening of a meeting of the Committee.

5. **Meetings of experts (Article 5)**

205. The need for a forum taking in all the States bound by the Convention to discuss the development of case-law on the Convention, which was previously provided by the Standing Committee, is now to be met by a different kind of consultation, in which a meeting of experts will be called whenever it is necessary or appropriate. The Depositary can convene a meeting without needing to be formally requested, whenever it considers it advisable, which was already the practice for the convening of the committee set up by the 1988 Convention. The purpose of a meeting of experts is to exchange views on the functioning of the Convention, in particular on the development of the case-law and new legislation, usually Community legislation, that may influence the application of the Convention. Exchanges of opinion of this kind are obviously useful with a view to achieving parallel and uniform interpretation of the Convention and the Brussels I Regulation.

The composition of these meetings is broader than of the Standing Committee, and substantially the same as that of the committee provided for in the earlier Protocol 2, as is natural given that they have the same task of exchanging opinions on national case-law. The participants are therefore experts from the contracting parties, the States bound by the Convention, the Court of Justice, and EFTA. The composition of the meetings may even be broadened further, with the participation of other experts whose presence may be deemed appropriate.

Although the tasks of the meetings of experts are more limited, a connection is established with the Standing Committee. If, in the course of meetings, questions arise on the functioning of the Convention which, in the judgment of the participants, require further consultations between the contracting parties or more thorough examination with a view to revision of the Convention, they may be referred to the Standing Committee for further action.

3. ***Protocol 3 on the application of Article 67 of the Convention***

206. The Protocol on the application of Article 67 of the Convention largely reproduces the preceding Protocol No 3 to the 1988 Convention, which was concerned with the application of Article 57 of that Convention. The Protocol states that provisions contained in acts of the institutions of the European Communities which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments are to be treated in the same way as the conventions referred to in Article 67(1). The reasons for this equivalence are fully explained in the report on the 1988 Convention, to which reference should be made (Jenard-Möller report, paragraphs 120-125). That report observes, however, that the reference is only to Community acts and not to the legislation of the Community Member States where this has been harmonised pursuant to those acts, such as Directives, because 'The assimilation of Community acts to conventions concluded on particular matters can only refer to an act which is equivalent to such a convention and cannot therefore extend to national legislation' (paragraph 125).

The new Protocol adds a provision (paragraph 3) stating that where a contracting party or several parties together incorporate into national law some or all of the provisions contained in acts of the institutions of the European Community, then these provisions of national law shall be treated in the same way as conventions on particular matters. This provision is intended to facilitate the adaptation to the legislation enacted by the Community of the national law of the non-Community States, and to give those States the flexibility they need to make the necessary adaptations, especially when the Community instruments in question are Directives.

207. Paragraph 2 of the Protocol reproduces the corresponding article in the earlier protocol, and provides that if a Community act is incompatible with the Convention the contracting parties must promptly consider amending the Convention pursuant to Article 76, without prejudice to the procedure established by Protocol 2. The earlier protocol applied only to a Community act that was incompatible with the Convention, but the new paragraph 2 also covers the case of a proposal for a Community act that is incompatible, thus allowing the Convention to be amended at the same time as the Community act is finally adopted.