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LIMITE

JUSTCIV 79

REPORT

from : Steering Group III

to : K.4 Committee/Permanent Representatives Committee (Part 2)

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Subject: Draft Convention on scope; jurisdiction and the enforcement of judgments in
matrimonial matters

At its meeting on 25 and 26 September 1995, the Council gave instructions for a draft Convention to be submitted for its meeting on 23 and 24 November 1995, including the manner of incorporating custody of children.

Progress of proceedings

Discussions focused on aspects concerning the scope of the Convention (Article 1), jurisdiction with regard to a petition for annulment of the marriage, divorce or legal separation (Article 2) and the existence of parental authority at the time of the dissolution of the marriage (Article 3). In order to move discussions forward, the Presidency has submitted a draft Convention, certain aspects of which have been revised.

The overall state of proceedings is set out in Annex I. In particular, the K.4 Committee/Coreper should examine the following aspects of Articles 2 and 3 with a view to preparing for the Council's discussions.

Article 2 (marriage)

The Group examined the Swedish and United Kingdom delegations' proposals (5862/95 JUSTCIV 51 + ADD 1 and 10585/95 JUSTCIV 62), and the arguments put forward by those delegations concerning Article 2. In their opinion, this text was a step backwards compared with the 1970 Hague Convention on the Recognition of Divorces and Legal Separations.

In particular:

- the Swedish delegation called for inclusion of an additional criterion rendering a Member State's authorities competent to rule on the dissolution of a marriage where the applicant was a national of that Member State and habitually resident therein. All the other delegations opposed that suggestion;
- the United Kingdom delegation suggested including an additional criterion rendering the authorities of the Member State of nationality or "domicile" ⁽¹⁾ of one of the spouses competent to rule on the dissolution of the marriage, provided that that spouse had been habitually resident for at least one year within the five years immediately preceding the filing of the petition for divorce. Most delegations opposed that approach.

When examining those two proposals, the delegations which opposed them put forward the following arguments. The proposed criteria:

- showed a distrust of Member States' legal systems, which was at variance with the principle on which this Convention would be based, namely that national rules varied from one Member State to another but there was mutual confidence in the legal systems established by the Member States;
- created an artificial system in that there would be no link between the proceedings between the spouses and the place where the proceedings were settled;
- multiplied cases of exorbitant jurisdiction. That created confusion and imbalance in the present system provided for in the Convention;
- established jurisdiction which could cause legal uncertainty;

(¹) Within the meaning of English law.

would encourage abuses and even fraud in that they would protect the establishment of an arbitrary system from which either spouse could profit unlimitedly.

Those delegations considered moreover that the 1970 Hague Convention was a simple Convention in that it did not lay down rules of jurisdiction but only concerned recognition and enforcement of decisions taken in a State party to that Convention.

Article 3 (exercise of parental authority)

The Steering Group wishes to put the question of the extent to which the exercise of parental authority can be settled in the context of this Convention.

- Two delegations (FIN and UK) considered that such jurisdiction could be envisaged only where the child was habitually resident in the Member State in which the marriage was dissolved. The Finnish delegation considered moreover that only emergencies or other exceptional situations should be excluded. They would be able to agree only to Article 3(1) and considered the following paragraphs unacceptable. In particular, the United Kingdom delegation could agree to an alternative solution allowing a system of reservation on this point or the establishment of an additional protocol to the Convention concerning custody of children. The Netherlands delegation entered a scrutiny reservation but it also raised doubts concerning the inclusion of paragraphs 2 and 3.
- The German delegation considered that the authorities could still be given jurisdiction with regard to custody of children where one or more children were habitually resident in the State in which the divorce was granted. However, it requested the deletion of cases in which none of the children were habitually resident in that Member State. With this in mind, that delegation could agree to paragraphs 1 and 2 and requested that paragraph 3 be deleted. ⁽¹⁾
- Most delegations (F/ES/I/B/GR/P/A/IRL/UK/DK) ⁽²⁾ wanted the draft Convention to remain as it stood or could agree to it doing so. Several of those delegations considered that the paragraphs together constituted an inseparable whole. They considered that the authorities should have jurisdiction even where children were not habitually resident in the State in which the marriage was dissolved, in accordance with the criteria laid down in Article 1. The delegations based themselves on the principle that children lived with one of the spouses. The example put forward in the discussions to illustrate the situation was that of a spouse living in Rome with his/her children who petitioned for divorce in Paris where the respondent was habitually resident. Those delegations therefore requested that paragraphs 1 to 3 of Article 3 (already included in the draft Convention) should stand.

(¹) The Austrian delegation preferred this solution but could agree to inclusion of paragraph 3.

(²) The DK delegation would have liked paragraph 3 to stand but would be prepared to retain paragraphs 2 and 3 in a spirit of compromise.

Other aspects

Apart from Articles 2 and 3, other unresolved aspects should continue to be examined, in particular delegations' comments on Articles 1 to 12 (see footnotes to the Articles set out in the Annex), the provisions concerning recognition and enforcement of decisions, the final provisions and the legal basis for the future Convention.

It was agreed that the statements to be made in the context of this Convention would be set out in the explanatory report and published in the Official Journal of the European Communities in due course. It was also pointed out that the meaning of "domicile" in the text of the draft Convention was that adopted in common law legal systems.

Annex II contains a list of comments which the Group agreed to include in the explanatory report.

In Annex III delegations will find draft interpretative statements submitted by the Finnish delegation concerning certain Articles.

Conclusion

The K.4 Committee/Coreper is asked to examine the aspects concerning Article 2 and 3 with a view to preparing for the Council's discussions on these points.

TITLE 1

Scope

Article 1

1. This Convention shall apply to:
 - civil procedures relating to the [invalidity] ⁽¹⁾ of a marriage, to divorce and to the legal separation of spouses;
 - civil procedures relating to the exercise of parental authority over the children of [both] ⁽²⁾ spouses on the occasion of the matrimonial proceedings referred to in the previous indent ⁽³⁾.
2. Other proceedings officially recognized in a Member State shall be regarded as equivalent to judicial proceedings.

(4)

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- (1) The text will be edited by the Working Party of Legal/Linguistic Experts when the Convention is finalized.
- (2) Reservations by the Finnish and United Kingdom delegations which requested that "both" be deleted as parental authority may be exercised over children other than biological children (e.g. adopted children or stepchildren). Several delegations (F/DK/D/GR/COM) requested that the text remain as it stood. The Group also considered that adopted children were included in the concept of children of both spouses. Finally, the Netherlands delegation suggested that it was for the national judge to define the concept of a child of both spouses. The Presidency suggested that the explanatory report should specify that children of both spouses should be understood as meaning biological and adopted children.
- (3) Reservations by the Finnish and United Kingdom delegations on the method of including custody of children in the Convention. They were prepared to consider the possibility of withdrawing those reservations. The United Kingdom delegation also requested that the exercise of parental authority be dealt with comprehensively in a legal instrument separate from the Convention.
- (4) The Portuguese delegation stated that it would shortly submit a text concerning the exclusive jurisdiction of the ecclesiastical courts with regard to the invalidity of marriages contracted under canon law in Portugal. The Group agreed to continue the discussion on this point on that occasion.

TITLE II
Jurisdiction

Section 1
General provisions

Article 2 ⁽¹⁾ ⁽²⁾
Marriage

1. Competence to rule on matters relating to the invalidity of a marriage, to divorce and to the legal separation of spouses shall lie with the authorities of the Member State ⁽³⁾:

⁽¹⁾ The Greek delegation entered a reservation on this Article since it did not take sufficient account of nationality. It was examining the possibility of requesting the adoption of a rule (for example, in an annexed Protocol) applicable in particular where both spouses were of Greek nationality, which would take precedence over the criterion of habitual residence. That delegation stated that it would submit specific proposals in this connection if it were unable to withdraw its reservations.

⁽²⁾ Reservation by the Finnish delegation, which considered that the criteria for jurisdiction to be set under the Convention should apply only where the spouses were European citizens habitually resident in the territory of the Member States of the Union. In other cases, jurisdiction should be determined by national law. The rules governing *lis pendens* and the recognition of judgments should apply in both sets of circumstances, even where jurisdiction was based on national law. Two delegations (S and UK) supported that position. Several other delegations opposed this approach as it did not take account of European spouses habitually resident in a non-member State.

⁽³⁾ Text to be redrafted in the light of the discussions of the Working Party of Legal/Linguistic Experts.

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the petitioner is habitually resident if he or she resided there for at least a year immediately before the application was made; ⁽¹⁾

(b) of nationality of both spouses or of joint "domicile" established on a permanent basis ⁽²⁾ ⁽³⁾ .

2. Each Member State shall stipulate in a statement made when depositing its instruments of approval, acceptance or accession whether it will be applying the criterion of nationality or of joint domicile referred to in paragraph 1(b).

⁽¹⁾ The United Kingdom delegation suggested adding a criterion to the list set out in paragraph 1(a) concerning applications for the annulment of a marriage where a spouse dies under certain circumstances. That delegation stated that it would submit a text on this subject to the Group.

⁽²⁾ The Swedish delegation suggested including an additional criterion after paragraph 1(b) ensuring that a Member State's courts would always be competent to rule on the application of a national of the Member State in which the court is established who is habitually resident in that Member State (see 9862/95 JUSTCIV 51 + ADD 1). All the delegations were opposed to that approach.

⁽³⁾ The United Kingdom delegation requested that a criterion be included after paragraph 1(b) to the effect that the courts of the Member State of nationality or domicile of either spouse shall be competent to rule on an application where that spouse has been habitually resident in that State for at least one year in the five years preceding the petition for divorce (see 10585/95 JUSTCIV 62). All the delegations apart from two were opposed to that proposal.

Article 3

Exercise of parental authority ⁽¹⁾

1. The authorities of the Member State in which a ruling is given on actions relating to annulment of the marriage, divorce, or separation pursuant to Article 2 shall be competent to take decisions on the exercise of parental authority over each of the children ⁽²⁾ of both spouses ⁽³⁾ where such children are habitually resident in the said Member State. ⁽⁴⁾

⁽¹⁾ Two delegations (UK and FIN) requested that paragraphs 2 to 4 be deleted (NL scrutiny reservation).

One delegation (D) agreed to retain paragraphs 1 and 2 and to delete paragraph 3. Most delegations wanted or could agree to including at least the situations provided for in paragraphs 1 to 3.

⁽²⁾ Reservation by the Finnish delegation which considered that the word "children" should be written in the singular, taking account of the principles of the United Nations Convention on the Rights of the Child. In particular, the concept of the "child's" habitual residence was a source of confusion and was not recognized, in this delegation's view, under international law.

⁽³⁾ See footnote 2 to Article 1.

⁽⁴⁾ Certain delegations requested that it be made clearer that the exercise of parental authority provided for in this Article was that exercised at the time of the dissolution of the marriage within the meaning of Article 1 of the Convention.

2. Where only one or some of the children are habitually resident in the Member State whose authorities have received a petition for the annulment of the marriage, divorce or separation pursuant to Article 2, the authorities of that State shall be competent to rule on the exercise of parental authority over each child habitually resident in a Member State, provided such authorities do not regard their assumption of jurisdiction as contrary to the best interests of the children, whilst taking account of the wishes of the spouses. ⁽¹⁾ ⁽²⁾

3. Where none of the children are habitually resident in the Member State whose authorities have received a petition for the annulment of the marriage, divorce or separation pursuant to Article 2, the authorities of that State shall be competent to rule on the exercise of parental authority over each child habitually resident in a Member State, if the spouses are in agreement concerning the exercise of such competence and if such exercise is in the best interests of the children. ⁽²⁾

⁽¹⁾ Reservation by the Finnish delegation, which considered that any provision imposing jurisdiction on the Finnish authorities regarding custody of children (parental responsibility) would be unacceptable where the child did not have his habitual residence in Finland (except in emergency cases or other exceptional circumstances). Furthermore, Finland could not recognize or enforce any decision regarding custody of children, nor could it agree to act on such a decision as a basis for returning a child, in accordance with the 1980 Hague Convention, if the child was habitually resident in Finland.

⁽²⁾ Reservation by the French delegation.

4. The child's habitual residence shall be deemed unchanged if the child in question has been unlawfully displaced or has not been returned. ⁽¹⁾

[Where the authorities of the Member State [the Contracting State] in which a ruling must be given on a petition for annulment of the marriage, divorce or separation are not competent to rule on a petition concerning the exercise of parental authority over a child of both spouses pursuant to paragraphs 1 to 3, competence to take cognizance of such a petition shall be governed by the national law of the Member State [Contracting State] in which a ruling must be given on the petition for annulment of the marriage, divorce or separation, pursuant to Article 2.] ⁽²⁾ (*)

(*) Text submitted by the Commission, to be examined by the Group at a later stage.

⁽¹⁾ The Belgian delegation indicated that it was considering submitting a text to take account of the abduction of children by one of the parents. It wanted the court of the State of origin to retain jurisdiction for examining petitions concerning the exercise of parental authority if the child had left that State's territory less than a year earlier.

⁽²⁾ Three delegations wished to add a paragraph along the following lines:
"If the national legal system competent to rule on proceedings relating to divorce, separation and annulment is not competent to deliver ancillary judgments on the exercise of parental authority arising out of the proceedings referred to in the precedent paragraphs, the authorities of the Member State in which the child usually resides shall be competent to rule on the exercise of parental authority."

Most delegations opposed the inclusion of such a text.

[Article 3a (*)

1. The competent authorities within the meaning of paragraphs 1 to 3 shall rule on the exercise of parental authority in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. (N.B.: The substance of Articles 3 and 16 of that Convention may still be incorporated into this Convention.)]
2. Where a decision on parental authority has been taken in another State and should be recognized pursuant to this Convention, the competent authority pursuant to paragraphs 2 and 3 shall rule on an ancillary petition concerning the exercise of parental authority only if modification of that decision is necessitated by a change of circumstances.]

[Article 3b] (*)

The authority competent under the terms of Article 3(2) and (3) to rule on an ancillary petition concerning the exercise of parental authority shall apply the national law designated by the choice-of-law rules in force in the State in which the child is habitually resident. ⁽²⁾

(*) Text submitted by the Commission, to be examined by the Group at a later stage.

(²) *Limitation of the competence of the authorities of the State in which the divorce was granted.*

The Commission representative could suggest adopting clauses concerning preparatory inquiries, where appropriate in the form of direct communication, between the authorities of the State in which the divorce was granted and the authorities of the Member State in which the child is habitually resident or the Member State in which the child is present. Should the child be present in a non-Member State, while being habitually resident in a Member State, it should still be possible for the State in which the divorce was granted to cooperate with the State in which the child is habitually resident.

Article 4
Counterclaim

The authority in which the proceedings are pending on the basis of the preceding Articles shall also have jurisdiction to examine the counterclaim, insofar as the latter comes within the scope of this Convention.

Article 5 ⁽¹⁾

Proceedings aimed at supplementing or updating a judgment

1. Jurisdiction in proceedings aimed at supplementing or updating a judgment on a divorce or legal separation shall lie with the authorities of the Member State which delivered the last judgment on the application. Such jurisdiction shall include in particular conversion of separation into divorce.
2. Jurisdiction in ancillary proceedings relating to the exercise of parental authority, shall lie with the authorities of the Member State which delivered the last judgment on the application if the child is habitually resident in that State.

⁽¹⁾ Text submitted by the Presidency and not yet examined by the Group. Before that proposal, the Article was worded as set out in 9711/95 JUSTCIV 48.

Article 6

A spouse who is habitually resident in the territory of a Member State or who is a national of a Member State or who has his or her "domicile" in the territory of a Member State within the meaning of Article 2(1)(b) may be sued in another Member State only in accordance with Articles 2 to 4 ⁽¹⁾ ⁽²⁾.

⁽¹⁾ Some delegations requested that this Article be examined following the discussion on Article 2.

⁽²⁾ The situations provided for in national legal systems which may not be invoked under this Article will be specified in the explanatory report on the Convention. Delegations are requested to forward their contributions to the rapporteur in due course.

Article 7

Extra-Community proceedings

1. Where no authority of a Member State has jurisdiction pursuant to Articles 2 to 4, the jurisdiction of the authorities of each Member State shall be determined by the laws of that State.

2. As against a defendant who is not habitually resident [or does not have his domicile] ⁽¹⁾ within the territory of a Member State or who is not a national of a Member State, any national of a Member State who is habitually resident within the territory of a Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State. ⁽²⁾

⁽¹⁾ To be re-examined at the close of the discussions to be held on Article 2.

⁽²⁾ Scrutiny reservation by the Greek delegation linked to the competence criteria applicable internally in respect of nationality.

Section 2
Verification of jurisdiction and receivability

Article 8
Verification of jurisdiction

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

Article 9

Verification of receivability

1. Where a defendant does not enter an appearance, the competent authority shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, if the document instituting the proceedings had to be transmitted abroad in accordance with that Convention. ⁽¹⁾

⁽¹⁾ Text to be re-examined in the light of current discussions on the draft Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Section 3

Lis pendens - related actions

Article 10 ⁽¹⁾

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought before the different competent authorities, any authority other than the authority first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the authority first seised is established. ⁽²⁾
2. Where the jurisdiction of the authority first seised is established, any authority other than the authority first seised shall decline jurisdiction in favour of that authority.
3. The preceding paragraphs shall apply to separation and divorce even where the proceedings brought by the two spouses are not based on the same grounds.
4. [The lis pendens of matrimonial proceedings is established with the valid submission to the competent authority of the document instituting the proceedings or any document having equivalent effect]. ⁽³⁾

⁽¹⁾ Scrutiny reservations by two delegations (NL and UK).

⁽²⁾ In the Spanish text, paragraph 1 should read as follows:

"Cuando se formularen demandas con el mismo objeto y la misma causa entre las mismas partes ante tribunales de Estados contratantes distintos, el tribunal ante el que se formulare la segunda demanda suspenderá de oficio el procedimiento en tanto no se declare competente el tribunal ante el que se interpuso la primera".

⁽³⁾ Two delegations (P and GR) requested that the lis pendens be established when the document was served on the respondent. The Swedish delegation entered a scrutiny reservation.

Article 11

Related actions ⁽¹⁾ ⁽²⁾

1. Where related actions are brought before the authorities of different Member States and are pending at first instance, any court other than the court seised may stay its proceedings.
2. That authority may also on the application of one of the parties, decline jurisdiction if the law of that authority permits the consolidation of related actions and the authority first seised has jurisdiction over both actions.
3. For the purposes of this Article, proceedings other than those provided for in Article 10 are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

⁽¹⁾ Text proposed by the Presidency and not yet examined by the Group. The Article takes over Article 22 of the Brussels Convention, correcting the substantive error made following a drafting incident and consisting of making the stay of proceedings subject to the two actions being pending at first instance, whereas this could only apply to declination of jurisdiction.

⁽²⁾ Scrutiny reservation by the Netherlands delegation.

Fourth section
Provisional and protective measures

Article 12 ⁽¹⁾

1. In urgent cases application may be made to the competent authorities of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the authority of another Member State has jurisdiction as to the substance of the matter.

2. Measures pursuant to paragraph 1 shall cease to have effect in all cases as soon as the competent authority under this Convention has taken the required measures [or has ruled that such measures are unnecessary].

TITLE III

Recognition and enforcement of decisions

P.M.

⁽¹⁾ The United Kingdom delegation considered that if custody of children was excluded from the scope of the Convention, this Article would be superfluous. Several delegations opposed such an approach.

Comments to be taken into account in drafting
the explanatory report to the Convention

Article 1

The Finnish delegation thought that the application of this Convention would not oblige a Member State in which annulment of marriage or legal separation did not exist in its legal system to amend its domestic legislation.

It was agreed that the explanatory report would specify that the exercise of custody of children also included children adopted by the couple.

Article 2

Re first paragraph

A provision will be laid down in the section relating to recognition and enforcement to the effect that any Member State whose constitution prohibits divorce may invoke a control procedure to verify whether application of the criteria of competence to rule on matrimonial matters, and in particular that of the habitual residence of the plaintiff, has been used by the nationals of that State for the sole purpose of circumventing the application of national rules. The Irish delegation entered a scrutiny reservation on this point.

Member States which so wish may make a statement when depositing the instruments of approval, acceptance or accession, specifying the meaning of the concept of "domicile" in their legal system.

Re second paragraph

The explanatory report to the Convention will make it clear that it is not the purpose of the statement provided for in this paragraph to create an exception to the criterion referred to in 1 (b), but to specify in each legal system the place of close link of the spouses which applies.

Article 3

The explanatory report to the Convention will give a brief clarification to the effect that this Article starts from the principle that it is the State of habitual residence of the child which is competent to evaluate the ancillary application concerning the exercise of parental authority where it coincides with the State competent to rule on divorce, legal separation or the invalidity of a marriage. Only the cases referred to in paragraphs 2 and 3 are exempt from this principle. For all other applications, even if ancillary to the application for divorce, legal separation or invalidity of the marriage, the international instruments in force for each Member State and, where appropriate, the national rules in force, are applicable.

Article 6

The situations provided for in domestic legal systems which may not be invoked under this Article will be specified in the explanatory report to the Convention. Delegations are requested to forward their contributions to the rapporteur in due course.

Interpretative statements

by the Finnish delegation

Ad Article 2, paragraph 1(a), fourth indent:

Interpretative statement by the Finnish delegation which understands that "joint application" shall include applications where, after the application made by one of the spouses has been served on the other spouse, the latter spouse also makes in the same proceedings an application in a matter within the scope of application of Article 2.

Ad Article 2, paragraph 1(a), fifth indent:

Interpretative statement by the Finnish delegation which understands that Finnish courts are competent to exercise jurisdiction also in a divorce case where the plaintiff is habitually resident in Finland when the application instituting divorce proceedings has been made and the plaintiff has resided in Finland for at least a year immediately before the renewed application has been made after the expiry of the 6-month consideration period.

Ad Article 2, paragraph 1(b) and paragraph 2:

Interpretative statement by the Finnish delegation which understands that by virtue of paragraph 2 of Article 1, Finland may stipulate that when applying paragraph 1(b), it will apply the criterion of joint domicile within the meaning of domicile under Finnish law.

