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**NOTE**

Subject: Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters

Pages 19, 61, 77 and 81 shall be replaced by the attached pages.

Copenhagen) for that procedure to apply, there must be grounds for divorce and agreement between the spouses both on the divorce and on matters connected with it (custody, maintenance, etc.). Appeals against the judgments given by the Statsamt and the Københavns Overpræsidium lie to the Ministry of Justice (Civil Law Directorate) and may then be subject to judicial review through the normal procedure. In the same way, it may be noted that in 1983 Finland adopted a system under which matters relating to custody, residence and visiting may be settled outwith the legal proceedings by agreement that must be approved by the "kunnan sosiaalilautakunta/kommunal socialnämnd" (communal social (welfare) board): "Laki lapsen huollosta ja tapaamisoikeudesta"/"Lag angående vårdnad om barn och umgängesrätt", Law 361 of 8 April 1983, Sections 7, 8, 10, 11 and 12).

For that reason, the text stipulates, as did Article 1 of the 1970 Hague Convention on the recognition of divorces and legal separations, that the term "court" shall cover all the authorities, judicial or otherwise, with jurisdiction in matrimonial matters in the Member States.

- (B) The Convention excludes from its scope religious proceedings, which may become more frequent as a result of immigration (Muslim and Hindu marriages, for instance).

Article 42 safeguards agreements concluded between certain Member States and the Holy See (see commentary on Article 42 paragraph 120).

21. In the matters covered, a distinction also needs to be made between purely matrimonial questions and questions of parental responsibility.

## Article 17

### Differences in applicable law

76. This provision is to be seen in conjunction with Article 15(1)(a) (see commentary on the provision). It is designed to meet the concerns of States with more tolerant internal provisions on divorce who fear that the judgments given by their courts might not be recognized in another State because they are based on grounds unknown in the legislation of the State in which recognition is sought. The provision therefore limits indiscriminate use of public policy. An example might be legal separation as a basis for divorce: if in the State of origin divorce can be granted after a separation of two years, an incorrect interpretation of the public policy of the State in which recognition is sought, where the law requires five years of separation, could result in the refusal of recognition.

The drafting difficulties encountered in the Working Party resulted in a text which refers only to the "law" of the Member State in which recognition is sought and the word "internal" has been deleted: the reason for the deletion was to include both internal substantive provisions and private international law provisions. The objective is simply to ensure that differences between legislation in the Member States cannot result in non-recognition and, ultimately, the very purpose of the Convention being turned into a dead letter.

## Article 18

### Non-review as to substance

77. This is the classic prohibition on review as to substance at the time of recognition or enforcement. The same provision appears in Article 29 of the 1968 Brussels Convention and in other Conventions on enforcement. It is a necessary rule in Conventions of this kind in order not to subvert the meaning of the exequatur procedure, which does not mean allowing the court in the State in which recognition is sought to rule again on the ruling made by the court in the State of origin.

113. The Nordic States which are Member States of the European Union (i.e. Denmark, Finland and Sweden) are party to the Agreement of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden which contains rules of international private law concerning marriage, adoption and custody. That Agreement was amended most recently by an Agreement adopted in Stockholm in 1973. As a result of the political agreement reached in December 1997 within the European Union, Article 38(2) refers to this particular situation, enabling the Nordic Member States to continue applying the Nordic Agreement in their mutual relations. However, the conditions laid down in that Article must be fulfilled.

Application by the Nordic Member States of the 1931 Nordic Agreement in their mutual relations is in line with Article K.7 of the Treaty on European Union, which does not prevent the establishment of closer cooperation between two or more Member States insofar as such cooperation does not conflict with, or impede, that provided for in the Convention.

- (a) Under Article 39(2)(a) of that Agreement, each one of the Nordic Member States shall have the right to declare that the 1931 Nordic Agreement will apply in whole or in part in their mutual relations in place of the rules contained in this Convention. That declaration shall be made at the time of notification of the adoption of this Convention in accordance with the internal constitutional rules of the State concerned. Such a statement shall be effective until it is withdrawn in whole or in part.

## Article 41

### Agreements between Member States

119. This Article provides that judgments given pursuant to agreements concluded between Member States party to this Convention in order to facilitate or supplement the Convention may be recognized and enforced in other Member States, within the limits of non-recognition provided for in Title III; this is a logical solution since those complementary agreements cannot breach the provisions of this Convention and the solution therefore does no violence to the content of the Convention.

## Article 42

### Treaties with the Holy See

120. When the scope of the Convention was being examined (see commentary on Article 1, paragraph 20, B) it was pointed out that certain treaties with the Holy See enjoyed special arrangements. There remained to be resolved the difficult problem linked to the fact that in Portugal ecclesiastical courts have exclusive jurisdiction to annul a catholic marriage concluded in accordance with the Concordat, pursuant to Article XXV of the Concordat (the term used to describe international treaties with the Holy See) between Portugal and the Holy See of 7 May 1940, as amended by the Additional Protocol of 4 April 1975 and Articles 1625 and 1626 of the Portuguese Civil Code.

It is necessary to point out that the 1975 Additional Protocol has no bearing on this Convention because it is limited to amending Article XXIV of the Concordat to enable civil courts to issue a decree of divorce in the case of canonical marriages, which was forbidden to both civil and ecclesiastical courts by the original version of the Concordat as canonical law does not recognize the dissolution of marriage by divorce.