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JUSTCIV 10

NOTE

from: General Secretariat of the Council

~~to :Working Party on the Extension of the Brussels Convention~~

No. prev. doc.: 12903/96 JUSTCIV 103

Subject: Suggested texts for:

- **general clauses**
- **final clauses**

Delegations will find attached some suggested drafts for the general clauses (Articles 39 to 44) and the final clauses (Articles 45 to 49).

Suggestions for the general and final provisions
of the draft Convention on jurisdiction, recognition
and enforcement of judgments in matrimonial matters

A. GENERAL PROVISIONS

1. Relationship to other conventions

1(a) Bilateral conventions

The proposed version of Article 39 in the Annex deals with the relationship between the Convention and existing or future bilateral agreements between Member States.

Existing bilateral conventions between Member States

Retaining the basic idea of the Brussels Convention, this draft article suggests replacing bilateral conventions established between Member States by the rules of the Convention. There are two reasons behind this idea: first, that the Convention, when concluded, should be the lynch pin of relations between the Member States in matters of divorce, legal separation, and annulment of marriage, and in matters of custody following the dissolution of a marriage; second, that everything possible should be done to ensure that the aims of the Convention are not undermined as a result of the existence of numerous bilateral agreements (Article 39(1)).

The only exceptions to this rule would be those laid down in Articles 38 and 41.

However, it may be that in the course of its discussions the Working Party will establish that certain agreements do not conflict with this Convention, but that, on the contrary, they supplement it or facilitate its application. In that case, if the Working Party so wished, exceptions could be made from Article 39(1).

It is also proposed that the arrangements of paragraph 1 will not apply in the case of the uniform laws established between the Nordic States. Those laws in fact constitute national law in those countries, even if they result from agreements previously concluded between them. The proposed version of Article 39(2) is based on Article 52(4) of the 1996 Hague Convention (Article 39(2)).

Future bilateral conventions between Member States

It is proposed that Member States should be free to conclude bilateral agreements between themselves, provided that such agreements do not frustrate the aims of the Convention. Those agreements could deal with aspects not covered in the Convention or lend flexibility to its provisions. For example, any Member State could conclude a bilateral agreement with another Member State, excluding public policy as grounds for non-recognition of a divorce. This idea is contained in Article 28 of the Convention on extradition concluded within the Council of Europe in 1957.

With regard to the listing of any future bilateral agreements between the Member States, it is suggested that the system be flexible but provide guarantees of legal certainty and transparency. It is proposed that such agreements or other arrangements, as well as any denunciations or amendments thereto, be forwarded to the depositary which must publish a list of them in the Official Journal of the European Communities.

Existing or future bilateral conventions between Member States and third countries

The proposed provisions on existing or future bilateral conventions between Member States and third countries are set out in Article 39a(1).

Bilateral agreements between Member States are a different matter from bilateral agreements between Member States and third countries.

The Convention cannot be binding on third countries. Consequently, Member States should retain their freedom to conclude agreements with third countries on the subjects dealt with in the Convention. It is therefore suggested that the Convention should not affect the provisions of such agreements.

1(b) <u>Multilateral conventions</u>

Aspects relating to multilateral conventions are set out in Articles 39a and 39b.

Existing multilateral conventions

The Convention does not affect existing multilateral conventions to which Member States are parties, except for provisions on matters governed by the Convention. In such cases it takes precedence over those other conventions in relations between the Member States parties to them.

Article 39a is proposed in order to demonstrate more clearly the relationship between the Convention and existing conventions on divorce, legal separation, annulment or custody following the dissolution of a marriage. That article provides for the priority of the Convention over the conventions indicated in the article in the matters to which it applies.

Future multilateral conventions

This matter is dealt with in Article 39a(1) and (2). In the case of future multilateral conventions between one or more Member States and one or more third countries, it is proposed that the Member States have complete freedom of action. Thus, if a multilateral convention were concluded, for example in the framework of the Hague Conference or the Council of Europe, the Member States would be able to conclude such conventions where they covered matters governed by this Convention.

However, in relations between the Member States parties to it, the Convention and any bilateral agreements which complied with the rule laid down in Article 39(3) would still apply. Paragraph 2 of Article 39a lays down this rule.

1(c) Effects in matters to which the Convention does not apply (Article 40)

The Convention does not cover all questions covered in bilateral or multilateral agreements. It is therefore suggested that Article 40 (which already appears in 12903/96 JUSTCIV 103) be included, to enable such agreements to continue to have effects in the matters to which the Convention does not apply. It also indicates the time from which judgments and documents have effect in relation to the entry into force of the Convention. This is a provision found in the Brussels Convention.

1(d) <u>Recognition of decisions taken in the context of other agreements or conventions</u> (Article 41)

The Working Party is invited to consider the question of whether it would not be desirable to recognize, in the framework of the Convention and subject to certain conditions, decisions taken on the basis of bilateral agreements (between Member States or between a Member State and a third country) or international conventions to which the Member States are parties. Article 41 is proposed to that effect.

Three conditions should be fulfilled before the recognition rules laid down in the Convention are applied: first, a judgment on one of the matters covered by the Convention must be taken on the basis of an agreement (bilateral or multilateral); the Member State concerned must have already recognized the judgment; and the criteria for jurisdiction in the agreement on the basis of which the judgment was given must be consistent with a forum provided for in the Convention.

For example, if Member State "A" delivers a divorce judgment on the basis of a bilateral agreement concluded with a third state, according to which Member State "A" has jurisdiction because of the nationality of one of the spouses, that judgment could not be recognized in Member State "B" by means of the Convention.

On the other hand, if the fora are those indicated in Title II, the judgment taken could be treated as a judgment established in the framework of the Convention.

2. References to be given in Member States with two or more systems of law or sets of rules (Article 43)

Article 43 specifies the meaning to be attached to certain concepts, such as habitual residence, in the case of a Member State in which two or more systems of law or sets of rules apply within different territorial units.

A similar provision is contained in modern private international law conventions. Article 43 is based on Article 47 of the 1996 Hague Convention.

B. FINAL CLAUSES (Articles 45 to 49)

Title VII (Articles 45 to 49) contains the final clauses. It is suggested that the provisions already laid down in other conventions established in the framework of Title VI of the Treaty on European Union be used and, in particular, those used in the draft Convention on the service of judicial and extrajudicial documents.

TITLE VI

General provisions

Article 39

1. Subject to the provisions of Articles 38 and 40, this Convention shall, for the Member States which are parties to it, supersede conventions existing at the time of entry into force of this Convention which have been concluded between two or more Member States and relate to matters governed by this Convention.

[2. Paragraph 1 shall not apply to the uniform laws established between two or more Member States.]

3. After the entry into force of the Convention, Member States may not conclude or apply agreements between themselves except in order to supplement the provisions of this Convention or to facilitate application of the principles contained therein.

4. Member States shall send to the depositary of this Convention:

(a) a copy of the agreements referred to in paragraph 3;
(b) any denunciations of or amendments to those agreements or uniform laws.

Article 39a

1. This Convention shall not affect existing or future agreements between one or more Member States and one or more third States which contain provisions on matters governed by this Convention.

2. However, in relations between the Member States which are parties to it, such agreements shall be applied in conformity with the provisions of Article 39(3).

Article 39b

In relations between the Member States which are parties to it, this Convention shall take precedence over the following Conventions insofar as they concern matters governed by this Convention:

– the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants,

– [the Hague Convention of 25 October 1980 on the civil aspects of international child abduction],

– the European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children,

– the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

Article 40

1. The agreements and conventions referred to in Articles 39 to 39b shall continue to have effect in relation to matters to which this Convention does not apply.

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

Article 41

1. Without prejudice to the grounds for recognition provided for in Title III, judgments given pursuant to the agreements referred to in Articles 39(3), 39a and 39b may be recognized in Member States which are not party to those agreements provided that those judgments were given in a forum consistent with a forum provided for in Title II and were recognized in a Member State party to such an agreement.

2. [Article 42 of 6045/97 JUSTCIV 11]

([1])

Article 42

[See text given in telex 374 of 29 January 1997.]

Article 43

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

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

(b) any reference to the presence of a child in that Member State shall refer to the presence of a child in a territorial unit;

([1]) The Portuguese delegation suggested an Article 41a which is set out in footnote 1 to 12903/96 JUSTCIV 103.

(c) any reference to nationality shall refer to the territorial unit designated by the law of that State [or, in the absence of relevant rules, the territorial unit with which the child is most closely linked];

(d) any reference to the authority of a Member State having received a petition for divorce or legal separation of a child's parents or for the annulment of their marriage shall refer to the authority of a territorial unit which has received such a petition;

[(e) any reference to the Member State with which a child is closely linked shall refer to the territorial unit with which the child is so linked;]

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

Article 44

[Court of Justice]

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TITLE VII

Final provisions

Article 45

This Convention may not be subject to any reservation.

Article 46

Adoption and entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Convention.

3. This Convention shall enter into force ninety days after the notification referred to in paragraph 2 by the last State to complete that formality.

4. Until this Convention enters into force, each Member State may, when giving the notification referred to in paragraph 2, or at any later date, declare that as far as it is concerned the Convention shall apply to its relations with Member States that have made the same declaration. Such declarations shall apply ninety days after the date of deposit.

Article 47

Accession

1. This Convention shall be open to accession by any State that becomes a member of the European Union.

2. The text of this Convention in the language of the acceding Member State, as drawn up by the Council of the European Union, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

4. This Convention shall enter into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force at the time of expiry of the said period of ninety days.

5. Where this Convention is not yet in force at the time of the deposit of their instrument of accession, Article 45(4) shall apply to acceding Member States.

Article 48

Amendments

1. Amendments to this Convention may be proposed by each Member State or by the Commission. Any proposal for amendment shall be forwarded to the depositary who shall communicate it to the Council.

2. Amendments shall be adopted by the Council, which shall recommend their adoption by the Member States in accordance with their respective constitutional requirements.

3. Amendments thus adopted shall enter into force in accordance with Article 45(3).

Article 49

Depositary and publication

1. The Secretary-General of the Council of the European Union shall act as depositary of this Convention.

2. The depositary shall publish in the Official Journal of the European Communities:

   (a) adoptions and accessions;
   (b) date on which the Convention enters into force;
   (c) (...).

Done at , this , in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all texts being equally authentic, such original being deposited in the archives of the General Secretariat of the Council of the European Union.