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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

Delegations will find attached the abovementioned explanatory report on the Convention, following the work of the Working Party on Legal/Linguistic Experts.

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
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CONTENTS

Page

I.	BACKGROUND TO THE CONVENTION	5
II.	GENERAL LAYOUT OF THE CONVENTION	13
III.	ANALYSIS OF THE PROVISIONS	18
(A)	Scope (Article 1)	18
(B)	Jurisdiction: General provisions (Articles 2 to 8)	22
(C)	Examination as to jurisdiction and admissibility (Articles 9 and 10)	41
(D)	Lis pendens and dependent actions (Article 11)	43
(E)	Provisional and protective measures (Article 12)	47
(F)	Recognition and enforcement of judgments: Meaning of a judgment (Article 13)	49
(G)	Recognition (Articles 14 to 19)	52
(H)	Enforcement (Articles 20 to 32)	63

(I)	Recognition and enforcement of judgments: common provisions (Articles 33 to 36)	72
(J)	Transitional provisions (Article 37)	75
(K)	General provisions (Articles 38 to 44)	76
(L)	Court of Justice (Article 45)	86
(M)	Final provisions (Articles 46 to 50)	86

I. BACKGROUND TO THE CONVENTION

1. European integration was mainly an economic affair to begin with and for that reason the legal instruments established were designed to serve an economic purpose. However, the situation has changed fundamentally in recent times so that integration is now no longer purely economic and is coming to have an increasingly profound effect on the life of the European citizen, who finds it hard to understand that he encounters problems in matters of family law while so much progress has been made in property law. The issue of family law therefore has to be faced as part of the phenomenon of European integration. We only need to look at the questions put in the European Parliament not only on dissolution of marriages but also on more general aspects of family law (marriage contracts, paternity, child abduction, adoption, etc.). This Convention is a first step – and a positive and decisive one – along this new road and it may open the way to other texts on matters of family law and succession.

2. This Convention was made possible by the Maastricht Treaty, which opened up new channels for judicial cooperation in civil matters under Article K.3 (see Section II, paragraph 11). Until then, what limited scope there was depended only on Article 220 of the Treaty establishing the European Economic Community. In that Article, the Member States undertook, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. In a note sent to the Member States on 22 October 1959 inviting them to commence negotiations, the Commission of the European Economic Community pointed out that

"a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments".

Various Conventions have been concluded directly or indirectly on the basis of Article 220 of the TEC. The major achievement in judicial matters was the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters and the various amendments resulting from enlargement of the Community. Article 1(2) of that Convention excludes a range of matters from its scope. These exclusions were based on a great variety of grounds and some of the matters excluded have been dealt with in other Conventions, for instance the Convention on insolvency proceedings signed in Brussels on 23 November 1995.

In addition, the thirty years which have passed since its conclusion and the practical application of the Brussels Convention have led to the initiation of a process of revision of the latter, carried out at the same time as that of the Lugano Convention of 16 September 1988 (the so-called "parallel Convention"). As only preliminary studies have been carried out and only two meetings have been held of the ad hoc Working Party set up to prepare the revised text, it has not been possible to take account of those proceedings in the drafting of this Convention. There is still the possibility, therefore, of adapting this Convention to the revised Brussels Convention at a later date.

As the situation changed, it was normal that Member States should endeavour to respond to European citizens' new requirements and this Convention is the latest such endeavour. The desire to extend the 1968 Brussels Convention to family issues is a recent development and the grounds are twofold.

3. In the first place, the grounds for exclusion from the 1968 Brussels Convention need to be recalled. The Jenard report (explanatory report on the original version of the Convention) justified the exclusion of matters relating to natural persons as follows:

"Even assuming that the Committee managed to unify the rules of jurisdiction in this field, and whatever the nature of the rules selected, there was such disparity on these matters between the various systems of law, in particular regarding the rules of conflict of laws, that it would have been difficult not to re-examine the rules of jurisdiction at the enforcement stage. This in turn would have meant changing the nature of the Convention and making it much less effective. In addition, if the Committee had agreed to withdraw from the court of enforcement all powers of examination, even in matters not relating to property rights, that court would surely have been encouraged to abuse the notion of public policy, using it to refuse recognition to foreign judgments referred to it. The members of the Committee chose the lesser of the two evils, retaining the unity and effectiveness of their draft while restricting its scope. The most serious difficulty with regard to status and legal capacity is obviously that of divorce, a problem which is complicated by the extreme divergences between the various systems of law".

The 1968 Convention is therefore the "general convention" on recognition and enforcement, under the mandate in Article 220 of the EEC Treaty; it does not exclude any civil or commercial matter per se and could have dealt with status and legal capacity. They were excluded because of their complexity and the fact that they did not directly affect economic integration.

4. In the second place, in family law the major issue is divorce – matrimonial matters as dealt with in this Convention. It should be noted that the Jenard report refers to the "extreme divergences" between systems of law at a time when there were only six Member States; those divergences are clearly greater now that there are fifteen Member States, so that the difficulties facing the Working Party were greater. These are not minor differences; some of them even have constitutional implications. In other cases the difficulties affect the recognition or non-recognition of the various forms of civil status affected by the Convention (for instance, separation and annulment are unknown in the national law of Finland and Sweden). Even among States which have all the various forms covered, there are significant differences in the rules (grounds, prior separation requirement, etc.).

Neither the time required to achieve a Convention nor the compromise solutions which had to be worked out in some instances can therefore come as a surprise. The exclusion of this matter from the 1968 Convention and the preparation of this Convention highlight the difference between family litigation and property litigation. European integration has advanced considerably in the thirty years since the 1968 Brussels Convention was drawn up. The achievement of free movement of persons and establishment of increasingly frequent family links between individuals who are nationals or residents of different countries demanded a judicial response which is provided by this Convention, taking account of the various elements involved.

5. A full discussion was held on the question whether a Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters was necessary. Some Member States, which were parties to the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, expressed satisfaction at the results achieved by applying it. Other Member States, however, which were not parties to the 1970 Hague Convention, declared that they were not prepared to become parties to it. There were three fundamental arguments in favour of considering the advantages of drawing up a new Convention in a European context: (a) the desire to introduce uniform standards for jurisdiction in matrimonial matters; (b) the need to introduce modern rules for the recognition and enforcement of judgments on annulment, divorce and separation amongst the Member States of the European Union, establishing a uniform procedure; (c) the avoidance of parallel procedures on matrimonial matters in different Member States, establishing rules on *lis pendens*, an innovation that on its own would be justification for the Convention and would contribute to the prevention of contradictory rulings. For all those reasons the Council decided to initiate negotiations on the conclusion of a Convention on these matters. It should also be pointed out that Article 18 of the 1970 Hague Convention allows the States party to it to conclude Conventions on those matters.

6. The initial purpose of the Convention was to extend the 1968 Brussels Convention to cover matrimonial matters. Hence the starting-point for the preparation of this Convention lies in the text of the 1968 Convention which is cited in the preamble. It would have been impossible to disregard such an important background text which has been demonstrably successful and is accompanied by extensive case law from the Court of Justice of the European Communities, making it possible to pinpoint its most controversial features in the section applicable to this text. Nevertheless, the differing matters covered in both texts result in significant differences on a number of points (e.g. the fact that there is no general forum and the absence of any hierarchy in the grounds of jurisdiction) whereas in other areas the rules are more convergent (as for *lis pendens* and automatic recognition). The outcome is therefore a separate convention although the objectives pursued are the same: to unify the rules on international jurisdiction and to facilitate international recognition and enforcement of judgments.

Unless stated otherwise, the identical terms in the 1968 Brussels Convention and in this Convention must in principle be considered to mean the same thing and therefore the case law of the Court of Justice of the European Communities must be taken into consideration. It should be noted that on provisions for which the wording is the same as in the Brussels Convention, there is little to add to the explanatory reports on the 1968 Convention and the subsequent amendments thereto. It seemed advisable, nevertheless, to reproduce the necessary sections of the earlier report in this one for ease of consultation by the judiciary, who are thus not obliged to consult several different texts in conjunction.

7. In the early nineties consideration was given in the context of European Political Cooperation to the viability of a Convention at European level on proceedings to dissolve or loosen the marriage bond. On the basis of a questionnaire drawn up by the United Kingdom Presidency in 1992 and a synthesis of the replies prepared by the Danish Presidency in the first half of 1993, the Member States conducted an initial exchange of views on the matter. Under the Belgian Presidency in the second half of 1993, before the TEU came into force, Prof. Marc Fallon was invited to a meeting of the Working Party in his capacity as Secretary of the European Group on Private International Law and reported on the "Heidelberg Project", which was prepared by that Group and is so called because it was approved in Heidelberg on 2 October 1993. The European Group, as a group of specialists whose sole objective is to make proposals in the fields in which Community law and private international law come together, approved a proposal for a Convention on jurisdiction and the enforcement of judgments in family and succession matters which was of considerably broader scope than this Convention. The need to achieve results and developments in the studies carried out made it necessary to focus the work within the European Union on a more limited range of subjects.

8. At its meeting in Brussels on 10 and 11 December 1993 the European Council considered that the entry into force of the Treaty opened up new prospects for the European citizen, requiring additional work to be carried out in respect of certain aspects of the citizen's family life. To that end, the Council considered that examination of the possibilities of extending the scope of the 1968 Brussels Convention to matters of family law should be actively pursued. In the first half of 1994 the Greek Presidency circulated a questionnaire to the Member States to identify the general outline of what the Convention should contain. In the light of the replies received, a synthesis was drawn up and used as a basis for the instruction to draw up a draft Convention given by the European Council in June 1994. In the second half of 1994 the German Presidency presented a draft Convention covering only divorce, legal separation and marriage annulment. The Spanish and French delegations then requested the inclusion of child custody within the scope of the Convention.

9. When describing the background to the Convention, we cannot fail to mention the contacts maintained with the Hague Conference on Private International Law. While the European Union was preparing the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters, the Hague Conference on private international law was revising the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. That situation must be taken into account in relation to the possibility of a provision in the new Hague Convention relating to the competence of the authorities of the country of divorce to adopt measures to protect the children, although differing working methods require different approaches. Thus, while the European Union has observer status at the Hague Conference (so that representatives of the Commission and the Council Secretariat are attending the proceedings in The Hague), the reverse is not possible under the Treaty establishing the European Community and the Treaty on European Union. For that reason, beginning with the French Presidency in the first half of 1995, the Troika, the Council Secretariat and the Commission, alongside the official meetings, held informal meetings with the Permanent Bureau of The Hague Conference on Private International Law in view of the links between the texts under preparation in both fora.

The initial problems regarding the relationship between the two Conventions under preparation were thus resolved and the result is visible both in the Convention which is the subject of this report, concluded between the Member States of the European Union, and in 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. At the Council of Ministers of Justice and Home Affairs on 25 September 1995, it was agreed that "it was essential to make provision for custody of children in the context of these proceedings, in the form of measures supplementary to those laid down in the Hague Convention". Therefore once the Hague Convention had been concluded, its provisions were taken into account by the Working Party, particularly those directly affecting the Convention now under consideration, i.e. Article 10 regarding the jurisdiction of the courts deciding upon the annulment of a marriage, an application for divorce or legal separation of the parents to take measures directed to the protection of the child and Article 52 regarding the relationship between the Hague Convention and other Conventions, and particularly the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by the Hague Convention.

10. Preparation of the text of the Convention became the responsibility of the Working Party on Extension of the Brussels Convention which has been meeting on a constant basis since 1993. The negotiations were lengthy and on some points particularly difficult. At the Council meeting in December 1997, under the Luxembourg Presidency, final political agreement was reached on a series of provisions on the basis of the final compromise solution proposed by the Presidency.

In broad terms, that is the history of the laborious but fruitful work which went into preparing the Convention now before us.

II. GENERAL LAYOUT OF THE CONVENTION

11. The first point of interest is the legal base for the text. When the Brussels Convention was concluded in 1968 only Article 220 of the Treaty was available as a base. At present we have, in addition to that Article, another provision which can serve as a legal base for the Convention: the new provision introduced by the Maastricht Treaty, i.e. Article K.3 in conjunction with Article K.1. In point 6 of Article K.1, "judicial cooperation in civil matters" is listed as one of the "matters of common interest" referred to in the introductory wording to that Article for the purposes of achieving the objectives of the Union. Such cooperation undoubtedly contributes to the achievement of one of the objectives of the Union, "to develop close cooperation on justice" (Article B).

Dealing in a precise and appropriate manner with the matter which is the subject of the Convention is undoubtedly a significant achievement in terms of provisions on judicial cooperation between the Member States of the European Union in civil matters. Accordingly Article K.3 of the Treaty was chosen as the legal basis for the Convention although Article 220 would also have been a theoretically possible legal basis. Finally, it should be pointed out that the legal basis has consequences for the drafting process, but not for legal practitioners or for the citizen as regards the application of the Convention.

In line with the provisions of Title VI, the Commission was fully associated with the proceedings of the Working Party, that is to say it took an active, positive part in the preparation of the text. At the close of the Working Party's proceedings, the Presidency, in accordance with Article K.6 of the Treaty on European Union, presented the text of the draft Convention for consideration by the European Parliament.

The European Parliament delivered its Opinion in the Plenary Session of 30 April 1998. During May 1998 the relevant Council bodies studied the opinions expressed by the European Parliament.

On 28 May 1998 the Council approved the Convention, signed on the same day by the representatives of all the Member States.

12. The concerns and the thinking underlying the preparation of the Convention are clear from the Preamble, which highlights four aspects:

- 1) The desire to introduce uniform modern standards for jurisdiction on annulment, divorce and separation and to facilitate the rapid and automatic recognition among Member States of judgments on such matters given in the Member States.
- 2) The importance of laying down rules of jurisdiction concerning parental responsibility over the children of both spouses on the occasion of such proceedings and therefore simplifying the formalities governing the rapid and automatic recognition and enforcement of the relevant judgments.
- 3) The need to bear in mind the principles on which the 1968 Brussels Convention is based; this Convention is therefore influenced by the Brussels Convention but differs insofar as the matter covered is different.
- 4) The possibility of giving jurisdiction to the Court of Justice of the European Communities to interpret the provisions of the Convention.

13. Two characteristics of the Convention need to be emphasized:

- (A) The Convention is what is known as a "double treaty" in that it contains rules of direct jurisdiction and also rules for the recognition and enforcement of foreign judgments. It is modelled on the Brussels Convention, which was at the time a revolutionary step, but it introduces substantial changes. Rules of international jurisdiction are thus laid down which have to be respected by the court of origin and may lead it to decline jurisdiction where it does not consider that jurisdiction lies with it under the rules of the Convention. The citizen thus enjoys legal certainty and a climate of mutual confidence is established allowing the introduction of a system of automatic recognition and a greatly simplified enforcement system.
- (B) Once the Convention has been adopted in the Member States in accordance with constitutional requirements and has entered into force in each Member State, it will become applicable *ex officio*. This means that it is compulsory to apply all the rules in the Convention and that, between the States party to it, those rules will, as from the date of entry into force, replace all other national or contractual provisions, subject only to the limitations resulting from the Convention itself and within the relevant constitutional framework. The mechanism is thus at once founded on and incorporated into each Member State's national legislation. Situations not covered by the Convention will therefore be subject to national law.

14. The Convention is divided into seven titles, as follows:

- Title I: Scope
Title II: Jurisdiction
Title III: Recognition and enforcement of judgments
Title IV: Transitional provisions
Title V: General provisions
Title VI: Court of Justice
Title VII: Final provisions

It will be obvious that the core of the Convention, and therefore the section which gave rise to most discussion, lies in Titles II and III (jurisdiction and recognition and enforcement of judgments). Discussion of those issues also reflected, to a large extent, the whole debate on scope (Title I).

15. Title I of the Convention (scope) contains only one Article which was the subject of lengthy discussion which had to be resolved by a political agreement setting the material scope of the Convention to include proceedings on divorce, legal separation or marriage annulment and proceedings relating to parental responsibility for the children of both spouses on the occasion of the application.

16. Title II contains rules of direct international jurisdiction, i.e. rules which must be respected by the court of origin prior to a judgment in matrimonial proceedings. Such provisions do not, however, affect the distribution of territorial jurisdiction within each State or the situations of States the legal systems of which have not been unified. The existence of direct jurisdiction in matrimonial matters is undoubtedly the major innovation in this Convention. Conventions dealing with such matters are normally confined to the recognition and enforcement of judgments and the concomitant inclusion of rules on indirect jurisdiction, that is to say the examination of the jurisdiction of the court of origin to be made by the court of the State in which recognition is sought.

The Title is divided into four sections:

- (a) Section 1 contains the provisions on grounds of jurisdiction, that is to say the grounds of jurisdiction *stricto sensu* (Articles 2 to 8). The central provision is Article 2 which establishes the grounds in matrimonial matters and it is supplemented by Article 3 on parental responsibility and Article 4 regarding the particular rule relating to the 1980 Hague Convention. The text then deals with counterclaims (Article 5) and conversion of legal separation into divorce (Article 6) and Article 7 covers the exclusive nature of jurisdiction under Articles 2 to 6 while Article 8 covers residual jurisdiction and is parallel to the provision in Article 4 of the 1968 Brussels Convention.
- (b) Section 2 (Articles 9 and 10) deals with examination as to jurisdiction in accordance with the grounds in the Convention and as to whether the respondent has been able to arrange for his defence.
- (c) Section 3 (Article 11) deals with *lis pendens* and dependent actions.
- (d) Section 4 (Article 12) deals with provisional and protective measures.

17. Title III is the logical consequence of Title II and deals with recognition and enforcement of judgments. At first sight, it might seem that once the subjects covered in the earlier Articles had been resolved, matters would be easy, but that was not the case. Discussions focused mainly on the effects of automatic recognition in relation to the civil-status records and the grounds of non-recognition and non-enforcement. In the same way, account had to be taken of the restriction of recognition to the dissolution of the link and its not affecting other matters (see paragraphs 22 and 64). The problem also affects the need for enforcement and the issue is in turn resolved in relation to the scope. The procedure for enforcement is similar to that in the Brussels Convention.

18. Title IV contains the transitional provisions and Title V the general provisions while Title VI relates to interpretation by the Court of Justice and Title VII contains the final provisions.

III. ANALYSIS OF THE PROVISIONS

TITLE I

A. Scope

Article 1

Scope

19. This matter is the essential point which justifies the very existence of the Convention and its extent which, as indicated in paragraph 12, includes rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters. Determining the scope involves separate issues, relating on the one hand to the type of proceedings conducted and on the other to matters covered.

20. As to the type of proceedings, paragraph 1 refers to "civil proceedings", to the exclusion of all other types of proceedings, since these are the normal proceedings conducted in matters of divorce, legal separation or marriage annulment. The term "civil" is nevertheless intended to define the object of the Convention clearly. It is to be understood not only as a means of including the administrative proceedings referred to in paragraph 2 but also as a means of excluding all merely religious proceedings. The result is as follows:

- (A) In addition to civil judicial proceedings, the scope of the Convention also includes other non-judicial proceedings occurring in matrimonial matters in certain States. Administrative procedures officially recognized in a Member State are therefore included. In Denmark, for instance, there is, in addition to the judicial course of action, an administrative procedure before the Statsamt (District Council) or before the Københavns Overpræsidium (which performs the same functions as the Statsamt for

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, Dirección de Derecho civil, (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.

22. The Convention is confined to proceedings relating to the marriage bond as such, i.e. annulment, divorce and legal separation. So the recognition of divorce and annulment rulings affects only the dissolution of the marriage link. Despite the fact that they may be inter-related, the Convention does not affect issues such as, e.g., fault of the spouses, property consequences of the marriage, the maintenance obligation or other possible accessory measures (such as the right to a name, etc.). As to maintenance, in addition to other international instruments, jurisdiction and the recognition and enforcement of judgments are covered by the 1968 Brussels Convention which contains a specific jurisdiction rule (Article 5(2)) and there is also the Rome Convention of 6 November 1990 on the simplification of procedures for the recovery of maintenance payments, which is no longer in force. On all other issues the rules (national or international) currently applicable between the States in question will continue to apply.

23. The most complex issue is parental responsibility since in some States the legal system requires that the decision on matrimonial matters include parental responsibility, while in others matrimonial and child-protection issues follow totally separate routes, that is to say the judgment on the marriage does not necessarily cover parental responsibility and may even refer judgment on it to other authorities. For that reason, separate problems had to be faced and it was difficult to bring all States to accept the text in paragraph 1(b) which includes the issue in this Convention rather than leaving it for a separate text, as some delegations had originally proposed. It is a question, however, only of the matters relating to parental responsibility that appear to be linked to the matrimonial proceedings when those take place (see Article 3(3)).

24. The first problem to be resolved was the inclusion of the topic of parental responsibility. In addition to the differences in legal systems mentioned above, difficulties also arose from the fact that the Hague Conference was preparing the 1996 Convention on child protection. The consequences of that situation are reflected in the text of Article 3. The concept of "parental responsibility" presents problems too since it has to be defined by the legal system of the Member State in which responsibility is under consideration. For matters concerning maintenance, see paragraph 22. The term "parental responsibility", which is a difficult one to translate for some countries, appears, however, in various international Conventions and in particular in the 1996 Hague Convention so that it does have a degree of unifying potential.

25. The second problem was to determine which children were affected by the provision. There was agreement that the provision covers both biological and adopted children of the couple. Some States also raised the possibility of dealing with parental responsibility not just for children of both spouses but also what are called "children of the family". That would include, for instance, the children of one or other of the spouses from a previous union. That situation is known in English, Scots and Netherlands law. The view that prevailed was that the Convention had to be confined to children of both spouses, in view of the fact that the context is that of measures relating to parental responsibility taken in close conjunction with divorce, separation or annulment proceedings. The other solution could also affect the fundamental rights of the father or mother living in another Member State. The consequence of that provision is to be seen in Article 3(3), which determines when the jurisdiction regarding parental responsibility conferred on the authorities of the State in which a decision is to be taken on the matrimonial proceedings is to cease.

The decision to restrict the scope of the Convention as regards parental responsibility to judgments concerning the "children of both spouses" will not, however, prevent Member States from deciding in future to apply jurisdictional criteria identical to those laid down in Article 3 to "children of the family" not included in the former category. The jurisdictional criteria applicable to such children will not be affected by the Convention and it will therefore be internal law that will govern jurisdiction and the recognition and enforcement of judgments relating to such children.

26. Finally, in the light of other international texts, particularly the 1989 United Nations Convention on the rights of the child it must be understood that each child is to be considered individually. That means that although the issue is included in general terms in the scope of the Convention, for application it will be necessary to ensure that the conditions set out in Article 3 apply in respect of each one of the children.

TITLE II

B. Jurisdiction

SECTION 1

General provisions

Article 2

Divorce, legal separation and marriage annulment

27. The fora of jurisdiction adopted are designed to meet objective requirements, are in line with the interests of the parties, involve flexible rules to deal with mobility and are intended to meet individuals' needs without sacrificing legal certainty. It is therefore not surprising

that, in view of these requirements, this Article, along with Article 3, occupied a large part of the lengthy discussions which led to the adoption of this text. The solution adopted is the result of a difficult balance between some of the jurisdictional criteria adopted. It was necessary to establish grounds of jurisdiction in matrimonial proceedings without becoming involved in any examination of the situation in which the validity of a marriage needs to be considered as part of annulment proceedings when one of the spouses is deceased or after the decease of both spouses, since that situation is not within the scope of the Convention. Such situations arise, in the majority of cases, as preliminary questions relating to successions. Instead, it will be resolved by the international instruments applicable in the matter, such as the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, or according to the internal legislation of the State where that is possible.

28. The view was that, unlike the 1968 Brussels Convention, which involves an interplay of the general rule laid down in Article 2 and the special grounds of jurisdiction set out in Article 5, the peculiarity of the matter covered in this instance did not lend itself to a provision similar to Article 2 of the Brussels Convention establishing a general forum, nor should a hierarchy be established between the grounds adopted. The exclusion of a general forum and the establishment of a concrete list of fora is a logical step since, precisely as a result of marriage breakdown, the situation constantly changes at short notice.

The result is that the grounds adopted are objective, alternative and exclusive, in the manner explained below.

Only objective grounds appear in Article 2 and they are subject to the examination as to jurisdiction provided for in Article 9. Therefore if a spouse initiates proceedings in a Member State whose courts do not have jurisdiction on any of the grounds set out in Article 2, those courts cannot claim jurisdiction by reason of the fact that the other spouse makes an appearance to contest the application. Instead the court must examine whether it has jurisdiction and if it does not, must decline. For the role of personal choice, see paragraph 31 of Article 2(1)(a).

The grounds in Article 2 are therefore set out as alternatives and inclusion in either (a) or (b) is not to be interpreted as an order of precedence. Point (a) uses habitual residence in order to determine international jurisdiction, whereas the Brussels Convention uses domicile. In point (b), bearing in mind the specific aspects of certain national legislation, the ground of jurisdiction is either nationality or "domicile" as the term is used in the United Kingdom and Ireland. Under the 1968 Brussels Convention, a party's domicile is determined in accordance with the internal law of the State of the forum (Article 52). In this case, there was discussion as to whether a similar provision should be included in relation to habitual residence: on this issue see paragraph 31.

29. The grounds set out in this Article are the only ones which can be used for the matter covered; they can therefore be termed "exclusive" (see commentary on Article 7). That term, however, cannot be understood in the same way as in the Brussels Convention where, for certain matters provided for in Article 16 thereof, only the courts of a particular Member State have jurisdiction and that rule takes precedence over other grounds. In the case we are dealing with here, the term "exclusive" must be understood as meaning that only the grounds set out may be used and that they are alternatives none of which takes precedence over the rest. The list is therefore exhaustive and closed. It is therefore not necessary to include a rule similar to the one in Article 28(1) of the 1968 Brussels Convention.

30. The grounds for determining the jurisdiction of a State's courts to rule on matrimonial matters coming within the scope of the Convention fall into two groups which are set out in points (a) and (b) respectively. Paragraph 2 of the Article applies to point (b) of paragraph 1 and also to the last indent in point (a) (for the effects of the declaration, see Article 7 and Article 8(2)).

The grounds adopted are based on the principle of a genuine connection between the person and a Member State. The decision to include particular grounds reflects their existence in various national legal systems and their acceptance by the other Member States or the effort to find points of agreement acceptable to all.

31. Of the grounds in point (a) of paragraph 1, the rule that international jurisdiction should lie with the courts of the place in which the spouses are habitually resident at the time of application (first indent) is a ground widely accepted in the Member States and will undoubtedly apply in the great majority of cases. Nor does the ground in the third indent (place in which "the respondent is habitually resident") create any problems in that it corresponds to the general ground based on the principle of actor sequitur. There was also a broad consensus on the ground to apply in the event of a joint application (fourth indent) as the application may be made to the authorities of the place in which either spouse is habitually resident; in that case, it should be noted that, unlike the 1968 Brussels Convention, this Convention allows only a minor role for the spouses' free choice, which appears only in this limited form: it is logical that it should be so since the issue is matrimonial proceedings.

32. Acceptance of the other grounds in this paragraph was more problematic. In principle, there should be no objection to the jurisdiction of the courts of the State in which the spouses were last habitually resident, insofar as one of them still resides there (second indent). The problem arising for some Member States was how to reconcile that situation with the situation of the other spouse who, as a result of the marriage breakdown, often returns to his/her country of domicile or nationality prior to the marriage and there comes under the limitations laid down in the fifth and sixth indents, provisions which will undoubtedly have consequences regarding lis pendens (see Article 11).

Both these provisions allow forum actoris in exceptional cases on the basis of habitual residence combined with other elements. That is why the fifth indent allows jurisdiction to lie with the courts of the Member State in which the applicant is habitually resident if he or she resided there for at least a year. Since some Member States did not find the rule set out in those terms sufficient and bearing in mind the frequency with which the spouse's new residence is in the State of nationality or of "domicile", in the sense in which this term is used in the United Kingdom and Ireland, the sixth indent adds the possibility of having the matrimonial proceedings heard by the courts of the Member State in which the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made, provided that that State is the State of nationality or of domicile as defined in the United Kingdom and in Ireland. That provision was introduced as a result of the political compromise adopted in December 1997 following a formal statement by some States that acceptance of that forum was an essential prerequisite of vital importance for an overall compromise solution.

The solution takes into account the situation of the spouse who returns to his or her country but does not mean establishing a ground based solely on the forum of the applicant: on the one hand, the existence of nationality or "domicile" demonstrates that there is an initial connection with that Member State; on the other hand, in order to initiate proceedings in that Member State, he or she must have resided there for at least six months immediately before the application was made. The last requirement led to a discussion of establishment of habitual residence, taking account of the situation of the spouse who returns to the country of origin as a consequence of the breakdown of the marriage. The existence of the connection will be assessed by the court. Although the possibility of including a provision determining habitual residence similar to the one in Article 52 of the 1968 Brussels Convention was discussed, in the end it was decided not to insert any specific provision on the matter. However, although not applicable under the 1968 Brussels Convention, particular

account was taken of the definition given on numerous occasions by the Court of Justice, i.e. "the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence". Other proposals were therefore rejected whereby it would be sufficient for the applicant to have his or her habitual residence there for a total of at least one year in the five years immediately before the application was made, even when combined with nationality or "domicile".

Moreover, the mutual confidence which underlies the preparation of this Convention, like the 1968 Brussels Convention, should be sufficient to overcome the existing reluctance to have a case heard by the courts of another State.

33. Another alternative to the grounds listed above, which for organizational reasons appears in a separate point (point (b) of paragraph 1), is to allow the matrimonial proceedings to take place before the courts of the State of nationality of both spouses or of "domicile of both spouses" established on a long-term settled basis. This provision merits particular attention and comment.

In the first instance, it is worth emphasizing that the nationality or "domicile" must be common to both spouses. Some States wanted to allow that condition to apply to only one spouse. That possibility was rejected since it would be equivalent to pure forum actoris, often with no real connection whatsoever with the State in question, and would thus be contrary to the spirit of the Convention.

Establishing the possibility of having the authorities of the State of nationality or "domicile" of both spouses handle proceedings does not mean that the courts of the State can in every instance examine whether one or other of those criteria has been met. What is intended is that in the light of their internal system, States will adopt one or other of the criteria. Hence, just as common nationality may be acceptable to Spain, "domicile" will be the criterion for the United Kingdom and for Ireland.

It is precisely for that reason that paragraph 2 of this Article requires the Member States to stipulate in a declaration made when giving the notification referred to in Article 47(2) whether it will be applying the criterion of nationality or of "domicile" referred to in paragraph 1(b).

The Convention is silent on the consequences of dual nationality, so the judicial bodies of each State will apply their national rules within the framework of general Community rules on the matter.

34. The problems arising from the many language versions of the Convention made it necessary to make some special arrangements for the term "domicile" as it appears in this text but only in relation to this Convention. That is the purpose of Article 2(3). The problems and solutions appearing in the 1968 Brussels Convention have been adverted to. In this instance, when extending the Convention to matrimonial matters and having to include nationality as a criterion for determining international jurisdiction, it was not possible to follow the 1968 criteria. While nationality is a criterion which does not raise any major problems as to meaning, domicile presented a more complex problem since it appears in this text with the meaning it has in the United Kingdom and Ireland. This is the reason why in most texts the equivalent of the word "domicile" appears in inverted commas to indicate that it has a special meaning. There can therefore be no possibility of equating this term with habitual residence as referred to in paragraph 1.

In a detailed document, the United Kingdom delegation provided clarification on the concept of "domicile", purely for the purposes of the Convention without attempting to give a definitive account. The essential purpose of domicile is to connect a person with the country in which he has his home permanently or indefinitely. It is used so as to make that person subject to the law and legal system of that country for several purposes of broad application, principally concerning important matters affecting family relations and family property. In United Kingdom law, the rules for determining a person's domicile operate generally to ensure that every person has a domicile, and only one domicile, at all times. In addition to rules for determining the domicile of children (domicile of origin), there are rules for establishing the domicile of adults, either by acquisition of a new domicile (domicile of choice) or by revival of the domicile of origin. The same principles apply in Irish law.

Article 3

Parental responsibility

35. Article 1 having established that proceedings relating to parental responsibility (for the use of this term see commentary on Article 1) which are seen to be connected with the proceedings relating to divorce, legal separation or marriage annulment fall within the scope of the Convention, Article 3 determines where and under what conditions authorities of the State the judicial bodies of which have jurisdiction in matrimonial proceedings in accordance with the grounds set out in Article 2 have jurisdiction in a matter relating to parental responsibility over a child of both spouses. Article 3 thus comprises three paragraphs; paragraph 1 establishes the jurisdiction of the authorities of the Member State whose courts have jurisdiction in the matrimonial proceedings and paragraph 2 deals with cases where the child is not habitually resident in that Member State. Paragraph 3 sets a time limit for such jurisdiction.

36. The structure and content of this provision are the product of difficult negotiation, both within the Community and in relation to worldwide provisions, particularly the 1996 Hague Convention. The fact that the Community Convention limits itself to children habitually resident in the Member States facilitates its compatibility with the Hague Convention.

The agreement between the Member States to include this matter within the scope of the Convention simply transferred the problem to the establishment of grounds of jurisdiction, since while there were no problems where the child is habitually resident in the State whose authorities have jurisdiction in the matrimonial proceedings, the same does not apply to cases where the child is habitually resident in another Member State.

The problem is further complicated by the fact that Article 52(2) of the 1996 Hague Convention provides that that Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by that Convention. As a result, where both Conventions are in force, the Convention to which this report relates will take precedence in respect of children resident in Member States of the European Union which are party to it, whereas the Hague Convention will apply to other cases.

37. There are no problems in relation to Article 3(1) which establishes jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in the Member State whose authorities also exercise jurisdiction in the matrimonial proceedings. It needs to be made clear that in no case does that provision mean that it must be the same authorities in the State concerned who rule on the matrimonial issue and on the parental responsibility: the rule is intended only to establish that the authorities deciding on both matters are authorities of the same State. In practice, they will be the same authorities in some States and separate authorities in others. For the purposes of the Convention, the only point of interest is that they be authorities of the same Member State, with due regard for the internal distribution of competence.

38. Paragraph 2 sets out the conditions under which the authorities of the Member State exercising jurisdiction on the divorce also have jurisdiction to decide on parental responsibility where the child is resident not in that State but in another Member State. Both of the following conditions have to be met: at least one of the spouses must have parental responsibility in relation to the child and the jurisdiction of the courts must have been accepted by the spouses and must be in the best interests of the child. This provision is taken from Article 10(1) of the 1996 Hague Convention, which guarantees that there is no contradiction between Article 3(2) of the Convention under discussion and the relevant provisions of the said Hague Convention. The relevant provision of the Hague Convention says practically the same thing, the only difference being that in addition to requiring that one of the parents have parental responsibility, it also requires that at the time of commencement of the proceedings, one of the parents habitually reside in that State.

The difference derives from the differing subject matters of the two Conventions: the Hague Convention deals with protection of children, whereas the Convention to which this report relates deals with matrimonial matters and for that reason the parents' connection with the territory of a State for the purposes of determining jurisdiction in matrimonial matters is determined by the grounds set out in Article 2. Article 3(2) is designed to cover one particular situation in which the best solution is to use the same grounds as in the Hague Convention.

39. The Convention chose not to enshrine *perpetuatio jurisdictionis* for the divorce forum in relation to protection of the child of both spouses and for that reason paragraph 3 determines when the jurisdiction conferred by paragraphs 1 and 2 will cease, listing three alternative events any of which will cause it to cease. This provision follows Article 10(2) of the 1996 Hague Convention, the object being to avoid any contradiction between the two texts.

- (a) Subparagraph (a) deals with the basic assumption that the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final, that is to say that no further appeal or review of any kind is possible. Once that happens, and without prejudice to subparagraph (b), Article 3(1) and (2) no longer apply. Parental responsibility will then have to be determined either by national law or by the relevant international Conventions.
- (b) In addition to this well-known situation, and without prejudice to the residual rule in subparagraph (c), subparagraph (b) adds another situation where, on the date on which the judgment on the matrimonial proceedings becomes final, in the sense that such a judgment cannot be the subject of any sort of appeal, proceedings in relation to parental responsibility are still pending and provides that jurisdiction will not cease until a judgment in the responsibility proceedings has become final; in any event in this situation jurisdiction on parental responsibility may be exercised even if the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final. It was necessary to insert this provision in this Convention because it is conceivable that when different authorities within the same country are involved or in cases before the same authorities, the judgment on the matrimonial proceedings may be final at a time when the proceedings on parental responsibility have not yet come to an end. Jurisdiction on the parental responsibility therefore ceases on whichever of those two dates applies. It is therefore understood that proceedings on parental responsibility, once initiated, must continue until a final judgment is reached. The fact that the application relating to the marriage has been resolved may not prejudice the expectations created both for the parents and for the child that the parental responsibility proceedings will terminate in the Member State in which they began. Although not expressly stated, the intention is that there should be no perpetuatio jurisdictionis but that proceedings on parental responsibility initiated in connection with matrimonial proceedings should not be interrupted.
- (c) Subparagraph (c) deals with the residual or concluding situation where the proceedings have come to an end for another reason (for example, the application for divorce is withdrawn or one of the spouses dies).

Article 4

International child abduction

40. One of the risks – and perhaps the major risk – to which the child of both spouses is exposed when a marriage breaks down is being taken out of the country by one of the parents, with all the stability and protection problems which that entails. To resolve such problems, very special attention was paid to the Hague Convention of 25 October 1980 on the civil aspects of international child abduction. But Conventions on the protection of children such as the 1996 Hague Convention and this Convention on matrimonial matters, which involve questions of protection for the child of both spouses at times of crisis, may have a negative effect on the return of the child if appropriate steps are not taken. That is the purpose of Article 4 of the Convention under discussion.

41. In that instance, a special rule of jurisdiction has been established referring to the 1980 Hague Convention, creating a situation different from the relation with certain other Conventions established in Article 39. That Article states that this Convention supersedes other Conventions between States which are party to both, whereas Article 4 contains a rule to the effect that the jurisdiction conferred by Article 3 must be exercised within the limits established in the 1980 Hague Convention and particularly Articles 3 and 16 thereof. That safeguards the habitual residence as the ground of jurisdiction where, as a result of wrongful removal or retention, there has in fact been a change in habitual residence.

It is important for various reasons to refer to both Articles. In the first instance, because Article 3 of the 1980 Hague Convention provides that the removal or the retention of a child is to be considered wrongful where:

- "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

In the second instance, the reference is important because the consequences of wrongful removal or retention, for the interested parties, are dealt with in Article 16 which provides that:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice."

Accordingly, the habitual residence has changed and it might be thought appropriate to use the grounds of jurisdiction allowed in this Convention, the priority role accorded to Article 16 of the Hague Convention would prevent any steps being taken which would alter parental responsibility prior to any decision on return or non-return.

This Article assumes that the Member States are parties to the 1980 Hague Convention. Accordingly, if in future new Member States accede, it would be advantageous if they acceded to the 1980 Hague Convention if they have not already done so.

Article 5

Counterclaim

42. This Convention contains the classic rule on counterclaims, giving jurisdiction to the court in which the initial proceedings are pending should a counterclaim be made. The limited scope of the Convention and the frequency with which matters covered by it arise in connection with other matters make it necessary to specify that that rule applies only when the subject of both the initial proceedings and the counterclaim come within the scope of this Convention. This provision has to be seen in conjunction with Article 11 (see commentary on that Article in relation to *lis pendens*) in order to differentiate between the situations covered by each Article although in practice they may in many cases produce identical effects.

Article 6

Conversion of legal separation into divorce

43. The conversion of legal separation into divorce is fairly frequent in some legal systems. In some States separation is an obligatory step prior to divorce and a stated period of time must usually elapse between the separation and the divorce. That distinction is, however, unknown in other legal systems.

The Working Party arrived at this provision after having checked whether there were other situations in which applications might arise to supplement or update a judgment in matrimonial proceedings. The finding was that only conversion of legal separation into divorce should be covered by this provision.

In such instances, in accordance with the provisions of the Convention it is possible to obtain the divorce either before the courts of the State having jurisdiction under Article 2 or before the courts of the State in which the separation was obtained, it being clearly understood that the fact that conversion is possible does not itself depend upon the Convention but is a possibility allowed under the internal law of the State in question.

Article 7

Exclusive nature of jurisdiction under Articles 2 to 6

44. The essential characteristics of the jurisdiction rules provided for in this Convention have been examined in connection with Article 2 (see paragraph 29); that is to say, only the criteria listed in Articles 2 to 6 may be used, as alternatives and without any order of precedence. However, this Article is intended to emphasize the exclusive nature of the grounds contained in earlier Articles for determining the jurisdiction of a State's authorities. It should be noted that the exclusive nature of the jurisdiction established refers only to matrimonial matters and questions of parental responsibility connected with such cases and does not therefore affect the rules of jurisdiction in matters of protection of minors where they are independent of the matrimonial proceedings. The exclusive nature should be understood without prejudice to the rules laid down in Articles 8(1) and 38(2).

45. Where the grounds under Article 2 are either the spouse's habitual residence or his or her nationality or "domicile" (see statement provided for in Article 2(2), to which paragraph 33 refers), an application may be made to a court only in accordance with the rules laid down in the earlier Articles. That limitation on the rules of jurisdiction opens the way to the residual jurisdiction provided for in Article 8. Accordingly, if the United Kingdom adopts the criterion of domicile in Spain that of nationality, a spouse of British nationality domiciled in Spain and habitually resident in Brazil would not be subject to the rules laid down in Article 7 and could still be subject to an application made in accordance with Article 8.

Article 8

Residual jurisdiction

46. This Article corresponds to the rules of exorbitant jurisdiction referred to in Articles 3 and 4 of the 1968 Brussels Convention. There are, however, differences between the two texts. The nature of the jurisdictions laid down in the aforementioned articles renders unnecessary a provision such as Article 3 of the 1968 Brussels Convention.

47. Following the provision in Article 7 (exclusive nature of jurisdiction under Articles 2 to 6), this Article deals with arrangements existing in the national legal system which can be used only in the context of this Article. For some States, when one of the spouses resides in a non-Member State and none of the jurisdictional criteria of the Convention is met, jurisdiction should be determined in accordance with the law applicable in the Member State in question. To deal with that situation, the solution adopted is an assimilatory one whereby the applicant who is a national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State. The prerequisite for applying that provision is that the respondent does not have his habitual residence in a Member State and does not have his "domicile" within the territory of a Member State and is not a national of a Member State according to the criteria applicable to the case in accordance with the statement provided for in Article 2(2) (see above).

Such jurisdiction is termed "residual" in view of its nature and the place it occupies in relation to the grounds of jurisdiction established by the Convention. That description was regarded as preferable to "extra-Community disputes". In view of the function that that Article performs, like that of Article 4 of the Brussels Convention, contrary to the practice followed in Article 3 of the 1968 Brussels Convention, a list of these types of jurisdiction has not been included in this Article.

Some States, like the Netherlands, have no jurisdiction in their internal legal system which can be defined as "residual" for the purposes of Article 2 of the Convention.

Such jurisdiction does, however, exist in other national systems. Some examples are set out below.

In Germany, the rules of jurisdiction provided for in sections (1), (3) and (4) of Article 606a of the Zivilprozessordnung could be described as residual; they provide that German courts have international jurisdiction when (1) one spouse is German or was German when the marriage took place; (2) one spouse is stateless and is habitually resident in Germany; or (3) one spouse is habitually resident in Germany, except where any judgment reached in their case could not be recognized in any of the States to which either spouse belonged.

In Finland, under Section 8 of the "Laki eräistä kansainvälisluontoisista perheoikeudellisista suhteista"/"Lag angående vissa familjerättsliga förhållanden av internationell natur" (International Family Relations Act) revised in 1987, Finnish courts will hear matrimonial cases even where neither spouse is habitually resident in Finland if the courts of the State of habitual residence of either of the spouses do not have jurisdiction or if application to the courts of the State of habitual residence would cause unreasonable difficulties and, furthermore, in the circumstances it would appear to be appropriate to assume jurisdiction (forum conveniens).

In Spain the only example would be one of the rules contained in Article 22(3) of the Ley Orgánica del Poder Judicial (Law on the judicial system) of 1 July 1985 which allows the application to be made in Spain when the applicant is Spanish and is resident in Spain but does not meet any of the requirements in Article 2(1) of this Convention such as the express or tacit submission referred to in Article 22(2). Apart from that, all the other grounds for international jurisdiction in matrimonial matters which exist in Spanish law are contained in the Convention, these being that both spouses are habitually resident in Spain at the time of the application or that both spouses are of Spanish nationality, whatever their place of residence, provided that the application is made either jointly or with the agreement of the other spouse.

In France, Article 14 of the Civil Code would give French courts jurisdiction if the petitioner had French nationality.

In Ireland the courts would have jurisdiction in matters of annulment (Section 39 of the Family Law Act, 1995), divorce (Section 39 of the Family Law (Divorce) Act, 1996), and legal separation (Section 31 of the Judicial Separation and Family Law Reform Act, 1989), when either of the spouses is domiciled, for the purposes of Article 2(3), in the State on the date of institution of proceedings.

In Italy, the rules laid down in Articles 3, 4, 32 and 37 of Law 318 of 31 May 1995 on the reform of the Italian system of private international law are of this nature.

In the United Kingdom, a distinction has to be made between divorce, separation and annulment proceedings and custody orders relating to such proceedings. With regard to divorce, annulment and legal separation proceedings, this Article may cover grounds of jurisdiction based on the "domicile" of either party in the United Kingdom at the time the application is made or on habitual residence for a year immediately preceding that date. In the case of divorce and separation proceedings, the Sheriff Courts in Scotland have jurisdiction if one party is either resident in the place for 40 days immediately prior to the submission of the application or has resided there for a period of at least forty days ending not more than 40 days before that date and has no known residence in Scotland on that date. For custody orders contained in divorce, annulment and legal separation judgments, United Kingdom judicial bodies, including the Sheriff Courts in Scotland, will have jurisdiction, but if a court outwith the United Kingdom is conducting relevant proceedings, United Kingdom courts have a wide discretion to decline jurisdiction, provided that those proceedings continue and, in addition, that the proceedings continue before a judicial body that has jurisdiction under its national legislation.

In the case of Sweden, the jurisdictional rules of Swedish courts for divorce matters are to be found in the lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap (Act on Certain International Legal Relations Concerning Marriage and Guardianship) 1904, as amended in 1973. As regards Article 7 of the Convention, Swedish courts have jurisdiction in matters of divorce if both spouses are Swedish citizens, if the petitioner is Swedish and is habitually resident in Sweden or has been so at any time since reaching the age of eighteen or if, in other cases, the government gives its consent to the case's being heard in Sweden. The government can give its consent only if one of the spouses is Swedish or the petitioner cannot bring the case before the courts of the State of which he is a national.

48. Taking into account the grounds of jurisdiction laid down in Articles 2 to 6 of the Convention, paragraph 1 sets the boundary between grounds of an exclusive nature established by the Convention and the principle of applying internal rules of jurisdiction, thus demonstrating the geographical limits of the Convention. The requirements set out in Article 8(2) must be examined in the following sense:

- (a) the applicant must be a national of a Member State habitually resident in another Member State. Hence the principle of assimilation between citizens of Member States for the purposes of paragraph 1;
- (b) the respondent must meet two conditions: on the one hand he or she must be habitually resident outside the Member States; on the other hand, he or she must not be a national of a Member State or have his or her "domicile" in a Member State (declaration provided for in Article 2(2)). Both conditions are concurrent, otherwise the situation would be one requiring application of one of the grounds in Article 2.

SECTION 2

C. Examination as to jurisdiction and admissibility

Article 9

Examination as to jurisdiction

49. It is worth emphasizing the special importance attaching in this Convention to the examination as to jurisdiction carried out automatically by the court of origin, without any need for any party to request it. Internal legal systems are particularly sensitive to matrimonial matters, more sensitive than they are to the property matters covered by the 1968 Brussels Convention.

Bearing in mind the major differences between internal regulations in the Member States and the interplay of choice-of-law rules applicable, it is easy to imagine that the fact that the grounds of jurisdiction set out in Article 2 are alternatives may lead some spouses to attempt to make their application in matrimonial matters before the courts of a State which, by virtue of its choice-of-law rules, applies the legislation most favourable to their interests. For that reason, the court first seised must examine its jurisdiction, which might not happen if the issue were discussed in that Member State only as an exception.

On this topic, see also Ireland's particular problem regarding recognition of foreign judgments in the commentary on Article 46.

Article 10

Examination as to admissibility

50. The purpose of this provision is to guarantee the right of defence. It is not sufficient to examine jurisdiction alone, as provided for in the previous Article; it is also necessary to establish a similar rule for examining admissibility, involving staying the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end. The intention is that court can thus satisfy itself that international jurisdiction is well founded and so avoid possible causes of refusal of recognition wherever possible.

51. The provision is based on Article 20 of the 1968 Brussels Convention and, on the same topic, the provisions in the 1965 Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters. The court, when applying one of the grounds of jurisdiction provided for in the Convention, will examine its jurisdiction where the respondent does not enter an appearance. The wording adopted is simpler than in other Conventions but the essential elements are covered:

- (a) an obligation on the court to stay proceedings, not merely an option;
- (b) the respondent's rights of defence to be examined by the court, both as to whether he has been able to receive the document "in sufficient time to enable him to arrange for his defence" and as to whether "all necessary steps have been taken to this end".

The recent signing of the Convention of 26 May 1997 on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters has led to a provision that, once it has entered into force, Article 19 thereof will be applied instead of the provisions in paragraph 1. Bearing in mind the possibility of the early application of the 1997 Convention, there will be a gradual substitution of the European Community Convention for the Hague Convention and there will not, therefore, be a general entry into force. As Articles 15 and 16 of the Hague Convention are reproduced in the 1997 Convention the change of Convention applicable will not entail any significant changes.

SECTION 3

D. Lis pendens and dependent actions

Article 11

Lis pendens and dependent actions

52. This provision is based on Article 21 of the Brussels Convention and is related to Article 13 of the 1996 Hague Convention with regard to child protection. It was one of the provisions on which discussion continued until the very last moment and there were two reasons for the difficulty.

On the one hand, the case law of the Court of Justice of the European Communities on Article 21 of the 1968 Brussels Convention has demonstrated the problems caused by that provision as currently worded and the problems of delimitation in relation to dependent actions, as many cases have been drawn towards *lis pendens*. It is no accident that that Article of the Brussels Convention will require special attention during the joint review of the Brussels and Lugano Conventions set in motion in January 1998, even if as yet only in the form of preliminary studies which cannot affect the text we are dealing with here.

On the other hand, the differences between the legal systems in the Member States are particularly evident on this topic. Account will need to be taken of the situation in States such as Sweden and Finland, where the only legal form of the dissolution of marriage between living spouses is divorce and national law makes no provision for separation or annulment, so that some divorce proceedings in those countries correspond to annulment proceedings under other legal systems.

The difference in rules between the Member States also affects the very notion of *lis pendens*. The notion is more restricted in some States (France, Spain, Italy and Portugal) requiring the same subject matter, the same cause of action and the same parties, and broader in others which require only the same cause of action and the same parties.

The *lis pendens* mechanism is designed to avoid parallel actions and consequently the possibility of irreconcilable judgments on the same issues and the objective was to provide a rule which, on the basis of the basic principle of *prior temporis*, could provide a solution for the various possibilities in family law, which differ from those in property law. The traditional *lis pendens* arrangement did not solve all the problems and there was therefore a need to find a new wording which would achieve the objective desired. After lengthy discussion, it was the Luxembourg Presidency which proposed the text finally accepted by the Member States.

53. Paragraph 1 contains the traditional lis pendens rule, that is to say the prior temporis rule applicable to all proceedings covered by the Convention, provided the subject matter and cause of action are the same between the same parties. To avoid the risk of negative conflict of jurisdiction, it is stipulated that the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

54. Paragraph 2 contains an innovation designed specifically to deal with the differences in legislation between the various Member States on the admissibility of proceedings for separation, divorce or marriage annulment. The provision in that paragraph therefore relates to what are called "dependent actions" and could be termed "false lis pendens".

The solution adopted was proposed by the Luxembourg Presidency as a compromise solution and should be examined particularly in connection with paragraph 3 since the cases covered by paragraph 1 are relatively rare. The solution adopted was regarded as preferable to the other solution proposed which would have involved retaining the force of attraction of the jurisdiction producing the greatest effects in order to provide certainty and prevent problems for those States which do not have legal separation or annulment. For others, more flexible rules on dependent actions, similar to those of the 1968 Brussels Convention, would have been preferable.

It might seem on a first reading that, since it applies the same solution as in paragraph 1 to proceedings not involving the same cause of action, paragraph 2 is repetitive and superfluous. That conclusion would, however, be erroneous since, unlike paragraph 1 which also includes parental responsibility, paragraph 2 is deliberately confined to divorce, legal separation and marriage annulment: only in relation to them does the lis pendens rule apply where the cause of action is not the same.

55. Paragraph 3 sets out the consequences of the acceptance of jurisdiction by the court first seised. The provision contains a general rule, which is that the court second seised shall decline jurisdiction in favour of that court. It also contains a special rule whereby the party who brought the relevant action before the court second seised may, if he so wishes, bring that action before the court which claims jurisdiction because it was seised earlier. The first words in the second paragraph of paragraph 3, "in that case", must therefore be interpreted as meaning that only when the court second seised declines jurisdiction does the party have the possibility of bringing the action before the court having claimed jurisdiction because it was first seised. The rule in paragraph 3 is part of the political agreement reached in December 1997 and the Working Party therefore confined itself to expressing it appropriately. It should be noted, however, that some members of the Working Party did not agree with the broad scope given to that paragraph and were in favour of having the possibility offered to the applicant in the second action limited to the cases covered by paragraph 2.

In any event, it needs to be noted that the rule in paragraph 3 of this Article differs from the one in Article 5 (counterclaim). The rule in Article 5 is a rule of jurisdiction whereas the one in Article 10 is a provision applying the rules of jurisdiction in dependent actions. We must also remember that it will operate differently since there will be cases in which no counterclaim would be possible (for instance because the time is not right), but it would still be possible to apply the rule in Article 11(3).

56. The consequence of including the rule on dependent actions is the disappearance of an Article on related actions given that it was not considered that there were cases, involving the subject matter of the Convention, which would be outside the framework of the dependent action provision.

57. It should be emphasized that, under this rule, the court second seised must always decline jurisdiction in favour of the court first seised, even when the internal law of that Member State does not provide for separation or annulment. That would be the case, for instance, if an application for divorce were presented in Sweden and an application for annulment in Austria: the Austrian court would have to decline jurisdiction even though Swedish law makes no provision for annulment. Once the divorce ruling was final in Sweden, however, the interested party could apply to a court in Austria, in order to ensure that those effects of the divorce which would be null under Austrian law would have the necessary effects *ex tunc* as opposed to divorce which has only effects *ex nunc*, bearing in mind, moreover, that the recognition of the scope of this Convention is restricted to changes in civil status (see paragraph 64). The same principle would apply to the reverse situation. That is to say that the Convention will not prevent an Austrian judgment on annulment from being the object, in Sweden, of a subsequent court judgment to the effect that the annulment will have the effect of a divorce ruling in Sweden. The same problems would not, however, arise in relation to separation since, although Swedish law does not provide for it, divorce produces effects which are more extensive than and superimposed upon the effects of separation.

SECTION 4

E. Provisional and protective measures

Article 12

58. As regards the rule on provisional and protective measures, it must be observed that it is not subject to the jurisdictional rules of the Convention because it refers to proceedings encountered within its scope and this Article applies only to urgent cases. This provision is taken from Article 24 of the 1968 Brussels Convention, although it goes further than the provisions of that Article. Although Article 24 of the Brussels Convention presents problems which are under consideration in the current review of the Brussels and Lugano Conventions, it was considered preferable not to innovate on this occasion or to incorporate any of the suggestions made on the matter. In this instance, as in some others, the question of how any improvements made to the equivalent provision in the Brussels Convention can be incorporated will be left until later.

59. As to the content of the provision, it should be noted that although provisional and protective measures may be adopted in connection with proceedings within the scope of the Convention and are applicable only in urgent cases, they relate to both persons and to property and therefore touch upon matters not covered by the Convention, in the case of actions provided for in national rules. The differences with respect to the Brussels Convention are significant, as in the Brussels Convention the measures to which Article 24(a) refers are restricted to matters within the scope of the Convention: those in (b) on the other hand, have extraterritorial effects. The measures to be adopted are very broad since they can affect both persons and assets in the State in which they are adopted, something which is very necessary in matrimonial disputes. The Convention says nothing about the type of measures or about their connection with the matrimonial proceedings. These measures, accordingly, affect even matters that do not come within the scope of the Convention. This is a rule which enshrines national law jurisdiction, thereby derogating from the rules laid down in the first part of the Convention. The provision makes it clear that such measures may be adopted in one State even though the court of another State has jurisdiction to hear the case. The measures will, of course, cease to apply once the court having jurisdiction gives a judgment on the basis of one of the grounds of jurisdiction set out in the Convention and that judgment is recognized (or enforced) under the Convention. Other measures relating to matters excluded from the scope of the Convention will continue to apply until appropriate judgments are given by a court with jurisdiction for, e.g., marriage contracts.

The rule laid down in this Article is confined to establishing territorial effects in the State in which the measures are adopted.

TITLE III

F. Recognition and enforcement

Article 13

Meaning of the term "judgment"

60. The provisions in this Article have been taken partly from Article 25 of the 1968 Brussels Convention. The aim is to define what is meant by a "judgment", for the purposes of recognition and enforcement. Thus, in addition to the general definition in paragraph 1, paragraph 2 makes it clear that the provisions of Title III shall also apply to the determination of the amount of costs and expenses of proceedings and any order concerning such costs and expenses. For the purposes of this Article account must be taken of the fact that it also covers judgments given by the bodies referred to in Article 1(2) (see paragraph 20(A)).

In some language versions, one term is used to refer to both the judgment adopted in the state of origin and that relating to execution. In other versions different terms are used for each.

There was much discussion as to whether the term "judgment" covered only positive decisions or whether it also covered negative decisions adopted in a Member State, that is to say decisions which did not grant a divorce, legal separation or marriage annulment. Taking into account, on the one hand, the mandate received, which was to prepare a Convention to facilitate recognition and enforcement of divorces, legal separations and marriage annulments, and, on the other hand, the major differences between the Member States on divorce and separation, it is understood that the word "judgment" refers only to positive

decisions, that is to say those that do grant a divorce, legal separation or marriage annulment. As regards decisions on parental responsibility that come within the scope of the Convention and are subject to the jurisdictional rules laid down in Article 3, some positive judgments may have negative effects with regard to parental responsibility for a person different from the person in whose favour the judgment was given. Clearly a judgment of that sort comes within the scope of the Convention.

Special attention must be given to divorce judgments given by Netherlands and Belgian courts. Under Netherlands law, a divorce judgment must be registered if the divorce is to be effective. If registration is not effected within six months of the date of the judgment, the judgment loses its effect as a *res judicata*. Under Belgian law (Articles 1275, 1303, 1309 and 1310 of the "code judiciaire"/"gerechtelijk Wetboek") the enacting terms of the divorce or legal separation judgment must be recorded in the register of marital status within one month of notification of the judgment to the registrar; this requirement does not appear in connection with judgments for marriage annulment; however, failure to record the judgment only prevents the divorce from being relied upon as against third parties.

It is for national legislation to determine what is meant by measures relating "to parental responsibility". For this concept, see the commentary on Article 1.

In relation to costs, the provision in Article 38(1) regarding the application of the 1954 Hague Convention on Civil Procedure and, where appropriate, the 1980 Hague Convention on International Access to Justice needs to be taken into account.

61. Paragraph 3 is designed to meet a specific objective. In the 1968 Brussels Convention, the title on recognition and enforcement is followed by a special title on authentic instruments and court settlements of which recognition or enforcement can be refused only if contrary to public policy. At the beginning, consideration was given to doing the same in this Convention or to deleting the rule. However, after examination of the national laws, it became apparent that while in some States there were no concrete instances in which this rule would be necessary, in others it was essential, e.g. situations existing in Scotland or custody agreements approved by the administrative authority with jurisdiction in Sweden or Finland. Examination of the possibilities which existed led to the conclusion that there were no reasons to justify copying the Brussels Convention exactly and it was considered more appropriate to include a third paragraph in Article 13 applying the same treatment to "documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded" as to the "judgments" referred to in paragraph 1.

In the United Kingdom, authentic documents, although recognized in all jurisdictions for the purposes of enforcement, can only be created under the Scottish legal system. They must be documents whose enforceability is established by a public authority and can be recorded in public registers existing in the Higher Courts in Scotland, known as the Books of Council and Session and the Books of the Sheriff Court. Entry in those books gives the document the force of a court judgment. Such instruments in Scottish family law practice may refer to any aspect of the re-organization of the spouses' affairs after the divorce. They will accordingly include matters not covered by this Convention, such as matrimonial property, but they may include matters relating to the children that do not come under parental responsibility, such as residence, visiting rights and other settlements. The intention is to distinguish it from the agreements that may be concluded by unmarried parents in connection with their parental responsibility towards their children, as laid down in Article 4 of the Children (Scotland) Act, 1995.

Although in practice the public-order exception may be sufficient, when its use is considered necessary, to prevent such settlements having an effect on civil status in another State, it did not seem sufficient to include a provision such as the one in Article 50 of the Brussels Convention since in matters of family law, there may be other cases of non-recognition (for example Article 15(2)(b)) and therefore the question of non-recognition of settlements needs to be examined in conjunction with the grounds of non-recognition of judgments.

SECTION 1

G. Recognition of a judgment

Article 14

Recognition

62. The provisions in this Article are based on Article 26 of the 1968 Brussels Convention. However, there is a fundamental difference in view of the matters covered by this Convention, and it relates to the effects of recognition. While there was agreement on the provision in paragraph 1 which involves automatic recognition, in the sense of recognition that does not imply any specific procedure, in all the Member States of judgments given in each one, the same level of agreement did not exist on the effects which should follow, particularly in relation to the most important issue, the updating of civil-status records.

63. That is why, after lengthy discussion, agreement was reached on Article 14(2) which requires no special procedure for updating the civil-status records of a Member State, the existence of a final judgment relating to divorce, legal separation or marriage annulment given in another Member State being sufficient for the purpose. The recognition involved is therefore not judicial but is equivalent to recognition for the purposes of civil-status records.

In the wording of this provision account was taken of Article 8 of the Convention of 8 September 1967 on the recognition of decisions relating to the validity of marriages, prepared in the International Commission on Civil Status. That is an important change and it will be much appreciated by European citizens since that is the effect most frequently sought and, once the Convention enters into force, updating civil-status records without the need for any additional decision will save time and money, thus representing a considerable advance over the 1968 Brussels Convention. It should be noted that the judgment must be a final one against which no further appeal lies, and that too is different from the 1968 Brussels Convention situation. See Article 33(3) regarding the documents to be presented.

64. As specified in Article 1 in relation to the scope of the Convention in terms of matters covered, it is sufficient to repeat here that the recognition referred to in this Article does not affect questions of the fault of spouses, marriage contract, maintenance or any other consequences of an economic or any other nature included in the same judgment. It is a question, therefore, only of recognition of the dissolution of the link of marriage or of the legal separation (see paragraph 22). For provisional measures, see Article 12(59).

65. As specified in the 1968 Brussels Convention, the recognition of the foreign judgment may be accepted or contested, and the procedure set out in paragraph 3 for enforcement will be followed. The concept of an "interested party" entitled to apply for a decision as to whether the judgment should or should not be recognized must be interpreted in the broad sense under the national law applicable and may include the public prosecutor or other similar bodies where permitted in the State in which the judgment is to be recognized or contested.

66. The provision on recognition as an incidental question comes from Article 26 of the Brussels Convention with some amendments. It is for reasons of simplicity that the courts hearing the main case also have jurisdiction to determine recognition of a judgment of incidental form.

Article 15

Grounds of non-recognition

67. This Article corresponds to Article 27 of the 1968 Brussels Convention and contains the grounds for non-recognition or non-enforcement. In view of the matter dealt with in the Convention, the grounds of non-recognition provided for in Article 23 of the 1996 Hague Convention also had to be taken into consideration in order to facilitate harmonious application of both Conventions when the time comes. Whereas some States wanted the grounds of non-recognition to be optional, most States were in favour of making them compulsory as in Article 27 of the 1968 Brussels Convention. Those rules need to be seen in conjunction with the limitations set out in Article 16 and the reference to Article 43.

68. The structure of this Article may seem rather surprising. Paragraph 1 sets out the grounds of non-recognition of judgments relating to a divorce, legal separation or marriage annulment, while paragraph 2 sets out the grounds of non-recognition of judgments relating to parental responsibility given on the occasion of matrimonial proceedings. The reason for the division is that, although both types of judgment are closely connected with the matrimonial proceedings, they may have been given by different authorities, depending on the internal distribution of jurisdiction within the State of origin. Another reason for the division may be that the objective of the matrimonial proceedings and the objective of the parental-responsibility proceedings differ in such a way that the grounds for non-recognition cannot be the same in both cases. It was therefore advisable to split the grounds of non-recognition into two paragraphs.

69. In line with normal practice, the first ground of non-recognition of judgments relating to a divorce, legal separation or marriage annulment is the fact that it is manifestly contrary to public policy in the State in which recognition is sought, something Member States do not want to give up even though experience demonstrates that the corresponding provision in Article 27(1) of the Brussels Convention has been of no practical significance. Nevertheless, sensitivity regarding the basic principles that justify the considerations of public order is less in cases involving property than in family cases. It needs to be borne in mind, too, that Article 18 of this Convention prevents a judgment being reviewed as to its substance, Article 17 prohibits non-recognition of a foreign judgment because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment upon the same facts and Article 16(3) states that the test of public policy may not be applied to the rules relating to jurisdiction.

Nevertheless, it should be noted that the States are extremely sensitive on this issue on account of the major discrepancies between their laws on divorce. Those Member States in which dissolution of the marriage bond is easiest fear that their judgments may not be recognized in Member States with more stringent rules. To provide adequate guarantees for both groups of States, a system is being established whereby, on the one hand, non-recognition on grounds that recognition is manifestly contrary to the public policy of the State in which recognition is sought is retained (Article 15(1)(a)) and, on the other hand, Article 17 stipulates that recognition may not be refused on the grounds that divorce, legal separation or marriage annulment would not be allowed upon the same facts (see commentary on Article 17). At the time of recognition, the court having jurisdiction must examine the judgment given in the State of origin in the light of the provisions referred to in the preceding paragraph. That solution is based on the arrangement under the 1970 Hague Convention on the Recognition of Divorces and Legal Separations to which some Member States are party.

On this issue, see also the statement by Ireland (in connection with Article 46(2), with due regard for the provision in Article 9 which refers to examination as to jurisdiction by the court of origin).

70. Paragraph 1(b) includes the ground of non-recognition which gave rise to the highest number of cases of non-recognition under the 1968 Brussels Convention (Article 27(2)) and therefore to the largest number of problems and questions put to the Court of Justice in relation to grounds of non-recognition. We are referring to non-recognition in cases where the judgment was given in default of appearance, if the respondent was not notified properly and in good time to defend himself. A point has been added to the original provision. It provides that the judgment must be recognized, as is the normal consequence of the proper operation of the Convention, where the respondent has accepted it unequivocally, as for instance by remarrying.

71. Irreconcilability of the judgment with other judgments is dealt with in two separate provisions, points (c) and (d) of paragraph 1. In contrast to the provisions of Article 27(5) of the 1968 Brussels Convention, there is no requirement for the objective and the ground to be identical.

The first refers to irreconcilability with a judgment given in proceedings between the same parties in the Member State in which recognition is sought, regardless of whether the judgment in the latter State predates or postdates the judgment given in the State of origin. A special problem arises when one judgment is on divorce and the other is on separation. An example may clarify the situation. Consider the case of a separation judgment given in State A and a subsequent divorce judgment given in State B. If recognition of the second judgment is sought in State A, recognition cannot be refused on grounds of its irreconcilability with the judgment given previously in State A, since separation may be considered a preliminary to divorce and, consequently, there would be no conflict with a subsequent divorce judgment. However, if recognition of the separation judgment given in State A were sought in State B, where the marriage had been dissolved by a divorce judgment, the judgment would have to be rejected since the separation judgment had been replaced by a divorce judgment in State B. The advantage of this interpretation is that it guarantees that the matrimonial situation of the spouses will be considered the same throughout the fifteen Member States. Any other interpretation would mean that the spouses could be considered divorced in fourteen States but only as legally separated in State A.

The second provision relates to cases in which the judgment, whether given in another Member State or in a non-Member State between the same parties, meets two conditions: (a) it was given earlier; (b) it fulfils the conditions necessary for its recognition in the Member State in which recognition is sought. An example may clarify the situation to which this provision refers. In non-member State E a separation judgment is given that meets the requirements for recognition in State B. Subsequently, a decision granting the same spouses a divorce is given in Member State C, requesting recognition of that judgment in Member State B. In this situation, the divorce judgment given in Member State C is not irreconcilable with the previous legal separation judgment given in non-member State E and is therefore recognized in Member State B. In the opposite case, that is to say if a divorce judgment is given in non-member State E and subsequently a separation judgment is given in Member State C, Member State B will refuse to recognize Member State C's judgment on the ground that it is irreconcilable with a divorce judgment given in non-member State E which meets the requirements for recognition in Member State B.

72. Paragraph 2 covers the grounds of non-recognition of judgments relating to parental responsibility understood in the broad sense and therefore including not only court judgments but also decisions of whatever kind by whatever authority provided that they are closely connected with the divorce. In addition to the general comment above on the justification for the separation of these grounds of non-recognition from those relating to matrimonial judgments, the grounds included merit some further comment.

73. The provision on public policy, which also appears in paragraph 2(a), corresponds exactly to the provision in Article 23(2)(d) of the 1996 Hague Convention, in that it makes it impossible to refuse recognition purely because the judgment is manifestly contrary to public policy and requires that consideration be given to taking the best interests of the child into account as well.

Default of appearance is dealt with in point (c) and the comments on point (b) of paragraph 1 also apply.

As in the 1996 Hague Convention (Article 23(2)(b) and (c)), the grounds of non-recognition include (in points (b) and (d)) the fact that the child was not given an opportunity to be heard or that any person claiming that the judgment infringes his or her parental responsibility was not given an opportunity to be heard. The child must be heard in accordance with the rules applicable in the Member State concerned, which must include the rules in the United Nations Convention of 20 November 1989 on the Rights of the Child and in particular Article 12 thereof, which provides:

"1. The States party shall guarantee any child who is in a position to form a judgment of his own the right to express an opinion freely on any matter affecting him, and that due account is taken of the child's opinion, in the light of his age and maturity.

2. To that end the child shall be given an opportunity to be heard in any legal or administrative proceedings affecting him, either directly or through a representative or an appropriate body, in accordance with the rules of procedure of national law".

Finally, points (e) and (f) deal with non-recognition on grounds of irreconcilability with another judgment and lay down different rules, depending on whether the judgment is given in the Member State in which recognition is sought or in another Member State or in the non-Member State of the habitual residence of the child. Solely with regard to parental responsibility, the judgment with which the judgment for which recognition is sought is irreconcilable must have been given later since earlier judgments will have been taken into account in the judgment connected with the divorce. The objective is to prevent the contradiction which could result, for instance, between a judgment given in another Member State regarding divorce and custody and a judgment given in the forum denying paternity. The commentary on Article 3(3) also needs to be taken into account in this connection (end of jurisdiction of the court hearing the matrimonial proceedings in matters of parental responsibility).

Article 16

Non-recognition and finding of facts

74. Further to Article 15, paragraph 1 of this Article provides that a judgment shall not be recognized in a case provided for in Article 43 (see commentary on Article 43, paragraph 125), which corresponds to Article 59 of the 1968 Brussels Convention. Article 43 enables a Member State not to recognize a judgment given in another Member State where the judgment is not founded on grounds of jurisdiction specified in Articles 2 to 7 but solely on grounds of national law, in accordance with Article 8. For that purpose, however, the Member State and the third country must have concluded a Convention on recognition and enforcement of judgments which is applicable between them. Article 16(1) is therefore an exception to the recognition of judgments adopted in a Member State within the framework of the residual jurisdiction which may apply under Article 8.

75. This provision means that the Member State in which recognition is sought must examine the grounds of jurisdiction on the basis of which the judgment in the Member State of origin has been adopted. The court is, however, subject to certain limitations in the matter. Under paragraph 2, the court in which recognition is sought is bound by the findings of fact on which the court of the Member State of origin based its jurisdiction. Secondly, under paragraph 3 it may not review the jurisdiction of the court of origin nor may it apply the test of public policy to the rules relating to jurisdiction set out in Articles 2 to 8.

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 automatic 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.

78. The inclusion of this rule in this Convention led to some reluctance by certain delegations insofar as it could mean making the measures adopted in connection with parental responsibility immovable. The object of the provision is to prevent the measures from being reviewed in the exequatur procedure, although it may in no case lead to their being set in stone. The basic principle is that the Member State in which recognition is sought may not review the original judgment, which is the logical consequence of a double Convention. However, a change in circumstances may lead to a need for revision of the protective measures, as always happens when we are dealing with situations which, despite having a degree of permanence in time, may need modification. In that sense, for instance, Article 27 of the 1996 Hague Convention makes it clear that the prohibition on review as to substance does not prevent such review as is necessary of the protective measures adopted. In this case too, the provision in this Article must be understood as being without prejudice to the adoption by the competent authority of a new ruling on parental responsibility when a change in circumstances occurs at a later stage.

Article 19

Stay of proceedings

79. This provision must be seen in conjunction with the provisions of the Convention (specifically Article 14(2)) providing that automatic recognition and in particular the updating of civil-status records do not require any special procedure if the judgment of the State of origin is one against which no further appeal lies under the law of that Member State.

This Article allows the court of a Member State in which recognition is sought to stay the proceedings if an ordinary appeal against the judgment has been lodged. For stay of enforcement, see Article 27 (and the commentary thereon in paragraph 94).

In the case of judgments given in Ireland or the United Kingdom, provision is made for special features of their national legislation.

SECTION 2

H. Enforcement

Article 20

Enforceable judgments

80. This provision governs the need for exequatur if a judgment given in one Member State is to be enforced in another. All that is required is that the courts referred to in the subsequent Articles decide, on the application of any interested party, on the possibility of enforcement in the State in which recognition is sought, a possibility which can only be refused on the grounds listed in Articles 15 (grounds of non-recognition) and 16 (see Article 23(2) and the commentary thereon in paragraph 89). While, for matrimonial matters, recognition procedures are sufficient, in view of the limited scope of the Convention and the fact that recognition includes amendment of civil-status records, rules for enforcement are necessary in relation to the exercise of parental responsibility for a child of both spouses.

"Interested party", for the purposes of the application, covers not only the spouses or children but must also include the public authority (Public Prosecutor's Office or similar authority) in States where that is possible.

81. The purpose of this provision is solely to make it possible to enforce a judgment given in another State in relation to parental responsibility since the procedure for enforcement in the strict sense is governed by each State's internal law. Thus, once exequatur has been obtained in a State, that State's internal law will govern the practical measures for enforcement.

The various provisions which follow are intended to establish a procedure common to all the Member States for obtaining exequatur which will replace the relevant provisions in internal legislation or in other Conventions.

Paragraph 2 contains a provision taking account of the particular situation in the United Kingdom.

Article 21

Jurisdiction of local courts

82. This provision is based on Article 32 of the 1968 Brussels Convention but, unlike that Article, it is divided into 3 paragraphs: the first governs the type of authority with international jurisdiction for enforcement and the other two refer to the court having jurisdiction within that State. These provisions are applicable to recognition, via Article 14(3), as well as to enforcement. The intention is to make matters easier for the European citizen, who will know from the beginning which court is to be seised.

83. Paragraph 1 lists the authorities having international jurisdiction. It follows the same system as in Article 32(1) of the 1968 Brussels Convention.

84. The solution differs from the one adopted in the 1968 Brussels Convention in relation to determining the court with local jurisdiction within the Member State. The reason for this is that, in relation to judgments both in matrimonial matters and on custody, there were major differences between the positions adopted since for some the rule ought to be deleted whereas for others its existence was vital, even though its content was open to discussion.

The solution ultimately adopted was to distinguish between two separate scenarios, depending on whether the application is for enforcement or for recognition. The possibilities offered by the 1968 Brussels Convention are thus extended.

Thus, what constitutes the general rule is stated first, i.e. the rule concerning an application for exequatur. Paragraph 2(a) provides that jurisdiction will lie with the local court of the place of the habitual residence of the person against whom enforcement is sought or of the place of habitual residence of any child to whom the application relates. It was noted, however, that there could be situations in which neither the person against whom enforcement was sought nor the child was habitually resident in a Member State, and point (b) provides that in such cases jurisdiction lies with the local court of the place of enforcement.

In the second scenario, where there was action to have a judgment given in another Member State recognized or not recognized, paragraph 3 leaves the matter to the internal legislation of the State in which the application is made.

Article 22

Procedure for enforcement

85. This Article governs the various aspects of the procedure to be followed for enforcement of judgments. As under the 1968 Brussels Convention, the arrangements are based on a procedure at the request of a party which will be a Community one, that is to say that the same procedure, which will be fast and simple, will apply in all Member States, which is an undoubted advantage. It is not necessary to mention that the procedure follows the same pattern as established in the 1968 Brussels Convention, with only such modifications as are necessary owing to the different matters covered by the two Conventions. Thus, with those exceptions, the commentaries on many of these provisions refer to the reports on the various versions of the 1968 Brussels Convention, particularly the Jenard report, as indicated at the beginning.

This provision deals with the action to be taken by the applicant. In the first place, it provides that the detailed rules for submitting the application will be determined in accordance with the internal law of the State in which enforcement is sought (paragraph 1). This means that national legislation must be consulted for the information to appear in the application, the number of copies to be submitted to the court, the authority with which they are to be deposited, the language in which they are to be drawn up and also whether or not a lawyer or any other representative or agent needs to be involved.

86. This Article also requires (paragraph 2) that the applicant give an address for service or else appoint a representative *ad litem* within the area of jurisdiction of the court applied to. That provision is of interest both as to the notice of the judgment to the applicant (Article 24) and the appeal against the judgment granting *exequatur*, which will be contradictory (Article 26).

87. Finally, paragraph 3 requires that the documents referred to in Articles 33 and 34 be attached to the application. For the consequences of failure to attach the documents, see Article 35 (and commentary thereon in paragraph 107).

Article 23

Decision of the Court

88. Paragraph 1 establishes the unilateral, ex parte, nature of the exequatur procedure, in which the person against whom enforcement is sought will not be entitled to make any submissions on the application, even in exceptional cases, since such submissions would systematically change the procedure from a unilateral into a contradictory one. The rights of defence are respected by allowing the person against whom enforcement is sought to appeal against the decision granting enforcement.

The court may rule only on enforcement and may not at this stage review the custody measures, for instance, in line with the 1996 Hague Convention: Article 39 would prevent that. The court must give its decision "without delay" but it was not considered advisable to set a time limit since such a limit does not exist in judicial practice and no sanction would be possible if it were not met. Since the general rule is the grant of exequatur on the basis of the mutual confidence created by the assumption that all courts within the Community will have applied the Convention correctly, the procedure in this instance, as in the 1968 Brussels Convention, remains unilateral and rapid given that there is provision for appeal in the later Articles of the Convention in cases in which there are problems.

89. This provision stipulates that the application may be refused only for one of the reasons specified in Articles 15 and 16 (paragraph 2) and that under no circumstances may a foreign judgment be reviewed as to its substance (paragraph 3).

Article 24

Notice of the decision

90. This Article provides that the application will be notified in accordance with the law of the State in which enforcement is sought. It illustrates the importance of an address for service or appointment of a representative ad litem (see Article 22) and has implications for the lodging of appeals referred to in the Articles that follow.

Article 25

Appeal against the enforcement decision

91. Like the 1968 Brussels Convention, this Article provides that if enforcement is authorized, the person against whom enforcement is sought may appeal against the decision, while Articles 28 and 29 deal with appeal arrangements in cases in which it was not considered appropriate to authorize enforcement.

Since normal operation of the Convention leads to the grant of exequatur, it is logical that the time allowed for appeal should be brief, just one month (paragraph 1). If the person against whom enforcement is sought is resident in a Member State other than that in which the decision authorizing enforcement was given, the time for appealing is to be two months from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Courts of appeal and means of contest

92. Paragraph 1 lists the courts of appeal against a judgment authorizing enforcement. In this case, the procedure in contradictory matters will be followed, unlike the application and original judgment for which procedure is unilateral. It should be emphasized that the sole requirement established by the Convention is that the appeal procedure be contradictory, in contrast to the original judgment which is decided by unilateral procedure. This topic needs to be taken into account particularly with regard to the language differences, which must not, under any circumstances, equate "contradictory" with "contentious". In some States the term means contentious as well as contradictory, whereas such is not the case in others. Hence, although the procedure must always be contradictory, whether or not it is also contentious will depend on internal law, in the same way as the law of the forum determines the procedure (*lex fori regit processum*).

93. The only means of contesting a judgment given on appeal is in cassation or by any other top-level appeal procedure in States which do not have a cassation system. The objective of limiting the avenues of appeal in this way is to avoid unnecessary appeals which could be unfounded delaying manoeuvres. The ultimate purpose is to safeguard the objective of the Convention which is to facilitate free movement of judgments. For that reason, some delegations even considered it more appropriate to dispense with the appeal procedure provided for in paragraph 2. However, it was considered more advisable to retain the same system as in the 1968 Brussels Convention, especially as it is difficult to see this avenue being used to excess in the area of family law.

Article 27

Stay of proceedings

94. In some cases it may happen that the judgment in the court of origin is enforceable even though an appeal has been initiated or the time limit for appeal has not come to an end. In such circumstances, it is desirable to avoid complicating the situation which would result from the grant of exequatur of the judgment. This provision therefore provides that the court with which the appeal is lodged may stay the proceedings if an ordinary appeal has been lodged against the decision in the Member State of origin or if the time for such appeal has not yet expired, but is not obliged to do so. The stay of proceedings can only take place on the application of the appellant.

For stay of recognition, see Article 19 (and the commentary in paragraph 79).

95. Paragraph 2 deals with the special circumstances in Ireland and the United Kingdom.

Article 28

Court of appeal against a judgment refusing enforcement

96. In parallel with the establishment of an appeal procedure for cases in which enforcement is granted, there is also a possibility of appeal by the applicant when enforcement is refused, and paragraph 1 lists the courts of appeal having jurisdiction. However, unlike the first case, there is no time limit for this appeal. As in the 1968 Brussels Convention, the reason is that, if the applicant's application has been rejected, he has the right to appeal when he thinks fit and when, for example, he is able to assemble the relevant documentation. Once again, the objective of the Convention denotes the difference in the procedure to be followed: the normal consequence is for the judgment to be enforced and, accordingly, after the first decision, taken rapidly by the unilateral procedure, every opportunity must be given for this aim to be achieved.

97. The fact that the procedure is contradictory and the need to protect the rights of the party against whom enforcement was requested have led to a provision in paragraph 2 that the person against whom enforcement is sought be summoned to appear and, if he fails to appear, the provisions of Article 10 (examination as to jurisdiction) will apply, whether he resides in a Member State or in a non-Member State.

Article 29

Contest of the appeal decision

98. As in Article 26(2) (see commentary in paragraph 93), only the limited procedures indicated are available to contest the appeal decision.

Article 30

Partial enforcement

99. Like Article 42 of the 1968 Brussels Convention, this Article deals with two separate issues. Paragraph 1 deals with the case where a judgment has been given in respect of several matters and enforcement cannot be authorized for all of them; in that case the court will authorize enforcement for one or more of them. The second hypothesis, in paragraph 2, is that the applicant may request only partial enforcement of a judgment.

Article 31

Exemption from legal costs

100. As is the pattern in other treaties on enforcement, if the applicant has benefited in the State of origin from complete or partial legal aid or exemption from costs or expenses he will also be entitled, in the State in which enforcement is sought, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the State addressed.

Article 32

Bond or deposit

101. This Article repeats the now well established principle that no security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition or enforcement of a judgment given in another Member State (*cautio judicatum solvi*).

SECTION 3

I. Common provisions

Article 33

Documents

102. A distinction needs to be made in this case between the various paragraphs and the various aspects referred to in each one.

103. To begin with, paragraph 1 refers to the documents which must be produced in any event by a party seeking or contesting recognition or applying for enforcement of a judgment. All enforcement treaties require a copy of the judgment which satisfies the conditions necessary to establish its authenticity in accordance with the *locus regit actum* rule, that is to say the law of the place in which the judgment was given. Where appropriate, a document must also be produced showing that the applicant is in receipt of legal aid in the State of origin.

104. Paragraph 2 refers to the documents which must be produced in the case of a judgment given in default and it is logical that it confines itself to cases in which recognition or enforcement is being sought because, precisely in cases of non-recognition it is normal that no such documents exist, as a judgment given in default is concerned. In cases of non-recognition (see commentary on Article 15), proof must be provided in the required form that the written application or a similar document was notified or, in the case of a judgment in divorce, legal separation or marriage annulment proceedings, that the respondent has unequivocally accepted the content of the judgment (see comment on Article 15 concerning cases of non-recognition).

Paragraph 2(b) is worded in such a way as to be consistent with Article 15(1)(b) and (2)(c).

105. Finally, paragraph 3 states the document to be produced, in addition to those provided for in paragraphs 1 and 2, for updating the civil-status records. Given that the civil-status records authenticate the data registered in them, it is also necessary to produce a document indicating that the judgment is no longer subject to a further appeal under the law of the Member State of origin.

Article 34

Other documents

106. In addition to the documents required under Article 33, the party applying for enforcement must also produce documents which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served.

Article 35

Absence of documents

107. In the spirit of the Convention and in order to facilitate attainment of its objective, there is provision to facilitate the production of documents, allowing the court to specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production (e.g. where documents have been destroyed). This possibility is allowed only for documents specified in Article 33(1)(b) and (2) and does not apply to those in paragraph 3 for updating the civil-status records. A copy of the judgment in question is therefore always necessary.

This provision must be seen in conjunction with the provision in Article 21 regarding the consequences if the application for exequatur is not supported by the documents required in earlier Articles. The question was discussed at great length in the work on the 1968 Brussels Convention with the result that it was stipulated that if, despite the mechanisms put in place, the documents presented were insufficient and the court did not succeed in obtaining the information desired, it could declare the application inadmissible.

108. In line with the simplification aimed at in the Convention, a translation will be necessary only if the court so requires. In addition, the translation can be certified by a person qualified to do so in any of the Member States and not necessarily in the State of origin or the State in which enforcement is sought.

Article 36

Legalization and similar formalities

109. No legalization or other similar formality is required for the documents referred to in Articles 32, 33 and 34(2) or for a document appointing a representative ad litem in the proceedings for obtaining exequatur. See also Article 21(2). This provision is also in line with the 1968 Brussels Convention.

TITLE IV

J. Transitional provisions

Article 37

110. This provision corresponds to Article 54 of the 1968 Brussels Convention. The general rule is that the Convention applies only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force in the Member State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the Member State addressed. It will not therefore apply where proceedings were instituted and the judgment given before the date of entry into force of the Convention (in conjunction with Article 47(3) and (4) and Article 48(4)).

111. There is, however, provision for the possibility of allowing a judgment to benefit from the system in the Convention, even if the action was brought before its entry into force, if the following requirements are met: (a) the Convention is in force between the Member State of origin and the Member State addressed; (b) jurisdiction was founded upon rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. The provision that the rules of jurisdiction applied "accorded with those provided for in Title II" means that the court in the State addressed will have to examine the jurisdiction of the court of origin, which could not have been examined at the request of the respondent in the State of origin on the basis of the Convention (see Article 8. Also Article 40(2)).

TITLE V

K. General provisions

Article 38

Relation with other Conventions

112. Paragraph 1 contains the general rule that this Convention shall, for the Member States which are parties to it, supersede bilateral or multilateral conventions existing between the Member States. Unlike the 1968 Brussels Convention (Article 55), this provision does not list the Conventions which exist. The reason is that in relation to other Conventions this Convention is the basic Convention on the matters covered by it (Article 1). Nevertheless, a special situation does arise in respect of certain multilateral Conventions and they are dealt with in Article 39 (see commentary on that Article). Bilateral and multilateral Conventions apply only in the circumstances dealt with in Article 40.

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 39(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 38(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 State concerned's internal constitutional rules. Such a statement shall be effective until it is withdrawn in whole or in part.

In accordance with the political agreement of December 1997, this exception to the general application of this Convention shall apply only when both spouses are nationals of a Nordic Member State and their usual place of residence is situated within one of those States. For that reason, the Nordic Member States which make use of the option to continue applying the Nordic Agreement undertake in a statement annexed to this Convention to cease applying Article 7(2) of that Agreement inasmuch as the rule is based on the nationality of only one spouse and also undertake to revise the grounds of jurisdiction applicable under that Agreement in the near future in the light of the principle of non-discrimination on grounds of nationality (see Article 8, paragraph 47).

In addition, in the annexed declaration, the Nordic Member States declare that the grounds for refusal of recognition contained in the Nordic Agreement are applied in practice in a manner consistent with Title III of this Convention.

- (b) Pursuant to paragraph 2(b), the principle of non-discrimination on grounds of nationality will be observed and monitored by the Court of Justice with regard to the exception to the general application of this Convention.
- (c) The provisions contained in (c) are included to guarantee that the rules governing jurisdiction included in any future agreement between the Nordic Member States concerning the matters included in the Convention comply with this Convention.
- (d) A judgment handed down in a Nordic Member State pursuant to the Nordic Agreement shall also be recognized and enforced in the other Member States in accordance with the rules contained in Title III of this Convention, provided that the grounds of jurisdiction used by the Nordic court correspond to those laid down in Title II of this Convention.

114. Paragraph 3 contains the general provision that Member States may not conclude or apply agreements between themselves having an objective which goes beyond supplementing the provisions of the Convention or facilitating its application. Member States may thus transcend the Convention; two Member States could, for instance, conclude a Convention dispensing with all or some of the grounds of non-recognition provided for in Article 15. The provision confirms the logic of Article 39.

Article 39

Relation with certain Multilateral Conventions

115. This provision contains the general rule that this Convention takes precedence over other international Conventions to which the Member States are party in so far as they concern matters governed by both Conventions.

The text adopted means that this Convention takes precedence and that it must therefore be compulsory to apply it in place of such other agreements. Some Member States wanted the use of this Convention to be optional in relation to one or other of the Conventions listed or even to apply internal rules in its place if they were more favourable, but that proposal was rejected. Legal certainty and mutual confidence require the rule which was finally adopted whereby there is an obligation to give precedence to the application of this Convention. It should be noted in particular that, inasmuch as its scope includes matters concerning parental responsibility for a child of both spouses, this Convention takes precedence over the 1996 Hague Convention in cases in which protection of the child is linked to the divorce process, also bearing in mind that the application of this Convention is confined to children residing in the Member States. The inclusion of the 1970 Hague Convention on divorce means that this Convention must take precedence since it is also a double Convention.

116. It should be pointed out that not all the Member States are party to all the Conventions mentioned in this Article and that their inclusion in the list does not mean that the Member States are recommended to accede to them. The provision is simply a practical statement of the relationship between this Convention and other treaty texts.

117. A clear distinction needs to be made between the question dealt with in this provision and the one referred to in Article 4 which relates to a particular rule of jurisdiction subordinate to the 1980 Hague Convention on the civil aspects of international child abduction. The situation is different in relation to the European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, although on many occasions that Convention has been used as an alternative to the Hague Convention, the conditions for its application differ significantly from those of the Hague Convention, particularly in relation to the need for a judgment to be in place regarding custody, a requirement which makes a provision like the one in this Convention necessary.

Article 40

Extent of effects

118. This Article lays down a rule for the application of the international conventions referred to in Articles 38 and 39 both in relation to matters to which this Convention does not apply (paragraph 1) and in respect of judgments given before the entry into force of this Convention (paragraph 2) but does not provide for any transitional rule on the latter issue, without prejudice to what is laid down in Article 37, allowing recognition under this Convention for judgments given by virtue of a ground of jurisdiction recognized in the Convention.

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. It was pointed out in connection with the scope of the Convention (see commentary on Article 1, paragraph 20, B) that religious procedures lay outside it. Nevertheless, judgments given in relation to canonical marriages under particular agreements with the Holy See enjoy special arrangements consisting of application of Title III of this Convention for recognition and enforcement of judgments if the judgment concerning nullity was made in accordance with those agreements concluded with the Holy See. This provision is designed to deal with the difficult problem arising in relation to Portugal where ecclesiastical courts have exclusive jurisdiction to annul a catholic marriage, 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.

For Portugal, the problem lay in the exclusive competence of ecclesiastical courts to annul canonical marriages. Portugal would in fact violate the international obligations it assumed under the Concordat if it agreed to ratify the Convention recognizing the competence (pursuant to Articles 2 et seq.) of civil courts to annul Portuguese canonical marriages.

The safeguarding of the Concordat, in accordance with Article 42(1), thus confers on Portugal the option of not recognizing such competence nor any judgments to annul the marriages referred to which these courts might hand down.

Secondly, in accordance with paragraph 2, annulment judgments pronounced pursuant to the rules of the Concordat or the Portuguese Civil Code are recognized in the Member States once they have been incorporated into the Portuguese legal system.

On the same topic, Italy (see paragraph 129 concerning Article 46) is making a declaration to be annexed to the Convention in which it reserves the right, in respect of judgments by Portuguese ecclesiastical courts, to adopt the procedures and carry out the checks provided for in its own legal system in respect of similar judgments by ecclesiastical courts, on the basis of the agreements it has concluded with the Holy See.

121. The situation in Portugal is different from that in Spain and Italy where the ecclesiastical courts' jurisdiction to declare annulment is not exclusive but concurrent and there is a particular procedure for recognition in the civil system. For that reason, a separate paragraph refers to those Concordats and stipulates that judgments given under them will enjoy the same system of recognition, although there is no exclusive jurisdiction.

122. In Spain there is an Agreement between the Holy See and the Spanish State on legal affairs of 3 January 1979. Article VI.2 thereof provides that "the contracting parties may, under the provisions of Canon Law, seise the ecclesiastical courts to apply for a declaration of annulment or a pontifical declaration on an unconsummated marriage. At the request of either party, such ecclesiastical decisions will be effective in the civil order if they are declared to comply with the Law of the State in a judgment given by the civil court having jurisdiction".

Separation and divorce are, however, matters for the civil courts. The ecclesiastical courts' exclusive jurisdiction in relation to annulment disappeared after the entry into force of the 1978 Constitution; the civil courts and the ecclesiastical courts now have alternative jurisdiction and there is provision for recognition of civil effects. In such cases, in addition to the 1979 Agreement mentioned above, account needs to be taken of Article 80 of the Civil Code and the Second Additional Provision to Law 30/1981 of 7 July which amends the rules on matrimony in the Civil Code and determines the procedure to be followed in annulment, separation and divorce cases. The consequences of these provisions are as follows: Firstly, canonical decisions and judgments only produce civil effects if both parties consent and neither contests. Secondly, there having been no contest, the ordinary court determines whether the canonical judgment has civil effects or not and, if it does, proceeds to enforce it in accordance with the Civil Code provisions on annulment and dissolution cases. Thirdly, annulment cases in canon law and in civil law do not coincide. For that reason, there is discussion as to whether canonical judgments "which accord with State Law" can be considered effective in the civil order. Fourthly, Article 80 of the Civil Code refers to Article 954 of the Law on Civil Procedure, regarding the conditions for enforcing foreign judgments. Such reference is relevant to default of appearance by the respondent. The essential issue is whether or not one of the parties has opposed the application to give the canonical judgments and decisions on marriage annulment civil effect.

123. In Italy the relevant agreement is the Agreement of 18 February 1984 between the Italian Republic and the Holy See amending the Concordato Lateranense of 11 February 1929. Article 8(2) provides that marriage annulment judgments by the ecclesiastical courts which are enforceable will produce effects in Italy by decision of the Corte d'appello having jurisdiction, provided that: (a) the ecclesiastical court had jurisdiction over the case in that it was a marriage celebrated in accordance with the requirements laid down by that Article; (b) the procedure before the ecclesiastical courts afforded the parties the right to appear and to be defended, in accordance with the fundamental principles of the Italian legal system; (c) the conditions required by Italian legislation for declaring foreign judgments effective have been met. Although Law 78 of 31 May 1995 reforming the Italian system of international private law (Article 73) derogated from Articles 796 et seq. of the Codice di Procedura Civile (Code of Civil Procedure) in practice it is understood that, pursuant to Article 2 thereof (International Agreements), those Articles remain in force for recognition of ecclesiastical judgments on annulment of marriages.

124. Paragraph 4, like Article 38, requires Member States party to such international treaties or concordats to send to the depositary of this Convention a copy of the Treaties and to notify any denunciation of or amendments to them. Deletions from the list of agreements will be made in accordance with the arrangements in Article 49(3).

Article 43

Non-recognition and non-enforcement of judgments based on Article 8

125. This Article transposes the rule in Article 59 of the 1968 Brussels Convention and needs to be seen in conjunction with Article 16(1) (see commentary in paragraph 74). It lays down a rule attenuating the effects in Member States of judgments given on the basis of residual jurisdiction. Article 43 gives a Member State the option of not recognizing a judgment given in another Member State when it is founded on grounds of jurisdiction other than those specified in Articles 2 to 7, i.e. solely on national law, as set out in Article 8. But for that the Member State and the third country must have concluded a convention applicable between them on the recognition and enforcement of judgments in which the Member State undertakes not to recognize judgments given in another Member State purely under Article 8. The reason for this is that Article 8 does not impose a common rule, hence Member States are free to conclude such agreements.

Article 44

Member States with two or more legal systems

126. This provision takes direct account of the provisions in the 1996 Hague Convention on child protection for cases in which there are two or more systems of law or sets of rules from the point of view of court procedure. The objective is to arrive at complementary criteria for identifying the territorial units. However, the only grounds included are the ones relating to matters included in this Convention.

TITLE VI

L. Court of Justice

Article 45

127. The establishment of Court of Justice jurisdiction to ensure uniform interpretation of this Convention gave rise to a great deal of discussion. For some delegations it was an important issue, endorsed by the practice of uniform interpretation of the 1968 Brussels Convention. Other States considered that such jurisdiction either should not be conferred or should, in any event, be confined to cases heard by the highest judicial organs in a Member State, thus excluding appellate courts in the Member States.

As a compromise, the solution adopted was simply to state the jurisdiction of the Court of Justice in the Convention and leave the rules of application to a Protocol to be adopted by the Council at the same time as the Convention (see the report on the Protocol). Therefore, only the courts and authorities of Member States which ratify the Protocol as well as the Convention may refer to the Court of Justice of the European Communities.

TITLE VII

M. Final provisions

Article 46

Declarations and reservations

128. The integration which a collective intra-Community convention presupposes brings with it the provision in paragraph 1 whereby, without prejudice to Articles 38(2) (Nordic Agreement) and 42 (Concordats), this Convention may not be subject to any reservation.

129. The difficulties encountered by some States in connection with particular situations led to agreement to include in paragraph 2 acceptance by the Member States of the declarations made by Ireland (see comment on Article 9, paragraph 49) and Italy (see comment on Article 42, paragraph 120) and the exclusion of other declarations on the same subject.

Ireland's situation merits special attention. Ireland has no difficulty in recognizing divorce judgments given in another Member State on the basis of more liberal grounds or rules than those prevailing in Ireland. However, it wants checks to ensure that parties petitioning for divorce have actually habitually resided in a particular Member State in order to avoid situations of fraud or circumvention of the aims of the Convention, which could be in contravention of the Irish Constitution. Taking account of the provision in Article 16(3) according to which public policy cannot be used to check jurisdiction, Ireland is particularly concerned that courts of the States of origin should verify the genuine existence of the connections provided for in Article 2 (jurisdiction in matrimonial matters). It was not, however possible to accept the initial Irish proposal to amend the Convention to allow refusal of recognition or enforcement of a divorce judgment given in another Member State if the jurisdiction to give the judgment was not based on a genuine link between one or both spouses and the Member State in question. That proposal was unacceptable in so far as it called into question one of the fundamental principles of the Convention, the mutual confidence between the States pursuant to which the substance of a judgment given in a Member State may not be reviewed in the Member State in which recognition is sought (see Article 18 in this connection). The delegations did, however, take into consideration the fact that the Irish Constitution contains specific provisions concerning divorce and that divorce had been introduced into Ireland very recently following a referendum. For that reason the declaration annexed to the Convention was accepted for a renewable transitional period of five years. In the long term, that position may lead to broader application of the provisions of the Convention.

130. Paragraph 3 establishes the system for withdrawing such declarations and the time at which withdrawal will take effect.

Article 47

Adoption and entry into force

131. Pursuant to this Article, the entry into force of the Convention will take place in accordance with the provisions established by the Council of the European Union.

The Convention will enter into force ninety days after the notification of deposit of the instrument of ratification by the last of the fifteen States Members of the European Union at the time the Council adopts the Act establishing this Convention on 28 May 1998 to complete that formality.

132. However, as was done under judicial cooperation arrangements concluded earlier between the Member States, paragraph 4 provides that any Member State, may, at the time of adoption or at any later date, declare that as far as it is concerned the Convention will apply to its relations with Member States that have made the same declaration. Such declarations will apply ninety days after the date of their deposit.

Member States may not, however, declare that the Court of Justice has jurisdiction to interpret the Convention during the period of advance application since that step requires adoption by all fifteen Member States of the provisions of the Convention and the entry into force thereof.

Article 48

Accession

133. This Article provides that the Convention is open to accession by any State that becomes a member of the European Union and carries out the procedures for accession. On the other hand, a State which is not a member of the European Union may not accede to the Convention.

If the Convention has already entered into force when the new Member State accedes, it will enter into force with respect to that State ninety days after the deposit of its instrument of accession. If it has not already entered into force at the time of expiry of the said period of ninety days, it will enter into force for that State, as for all the others, under the conditions set out in Article 47(3). In that case, the acceding State may make a declaration of advance application.

The accession of the new Member State will not be a condition for the entry into force of the Convention in respect of the other States which were members at the time of adoption by the Council of the Act establishing the Convention.

Article 49

Amendments

134. This Article lays down the procedure for amending the Convention. Amendments may be proposed by any Member State or by the Commission in accordance with Title VI of the Treaty on European Union. There are different arrangements depending on the nature of the amendments proposed.

135. The first scenario is dealt with in paragraphs 1 and 2 under which amendments will be drawn up by the Council, which will recommend their adoption by the Member States in accordance with their respective constitutional rules.

136. The second system is in paragraph 3 which allows a simplified procedure enabling the Council to adopt amendments to the naming of the courts or means of appeal referred to in Articles 21(1), 26(1) and (2), 28(1) and 29.

Article 50

Depositary and publication

137. This Article makes the Secretary-General of the Council the depositary of the Convention.

The Secretary-General will inform the Member States of all notifications relating to the Convention and publish them in the "C" series of the Official Journal of the European Communities.
