REPORT ON THE PROTOCOLS

on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters

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I. General remarks

1. In Joint Declaration No 3, annexed to the Convention on the mutual recognition of companies and legal persons, signed at Brussels on 29 February 1968, the Governments of the Member States of the European Communities expressed their willingness to study means of avoiding differences in the interpretation of the Convention. To this end, they agreed to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to that effect.

A similar Joint Declaration was annexed to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968. This Declaration envisages the possibility of assigning to the Court of Justice jurisdiction both to interpret the Convention and to settle any conflicting claims and disclaimers of jurisdiction which may arise in applying it.

2. In the course of negotiations to give effect to these Declarations, it was soon agreed to give the Court additional jurisdiction, and to use for the purpose a system based on Article 177 of the Treaty. The further question nevertheless arose as to whether it would be appropriate to draft a general convention applicable to all the conventions which had been or were to be concluded on the basis of Article 220, or whether it would not be preferable to seek solutions which took into account the individual characteristics of each of these conventions.

This question was approached in an entirely pragmatic manner. A detailed study was made of the two Conventions already signed, the Convention on the mutual recognition of companies and legal persons, and the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

3. This study led to the conclusion that these two Conventions have distinct features which justify different arrangements for their interpretation by the Court of Justice. Although it had been suggested that a single convention might determine the jurisdiction of the Court to interpret all the conventions concluded on the basis of Article 220 of the Treaty, in the end it was thought preferable to conclude separate Protocols which would be better adapted to the requirements of each of the Conventions.

4. There was no need to apply the procedure of Article 236 of the Treaty for the purposes of concluding these Protocols since they deal with the interpretation of Conventions drawn up pursuant to Article 220 of the Treaty and in no way aim at revising the Treaty itself.

They merely confer on the Court of Justice further jurisdiction which is additional to, but does not affect, its existing jurisdiction [1].

II. Protocol on the interpretation of the Convention on the mutual recognition of companies and legal persons

5. As regards the interpretation of the Convention on the mutual recognition of companies and legal persons,

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[1] On various occasions, jurisdiction has been conferred on the Court of Justice without reference to the revision procedure set out in Article 236 (internal agreements under Conventions of Association — see OJ No 93, 11. 6. 1964, p. 1490/64; provisions of Council Regulation No 17 on appeal to the Court — see OJ No 13, 21. 2. 1962, p. 204/62).

there was thought to be no reason for departing from the preliminary ruling system laid down in Article 177 of the Treaty; and this system was therefore adopted in the draft Protocol in question.

Article 1 of the Protocol confers on the Court jurisdiction to interpret the Convention of 29 February 1968, Joint Declaration No 1 contained in the Protocol annexed to that Convention, and the Protocol which is the subject of this report. Article 2 repeats, in identical terms, the second and third paragraphs of Article 177, defining the circumstances in which references may be made to the Court by courts which have to decide questions of interpretation.

6. Since the Convention sometimes refers back to national law, the problem arose as to whether it might be necessary expressly to exclude the jurisdiction of the Court to interpret such law. It was thought unnecessary expressly to exclude jurisdiction in this respect, for the cases decided by the Court of Justice have already firmly established that it has no jurisdiction to interpret national law.

7. Article 3 concerns the procedure to be followed before the Court of Justice when, in accordance with the Protocol, the Court is asked to give a ruling.

It was thought appropriate to provide that the Rules of Procedure of the Court should be supplemented to take account of the new jurisdiction. Article 3 (2) indicated that Article 188 of the Treaty is to be used for this purpose.

It was considered that, in order to ensure that the Convention would be applied as effectively and as uniformly as possible, an exchange of information should be organized on judgments of national courts against whose decision there is no remedy under national law.

A Joint Declaration to this effect is annexed to the Protocol.

III. Protocol on the interpretation of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

8. The study of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters showed that it has features sufficiently distinctive to justify a separate system for its interpretation by the Court of Justice.

There was unanimous agreement on the need to ensure uniform interpretation of the Convention, and hence to confer new jurisdiction on the Court of Justice, using a system based on Article 177. But it was feared that, in view of the number and diversity of the disputes to which the Convention applies, an application for a preliminary ruling on the lines of Article 177 might be made by one of the parties either as a delaying tactic or as a means of putting pressure on an opponent of modest financial means. In short, the application might be made for improper purposes.

(1) This Convention will be applicable in a large number of cases. It governs not only recognition and enforcement of judgments, but also the international jurisdiction of the courts, and in particular all cases where a person is sued in the courts of a Contracting State in which he is not domiciled. Moreover, it is not confined to a limited field such as the recognition of companies, but extends to all civil and commercial matters relating to rights in property (litigation over all kinds of contract, non-contractual liability, maintenance, etc.).

(2) At the stage of recognition and enforcement, Article 34 of the Convention provides that the court to which application is made for the issue of an order for enforcement shall give its decision without delay, and without the party against whom enforcement is sought being entitled at that stage of the proceedings to make any submissions.

Plainly, an application to the Court of Justice for a preliminary ruling would, if made at this stage, undermine the object of the Convention which, by introducing a new, standardized, *ex parte* procedure for enforcement, aims at eliminating delaying tactics and preventing the respondent from withdrawing his assets from any measure of enforcement.

(3) Finally it must be stressed that decisions of the Court of Justice on the interpretation of the Convention differ from decisions on the interpretation of other conventions, as regards the consequences for the parties.

Thus, if the court were to interpret a provision of the Convention so as to rule that the courts seised of a matter had no jurisdiction, the proceedings might well have to be instituted again from the outset, either in a State other than that whose courts were

originally seised or, perhaps, in other courts in the same State (see, for example, Article 5 of the Convention which lays down special rules of jurisdiction).

9. The Protocol therefore follows the system of Article 177, but subject to such adjustments as were thought necessary to deal with the matters set out above. The system may be summarized as follows:

(a) the courts which are allowed to refer questions to the court are expressly specified;

(b) the right to apply to the court for a preliminary ruling is not given to courts of first instance;

(c) the Protocol provides that the Courts of Cassation and other courts of last instance are required to refer a question of interpretation to the court if they consider that a decision of the Court on that question is necessary to enable them to give judgment;

(d) in addition to requests for a preliminary ruling, there is a novel provision for interpretation by the Court of Justice, similar to the 'pourvoi dans l'intérêt de la loi'.

10. Article 1, which is similar to Article 1 of the Protocol on the interpretation of the Convention on the mutual recognition of companies and legal persons, confers on the Court jurisdiction to interpret the Convention of 27 September 1968 and its Protocol, as well as the Protocol which is the subject of this report.

11. Article 2 lists the national courts which may ask the Court to give a preliminary ruling.

(1) Courts of first instance are not included in this list. Their exclusion is designed mainly to prevent the interpretation of the Court being requested in too many cases, and particularly in trivial matters. Moreover, it was thought that where two courts of first instance, for example a 'justice de paix' and an Amtsgericht, gave judgments which became *res judicata* and showed differences of interpretation in the application of the Convention, this should not necessitate further action, any more than would similar differences of interpretation between two inferior courts of the same country. Similarly, it was argued that the Court of Justice should not be required to give rulings unless it was fully informed. In order to achieve this, questions of interpretation should, in the first place, be dealt with by the national courts, especially in view of the fact that in the interests of legal certainty the Court of Justice can only seldom depart from the principles established by its previous judgments.

(2) Article 2 (1) specifies by name the courts which are allowed to refer questions to the Court of Justice, including those which, pursuant to Article 3 (1), are required to do so. Such a list seemed to be essential, since the present wording of the third paragraph of Article 177 has given rise to conflicting interpretations as to which are the courts and tribunals against whose decisions there is no judicial remedy under national law (for example, the theoretical and pragmatic schools of thought in Germany).

It seemed all the more necessary to make this point clear because, under the Protocol, inferior courts have no jurisdiction to refer a question to the Court of Justice.

This list also takes into account the fact that the Convention of 27 September 1968 governs only civil and commercial matters concerning property rights; the list therefore includes only those Courts which have jurisdiction in such cases.

(3) Article 2 (2) states that the power to refer a question to the Court is also given to the courts of the Contracting States when they are sitting in an appellate capacity. The Courts in question thus include courts of appeal, save for the exceptional cases when they are sitting at first instance when sitting in an appellate capacity.

In the Federal Republic of Germany the expression 'appeal' includes 'Beschwerde'.

(4) Article 2 (3) lays down that in the cases provided for in Article 37 of the Convention of 27 September 1968, the courts referred to in that Article may also refer a question to the Court of Justice. It will be remembered that Article 37 governs appeals against judgments authorizing the enforcement of a foreign judgment.

12. Article 3 lays down that a court of last instance is bound to refer a question to the Court of Justice only 'if it considers that a decision on the question is necessary to enable it to enable it to give judgment'. In Article 177 of the Treaty of Rome this provision appears only in the second paragraph, governing cases in which other courts are entitled to refer a question to the Court of Justice.

The provision contained in Article 3 (1) of the Protocol accords with the interpretation now generally given to Article 177: it is generally agreed to be beyond dispute that a court of last instance has discretion to assess the relevance of questions put to it for interpretation.

Nevertheless, this provision seemed necessary to avoid conflicting interpretations; for it will be remembered that, as has already been pointed out in paragraph 8 (3) of this report, decisions of the Court of Justice on the interpretation of the Judgments Convention differ, in their consequences, from decisions of the interpretation of other conventions.

Thus if the jurisdiction of a court were challenged on appeal, and the Court of Justice ruled that the Convention had been misinterpreted by the first court, the proceedings might have to be instituted again from the very beginning, either in another State or, perhaps, in another court in the same State.

A party to an action might accordingly be greatly tempted to raise a question of interpretation of the Convention before an appellate court merely in order to gain time, and the temptation would be all the greater if that court were automatically required to refer the question to the Court of Justice.

A number of other solutions were considered, including giving the highest courts only a power, rather than a duty, to refer a question to the Court, or requiring them to refer a question only if they would otherwise give to a provision an interpretation different from the interpretation already given either by the Court of Justice or by other courts. Finally, however, a provision very close to Article 177 was adopted in order to achieve the greatest possible uniformity in Community law.

For the reasons set out above, it was thought necessary to confirm the discretion of courts of last instance by means of a clear and unambiguous text, and above all to make it proof against any possible subsequent tendency automatically to refer questions to the Court.

As regards its form, Article 3 differs from Article 177, in that it sets out first of all the rule for the courts of last instance, and thereafter for the other courts. The object of this modified form was to emphasize that the Protocol was designed solely to provide a specific solution to problems of interpretation of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

13. Since the Convention also refers back to national law, reference should be made to what was said in this connection in the commentary on the protocol on the interpretation of the Convention on the mutual recognition of companies (see paragraph 6).

14. Article 4 lays down a new procedure based in part on the 'pourvoi dans l'intérêt de la loi' and in part on the procedure for giving advisory opinions. All the countries of the Community, with the exception of the Federal Republic of Germany, have a form of appeal for the clarification of a point of law which enables the competent judicial authority, in this instance the Procurators-General of the Courts of Cassation, to appeal against a final decision which misunderstands or misapplies either the letter or the spirit of the law. The purpose of this appeal is to avoid perpetuating an erroneous interpretation of the law where the parties have omitted to appeal against the decision which includes that interpretation (see Dalloz, Encyclopédie juridique under Cassation No 2509).

Article 4 is designed to make for a uniform interpretation of the Convention by introducing a procedure complementary to the request for a preliminary ruling provided for in Article 3. The purpose is to ensure a uniform interpretation for the future wherever existing judgments are in conflict.

In the last analysis, this procedure occupies an intermediate position between the 'pourvoi dans l'intérêt de la loi', from which it differs in that it does not entail the setting aside of a judgment which is ultimately shown to have misinterpreted the Convention, and that of an advisory appeal. The procedure is, however, limited to cases in which a court has already given judgment.

Paragraph 1 defines the cases in which the competent authority of a State may apply to the Court of Justice. It will be for that authority to decide whether it is advisable to refer a matter to the Court, and it will presumably not do so unless the national judgment includes reasons which might lead to an interpretation different from that previously given by the Court of Justice or by a foreign court. If there are no factors involved which make it likely that the principles

established in the decided cases would be changed, the national authority could always seek to clarify the point of law by appealing in its own country in accordance with the procedure there in force.

Paragraph 2 lays down that rulings given by the Court shall not affect the decisions submitted to it, in the same way that the setting aside of a judgment following an appeal to clarify a point of law in no way influences the position of the parties.

It follows that the judgments of the Court cannot give rise to any fresh proceedings, even where otherwise an extraordinary avenue of appeal might be appropriate.

Paragraph 3 lays down that the Procurators-General of the Courts of Cassation (who, in the countries which know the 'pourvoi dans l'intérêt de la loi', are competent) or any other authority designated by a State, are entitled to request the Court of Justice for a ruling. The designation of the Procurators-General is further evidence that the appeal procedure laid down in Article 4 is intended solely to clarify points of law.

The wording of paragraph 3 takes account of the situation obtaining in Germany, where the 'pourvoi dans l'intérêt de la loi' is unknown. It furthermore empowers any of the Contracting States to designate any other authority or even to designate two authorities, as for example the Procurator-General for appeals against judgments of civil, commercial or criminal courts in civil matters, and the Minister of Justice for appeals against decisions of administrative tribunals.

Paragraph 4 amends Article 20 of the Statute of the Court of Justice to deal with the procedure provided for in Article 4. The amendment takes account of the fact that the parties to the original proceedings will have no interest in intervening at this stage.

It may be wondered what are the implications of a ruling on interpretation given on the basis of Article 4. The ruling certainly is not binding on the parties. It must be acknowledged that such a ruling has no force in law, and that accordingly nobody is bound by it. But clearly it will have the greatest persuasive authority and will for the future constitute the guideline for all Community courts. In this respect it may be compared with the decision on a 'pourvoi dans l'intérêt de la loi'. Such a decision is binding on nobody, but constitutes a decision of principle of the greatest importance for the future, and one which judges will generally follow.

15. Article 5 of the Protocol, like Article 3 of the Protocol on the interpretation of the Convention on the mutual recognition of companies, extends the provisions governing the jurisdiction of the Court of Justice to cover the exercise of the new jurisdiction conferred on it.

However, these provisions are extended only in so far as the Protocol does not otherwise provide; this reservation chiefly concerns Article 177 of the Treaty, whose provisions, even if they should be modified, are not applicable to the Protocol, which has its own separate provisions on this point.

16. Article 11 provides for any relevant amendment to the jurisdiction of the courts of the Contracting States.

17. The other Articles of the Protocol, which contain the final provisions, give rise to no particular comment. Again, an exchange of information is to be organized on the decisions of the courts referred to in Article 2 (1) in order to ensure that the Convention is applied as effectively and as uniformly as possible. A Joint Declaration to this effect is annexed to the Protocol.

18. The provisions of the Convention on *lis pendens* and related actions should go a long way, if not all the way, towards resolving any problems which may arise from conflicting claims and disclaimers of jurisdiction. Where, however, such problems arise from conflicting interpretations, they will be solved by applying the Protocol.