SYNOPSIS OF CASE-LAW

The EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

Part 1

1977

CORRIGENDUM

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3rd line read :

" ... a claim instituted by the plaintiff before the ... "

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read this paragraph as follows :

" A judgment of the High Court of Justice, Queen's Bench Division, was held to be enforceable in Italy within the meaning of the Convention between Italy and the United Kingdom of 7 February 1964 for the recognition and enforcement of judgments. The Corte d'Appello, Milan, considered that, in providing that the procedure for registration shall be made "as simple and rapid as possible", Article VIII(3) of the aforesaid Convention should not, by an improper interpretation by analogy of the special provisions contained in the EEC Convention, be interpreted as permitting any adversary proceedings to be deferred until a second stage (namely, an appeal, if any, by the defendant). In the Convention between Italy and the United Kingdom there is in fact no provision corresponding to Articles 34 et seq. of the Brussels Convention and the absence of specific provisions requires that proceedings must take an adversary form from the very first steps in the procedure. "

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Part 1

1977

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The object of the synopsis of case-law

The effective and uniform application of the EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Council Document No. 100 on the Recognition of Judgments) must be guaranteed by the procedure whereby the Court of Justice of the European Communities, in accordance with the Protocol concerning the interpretation by this Court of the said Convention (Official Journal No. L204/28 of 2 August 1975) has jurisdiction to give preliminary rulings on questions referred to it concerning the interpretation of the Convention by national courts and other competent authorities.

The proper functioning of this procedure for referring questions for interpretation depends upon the diffusion of information concerning decisions made in application of the EEC Convention.

For this reason the signatory States declared in the "Joint Declaration" annexed to this Protocol concerning the interpretation by the Court of Justice of the Convention that they were "ready to organize, in co-operation with the Court of Justice, an exchange of information on the judgments".

The publication of the synopsis of case-law is intended to further this exchange of information. Its form has been determined by the endeavour to ensure that those using it are presented with the information speedily and in several languages.

The summaries of decisions have been supplemented by a table of statistical information, which is designed to make it possible to assess how effective the Convention has been in practice.

Instructions for users

1. The synopsis of case-law contains summaries of decisions of national courts concerning the EEC Convention and also extracts from judgments of the Court of Justice of the European Communities in which it

gives rulings concerning the interpretation of the Convention.*

2. It is hoped to publish the synopsis thrice yearly in the six languages of the European Community; cumulative indexes will be issued at regular intervals. It is therefore recommended that the individual issues be kept in a loose-leaf file.

3. The decisions will be numbered consecutively, commencing with the first issue ("Part 1") and are classified according to the subject-headings in the Convention. They have been included only under the heading with which they were most closely connected; however, rulings on the various questions of law dealt with in the decisions can also be traced by means of the detailed cumulative Index of provisions judicially considered.

4. The synopsis of case-law has been extracted from a comprehensive card index of the case-law on the EEC Convention kept by the Documentation Branch of the Court of Justice of the European Communities. Any user who is interested may have access to this card index.

5. Orders for the synopsis of case-law may be placed with the Documentation Branch.

6. In principle, the Documentation Branch receives copies of decisions under the EEC Convention from the Ministries of Justice. However, in order to ensure that the records of such decisions are as complete as possible the Branch will be grateful if users of the synopsis of case-law will send it copies of decisions direct.

7. The first issue of the synopsis of case-law largely consists of decisions taken since 1 July 1975.

* The judgments of the Court of Justice of the European Communities are published officially in the "Reports of Cases before the Court", which may be ordered through the "Office for official publications of the European Communities", Case Postale 1003, Luxembourg.

Table of statistical information as at 1 January 1977

	Applications for leave to enforce a judgment	Leave to enforce a judgment granted	Applications refused
Grand Duchy of Luxembourg	123	97	26

/The data at present available only provide reliable information in the case of the courts of the Grand Duchy of Luxembourg./

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TITLE I

SCOPE

Concept of "civil and commercial matters"

No. 1 Judgment of the Court of Justice of the European Communities, Luxembourg, of 14 October 1976
Firma LTU GmbH & Co. KG v Eurocontrol
(Reference for a preliminary ruling by the Oberlandesgericht Düsseldorf) Case 29/76

During proceedings relating to the authorization of enforcement of a judgment by which the Tribunal de Commerce, Brussels, ordered LTU to pay Eurocontrol route charges for the use of air safety services, the Oberlandesgericht Düsseldorf referred to the Court of Justice of the European Communities a question concerning the interpretation of the expression "civil and commercial matters" referred to in the first paragraph of Article 1 of the Convention.

The Court stated that "Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so when the public authority acts in the exercise of its powers" and that "Such is the case in a dispute which, like that between the parties to the main action, concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive". In answer to the question referred, it then ruled:

"1. In the interpretation of the concept 'civil and commercial matters' for the purposes of the application of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters, in particular Title III thereof, reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general

principles which stem from the corpus of the national legal systems;

2. A judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention."

Note: With reference to this judgment the Bundesgerichtshof has made two references for a preliminary ruling on the interpretation of Article 1 of the Convention, which are Cases 9/77 and 10/77 pending before the Court of Justice of the European Communities.

No. 2 Order of the Bundesgerichtshof of 26 November 1975, Eurocontrol v Firma LTU GmbH & Co. KG VIII 2B 26/75

The order related to proceedings for the enforcement of a judgment of the Tribunal de Commerce, Brussels, obtained by EUROCONTROL against a German air transport undertaking for payment of route charges. The Bundesgerichtshof, on appeal by the applicant undertaking, annulled an order of the Oberlandesgericht Düsseldorf of 24 March 1975, dismissing the application for authorization to enforce the Belgian judgment, and referred the matter back to the Oberlandesgericht for a further decision. By order of 16 February 1976 the Oberlandesgericht referred to the Court of Justice of the European Communities a question concerning the interpretation of Article 1 of the Convention, which was answered in the judgment of 14 October 1976 in Case 29/76.

The Bundesgerichtshof rejected the respondent's argument that the Belgian judgment was not concerned with a civil or commercial matter falling within the Convention. If the court of the State in which judgment was given has affirmed that the case before it is a civil or commercial matter, this affirmation must be accepted by the German courts in proceedings for the enforcement of the judgment. This is a consequence of the fact that by international treaties which it

has ratified the Federal Republic of Germany has made German users of Eurocontrol subject to the jurisdiction of Belgian courts in claims for payment of route charges. Furthermore, only by reference to the designation arrived at in the State where the judgment was given can the Contracting States apply the Convention as effectively as possible in accordance with their aim.

The Bundesgerichtshof held that service of the Belgian judgment had been effected in accordance with the provisions of the Hague Convention relating to civil procedure of 1 March 1954. Under Article 47(1) of the Convention production of a certificate of service is not required, because under German domestic procedural law proof may be furnished by means of other documents and under Article 5 of the Hague Convention a dated authenticated receipt from the addressee is sufficient for this purpose.

The matter has been referred back to the Oberlandesgericht, because the Bundesgerichtshof could not itself decide to stay the proceedings in accordance with the respondent's application pursuant to Article 38 of the Convention. Article 20(2) of the German Ausführungsgesetz (Implementing Law) does not allow it to make the requisite findings of fact.

No. 3 Order of the Oberlandesgericht München, 5th Civil Senate, of 3 November 1975
Eurocontrol v B.F.S. & Co. KG 5 W 1517/75

As in the case of the order of the Bundesgerichtshof of 26 November 1975, this dispute concerns the enforcement of a judgment of the Tribunal de Commerce, Brussels, obtained by EUROCONTROL against a German transport undertaking for payment of charges for the use of air safety services. The Oberlandesgericht has upheld the order of the Landgericht granting leave to enforce the judgment.

The Oberlandesgericht, like the Bundesgerichtshof, has held that in proceedings for authorization to enforce a judgment German courts are bound by the designation of the dispute as a civil or commercial matter by the court in which the judgment was given.

The respondent's alternative applications under Article 38 of the Convention for a stay of proceedings and an order for the provision of

security were rejected as the pending appeal in Belgium to have the judgment set aside had little chance of success.

No. 4 Order of the Oberlandesgericht Frankfurt am Main of 5 March 1976
Eurocontrol v Firma G.B. GmbH & Co. KG 20 W 437/75

As in the case of the order of the Bundesgerichtshof of 26 November 1975, these proceedings relate to the enforcement of a judgment of the Tribunal de Commerce, Brussels, obtained by EUROCONTROL against a German air transport undertaking for payment of charges for the use of air safety services.

The Oberlandesgericht, with legal reasoning modelled on that applied by the Bundesgerichtshof to the concept of "civil and commercial matters" and to the evidence of service required by Article 47(1) of the Convention, has made an order for the enforcement of the judgment of the Tribunal de Commerce, Brussels.

Actions arising out of contracts of employment

No. 5 Judgment of the Cour Supérieure of Luxembourg of 8 October 1975
Saarfürst-Brauerei A.G., Osiris S.A.R.L. v Armand Engels 3629

The court has upheld the contested decision by which the "Tribunal Arbitral pour les contestations entre patrons et employés" held that it had jurisdiction ratione materiae and ratione loci in a claim for damages against a German company for breach of a contract of employment.

The court has held on the question of jurisdiction ratione materiae that the Convention includes within its substantive field of application actions arising out of contracts of employment, since labour law is not one of the matters excluded by Article 1 thereof. With regard to jurisdiction ratione loci it has held that the place of performance referred to in Article 5(1) of the Convention may be either the place of work of the employed person or the place where performance

was required or found to be bad or unfinished, a plurality of places of performance giving rise to a plurality of jurisdictions available to the applicant.

No. 6 Judgment of the Conseil des Prud'hommes, Vannes, of 19 December 1975
Laforge v Naturana-Miederfabriken
(Recueil Dalloz-Sirey, 1976, No. 3, Jurisprudence, p. 203; Note de DROZ, p. 204)

Only the German court has jurisdiction to settle a dispute concerning a sales agent employed by a German company where the contract contains a clause conferring jurisdiction in any dispute relating to its performance on the court of first instance, Tübingen.

Article 17 provides that if the parties have, by agreement in writing, agreed that a court of a Contracting State is to have jurisdiction to settle any disputes which have arisen or which may arise in connexion with a particular legal relationship, that court shall have exclusive jurisdiction, except in certain circumstances mentioned in Articles 12, 15 and 16. Article 1 of the Convention states "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal"; the expression "civil matters" must be given a wide meaning; in fact, Article 1 specifies that it does not apply to "social security"; therefore, if the Contracting States considered that social security was a "civil matter", it stands to reason that labour law is also a "civil matter" and that the Convention applies to it since it has not been excluded by a special provision.

Application in cases concerning maintenance

No. 7 Order of the Landgericht Stuttgart of 22 September 1975
M.M.L.L. v R.L. 17 OH 30/75

The Landgericht has granted leave for the partial enforcement of an interim injunction of the Tribunal de Grande Instance, Versailles. According to the terms of the injunction the respondent had to pay the applicant arrears of maintenance of 8,000 FF per child for each of their children. The proceedings were conducted in accordance with the EEC Convention and not the Hague Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, because the issue was not a claim for maintenance on behalf of a child but the formal and substantive right of a wife to payment of a contribution towards the maintenance of her children.

TITLE II

JURISDICTION

Section 1

General provisions

(See also Nos. 31, 32, 33 and 34)

No. 8 Judgment of the Cour d'Appel, Paris, of 14 June 1975
Michael Horauf Maschinen v Société Leysens Meier
(Revue critique de droit international privé, 1976, No. 1, p. 117; Note de DROZ, p. 120)

A French company (the representative) and a German company mutually agreed to determine a representation agreement. In accordance with this agreement the French company returned the stock in its possession to the German company which refused to pay for it.

The French court did not have jurisdiction to entertain the action brought by the representative in France of a company having its registered office in Germany for payment for returned stock, because of the principle that payment is made at the place where the debtor is domiciled. Since national laws can neither add to nor subtract from the Convention, Article 15 of the French Decree of 20 July 1972, which imposes upon the party claiming lack of jurisdiction the duty to make known the court which he claims has jurisdiction, does not apply and on the other hand it is not for the court to designate the foreign court which has jurisdiction.

No. 9 Judgment of the Tribunal d'Instance, Angers, of 4 November 1975
Sion v Société Nino
(Recueil Dalloz-Sirey, 1976, No. 3, Jurisprudence, p. 202;
Note de DROZ, p. 204)

The court having jurisdiction in respect of the breach of the contract of employment entered into by a German company and a French employee, who in this particular case was a commercial representative ("Handelsvertreter" was the description in the original contract) is the German court, the two parties having expressly agreed that the German courts were to have jurisdiction and that the place of performance was to be Germany.

Under Article 2 of the Convention a defendant domiciled in a Contracting State must be sued in the courts of that State; however, under the provisions of Article 5 and by way of exception to that rule, a person domiciled in a Contracting State may, in another Contracting State, be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question.

In Article 3, the Convention expressly excludes the application of Article 14 of the code civil, which relates to the right to sue in French courts and, so far as the Convention's rules relating to jurisdiction are concerned, it does not include any restriction relating to the domestic public policy of the Contracting States and in particular it does not enact any special rules relating to jurisdiction for disputes arising out of contracts of employment, which are governed by the general rules.

Section 2

Special jurisdiction

Determination of the "place of performance of the obligation in question"

No. 10 Judgment of the Court of Justice of the European Communities, Luxembourg, of 6 October 1976
Industrie Tessili Italiana v Dunlop A.G.
(Reference for a preliminary ruling by the Oberlandesgericht Frankfurt am Main)

The Oberlandesgericht Frankfurt am Main, on an appeal against a judgment of the Landgericht Hanau which had held that it had jurisdiction in an action for repudiation of a contract for delivery by Tessili of ski suits, referred to the Court of Justice of the European Communities for a preliminary ruling a question relating to the interpretation of the expression "the place of performance of the obligation in question" within the meaning of Article 5(1) of the Convention.

Since this was the first case referred to it pursuant to the Protocol which gives it jurisdiction to interpret the Convention, the Court of Justice first of all laid down certain general principles for the interpretation of the Convention and then answered the question referred as follows:

"The 'place of performance of the obligation in question' within the meaning of Article 5(1) of the Convention ... is to be determined in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought."

No. 11 Judgment of the Oberlandesgericht Oldenburg, 6th Civil Senate, of 14 November 1975
B.K. v V. - D., F. 6 U 74/75

The German plaintiff had entered into a contract with the French defendant for the sale of a consignment of trousers. As the trousers were not delivered the plaintiff commenced proceedings for repayment of the amount paid on account and also of the travel expenses of a journey to Paris in connexion with the contract of sale.

The Oberlandesgericht upheld the judgment of the Landgericht Oldenburg which dismissed the application as being inadmissible on the ground that it did not have international jurisdiction. Jurisdiction in Germany can only arise under Article 5(1) of the Convention. The requirements prescribed by Article 13 for a sale on instalment credit terms were not fulfilled simply because the purchaser made a payment on account of the purchase price.

The action is concerned with a matter relating to a contract within the meaning of Article 5(1) of the Convention; under that provision it makes no difference whether the right which the plaintiff claims he has to rescind a contract is based on a clause of the contract or on a statutory provision. However, the obligation to repay the amount paid on account does not have to be performed in the district of the Landgericht Oldenburg. The concept of the place of performance contained in Article 5(1) is not to be defined according to the rules of the German international law relating to civil procedure, but according to the prevailing consensus of opinion in the Contracting States on this concept. In the case of money debts what matters therefore is the actual place of residence or registered office of the debtor undertaking. Since the circumstances in which the debtor has to make payments at a place other than his residence or the registered office of his undertaking differ in each Member State, the actual place of residence of the debtor or the registered office of his undertaking is the only feature of the concept common to all the Contracting States of the place where payment is to be made.

No. 12 Judgment of the Tribunal de Commerce, Verviers, 1st Chamber, of 31 May 1976
S.P.R.L. "André Ransy" v Société de droit néerlandais Volvo Car B.V. R.G. 57/76

The Tribunal de Commerce, Verviers, before which a claim for compensation was brought by S.P.R.L. "André Ransy" for unilateral repudiation of an exclusive sales agreement, held that it had jurisdiction.

The Convention takes precedence over Belgian rules relating to jurisdiction and consequently over those prescribed by the Law of 27 July 1961, even though that law is mandatory. Article 5(1) of the Convention confers jurisdiction in matters relating to contract on the courts for the place of performance of the obligation in question.

The fact that laws are enacted which govern matters relating to contract does not cause them to lose their contractual nature. The court must interpret the expression "the place of performance of the obligation in question" in accordance with its own domestic law. A grantor who intends to bring to an end a concession granted for an indefinite period must give reasonable notice or agree to pay fair compensation. By deciding to give notice the grantor discharged his obligation in Belgium. The indemnity asked for because insufficient notice was given is a claim for compensation and corresponds to performance of the original obligation.

Note: On the Belgian Law of 27 July 1961 see also Nos. 14, 32 and 33

No. 13 Order of the Oberlandesgericht Frankfurt, 20th Civil Senate, of 9 December 1975
S.A. G.M. S.p.A. v Firma J.S.F. & S. 20 W 185/75
(Recht der internationalen Wirtschaft, Aussenwirtschaftsdienst des Betriebs-Beraters, 1976, No. 2, p. 107)

The Oberlandesgericht dismissed the appeal against an order for enforcement of a judgment of the Appeal Court, Brescia, of 13 June 1973. In accordance with the first sentence of Article 17 of the German implementing law, read together with Article 546(1) ZPO (Zivilprozessordnung - Code of Civil Procedure), it granted leave to appeal on a point of law against its order on the ground that an important question of principle had arisen. The subject-matter of the original action was the debtor firm's obligation to deliver and assemble a casting installation at the creditor firm's factory in Brescia.

Since proceedings were instituted before the entry into force of the Convention it was necessary, having regard to the second paragraph of Article 54, to consider whether, on the Convention's being applied, international jurisdiction was conferred upon the State in which judgment was given.

The Italian courts did not have jurisdiction under Article 18, because the debtor firm had not entered an unconditional appearance. It is true that, after the Corte di Cassazione, Rome, had finally rejected the plea of want of jurisdiction, it pleaded unconditionally on the main issue; yet that was not submission to the jurisdiction of the Italian courts, for there can be no question of such submission by the defendant if an attempt to challenge the jurisdiction of the foreign court had no foundation according to the law applicable to that court and consequently had from the very beginning no chance of success.

The Italian courts, however, had jurisdiction under Article 5(1). The place where an obligation is to be performed must be inferred from substantive law. Private international law determines the substantive law to be applied to the specific matter, in this case, Italian substantive law. According to Article 1182 of the Codice Civile the obligation of the debtor firm had to be performed, at least in part, in Italy.

An oral agreement, confirmed in writing, conferring jurisdiction upon the appropriate court in Frankfurt, had not been proved.

There was no reason to believe that authorization to enforce the judgment would contravene public policy in the Federal Republic of Germany.(Article 27(1)). In any case, the fact that the appeal court in Brescia, applying Italian law, took the view that the debtor firm's business conditions, (limiting the

purchaser's rights if deliveries to him are defective, to repairs or replacements only), were not applicable between the parties, did not constitute any such contravention.

Concept of "obligation" - Belgian law of 27 July 1961 on exclusive concessions

No. 14 Judgment of the Court of Justice of the European Communities, Luxembourg, of 6 October 1976
Etablissements A. De Bloos, S.P.R.L. v Société en commandite par actions Bouyer
(Reference for a preliminary ruling by the Cour d'Appel, Mons)
Case 14/76

The Cour d'Appel, Mons, on the hearing of an appeal against a judgment in which the Tribunal Commercial, Tournai, held that it lacked jurisdiction in an action based on the Belgian Law of 27 July 1961 for damages for unilateral repudiation without notice of an exclusive distribution agreement because "the place where the obligations arose and were to be performed was ... in France where the defendant has its registered office", referred to the Court of Justice of the European Communities for a preliminary ruling questions relating to the interpretation of the following expressions:- "obligations", referred to in Article 5(1), and "branch, agency or other establishment", referred to in Article 5(5) of the Convention. The Court gave the following answers to the questions referred:

"In disputes in which the grantee of an exclusive sales concession is charging the grantor with having infringed the exclusive concession, the word "obligation" contained in Article 5(1) of the Convention ... refers to the contractual obligation forming the basis of the legal proceedings, namely the obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.

In disputes concerning the consequences of infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or dissolution of the contract, the obligation to which reference must be made for the purposes of applying Article

5(1) of the Convention is that which the contract imposes on the grantor and the non-performance of which is relied on by the grantee in support of his claim for damages or for the dissolution of the contract. In the case of actions for payment of compensation by way of damages, it is for the national court to ascertain whether, under the law applicable to the contract, an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved.

When the grantee of an exclusive sales concession is not subject either to the control or to the direction of the grantor, he cannot be regarded as being at the head of a branch, agency or other establishment of the grantor within the meaning of Article 5(5) of the Convention."

Note: On the Belgian Law of 27 July 1961 see also Nos. 12, 32 and 33

The place where the harmful event occurred

No. 15 Judgment of the Court of Justice of the European Communities, Luxembourg, of 30 November 1976
Handelskwekerij G.J. Bier B.V. and the Reinwater Foundation v Mines de Potasse d'Alsace S.A.
(Reference by the Gerechtshof of The Hague for a preliminary ruling) Case 21/76

In an action brought by the plaintiffs, which are established in the Netherlands, against the defendant, having its registered office at Mulhouse, because the latter discharges into the Rhine a large amount of residuary salts which causes damage to the first plaintiff's seed beds, the Gerechtshof of The Hague asked the Court of Justice of the European Communities to interpret the expression "the place where the harmful event occurred" within the meaning of Article 5(3) of the Brussels Convention.

The Court gave the following answer:

"Where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5(3)

of the Convention ... must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.
The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage."

No. 16 Judgment of the Arrondissementsrechtbank, Arnhem, of 3 July 1975
Forge et coutellerie Dubois N.V., Wopla plastics v Fantu Food B.V. and Henk Reinders KG 1975/95

The court before which an action (summary proceedings) was brought by two Belgian undertakings against a Netherlands undertaking and a German undertaking for infringement of patent rights in containers for the transportation of foodstuffs ("transportbakken") decided that it had jurisdiction under Article 5(3). It stayed proceedings pursuant to the second paragraph of Article 20 because it had not been shown that the second defendant had knowledge of the summons instituting the proceedings, although counsel for the plaintiffs had forwarded a copy thereof by ordinary post to the second defendant who did not appear.

The court then invited the plaintiffs to consider the procedure mentioned in the second paragraph of Article IV of the Protocol annexed to the Convention for service of its judgment as a basis for continuing with the proceedings.

No. 17 Judgment of the Arrondissementsrechtbank, Zwolle, of 18 February 1976

N.V. Verzekeringsmaatschappij De Oude Zwolsche van 1895 v B.V. G. Beens & Zn et Heinrich Häussling 307/1974

A German manufacturer sold some rolls of felt to a Netherlands undertaking which resold part thereof to a third undertaking. These rolls caught fire of their own accord in the latter's warehouse. The insurer, in whom the rights of the undertaking suffering the loss are vested, sued the manufacturer and the intermediary in the court at Zwolle which has held that it has jurisdiction in the action against the German manufacturer, because the place where the harmful event occurred was in the district of Zwolle (Article 5(3)).

Jurisdiction when there is a number of defendants

No. 18 Judgment of the Landgericht Stuttgart, 3rd Civil Chamber, of 14 October 1975

H.v.Sch. v J.M. and others 3 O 112/75

The first and second defendants, who are resident in France, are personally liable partners of the third defendant, a general partnership having its registered office in the Federal Republic of Germany, which was formed for the purpose of exploiting the first defendant's industrial property rights. The plaintiff, a patent agent, claimed payment of his fees and repayment of expenses incurred in connexion with the said rights of the first defendant.

The Landgericht affirmed that it has international jurisdiction. The interrelationship between the claims affords justification under Article 6 (1) of the Convention for suing the three defendants jointly, because not only was the first defendant in contact with the plaintiff through the partnership, but he also made payments to the plaintiff through it.

No. 19 Judgment of the Corte di Cassazione, plenary session in civil proceedings, of 6 November 1975
Società B.V. Handel-en Exploitatie Maatschappij 'Selene' v Società Philips S.p.A., Tacqui Tellian ved. Colombo and others 3718

In this judgment, which was delivered in accordance with Article 41 of the Italian Codice di Procedura Civile (code of civil procedure) the Corte di Cassazione ruled that the Italian court has jurisdiction in respect of the Netherlands plaintiff.

The heirs of Mr Colombo requested the court of first instance to order the Italian undertaking Philips, the employer of Mr Colombo and the original defendant, jointly and severally with the Netherlands undertaking Selene, the managing company of the hotel which was burned down, and against which the plaintiffs extended their claim after the company had been summoned and entered an appearance, to pay compensation for the loss suffered in consequence of the death of their relative in a fire in a hotel in the Netherlands. The Corte di Cassazione considered that, in the present case, there were a number of defendants within the meaning of Article 6(1) of the Convention. In that provision the reference to a number of defendants includes not only the situation where on the basis of a single legal relationship the same proceedings are instituted against a number of parties (when these parties must be joined) but also the situation in which separate proceedings are instituted against a number of parties involving separate but connected cases (when these parties may be joined).

The principle of the "continuity of jurisdiction" laid down in Article 5 of the Codice di Procedura Civile means that the subsequent reduction in the number of defendants (the heirs of Mr Colombo and the Philips undertaking in fact reached a settlement through the Guidice Conciliatore) does not in any way affect the Italian jurisdiction.

(The Corte di Cassazione observed obiter that if it were wished to invoke the situation in which there are a number of defendants only in the context of an initial joinder, and the situation of a third party in third party proceedings in every subsequent joinder of the parties, the present proceedings would fall under Article 6 (2) of the Convention.)

Section 3

Jurisdiction in matters relating to insurance

Section 4

Jurisdiction in matters relating to instalment sales and loans

(See No. 11)

Section 5

Exlusive jurisdiction

Claim for payment of rent

No. 20 Judgment of the Landgericht Aachen of 24 October 1975
W.K. v G. and M.St. 5 S 339/75
(Neue juristische Wochenschrift, 1976, No. 11, p. 487)

The parties are German citizens resident in their home country. The plaintiff let his house in the Netherlands to the defendants and brought proceedings against them claiming payment of the rent. His view that the German court has jurisdiction is based on a clause of the lease stating that it is governed by German law and conferring jurisdiction on the courts in Aachen. The Landgericht Aachen which heard the appeal dismissed the action as being inadmissible, because under Article 16(1) of the Convention the Netherlands courts have exclusive jurisdiction.

Article 16(1) also applies to actions limited to a claim for payment of rent. The contrary view expressed in the report on the Convention by the experts appointed by the government overlooks the fact that in proceedings for payment of rent, ancillary questions (e.g. concerning the property leased) may arise and that these questions, which must be decided by national law, may well be decisive to the outcome of the proceedings.

Moreover, distinguishing between actions limited to claims for payment of rent and other actions may in practice lead to difficult demarcation problems.

The court decided not to refer the question of interpretation to the Court of Justice of the European Communities for a preliminary ruling in accordance with Article 3(2) of the Protocol of 3 June 1971 which leaves this decision to the discretion of the court. Although the view expressed in the German preparatory works (e.g. Parliamentary drafts and debates) differs from that of the court, it did not consider that reference of the question to the Court of Justice of the European Communities for interpretation was necessary, because the differing opinion was not substantiated in detail. The court was not aware of any judicial decisions which followed that opinion and which gave specific reasons for doing so.

Actions relating to rights in rem in immovable property

No. 21 Judgment of the Arrondissementsrechtbank, Amsterdam, First Chamber B, of 25 November 1975
Société civile immobilière de Bourgogne, Société civile particulière et immobilière "Azuréenne" v Gerardus Jurriaan Raat 73. 3878

Two French companies sold, subject to a condition precedent, a property in France to a Dutchman. Part of the purchase price had to be paid when the condition precedent was fulfilled. The debtor failed to perform his obligation and the creditors sued him in the court of the place where he was domiciled for the amount stated in the penalty clause of the agreement for sale. The court held that it had jurisdiction because the action was not concerned with real property rights.

Procedure relating to enforcement of judgments

No. 22 Order of the Oberlandesgericht Nürnberg, 9th Civil Senate, of 5 April 1974
Firma R.S. v Firma E.R. 3 W 31/74

The Oberlandesgericht had to give judgment on an appeal against an order containing enforcement measures. The issue in the main action between an Italian manufacturer of toys - the debtor firm - and its sole sales representative for Germany - the creditor firm - is whether and if so how many sales were concluded directly in Germany, i.e. without the creditor firm's participation. The Landgericht, in a judgment of 14 November 1973 for part only of the claim, ordered the debtor firm to produce an account of the commission due and payable and to supply particulars of the transactions which it carried out in the Federal Republic. Since the debtor firm did not comply with the partial judgment the Landgericht ordered that several enforcement measures be taken against it. The debtor firm appealed against this judgment on the ground that German courts do not have jurisdiction to enforce German judgments outside Germany.

The Oberlandesgericht dismissed the appeal in so far as it was directed against the threat of a fine or imprisonment under Article 888 ZPO (Zivilprozessordnung - Code of Civil Procedure). The fact that the debtor's residence and place of business was in Rome made no difference; there was no encroachment upon any foreign jurisdiction, because the order for enforcement was directed against the debtor firm only within the frontiers of the Federal Republic of Germany. On the other hand, the Oberlandesgericht allowed the appeal in so far as it was directed against the order that an accountant in Rome was to take from the books of the debtor firm extracts relating to the transactions in question. According to Article 16 of the Convention the Contracting State in which the judgment has been or is to be enforced shall have exclusive jurisdiction to take measures of this kind.

No. 23 Judgment of the Oberlandesgericht Nürnberg, 9th Civil Senate, of 25 February 1976
Firma E.R. v Firma R.S. 9 U 167/75

In these proceedings the parties and the whole of the facts are the same as those to which the order of the Oberlandesgericht Nürnberg of 5 April 1974 (cf. No. 22) related. The debtor firm was ordered first of all in a judgment of 14 November 1973 for part only of a claim to prepare an account of commission due and payable and to supply certain particulars. It lodged an appeal against the coercive measures contained in the order for the enforcement of this partial judgment which was dealt with by the order of 5 April 1974.

After the debtor firm had supplied certain particulars, which however the creditor firm considered to be inadequate, the latter brought a fresh action against the debtor firm and obtained judgment in the Landgericht by which the debtor firm was ordered to permit inspection of its books and other documents and to file an affidavit verifying the vouchers it had produced. On appeal the debtor firm then submitted that this judgment contravened Article 16(5) of the Convention, because in proceedings for the enforcement of a judgment the court of the place of domicile has exclusive jurisdiction. Essentially, the judgment is executory in character and it cannot be implemented according to the criteria laid down in its operative part, because enforcement must be effected under Italian law.

The Oberlandesgericht dismissed the appeal. A sharp distinction must be drawn between a judicial decision and its enforcement. It is true that the German plaintiff cannot make direct use of the judgment, but it is the judgment alone which enables it to embark upon enforcement under Italian law.

Section 6

Jurisdiction by consent

(See also Nos. 6, 9 and 13)

Clauses conferring jurisdiction in general conditions of sale

No. 24 Judgment of the Court of Justice of the European Communities, Luxembourg, of 14 December 1976
Estasis Salotti di Colzani Aimo and Gianmario Colzani
v RÜWA Polstereimaschinen GmbH
(Reference for a preliminary ruling by the Bundesgerichtshof)
Case 24/76

In a case which raised questions concerning the interpretation of Article 17 of the Convention the Bundesgerichtshof asked the Court for a preliminary ruling. To be more precise, it referred to the Court the question whether in two particular sets of circumstances the requirement of an agreement in writing under the first paragraph of Article 17 can be regarded as fulfilled.

In its judgment the Court first of all made some general observations on the interpretation of Article 17. It affirmed that the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. The purpose of these formal requirements is to ensure that the consensus between the parties, which must be clearly and precisely demonstrated, is in fact established.

The Court in answer to the questions referred ruled as follows:
"Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention ... is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.

In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 of the Convention is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care."

Oral agreement confirmed in writing

No. 25 Judgment of the Court of Justice of the European Communities, Luxembourg, of 14 December 1976
Galeries Segoura v Rahim Bonakdarian
(Reference for a preliminary ruling by the Bundesgerichtshof)
Case 25/76

In the main action the question arose whether a clause conferring jurisdiction was to be regarded as validly concluded by the parties.

By its first question the Bundesgerichtshof asked the Court whether the requirements of Article 17 of the Convention are satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction. By its second question the Bundesgerichtshof asked whether the requirements of Article 17 are satisfied if, in dealings between merchants, a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause conferring jurisdiction and if the purchaser does not challenge this written confirmation. (The circumstances envisaged in this question were a sale concluded without any reference to the existence of general conditions of sale.)

The Court in a single answer to the questions referred ruled as follows:

"In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 of the Convention ... as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.

The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship

between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction."

Clause conferring jurisdiction contained in an invoice

No. 26 Judgment of the Rechtbank van koophandel, Kortrijk, 2nd Chamber, of 7 October 1975
P.V.B.A. M.I. v K.
(Rechtskundig Weekblad, 1976, No. 32, col. 2030)

The commercial court of Kortrijk (Courtrai), before which the undertaking M.I. brought an action against J. and O.K. for payment in respect of goods sold and delivered, held that it did not have jurisdiction ratione loci.

The Convention applies to an action brought after its entry into force, even if the action relates to obligations which arose before that date.

Under Article 17 of the Convention the parties can derogate from the normal rules governing jurisdiction only by means of an agreement in writing or by an oral agreement confirmed in writing. The fact that no protest was made when the invoices, which included among the general conditions such a jurisdiction clause, were received cannot in law be interpreted as a tacit acceptance of this clause as against a national of the Federal Republic of Germany.

Article 5(1) of the Convention confers jurisdiction only on the courts for the place of performance of the obligation in dispute. If the dispute relates to a payment which has yet to be made it is the place where payment must be made and not where it may be tendered which is determinative.

Agreement as to jurisdiction in a confirmation of an order

No. 27 Judgment of the Corte di Cassazione, plenary session in civil proceedings, of 20 October 1975

Ditta Wilhelm Wiest Maschinen und Werkzeugfabrik v
Manifattura Ceramica Pozzi S.p.A. 3397

The German undertaking Wiest was summoned before the Italian court for failure to fulfil its obligations relating to delivery of the goods sold and objected that the court before whom the matter had been brought did not have jurisdiction and appealed to the Corte di Cassazione in plenary session as the court competent to settle the question of jurisdiction within the meaning of Article 41 of the Codice di Procedura Civile (code of civil procedure). In its judgment the Corte di Cassazione rejected the appeal on the following grounds:

The clause restricting jurisdiction to the German court, upon which the plaintiff relies, cannot be held to fulfil the formal requirements laid down in Article 17 of the Convention, since the parties not only did not sign the document, a "confirmation of an order", which contains the clause, but do not appear even to have approved it by an exchange of letters or of telegrams. The jurisdiction of the Italian court in proceedings concerning the termination of the contract of sale is based on Article 5(1) of the Convention. In the contract, the German seller undertook to install a machine in the buyer's Italian place of business; in that case, the place where the obligation to deliver the goods sold is to be performed must be identified as the place where the machine was to be installed and not the place where the machine was handed over to the carrier for delivery.

No. 28 Judgment of the Landgericht Heidelberg of 29 April 1976
O 2/76 KfH II
(Recht der internationalen Wirtschaft, Aussenwirtschaftsdienst des Betriebs-Beraters, 1976, No. 9, p. 533)

The Landgericht dismissed the German plaintiff's claim against the French defendant as being inadmissible because no clause conferring jurisdiction upon it had been validly agreed in accordance with Article 17.

Although the plaintiff by means of a clear reference on the front of its form of confirmation of order referred to the printed general conditions of sale and terms of payment on the back of that form, there was no separate reference to the jurisdiction clause included among the general conditions. A general reference to general business conditions is not sufficient.

No. 29 Judgment of the Oberlandesgericht Frankfurt of 27 April 1976
5 U 173/75
(Recht der internationalen Wirtschaft, Aussenwirtschaftsdienst des Betriebs-Beraters, 1976, No. 9, p. 532)

The German plaintiff claimed payment from the Netherlands defendant for work carried out in connexion with insulation against fire. The Oberlandesgericht, like the Landgericht, dismissed the claim as being inadmissible in the absence of international jurisdiction in favour of the German courts.

The jurisdiction clause in the plaintiff's terms of delivery and payment, to which it referred in its confirmation of order, was not agreed by the parties in the form prescribed by Article 17. Contrary to the plaintiff's view, the defendant's notice to the effect that the plaintiff should begin work cannot be taken as an effective declaration of intent to incorporate the terms of delivery and payment into the contract. Although in principle clauses conferring jurisdiction can under Article 17 be agreed by reference to general business conditions such agreement presupposes that this reference is unequivocally comprised in the declared intention of the parties to the contract, and consequently the insertion of clauses conferring jurisdiction in a contract without the knowledge of one of the parties is impossible.

Therefore an agreement conferring jurisdiction cannot be inferred from the conduct of the parties, for instance by one party calling upon the other to begin the work, and thus become a term of the contract.

Agreement conferring jurisdiction contained in the conditions in a bill of lading

No. 30 Judgment of the Oberlandesgericht Düsseldorf, 18th Civil Senate, of 20 November 1975
Firma K.H. & Co. GmbH v R.J. 18 U 44/75
(Recht der internationalen Wirtschaft, Aussenwirtschaftsdienst des Betriebs-Beraters, 1976, No. 5, p. 297)

The claim by a German forwarding undertaking pending before the appellate court against a Belgian undertaking for damages for non-performance of a contract of affreightment was held to be admissible and well-founded.

The German court's jurisdiction was determined by Article 5(1), because Düsseldorf being the place for delivery was the place of performance. This followed from German law which was applicable, because the focal point of the contract was in Germany.

The jurisdiction of the Belgian courts was not determined by the conditions contained in the defendant's bill of lading, which provided that the courts in Antwerp were to have jurisdiction, because the formal requirement of the first paragraph of Article 17 had not been complied with. Since there was no statement by the plaintiff in the conditions contained in the bill of lading and since also the plaintiff had made no other reference in writing to the conditions of the bill of lading there was no declaration by the plaintiff in proper form.

No.31 Judgment of the Rechtbank van koophandel, Antwerpen, 12th Chamber, of 19 November 1975
Hamburger Senator Shipping Cy and others v La Générale de Berne and others
(Rechtskundig Weekblad, 1976, No. 35, col. 2225)

The decided cases, according to which the clause in a bill of lading conferring jurisdiction on a foreign court is valid only if it is certain that that court will apply the mandatory provisions of Article 91 of the law of 21 August 1879 as interpreted by Belgian case-law

and legal writings cannot, after the entry into force on 1 February 1973 of the Convention, be relied upon against a clause in a contract providing for a court of a Contracting State to have jurisdiction if at least one of the parties is domiciled in a Contracting State.

Agreement conferring jurisdiction in relation to an exclusive concession - Belgian Law of 27 July 1961

No. 32 Judgment of the Tribunal de Commerce, Brussels, of 15 January 1976
S.A. Agecobel v S.A. Flaminaire
(Journal des tribunaux, 1976, No. 4948, p. 210)

The Tribunal de Commerce, Brussels, before which S.A. Agecobel had brought an action for damages for unilateral repudiation of an exclusive sales concession, held that it had no jurisdiction ratione loci. Community law takes precedence over national law whatever that law may provide. The Convention establishes a community legal system which is a separate, self-sufficient entity, without its being possible either to add to or subtract from it; to retain other rules as to jurisdiction , by way of exception, based on national laws would run directly counter to the intention of the Community legislature.

Article 17 applies whenever there is a clause conferring jurisdiction on the courts of a Contracting State. The only exceptions to this rule are those exhaustively enumerated in the second paragraph of Article 17. Consequently, as the Tribunal held that the conditions determining the validity (see first paragraph of Article 17) of the clause conferring jurisdiction were present, it was forced to infer that the court designated by the parties was the only one having jurisdiction in all actions relating to the agreement in question granting an exclusive sales concession, including those which arose out of the repudiation of the contract, and that all other courts had to hold that they did not have jurisdiction.

Note: On the Belgian Law of 27 July 1961 see also Nos. 12, 14 and 33

No. 33 Judgment of the Bundesgerichtshof of 3 March 1976 VIII ZR 251/74 (Recht der Internationalen Wirtschaft, Aussenwirtschaftsdienst des Betriebs-Beraters, 1976, No. 7/8, p. 447)

The German plaintiff granted the Belgian defendant the exclusive right to sell its products in Belgium and Luxembourg. The plaintiff in the pending application, which has succeeded in two courts, has asked for a declaration that it had determined the agreement by notice. The defendant on appeal on a point of law has asked for the application to be dismissed on the ground that the German courts do not have international jurisdiction. The Bundesgerichtshof has dismissed the appeal.

The agreement conferring jurisdiction, which was validly concluded in accordance with the first paragraph of Article 17 of the Convention, provided that the courts of Kronach, in Oberfranken, were to have jurisdiction. The defendant's objection that the jurisdiction of the German courts had been excluded for an indefinite period by the Belgian law of 27 July 1961 and 13 April 1971 on the unilateral determination of exclusive sales agreements cannot be sustained. For although that law established in favour of sole distributors an additional jurisdiction, which under Belgian law cannot be excluded by agreement between the parties, it does not, however, forbid agreements conferring jurisdiction to settle disputes which it governs. Furthermore, in relation to actions brought by the grantor of the concession, which is the case in point here, the Belgian law does not contain any rules for determining which court has jurisdiction. The question whether with reference to Article 17 of the Convention a validly concluded agreement conferring jurisdiction may still be challenged by a distributor under Belgian law in Belgium can only be relevant for a Belgian court before which proceedings are brought under that law.

Note: On the Belgian law of 27 July 1961 see also Nos. 12, 14 and 32

Proceedings arising out of a contract for commercial representation - Choice of forum

No. 34 Judgment of the Pretura di Brescia, of 25 October 1975
Moretti v Soc. Schrottverwertung GmbH
(Rivista di Diritto Internazionale Privato e Processuale, 1976, No. 3, p. 547; Il Foro Italiano, 1976, No. 1, I, Col. 250)

The plaintiff, formerly an agent of the Schrottverwertung GmbH, claimed that the latter should be ordered to pay arrears of commission and compensation for termination of his contract. The German undertaking entered appearance and raised the objection of want of jurisdiction and competence by the Pretore hearing the case, relying on a clause in the contract, concluded in August 1969, which provided that a German court should have jurisdiction in any disputes. The Pretore considered that the above-mentioned clause was void because it infringed rules which are binding by virtue of the principle that the jurisdiction of the Italian courts may not be excluded by agreement (Art. 2 of the Codice di Procedura Civile (Code of Civil Procedure)). The Pretore further observed that, even if it were held that the nullity of the article in question is cured by the entry into force of the first paragraph of Article 17 of the Convention, the Italian court would also be deemed to have jurisdiction. Indeed Article 413 of the Codice di Procedura Civile, as amended by Law No. 533 of 11 August 1973, provides that terms of a contract derogating from territorial jurisdiction are void also in questions arising in the field of commercial representation (with regard to which Article 409(3) provides that the Pretore shall have jurisdiction in his capacity as "giudice del lavoro" [labour court judge]). This provision must be deemed to have repealed Law No. 804 of 21 June 1971 ratifying the Convention in so far as it permits derogations by agreement from jurisdiction in the matters indicated in Article 409 of the Codice di Procedura Civile.

Agreement conferring jurisdiction concluded for the benefit of only one of the parties

No. 35 Judgment of the Landgericht Trier, 6th Chamber, of 30 October 1975
U.C.d.C.S.A. v J.F.O. 6 O 74/75

The plaintiff, a French credit undertaking, claimed repayment of a loan. The defendant, who at the time the contract was concluded was resident in France, submitted that the court where the plaintiff sought redress did not have jurisdiction, because on the basis of the plaintiff's general business conditions the parties had agreed that the courts of Strasbourg had jurisdiction.

The Landgericht held in an interlocutory judgment that it had jurisdiction ratione loci. Under the second paragraph of Article 14 the court of the State in which the borrower is domiciled has jurisdiction ratione loci. Although the parties concluded an agreement conferring jurisdiction, which is valid according to Article 15, the plaintiff can nevertheless bring proceedings in the courts where the defendant is domiciled, because the agreement conferring jurisdiction within the meaning of the third paragraph of Article 17 was concluded for the benefit of only one party. The fact that the defendant had to enter into this agreement in order to obtain credit indicated that it was not in his interest for it to be included in the contract. It is true that it could have been in the interests of both parties, particularly if difficult legal questions had to be determined, that French courts should adjudicate, but such an intention was not disclosed in the agreement conferring jurisdiction concluded between the parties. It was rather to be construed as meaning that legal disputes must be argued at the lending institution's principal place of business in Strasbourg and not for instance before the courts where the other party to the contract is domiciled.

Section 7

Examination as to jurisdiction and admissibility

(See Nos. 16 and 52)

Section 8

Lis Pendens - Related actions

No. 36 Judgment of the Tribunale di Bassano del Grappa of 13 February 1976
Ditta Armet di Giovanni Ferronato v Ditta Barth & Phol KG Elektrowerke

By this judgment the objection of lis pendens submitted by the plaintiff was overruled on the ground that the proceedings regarding a claim on a quantum valebat instituted by the plaintiff before the Italian court against the German undertaking for a reduction in the price because of latent defects in the goods sold, in addition to compensation for damage, constitutes a related action and not a lis pendens in respect of the proceedings instituted by the foreign seller before the courts of its own country to have the same contract performed and to obtain an order that the recipient of the goods must pay the balance of the price. It is insufficient to constitute lis pendens that a common feature of the proceedings pending before different courts is that they involve the same legal points; it is necessary for the parties, the grounds of the action and of the claim to be exactly the same. The objection that the cases are related should be submitted, or raised by the court not later than the first hearing on the substance; in any case, the fact that the actions are related does not oblige the court before which the matter is subsequently brought to stay the proceedings and to decline jurisdiction.

Section 9

Provisional and protective measures

Procedure in cases of attachment

No. 37 Judgment of the Amtsgericht Hamburg-Harburg of 9 July 1975

Firma N.R.G. & Co. v Firma G.S.K. B.V. 612 C 257/75

In proceedings for an order for attachment the plaintiff had claims against the Netherlands defendant which were not disputed. After the defendant had discontinued payments and asked in the Netherlands for a postponement of the payment of the debt, the plaintiff obtained an order for attachment in respect of the defendant's assets in the Federal Republic of Germany. The Amtsgericht dismissed its protest against this order.

The international jurisdiction of German courts is governed by Article 24 of the Convention; the kind of measures to be ordered is determined by domestic German law. The attachment was lawful under Article 917(2) of the Zivilprozessordnung (Code of Civil Procedure), which states that the need to enforce a judgment abroad is to be regarded as an adequate ground for attachment. Contrary to a view held in some quarters, this provision also applies if the main issue has to be determined by a foreign court. Furthermore, it still applies to debtors of other Contracting States of the EEC Convention after the entry into force of the latter. For unlike Article 3 of the Convention which provides that certain national provisions relating to jurisdiction shall no longer apply, under Article 24 of the Convention that part of the law of Member States which relates to the granting of applications for provisional measures remains wholly valid. The justification for Article 917(2) in terms of legal policy has not been excluded by the Convention. For, even if decisions are recognised in the other Member States, their enforcement is nevertheless still dependant under Article 31 of the Convention on an application for an order for enforcement, so that the obstacles in the way of enforcement have not disappeared but have merely been reduced.

TITLE III

RECOGNITION AND ENFORCEMENT

Concept of "judgment" within the meaning of Article 25 of the Convention

No. 38 Judgment of the Corte d'Appello, Trieste, of 28 January 1976

Groetschel v Smeragliuolo 78/75

(Rivista di Diritto Internazionale Privato e Processuale 1976, No. 3, p. 559)

Pursuant to Article 25 of the Convention a German court order determining costs or expenses can be made enforceable in Italy independently of the judgment to which that order relates and even although the judgment does not relate to matters coming within the scope of the Convention. In this case the order which was held to be enforceable determined costs and expenses following judgment establishing the paternity of a natural child. The plaintiff requested that enforcement of the order and, in so far as necessary, of the related judgment be authorized. On this point the Corte d'Appello stated that the enforceability of this judgment could not even be considered since questions concerning the status of persons lie outside the scope of the Convention.

Section 1

Recognition

Section 2

Enforcement

(See also No. 13)

Action between the same parties and having the same subject-matter brought before a court of the State where a decision might be enforced pursuant to Article 31 - Prohibition

No. 39 Judgment of the Court of Justice of the European Communities, Luxembourg, of 30 November 1976
Josef De Wolf v Harry Cox B.V.
(Reference for a preliminary ruling by the Hoge Raad of the Netherlands) Case 42/76

De Wolf, having obtained from the Juge de Paix, Turnhout (Belgium), a judgment in default ordering Harry Cox B.V. to pay him the sum stated on an invoice, brought an action before the Kantonrechter, Boxmeer (the Netherlands), on the same subject-matter because, Harry Cox B.V. not having complied with the judgment of the Juge de Paix, Turnhout, the costs of enforcing that judgment were higher than those incurred by bringing a fresh action before the Kantonrechter, Boxmeer.

As the latter granted the application before him, the Attorney General to the Hoge Raad brought an appeal against the judgment of the Kantonrechter on the ground that the said judgment infringed Article 31 of the Convention, if not the Convention as a whole.

The Court of Justice of the European Communities answered the question referred to it by the Hoge Raad for a preliminary ruling as follows:

"The provisions of the Convention ... prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State."

Application for leave to enforce a judgment by a party who is not an interested party

No. 40 Order of the Oberlandesgericht Stuttgart of 21 July 1975
R.L. v E. + A.L.

The Landgericht, the court of first instance, on the application of the children granted leave to enforce the interlocutory order of a French court. On appeal by the father this order was set aside and the application was dismissed as inadmissible. The children were not parties to the French proceedings, in which the appellant was ordered to pay his wife a contribution to the maintenance of the children on the ground that she had a formal and substantive right thereto.

Judgment in default, without a statement of reasons

No. 41 Judgment of the Corte d'Appello, Genoa, of 9 and 21 April 1976
Theisen KG v Bertella
(Rivista di Diritto Internazionale Privato e Processuale, 1976, No. 3, p. 583)

The Corte d'Appello ruled that a German judgment given in default of appearance is enforceable in Italy.

The Corte d'Appello held that the nature of a judgment given in default of appearance in which, under German law, there is no statement of reasons given by the judge does not prevent authorization of enforcement in Italy since, under the system laid down by the Convention, this constitutes no bar to adversary proceedings but merely its postponement because the party against whom enforcement is sought may appeal against the decision authorising enforcement pursuant to Article 36.

Review of the jurisdiction of the court of the State in which the judgment was given (Not permitted)

No. 42 Judgment of the Cour Supérieure de Justice, Luxembourg, of 11 November 1975
Soc. Weinor v S.A.R.L. Wirion Mod'enfants 3914
(Pasicrisie luxembourgeoise, 1976, No. 1-2, II, p. 230)

The court allowed an appeal against a decision refusing to make an order for enforcement of a German judgment in default and held in this connexion that Article 28 of the Convention does not allow the court or authority

applied to to review the jurisdiction of the court of the State in which the judgment was given, except in those cases concerning matters in respect of which Sections 3, 4 and 5 of Title II of the Convention prescribe mandatory or exclusive rules as to jurisdiction. In order to avoid any loopholes, the third paragraph of Article 28 states that "the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction".

The ordinary jurisdiction in contract may not be reviewed by the judge required to adjudicate and the Protocol annexed to the Convention which provides that "Any person domiciled in Luxembourg who is sued in a court of another Contracting State ... may refuse to submit to the jurisdiction of that court" does not contain any provision derogating from this principle.

Set-off after the decision authorizing enforcement of a judgment has been taken

No. 43 Order of the Oberlandesgericht Koblenz, 2nd Civil Senate, of 28 November 1975
L.T. v J.D. 2 W 625/75
(Neue juristische Wochenschrift, 1976, No. 11, p. 488)

The Oberlandesgericht dismissed an appeal against authorization to enforce a judgment of the Tribunale di Trento of 28 November 1974.

The debtor cannot invoke a set-off which he claimed after 8 August 1975, namely after judgment was given for the creditor. According to Article 14(1) of the German implementing law, in appeals against decisions authorizing enforcement "objections may be raised against the claim itself in so far as the grounds upon which they are based did not arise until after the decision was taken." Consequently, the debtor's objections are treated as inadmissible if they could have been raised before the decision was taken.

Since the debtor did not show that the counterclaim by way of set-off arose after judgment was given, his appeal failed.

Article 34 does not infringe the principle of the right of a defendant to be heard

No. 44 Order of the Oberlandesgericht Saarbrücken, 4th Civil Senate, of 13 August 1975
J.v.H. v E.R. 4 W 38/75

The Oberlandesgericht dismissed the appeal against the order for enforcement of a judgment.

The court stated that there are no objections of a constitutional nature against the enforcement of a judgment under Article 34 of the Convention in ex parte proceedings in which the party against whom enforcement is sought was not heard. The reason for this is that the debtor could without any difficulty obtain a hearing by appealing.

Article 33 of the Convention had not been infringed in the case in question. As is shown by Article 4(3) of the German implementing law, it is sufficient for the applicant - which is what happened in this case - to instruct a lawyer entitled to appear in a German court to act as his agent in the proceedings.

Enforcement of an English judgment - Application of the procedure laid down by the Convention

No. 45 Judgment of the Corte d'Appello, Genoa, of 28 July 1975
Orpheus Tanker Corporation v Terukuni Kaiun Kaisha Ltd.
(Rivista di Diritto Internazionale Privato e Processuale, 1976, No. 2, p. 379)

The proceedings were brought in order to obtain the registration ('dichiarazione di efficacia') of a judgment delivered by the High Court of Justice in England in proceedings instituted by the Orpheus Tanker Corporation (having its registered office in Monrovia, Liberia) against Terukuni Kaiun Kaisha Ltd. in which the defendant was ordered to pay the plaintiff a sum of money. The Corte d'Appello, Genoa, had jurisdiction because a ship belonging to the debtor was attached in the port of Genoa as security for the sum due from the Orpheus Tanker Corporation. The court before whom the matter was brought considered that, since Article VIII (3) of the Convention between Italy and the United Kingdom of 7 February 1964 provides that the

procedure for the registration of a British judgment in Italy shall be made "as simple and rapid as possible", this means that the simplified ex parte procedure laid down by the EEC Convention must be applied in this case. The application of this procedure is not precluded by the fact that the United Kingdom is not one of the signatories of the Brussels Convention and did not formally become a party to it after its accession to the EEC, because the procedure established under the EEC Convention must be considered as meeting the criterion"as simple and rapid as possible", and therefore, by implication, agreed.

The Corte d'Appello accordingly ruled that the English judgment was enforceable in Italy and notified the persons concerned that they might avail themselves of the right of appeal within the time-limit and by virtue of Articles 36 et seq. of the Brussels Convention.

No. 46 *Judgment of the Corte d'Appello, Milan, of 29 December 1975 XCan Grain Ltd. v Ditta Oleificio Bestetti and the Pubblico Ministero* (Diritto Comunitario e Degli Scambi Internazionali, 1976, No. 1, p. 149 Rivista di Diritto Internazionale Privato e Processuale, 1976, No. 3, p. 552)

A judgment of the High Court of Justice, Queen's Bench Division, was held to be enforceable in Italy within the meaning of the Convention between Italy and the United Kingdom of 7 February 1964 for the recognition and enforcement of judgments. The Corte d'Appello, Milan, considered that, in providing that the procedure for registration shall be made "as simple and rapid as possible", Article VIII(3) of the aforesaid Convention cannot, by an improper interpretation by analogy of the special provisions contained in the EEC Convention, be interpreted as permitting any adversary proceedings to be adjourned. In the Convention between Italy and the United Kingdom there is in fact no provision corresponding to Articles 34 et seq. of the Brussels Convention and the absence of specific provisions requires that once proceedings have begun, adversary proceedings shall be followed through until judgment.

Section 3

Common provisions

(See Nos. 2 and 4)

TITLE IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

TITLE V

GENERAL PROVISIONS

TITLE VI

TRANSITIONAL PROVISIONS

(See also No. 13)

Legal actions brought before the entry into force of the Convention

No. 47 Judgment of the French Cour de Cassation, 1st Civil Chamber, of 15 October 1975
Société Etablissements Michael Weinig v Société Rochard and others 74-10,982-540

By a summons lodged at the public prosecutor's office on 26 January 1973, the respondent (S.A. Rochard) summoned the appellant

(Société Etablissements Michael Weinig) to appear on 3 April 1973 before the Tribunal de Commerce, Belfort, to answer a claim against it for payment of damages. The official responsible for service omitted to send a copy of the document instituting the proceedings by registered letter, with the result that the copy forwarded through diplomatic channels reached the addressee on 27 March 1973. The latter argues that the lodging of the summons with the public prosecutor was invalid because the official responsible for service failed to bring the summons to its notice by sending it by registered letter and that the summons had not been validly served according to the Brussels Convention on 27 March 1973, the day when the appellant received it; the appellant refused to acknowledge that the French court had jurisdiction.

The Cour de Cassation dismissed the appeal against the judgment given by the Cour d'Appel, Besançon, on a procedural matter of jurisdiction, which upheld the judgment of the Tribunal stating that it had jurisdiction, because the defendant German company (the appellant) failed to establish any prejudice suffered, since at the hearing of 3 April 1973 it had been able to obtain an order adjourning the case for hearing at a later date (3 July next). As the lodging of the document instituting proceedings was in fact valid, the French court before which the matter was brought before 1 February 1973 (the date when the Convention came into force) had at that time, by virtue of Articles 14 and 15 of the Civil Code, jurisdiction to settle disputes between French and German nationals.

No. 48 Judgment of the Corte di Cassazione, plenary session in civil proceedings, of 11 November 1975
S.p.A. Compagnia Allevatori Vitelli v Miscela Macinazione Italo-Svizzera Cereali e Lavorazione Affini S.p.A. and Société Française pour l'Exportation des Produits Agricoles (Francexpa) S.A. 3790
(Diritto Communitario e degli Scambi Internazionali, 1976, No. 2, p. 385)

The Corte di Cassazione admitted the appeal submitted by the Compagnia Allevatori Vitelli pursuant to Article 41 of the Italian

Codice di Procedura Civile (code of civil procedure) for a preliminary ruling on jurisdiction and held that the Italian court had jurisdiction over the French undertaking Francexpa.

In its judgment the Corte di Cassazione held that the clause in the agreement conferring sole jurisdiction on the French court was null and void because it was contrary to the principle contained in Article 2 of the Codice di Procedura Civile that the jurisdiction of the Italian courts cannot be excluded by agreement and the clause was not rendered valid by the Convention between Italy and France of 1930 since, except for Articles 19 and 30, the said Convention does not contain provisions on jurisdiction, which accordingly continues to be governed by the national laws of each of the two Contracting States.

The EEC Convention, which recognizes as lawful agreements settling jurisdiction, was held to be inapplicable to the present case since the relevant court proceedings were instituted before the Convention entered into force, that is, before February 1973.

No. 49 Judgment of the Corte di Cassazione, plenary session in civil proceedings, of 25 May 1976
Società Anonimo Begro v Ditta Antonio Lamberti e Ditta Voccia Emanuele 1877

In proceedings instituted in 1967 by the undertaking Voccia against the undertaking Lamberti for compensation for damage on the grounds of failure to perform a contract, the defendant issued a third-party notice against the Netherlands undertaking Begro. Begro entered an appearance and inter alia objected that the Italian court did not have jurisdiction. The objection was overruled by the court of first instance and also by the court of appeal.

In this judgment the Corte di Cassazione confirmed that the Italian court had jurisdiction over the Netherlands undertaking, not on the ground, adopted by the courts of first and second instance, of the provisions of the Italian Codice di Procedura Civile (code of civil procedure) but solely of the provisions of the Convention, in particular Article 6(2). In fact, the Convention, as a "ius superveniens" (a law enacted subsequent to the commencement of the proceedings), applies also to proceedings pending at the time when it

entered into force since the provisions relating to jurisdiction are in the nature of public law and are therefore immediately applicable.

Judgments delivered after the entry into force of the Convention in proceedings instituted before that date - Enforceability

No. 50 Judgment of the Tribunale di Milano of 10 July 1975
Kores S.p.A. v Montblanc Simplo GmbH
(Il Foro Padano, 1975, No. 8/9, I, col. 239)

The parties concluded a contract in Milan to be performed in Italy wherein it was provided that the court in Hamburg should have jurisdiction in disputes arising from the contractual relationship. Therefore, when Montblanc was summoned before the Italian court it objected, relying on Article 17 of the Convention, that the Italian court did not have jurisdiction. The Tribunale di Milano ruled that, in this case, since proceedings were instituted before the Convention entered into force, jurisdiction was governed by the provisions previously in force, that is to say, the Italian Codice di Procedura Civile (code of civil procedure) which renders the exclusion of jurisdiction invalid in the case of a party having Italian nationality (see Article 2). The Tribunale di Milano accordingly ruled that it had jurisdiction under Article 4(2) of the Codice di Procedura Civile and moreover declared that, by virtue of the transitional provisions, the Convention would be applicable to the execution of the judgment to be delivered, since it is a condition of such execution that the court delivering judgment shall, in fact, have jurisdiction under the pre-Convention rules, which are in any event consistent with those provided for in Title II of the Convention. In this connexion it should be noted that the rule in Article 5(1) of the Convention is to exactly the same effect as

No. 51 Order of the Oberlandesgericht Frankfurt of 28 January 1976
S.A. G.F.A. v Firma P.R. 20 W 124/75

The order of the Landgericht for the enforcement of a judgment of the Tribunal de Commerce, Paris, of 19 January 1972 has been set aside on appeal by the debtor company and the matter sent back to the Landgericht for further consideration and a fresh decision.

The order of the Landgericht was not in accordance with the creditor company's application, since the latter asked for leave to enforce not the judgment of the Tribunal de Commerce, Paris, of 19 January 1972 but the judgment of the Cour d'Appel, Paris, of 1 March 1973 which in substance dismissed the debtor company's appeal against the former judgment. Furthermore, the order did not examine whether the preconditions laid down by the second paragraph of Article 54 for the enforcement of judgments in proceedings instituted before the date of entry into force of the Convention were in fact fulfilled.

TITLE VII

RELATIONSHIP TO OTHER CONVENTIONS

(See also Nos. 7, 45 and 46)

Benelux Convention on trade-marks

No. 52 Judgment of the Arrondissementsrechtbank, Amsterdam, of 14 August 1975
Pento Cosmetics B.V. v Helena Rubinstein S.A. 75.2561

Pursuant to the second paragraph of Article 20 the Netherlands plaintiff was called upon by an interlocutory judgment of 25 June 1975 to prove that the French defendant was in a position to receive the document instituting proceedings in sufficient time to enable it to arrange for its defence. It lodged a written statement by the defendant confirming that it had received the summons whereby proceedings were commenced. The court then proceeded to hear the case. It based its jurisdiction on Article 37 of the uniform Benelux law on trade-marks annexed to the Benelux Convention on trade-marks, the latter being a Convention within the meaning of Article 57 of the Brussels Convention of 1968.

CMR

No. 53 Judgment of the Landgericht Aachen of 16 January 1976
13 O 151/75
(Recht der internationalen Wirtschaft, Aussenwirtschaftsdienst des Betriebs-Beraters, 1976, No. 10, p. 588)

The Landgericht has stated that it has jurisdiction by virtue of a clause conferring jurisdiction which does not comply with the formal requirements of Article 17 of the Convention. The agreement conferring jurisdiction is valid under Article 31 of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which according to Article 57 of the EEC Convention continues to apply as a lex specialis. According to that provision the parties may agree that the courts of the Contracting States shall have jurisdiction without this having to be done in any specific form.

TITLE VIII

FINAL PROVISIONS

PROTOCOL

(See No. 42)

PROTOCOL

ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION

(See No. 20)

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