HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW

CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS

DRAFT ADOPTED BY THE ELEVENTH SESSION
AND EXPLANATORY REPORT BY MESSRS. P. BELLET AND B. GOLDMAN

(ENGLISH TRANSLATION)

PERMANENT BUREAU OF THE CONFERENCE
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2 The Hague Conference on Private International Law provides a favourable framework for dealing with this matter and it has concerned itself with this question since its inception. So long ago, indeed, as 12th June 1902 its Member States signed a Convention to deal with conflicts of law and jurisdiction in this field. Unfortunately, denunciations of the Convention have repeatedly occurred as it proved less and less adapted to prevailing circumstances, and to-day it is binding only on Hungary, Italy, Luxemburg, the Netherlands, Poland[1], Portugal and Rumania, without, moreover, applying to relations between Hungary and Portugal. At the same time, the Conference has enlarged its field of activities. The extremely important active participation since 1951 of the United Kingdom, and the joining of the United States of America in 1954 and of Canada in 1968 have given a voice to countries of the Common Law. Since it was necessary to draw up a new Convention, the Conference, in October 1964, in the Resolutions of its Tenth Session, at which it had just excluded family law from the Convention on the Recognition and Enforcement of Judgments, decided to draw up a preliminary draft convention on the recognition of decrees of divorce, legal separation and the nullity of marriage. A Special Commission, under the Chairmanship of the United Kingdom representative, Mr Graveson, was engaged upon this task from 1965 to 1967, and the text which it prepared was in October 1968 submitted to the Delegates who met in The Hague for the Eleventh Session of the Conference. The present text, which excludes from its ambit the nullity of marriage[2], is the fruit of the discussions that were held during that Session, under the Chairmanship of Mr Graveson, between the representatives of twenty-five countries.

3 The object of the authors of the Convention was essentially, as its preamble laconically reminds us, to "facilitate the recognition of divorces and legal separations". This does not by any means imply that they were favourable to divorces, but, matters being as they are, and since divorces exist and are even increasing in number, it is necessary to limit the social consequences of this unfortunate phenomenon by recognizing its existence. It is natural, and consequently desirable, that divorces and legal separations validly decreed within the territory of one Contracting State should be recognized in all others. Respect for rights acquired in foreign countries is the very foundation of international law, and the requirements of security and stability in family matters demand the highest degree of cooperation between States for the sake of the private interests involved, even if this means some sacrifice of their freedom of action.

It must, moreover, not be forgotten that divorce is often followed by remarriage and that it is consequently as much a matter of facilitating recognition of the validity of the second marriage as of recognizing the validity of the divorce. This is, of course, of particular importance for the children of this second union, to whom no blame attaches for the quarrels that broke up the first marriage and whose rights are morally as great as those of the children of that marriage.

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1 Poland has, moreover, just denounced the Convention, with effect from 1st June 1974.

2 It seemed that the question of the nullity of marriage would fall rather within the field of a convention dealing at the same time with the conclusion and recognition of marriages.

4 But security is impossible without a uniform legal solution, since divorced or separated spouses must know that their new status will receive the same recognition in any country in which they may settle. It is the specific object of a multilateral convention to establish a uniform regime in all Signatory States and this was the aim which its drafters set themselves. Unfortunately, the introduction of various reservations, in articles 19, 20, 21 and 24, has led to a certain lack of uniformity, which it was not possible to avoid. But, had these not been introduced, it would perhaps not have been possible to achieve a convention at all, and this result would have been more unfortunate still. The Convention does after all constitute a cohesive whole, and the reservations are simply exceptions which derogate from the principles it lays down.

It is true too that article 7 grants to Signatory States not the right to make a reservation, but the power of not recognizing certain divorces, and does not even make the use of this power subject, as in the case of reservations, to a declaration by that State at the time of ratification or accession (se paragraph 40). This provision introduces an unfortunate element of uncertainty, but it is the existence of laws prohibiting divorce which is the cause, and, moreover, it is easy to see that each State will adopt in this respect that attitude which is most in accordance with the practices followed in its general body of law.

Article 17 introduces a further disparity, by providing that the Convention shall not prevent "the application...of rules of law more favourable to the recognition of foreign divorces and legal separations" (see paragraph 59 below).

The desire to facilitate the recognition of divorces and legal separations has thus prevailed over the desire to achieve a uniform solution. But it can be said that the Convention already ensures uniformity, since, without imposing any limit on the liberality of the law, it lays down a minimum which all States must observe.

Finally, article 18, by safeguarding the working of other present or future conventions on this matter, once again weakens the common front established by the authors of the Convention, but its raison d'être is not far to seek (see paragraph 59 below).

5 A further objective was pursued by a great number if not by all Delegates - to combat, not divorce, but its abuses, and what has been variously called "the divorce industry", "forum shopping" or "migratory divorce". This is a recent but serious evil, which owes its origins to ingenious spouses who take advantage of modern opportunities for travel and the discrepancies between different legal systems in order to obtain a divorce where this can most easily be done.

The Convention, by seeking to facilitate the recognition of divorce, ran the risk of fostering this industry. This was forestalled by the conditions imposed by articles 2, 3, 4 and 5 for recognition (see paragraphs 24 et seq. below), which are strict enough to discourage any "dodgers". It is consequently not necessary to go into the intentions of the spouses except insofar as is necessary to determine their domicile or residence at the time of the divorce; and even this investigation of their intentions is excluded where the recognizing State is bound, by virtue of article 6, by the findings of the authorities of the State in which the divorce was granted (paragraphs 36 et seq. below).

6 We are not dealing here with a Convention on the enforcement of decrees of divorce or legal separation. The field of our Convention is both a wider and a narrower one. On the one hand it is concerned not only with the actual decrees themselves but with all decisions in this field, even those emanating from administrative, religious or legislative authorities, whilst on the other it is concerned only with the recognition of such decisions, leaving to each State the task of deciding whether or not their enforcement requires proceedings, and if so of what kind.

Moreover, the Convention is concerned only with divorces and legal separations. Nullity of marriage is excluded and so too is even the "Aufhebung" of German law (see paragraph 16 below). This restricted point of view was adopted in order to avoid a multiplicity of reservations, always harmful to the unity of a text, and it was carried so far that the second paragraph of article 1 (see paragraph 53 below) specifically excludes ancillary orders pronounced on the making of a decree of divorce or legal separation. It should be noted that the sole effect of this exclusion is that there is no obligation to recognize; it does not make non-recognition compulsory.

On the other hand, the Convention applies to all divorces, although it is true that there is no definition of divorce anywhere in the text and that attempts made in the course of the Eleventh Session to insert one proved unsuccessful.

But it is generally admitted that divorce consists in the dissolution of a valid marriage during the lifetime of the spouses. Such a dissolution will certainly fall within the field of application of the Convention. It will be for authorities who find themselves faced with an institution which does not precisely fit this definition to decide whether the Convention applies or not, though they may, if they so desire, seek the opinion of the authorities of the country in which the decree was made. The nature and form of a divorce are of no importance; it may be judicial, administrative, religious or legislative; nor does it matter whether or not the procedure was of a unilateral nature (subject to any infringements of the rights of the defendant spouse: see paragraph 48 below), and the consequences for the rights of the spouses, of the children or of third parties are likewise of no account. It is the actual fact of the divorce which counts, irrespective of the way in which it was brought about or of the effects it may have.

It was natural that the Convention should extend from divorce to embrace legal separations, which are no more than an attenuated form of divorce and constitute a relaxation of the conjugal tie, without its being necessary to consider whether or not they are convertible into divorce.

7 The means employed for achieving the proposed objectives are classic ones.

Only a few countries still make the recognition of decisions delivered in foreign countries dependent on respect for their own system of conflict of laws, as does France for example. Stress is consequently laid, in most recent conventions, on the jurisdiction of the authorities which delivered the decision. But the question arises each time of whether to impose rules of jurisdiction on those authorities by means of what is then described as a "double" convention, or whether, by means of what is called a "simple" convention, merely to subject recognition of the de - cisions delivered by such authorities to the observance of certain rules.

The present Convention is of this latter type. Whilst it is less perfect than the other it is still not without its advantages. It makes for predictability, for a spouse who seeks a divorce can make sure in advance that the authority to which he addresses himself is one of those whose jurisdiction is recognized by the Convention. This system, moreover, leaves each Signatory State free to preserve or create rules of jurisdiction of its own choosing. In such cases States risk having divorces decreed within their territory not recognized by the other Signatory States only if the rules they have chosen do not coincide with those laid down in the Convention. States are not obliged but are merely invited to adopt those rules, and the system provides definite guarantees for the individual whilst preserving the sovereignty of the State.

8 In order to represent any major advance on the general law of most countries, the jurisdiction of the authorities of the State of origin ought in principle to be the only condition that must be fulfilled. This is the case with the present Convention. It takes into consideration, moreover, not only habitual residence, as do most of the Hague Conventions, but also the domicile or even the nationality of the interested parties, something which is extremely rare in those conventions. But this last connecting factor could not be excluded from a field so personal as that of divorce and legal separation. It was, moreover, an indirect way of giving satisfaction to those countries attached to the application of the law of the nationality in this matter.

The diversity of the connecting factors adopted in articles 2, 3, 4 and 5, and the requirements with respect in particular to the duration of residence (see paragraphs 26 et seq. below) make it possible to assume that there was a genuine link between the States designated by those articles and the divorced or separated spouses, one which rules out the possibility of fraud and necessitates recognition of the decisions delivered.

9 It is true that certain departures from this principle have been allowed, but these must be restrictively interpreted if the spirit of the Convention is to be respected. It would have been impossible to omit an exception in favour of public policy (ordre public) from the Convention, but States are permitted to refuse to recognize decrees only if they are "manifestly incompatible" with their public policy (article 10; see paragraphs 46 et seq. below), or have been granted in violation of the rights of the defence (article 8; see paragraph 48 below), or again are incompatible with a previous decision (article 9; see paragraph 49 below). With respect to the right granted by article 7 (see paragraph 40 below) and the reservations provided for in articles 19, 20, 21 and 24 (see paragraphs 41 et seq. below), these, as has been said, are so many departures from the basic principles of the Convention, and must, consequently, also be restrictively interpreted.

10 Such are the objectives pursued by the Convention, and the general principles which it applies. We shall now pass on to a more detailed analysis of its provisions. Essentially, these concern its field of application (I), the jurisdiction of the State of origin (II) and the degree of supervision that may be exercised by the State where recognition is sought (III). The mechanism of recognition is determined by reference to the law of the State where recognition is sought; on the other hand, the Convention itself determines the extent and the effects (IV) of such recognition. In addition, the Convention provides for cases where more than one system of law exists in the State of origin, in the State where

recognition is sought or in a third State (V). The Convention contains an original provision, which allows Contracting States to make a declaration that certain classes of persons of their nationality need not be so regarded for the purposes of the Convention (VI). Finally, we shall consider the relationship between the Convention and other sources of law (VII) and there will be a brief reference to the final clauses (VIII).

I FIELD OF APPLICATION (first paragraph of article 1, and articles 23, 24, 27, 29 and 30)

11 The field of application of the Convention is essentially delimited by the characteristics which the divorces and legal separations to which it applies must present (first paragraph of article 1); articles 23 and 29 provide that its territorial or personal application may be limited; and, finally, its entry into force and duration are determined by articles 24 and 30.

We shall take up these various questions again, but it should be straightaway noticed that the Convention will only apply as between States which sign or accede to the Convention; it is not intended to constitute the common law of those States governing the recognition of divorces and legal separations. Article 26 provides that it is open for signature by those States that were represented at the Eleventh Session. Any State that was not represented but is a Member of the Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice, may accede to it after it has entered into force (article 28).

A Divorces and legal separations to which the Convention applies (first paragraph of article 1)

12 According to article 1, the Convention "shall apply to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State which follow judicial or other proceedings officially recognized in that State and which are legally effective there."

It has already been pointed out that the Convention employs the terms "divorce" and "legal separation" without defining them, and this is because it became apparent that it would be difficult to arrive at agreed uniform definitions; but it was also emphasized that by referring to divorces or legal separations obtained through judicial or other proceedings, the Convention covers not only decrees of divorce or legal separation granted by a court but also divorces or legal separations resulting from legislative, administrative or religious acts.

13 It remains necessary that the dissolution or relaxation of the marital tie should have occurred as a result of "proceedings officially recognized" in the State of origin. In principle, this condition contains two distinct elements, of which the first is that there must have been proceedings, i.e. a minimum of acts, steps or formalities required to be taken by established rules and carried out by an authority or at any rate with the agreement of such authority or in its presence, whilst the second element is that the proceedings must be officially recognized, i.e. the Contracting State must have prescribed or authorized their

employment for obtaining a divorce (or legal separation). This second aspect of the condition allows there to be excluded from the benefits of the Convention, for example, a religious divorce pronounced in a State which does not recognize the proceedings of religious courts. The first aspect of this requirement may, however, be of greater significance. "Proceedings" are in fact, according to the definition given above, an objective notion; to require "proceedings" means that a State can refuse to recognize a dissolution of marriage even where it is legally effective in the State of origin, if it does not result from "proceedings" as so defined.

In practice, this question might arise with respect to divorces by mutual consent and repudiation. There was little discussion at the Eleventh Session of the former, but there is no doubt that a divorce or legal separation by mere agreement between the spouses without the intervention of any authority (at least as a necessary witness), would not satisfy the requirements of article 1. On the other hand, the Delegates devoted lengthy consideration to the question of repudiation - in particular in the form of a Moslem "talak". The Israeli Delegate explained that in his country, and according to Mosaic law, there could be no repudiation without the wife's consent and that the intervention of a Rabbinical court was moreover always indispensable. For his part, the Delegate of the United Arab Republic stated that in his country a "talak" necessitated the intervention of an official of the Registry of Births, Deaths, Marriages and Divorces and that the decision was, furthermore, always notified to the wife. In the end, it was decided not to deal specifically with repudiation either by expressly including it in the field of application of the Convention or by expressly excluding it; but it must be recognized that it will be possible for it to enjoy the benefits of recognition if it involves the intervention of the public or religious authorities and can be regarded as "proceedings".

14 Article 1 limits the field of application of the Convention to divorces and legal separations that are "legally effective" in the State in which they have been obtained. This additional requirement, which was not present in the preliminary draft, excludes the recognition of divorces which are not effective in the State in which they were obtained (e.g., because they have been quashed by a higher court or because an appeal with suspensive effect has been entered against them) even if they were obtained by officially recognized proceedings. This was probably already implicit in the expression "divorces and legal separations obtained", but it seemed preferable to spell it out in so many words.

15 Dealing as it does with divorces (or legal separations) which have been obtained, article 1 also excludes from the field of application of the Convention decisions denying a petition for divorce or legal separation. In other words, such a decision delivered in a Contracting State would not, by virtue of the Convention, constitute any obstacle to bringing a fresh petition for divorce or legal separation in another Contracting State. A "negative" decision will have the effect of being res judicata in a foreign State only insofar as the general body of private international law of the country in which it is sought to attribute the effect of being res judicata to it so provides.

16 On the other hand, article 1 does not refer, even impliedly, to Aufhebung, a feature of German and Austrian law. This is the dissolution of a marriage ex nunc, for reasons which existed at the time of its celebration (in particular, where vitiating factors attached to the consent). But Aufhebung must be regarded as not falling within the Convention's field of application, since its inclusion, which had been requested by one delegation, was rejected on a vote. The majority of Delegates in fact considered Aufhebung to be closer to nullity of marriage than to divorce.

17 The Convention is similarly silent on divorces which terminate marriages which are not themselves recognized in the State where it is sought to invoke the divorce. It was proposed, in the course of discussions, that it should be made clear in the Convention that it did not require recognition in such cases; but this amendment was rejected, as it would have opened the door to allowing the State in which the divorce was invoked to investigate the existence or validity of the marriage. Nevertheless, it emerges from the discussions that a State which does not recognize the marriage that has been dissolved may perfectly well refuse to recognize the divorce that has put an end thereto, under the principles of its common law.

18 The recognition of divorces or legal separations applies to the dissolution or relaxation of the marital tie, but not to findings of fault or ancillary orders (second paragraph of article 1). This point will be discussed again below, in connection with the scope and effect of the recognition required by the Convention (see paragraphs 53 et seq. below).

B Territorial field of application of the Convention

19 It has already been pointed out that the Convention applies only to relations between Contracting States; in other words it is not aimed at a divorce or legal separation granted in a third State, the validity of which it is sought to have recognized in a Contracting State.

20 With respect to Contracting States, the Convention will apply to all the territories they represent at the international level or to one or more only of such territories, according to the declaration made by the State concerned at the time of signing, ratifying or acceding to the Convention. The Convention may subsequently be extended to territories not covered by the initial declaration, but such an extension will have effect only as regards relations with such Contracting States as declare their acceptance of this extension (article 29).

21 It is open to a Contracting State to limit the Convention's field of application only if it has two or more systems of law governing divorce or legal separation; it can then, when signing, ratifying or acceding to the Convention, declare that it shall extend to all its legal systems or only to one or more of them. This declaration may subsequently be modified at any time by means of a fresh declaration (article 23).

This provision is intended to cover a different set of circumstances from those covered by article 29, to which reference has just been made. Article 23 is intentended to cover States having a single international personality but made up of territorial units each having its own system of law (e.g. the United States), or of ethnic or religious groups each subject to a system of law of its own (e.g. the United Arab Republic

and Israel). In each case, the State in question can limit the application of the Convention to certain only of its systems of law (territorial or personal), which means that except under systems which are included divorces acquired in other Contracting States will not have to be recognized, at any rate on account of the Convention. Consequently, on the ground of reciprocity, the other Contracting States can refuse to recognize a divorce or legal separation, if at the time when it is sought to have such divorce or legal separation recognized the Convention is not applicable to the system of law under which such divorce or legal separation was granted (third paragraph of article 23).

Although it concerns States with more than one legal system, the object of this provision is entirely different from that of articles 13 to 16, which lay down the way in which the Convention is to be applied to different systems of law (territorial or personal) which exist side by side in a Contracting State and to which the Convention does apply.

C The temporal field of application of the Convention (articles 24, 27 and 30)

22 The first paragraph of article 24 provides that, "This Convention applies regardless of the date on which the divorce or legal separation was obtained". This paragraph, which was not present in the preliminary draft, expresses the views of the majority of the Delegations, who considered that it would be unfair to "penalize" spouses who obtained a divorce before the entry into force of the Convention, and, furthermore, that it was desirable to provide for terminating as great a number of "limping marriages" as possible, even if these arose from divorces obtained previously, and, by definition, not recognized under common law or treaties in force at the time. One delegation, however, feared that this solution might entail serious difficulties if the non-recognition of the divorce had already produced consequences in law (e.g. the annulment of a second marriage or succession to an inheritance). In order to take account of this, the second paragraph of article 24 allows any Contracting State to reserve the right not to apply the Convention to a divorce or legal separation obtained before the date of the Convention's entry into force for that State. All the same, even in those States which do not make such a reservation, the re-opening of legal situations which have arisen as a result of the non-recognition of a divorce might well conflict with imperative rules of the common law of such States, which the Convention has not sought to set aside.

It will be noted that, contrary to the practice in previous Conventions[3], it is not stated whether the employment of this reservation necessarily allows other Contracting States to invoke the same reservation vis-à-vis the State which has made it.

23 It is provided that the Convention shall enter into force for the three first-ratifying States on the sixtieth day after the deposit of the third instrument of ratification and for each Signatory State ratifying subsequently on the sixtieth day after the deposit of its own

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3 Cf. article 8 of the Convention of 15th June 1955 for Settling Conflicts between the Law of Nationality and the Law of Domicile and article 9 of the Convention of 1st June 1956 concerning the Recognition of the the Legal Personality of Foreign Companies, Associations and Foundations.

instrument of ratification (article 27). The Convention is to remain in force for 5 years from the date of its initial entry into force, even for those States which ratify or accede to it subsequently, and it is laid down that it shall be tacitly renewed every 5 years unless denounced (article 30).

II JURISDICTION OF THE STATE OF ORIGIN (articles 2 to 5)

24 Subject to such limited testing rights as the Convention allows to the State where recognition is sought, the recognition of divorces and legal separations is essentially linked to the existence of a sufficient claim to jurisdiction on the part of the State of origin.

The connecting factors which make it possible for this condition to be fulfilled are listed in article 2, which article 3 supplements with a provision concerning domicile, and the jurisdiction of the State of origin is further strengthened by the provisions of articles 5 and 6. Before examining these provisions, it should again be emphasized that they are by no means directed towards imposing upon Contracting States any internal rules of jurisdiction; they only mean that a divorce or legal separation must be recognized if the jurisdiction of the authorities which granted the divorce or legal separation fulfils the conditions laid down in articles 2 and 3.

A Connecting factors conferring jurisdiction on the State of origin for the purposes of the application of the Convention (article 2)

25 These connecting factors derive either from habitual residence (heads 1 and 2 of articles 2) or from nationality (heads 3 to 5). Before considering these connecting factors separately, it should be emphasized that they must always have existed at the time of the petition in the State of origin, subject however to the reservation that specific provision is made in the Convention in respect of each of these factors so far as concerns the time for the occurrence of certain circumstances ancillary to the chief connecting factor which are necessary to cause the latter to take effect (e.g. the habitual residence of the petitioner where this supplements his nationality; see paragraph 30 below).

Furthermore, it is sufficient that the habitual residence should have been in the State of origin, and the same is the case with respect to domicile, where the latter is assimilated to the former (see paragraph 32 et seq. below). In other words, the Convention makes recognition subject to the general jurisdiction of the State of origin, without concerning itself with where, within that State, the authority from which the decision emanates is situated.

a Habitual residence

26 The simplest and first-mentioned basis for the jurisdiction of the State of origin is that the defendant has his habitual residence within its territory. This is a transposition rather than a pure and simple application of the universally recognized adage actor sequitur forum rei, since jurisdiction results here from residence and not from domicile;

this substitution (subject to the reservation of the cases covered by article 3: see paragraph 32 below) reflects, as we know, the present trend of the Hague Conventions[4].

It was thus hoped to avoid the difficulties that an attempt at a uniform definition of the notion of domicile would have encountered, implying as it would have done a choice or a combination of choices between family and occupational ties, and, in addition, an agreement on the element of intent which forms a part of this notion. It should be noted that if this were to be achieved "habitual residence" would have to be defined only in relation to two questions of pure fact: living within the territory of the State in question and doing so in more or less permanent fashion. But we must not close our eyes to the fact that in the case of a number of residences in different countries it will not always be possible to decide which is the habitual residence without going into the question of intent in order to see which of the residences is the habitual, or "the most habitual" of them. It can, on the other hand, be contended that if the material characteristics and respective durations of several residences in the course of a given period do not make it possible to make such a choice, it would be proper to regard each of them as an "habitual residence", provided that the person concerned made more than the occasional brief stay there.

27 Habitual residence in the State of origin on the part of the petitioner also serves to found jurisdiction on the part of that State (article 2(2)). This approach is hardly surprising in this context, since, in particular, it allows an abandoned wife to obtain from the courts of the country in which the abandoned home is situated a decree which will enjoy the benefits of the Convention, without it being possible to raise against her the argument that since her husband has transferred his residence abroad he can no longer be summoned before the courts of the country (nor, of course, that this transfer has meant a transfer of the matrimonial domicile, which is in any case disregarded as a connecting factor). But it also entails a danger: that of facilitating a choice by the petitioner of the competent country and thereby of the law applicable, which would be that indicated by the private international law of that country.

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4 See for example article 1 of the Convention on the Law Applicable to Maintenance Obligations in Respect of Children, concluded on 24th October 1956; paragraphs 1 and 2 of article 3 of the Convention Concerning the Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children, concluded on 15th April 1958; article 1 of the Convention Concerning the Powers of Authorities and the Law Applicable to the Protection of Minors, concluded on 5th October 1961; articles 2 and 3 of the Convention on Jurisdiction, Applicable Law and the Recognition of Decrees Relating to Adoptions, concluded on the 15th of November 1965; and paragraph 1 of article 10 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Accordingly, the habitual residence of the petitioner only confers jurisdiction on the State of origin if in addition one of the following two conditions is fulfilled:

- either such habitual residence must have continued for not less than one year prior to the institution of proceedings (article 2(2) a);

- or else the spouses must have last habitually resided together in the State of origin (article 2 (2) b).

The first condition cannot give rise to any difficulty of interpretation, although it can properly be deduced therefrom that for the purposes of the Convention a residence can be "habitual" even if it has continued for less than a year.

With respect to the second condition, it was worded differently in article 2 (2) b of the preliminary draft, which read "the spouses had their last matrimonial residence there". This form of words was rejected on account of the difficulties of definition to which it might have given rise; and the expression "last common residence", which was at one time envisaged, was rejected for the same reason. It was hoped that with the form of words adopted, the questions to be considered (did the spouses reside there together and did they habitually reside in the State of origin) would be ones of pure fact. The text furthermore requires that the spouses should have "last" habitually resided there (in the country where the petitioner is habitually resident on the date of the institution of proceedings). The conclusion consequently seems unavoidable that this condition is fulfilled even if the common habitual residence ceased to exist before the date of the institution of proceedings, so long as it was the last one; more precisely, this is the only way to give meaning to the text, for if this common habitual residence had continued until the date of the institution of proceedings it would necessarily have been the defendant's residence on that date, which would have sufficed to confer jurisdiction on the State of origin in terms of article 2 (1). This provision is to be explained by the desire to protect the abandoned spouse.

b Nationality

28 Nationality alone suffices to found jurisdiction on the part of the State of origin where both spouses are nationals of that State on the date of the institution of proceedings (article 2 (3)).

29 But there are two cases where account is taken of the nationality of the petitioner alone - in conjunction, it is true, with other connecting factors.

30 This is so, firstly (article 2 (4)) where the petitioner is a national of the State of origin and one of the two following conditions is fulfilled: a the petitioner has his habitual residence there; or b he has habitually resided there for a continuous period of at least one year during the two years preceding the date of the institution of proceedings.

It should be emphasized that these two supplementary connecting factors are alternatives. The first one calles for no further explanation than that already given with respect to the notion of habitual residence.

The second, although complex, is clearly expressed; it leaves no room for doubt that in such a case - where it is not the chief connecting factor but an ancillary one - the habitual residence of the petitioner who is a national of the State of origin may have ceased before the date of the institution of proceedings. If, moreover, it had continued until that date and had lasted for at least the preceding year it would have conferred jurisdiction on the State of such residence irrespective of the petitioner's nationality (article 2 (2) a; see paragraph 16 above).

31 Finally, under the terms of article 2 (5), a divorce must be recognized if the petitioner was a national of the State of origin, if the petitioner was present in that State at the date of the institution of proceedings and if, in addition, the spouses last habitually resided together in a State the law of which, at the date of the institution of the proceedings, did not provide for divorce. As a practical example, one might cite the case of a Frenchwoman who has married an Italian; if the family's last common habitual residence was in Italy, a divorce obtained by the wife from a French court on her return to France would have to be recognized by all Contracting States (except for such as might have made the reservation provided for in article 20; see paragraph 41 below). For the purposes of this provision, the last common habitual residence may perfectly well have continued until the day before the institution of proceedings, since it suffices that the petitioner should have been present in the State of origin on the day of the institution of proceedings; in other words, it is not necessary that the petitioner should have resided there for a certain time before that date. But this provision would also be applicable if the last common residence, situated in a State the law of which does not recognize divorce, had come to an end a certain time before the institution of proceedings, and in the meantime the petitioner had resided in another country.

It should be noted that article 2 (5) refers to divorce alone; it is hard to see why the same provision should not have been extended to legal separations, but the wording is categorical and cannot be extended by analogy.

B The role of domicile (article 3)

32 Domicile is the essential factor conferring competence (especially jurisdictional) in numerous Common Law States, and in particular in the United Kingdom; this is also the case, moreover, in certain Civil Law countries, such as France.

It was, however, above all in order to meet the needs of the Common Law countries that article 3 was introduced into the Convention; it provides in its first paragraph that where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression "habitual residence" in article 2 is to be deemed to include domicile as the term is used in that State. This provision is of real significance only where the concept of domicile in the State is distinct from that of habitual residence. Such is the case, in particular, in the United Kingdom, where, on account of the importance attached to the element of intent in domicile, domicile can be retained despite a fairly prolonged stay abroad. A decree of divorce pronounced by a court in the United Kingdom which regards itself as having juris-

diction by virtue of the defendant's domicile must be recognized by the other Contracting States, even if it appears that there was in fact a divergence between that domicile and the "habitual residence". Similarly, if a country bases its jurisdiction on the petitioner's domicile, a divorce acquired in that country must be recognized if one of the further conditions laid down in article 2 (2) is fulfilled. It should be made clear, moreover, that domicile is assimilated to habitual residence for the purpose of the application of these supplementary conditions too: e.g. the divorce would have to be recognized if the petitioner had his or her domicile in the State of origin (the internal law of which recognized this connecting factor) and this domicile had existed for at least one year before the date of the institution of proceedings (article 2 (2) a, mutatis mutandis). The same transposition would have to be made where necessary in the other parts of article 2 which refer to habitual residence. It would perhaps have been simpler to add domicile to habitual residence as a connecting factor conferring jurisdiction, but the Scandinavian delegations firmly opposed this as this would have been regarded as tautological in their countries and the reason for it would not have been understood.

33 The second paragraph of article 3 provides that "the preceding paragraph shall not apply to the domicile of dependence of a wife". In the draft Convention, this exception applied only to the domicile of a defendant wife, its purpose being to prevent the husband from relying on the legal domicile of his wife in order to impose the jurisdiction of his own domicile upon her. This same concern to hold a balance between the parties ought logically to have led the text to have been extended to apply to the case which apparently exists in Belgium, where, it would seem, the husband's domicile is dependent on that of his wife. But this amendment, which was proposed by the Belgian delegation, was not adopted, which seems to rule out the adoption by analogy of the solution thus rejected.

C Extensions of jurisdiction (articles 4 and 5)

34 These provisions are substantially identical with the corresponding provisions of the draft Convention.

a Article 4 provides that where there is a cross-petition, a divorce or legal separation must be recognized once the State of origin had jurisdiction with respect to either the cross-petition or the original petition itself. This provision is perfectly clear; it provides not only for extending jurisdiction over the original petition to the cross-petition (which is very widely allowed) but also the converse, which is more original[5], in order, it was said, not to set a premium on "getting one's blow in fust" and also in order to prevent disparate treatment of petition and counter-petition.

5 Cf. article 11 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

b Article 5, for its part, provides that where a legal separation is converted into a divorce in the State in which the former was pronounced, it shall be recognized even if the conditions for that State to have jurisdiction no longer existed at the time of the petition for divorce. This approach, which is also an original one, reflects the fact that in these cases the divorce simply follows, often ineluctably, from the legal separation. Nevertheless, the Conference did not go so far as to extend recognition to cases where the legal separation is converted into a divorce in a State other than the one in which it was pronounced; in such cases, Contracting States are required to recognize the divorce only if the State in which it is granted itself had jurisdiction by virtue of articles 2 and 3.

III THE DEGREE OF SUPERVISION THAT MAY BE EXERCISED BY THE STATE WHERE RECOGNITION IS SOUGHT (articles 6 to 10, and article 12)

35 It has already been emphasized that the basic principle of the Convention is the recognition of divorces and legal separations obtained in a State which is competent to grant them in terms of articles 2 to 5 The unrestricted application of this principle would mean requiring the State where recognition is sought to grant such recognition without being able to exercise any supervision whatsoever over either the conditions in which the divorce or legal separation was obtained in the State of origin, or the effects which such recognition may have within its own territory.

This extreme position obviously could not be adopted, and it received, moreover, the support of no single Member State of the Conference. The reservation in favour of public policy (ordre public) -- even though confined within strict limits - as well as the safeguarding of the rights of the defence and the primacy of previous decisions rendered in the State in which recognition is sought, which are directly related thereto, could not in any event be left out; in one form or another, moreover, these limits on the recognition of foreign decisions are to be found in all the legal systems represented at The Hague.

But it was very much more difficult on the one hand to get certain delegations to accept the abandonment of, or, in any event, a serious limitation on, their right of supervision over the law applied for the granting of a divorce or legal separation, and, on the other, to induce other delegations to accept the introduction into the Convention of such supervision, even on a limited scale. In the main, the line of separation lay between Civil Law States, which admit the application of foreign laws in this field but at the same time require that their own law should have been applied in the foreign country if this was required by their own private international law (in practice, by virtue of the nationality of the spouses) and the Common Law countries, which concern themselves exclusively with the jurisdiction of the authority in question (whether judicial or otherwise) and take the view that if that authority be competent it can and must always decide in accordance with its own law. This latter approach conforms to that of the Convention, whereas the former would limit its positive consequences. It will readily be understood that it was often a hard task to find a compromise between these two approaches.

These are, in any event, the two essential aspects of supervision by the State in which recognition is sought, the limits of which it was sought in the Convention to define: supervision of the law applied and super-

vision over the compatibility of the recognition sought with the public policy (ordre public)of the State in which such recognition is sought. We shall deal with these seriatim, touching in passing upon those questions which are directly related. We shall deal first with the limits set to the right of the State in which recognition is sought to exercise supervision over the jurisdiction of the authorities of the State of origin, and we shall conclude by noting the exclusion of all power to go into the merits of the case, the precise significance of which may be gauged in the light of the observations expressed on the matters to which reference has just been made.

A The right of the State in which recognition is sought to verify the jurisdiction of the State of origin (article 6, first paragraph)

36 The first paragraph of article 6 provides that "Where the respondent has appeared in the proceedings the authorities of the State in which recognition of a divorce or legal separation is sought shall be bound by the findings of fact on which jurisdiction was assumed".

37 It will be noticed at once that verification of the jurisdiction of the State of origin is limited only in cases where the proceedings for divorce (or legal separation) have been contested, whereas no distinction was drawn on this ground in the draft Convention. This is of capital importance since, according to figures given during discussions, in certain countries almost all divorces are uncontested (in England, for example, the figure is said to be 96%, whilst in Scotland it is 99%!) It must be recognised that in all these cases the degree of verification which the State in which recognition is sought will be able to exercise will be very high: for example, if the court in the State of origin has founded its jurisdiction on the habitual residence of a respondent who has not contested the case, the latter can not only oppose recognition on the ground that his purported stay in the State of origin was wrongly regarded as habitual residence, but can also contest the length of such stay or even whether it ever took place at all. A fortiori can he contest the classification of his stay as "habitual residence" (on this point, see paragraph 27 above) - or the petitioner's nationality,where this has served to found jurisdiction.

38 The restriction on the right to verify the jurisdiction of the State of origin consequently operates only where the respondent has appeared in that State. But here a fresh difficulty raises its head. Article 6 lays it down that the authorities of the State in which recognition is sought shall be bound by the findings of fact on the grounds of which jurisdiction was assumed - which necessarily implies that they are not bound by the legal significance attached to those findings, nor, as the case may be, by any application of legal rules that must be made in order to found jurisdiction.

Having regard to this distinction, it must be recognized that the State in which recognition is sought is entitled to verify nationality and domicile - which are legal concepts. With respect to nationality, it must, it seems, be held that if the nationality of the State in which recognition is sought is not in issue but there is a conflict between the nationality recognized in the State of origin and in another State, the authorities of the State in which recognition is sought must decide

the issue in accordance with the rules of their own legal system. So far, however, as domicile is concerned, this is taken into consideration in article 3 only in those cases where it serves to found jurisdiction in the State of origin; it seems, consequently, that any verification in the State in which recognition is sought of a finding of domicile must be effected in accordance with the provisions of the law of the State of origin (which would, in theory at least, leave the door open for a dispute regarding the precise application of that law at the time of the granting of the divorce).

With respect to"habitual residence", the question arises as to whether this is a question of pure fact or a legal concept. It was recalled above that the term was substituted for domicile in several Hague Conventions precisely in order to avoid difficult controversies with respect to its application to a given set of facts. It is not certain that this has been successful, for it is always possible to ask, for example, whether "residence" and "dwelling" are synonymous, or to distinguish between "dwelling" and "presence", or again to ask what an "habitual" residence is: so difficult is it for a legal rule to deal with facts without classifying them into its own categories.

So true is this, that questions of "pure fact" would be reduced to very little: e.g. the duration of residence, or the period during which it continued. It should, however, be added that the authorities of the State in which recognition is sought would be acting in conformity with the spirit of the Convention were they to refrain from systematically subjecting to critical examination all findings of "habitual residence" in the State of origin.

B Verification of the law applied (article 6 (2) a and b and articles 7, 19 to 21)

39 The most serious difficulties in this field are to be encountered in connection with divorces granted between spouses having the nationality of States the laws of which do not provide for divorce (in practice, Italy, Spain and Ireland) or who had their habitual residence in such countries; the solutions adopted in respect of the former case have been partly extended for the benefit of States the laws of which do not provide for legal separation.

But it was also necessary to take account of cases where a divorce (or legal separation) has been obtained under a law other than that designated by the private international law of the State in which recognition is sought, even if no legal system which does not provide for divorce is involved.

a Divorces between nationals of States the laws of which do not provide for divorce or between two spouses having their habitual residence in such a State (articles 7, 19(2) and 20)

40 Article 7 of the Convention provides that "Contracting States may refuse to recognize a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State".

This provision is quite clear, though it resulted from laborious and sometimes heated discussions. There is no need to go over them again in this Report, but it is worthwhile calling attention to the very precise answers this provision gives to more numerous questions than its brevity would lead one to suppose.

i The non-recognition for which article 7 provides is optional. But this option is open as of right to all Contracting States, which means, in substance, that States the laws of which provide for divorce can avail themselves of it as much as can States the laws of which do not. This also means, in respect of its actual application, that it is not subject to the making of any declaration or reservation at the time of signing, acceding to or ratifying the Convention or at any other time. The substantive aspect of it is of primordial importance, for the draft Convention granted this option only to States whose laws prohibited divorce - in other words, it would not, for example, have been open to France to refuse to recognize a divorce granted in England where both spouses were Italian, whereas under the Convention as it was finally adopted, it will be open to the French courts to continue to refuse to recognize such a divorce in accordance with their traditional practice when applying French common law.

From the practical point of view, it goes without saying that those States availing themselves of this option will be found amongst those which apply to divorces the law of nationality of the parties.

ii Recognition can only be refused if both spouses are nationals of States which do not recognize divorce. It is not necessary, however, that they be of the same nationality. In consequence, the provision will cover cases of divorce where one of the spouses is Italian and the other Spanish. Cases where one spouse only is the national of a State which does not recognize divorce are covered by the reservation provided for in article 20 (see paragraph 41).

iii Recognition cannot be refused if one of the spouses has, or a fortiori if both spouses have, in addition to the nationality of a State which does not recognize divorce, that of a State which does.

iv Finally, for the purposes of the application of this provision, the nationality of the spouses is to be considered as it was on the date on which the divorce was granted. This approach is different from that adopted with respect to the jurisdiction of the State of origin, which falls to be judged in the light of the circumstances prevailing on the date of the institution of proceedings. The reason for the different approach adopted in article 7 is that it is the actual granting of the divorce rather than the institution of proceedings leading thereto which clashes with the laws of the State whose nationality the spouses possess.

41 Those States which do not recognize divorce took the view that this provision was insufficient. Their objections were partially met by the adoption of article 20, which provides that "Contracting States whose law does not provide for divorce may, not later than the time of ratification or accession, reserve the right not to recognize a divorce, if at the date it was obtained, one of the spouses was a national of a State whose law did not provide for divorce."

It will be noted that, unlike the right conferred by article 7, this reservation can be made only by States the laws of which do not provide for divorce. This condition is reinforced by the second paragraph of article 20, which provides that "This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce." The Conference had in mind here in particular the introduction in Italy of a limited measure of divorce.

42 It is a concern for parallelism, that so often manifested itself during the drafting of the Convention, which underlies article 19(2). This provision authorizes Contracting States to "reserve the right...to refuse to recognize a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce". This provision represents a transposal, at the request of Ireland, of the right of non-recognition conferred by article 7 in cases where the national laws of the spouses do not provide for divorce; it allows countries whose private international law designates the law of the country of habitual residence as applicable to divorces to respect the laws thus indicated as applicable where such laws do not provide for divorce. The provision goes on that a State which utilizes this reservation "may not refuse recognition by the application of article 7".

b Legal separation involving a spouse whose national law does not provide for legal separations (article 21)

43 Article 21, which also reflects the striving for equilibrium or parallelism, allows Contracting States whose law does not provide for legal separation to reserve the right to refuse to recognize a legal separation if, at the date it was obtained, one of the spouses was the national of a Contracting State the law of which did not provide for legal separation. Article 21 repeats word for word the provisions of the first paragraph of article 20 (see paragraph 41 above), except that the latter applies to divorce. But there is no provision with respect to legal separations in the Convention that corresponds to article 7 (see paragraph 40 above) or the second paragraph of article 20 (see paragraph 41 above); here again, an extension by analogy proved impossible, even though this made the so much sought-after parallelism far from perfect.

c Divorces or legal separations obtained upon facts on the basis of which they could not have been obtained under the internal law of the State in which recognition is sought or obtained by virtue of a different law from that designated by the private international law of the State in which recognition is sought (second paragraph of article 6, sub a and b, and article 19(1)).

44 In principle, the Convention rules out refusals to recognize on the ground of the facts upon which the divorce was based or on the ground of the law applied. This is laid down in the second paragraph of article 6, which prohibits a refusal of recognition on the grounds either that the internal law of the State in which such recognition is sought would not allow divorce or legal separation upon the same facts or that the law that was applied in the State of origin is not that applicable under the rules of private international law of the State in which recognition is sought.

The first of these prohibitions is in fact different from the exclusion of supervision over the law applied; what it was sought to prevent was that the State in which recognition was sought might refuse recognition not on the grounds of the direct applicability of its own law but on the grounds that, since the facts upon which the foreign decision was based were not, under its own law, grounds for divorce or legal separation, such recognition would be contrary to its public policy (ordre public). What this undoubtedly means is that recognition can not be refused on the pretext that to do so would infringe public policy by virtue of any divergence whatsoever between the law applied and the law of the State in which recognition is sought. The fact nevertheless remains that certain grounds for divorce (or legal separation) which may be admitted by the law that was applied might be regarded as contrary to the public policy of the State in which recognition is sought (it suffices to think, for example, of a divorce based on a difference of race or religion).

45 Article 19(1), for its part, tempers the exclusion of a refusal to recognize on the grounds of the law applied by allowing Contracting States to reserve the right "to refuse to recognize a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law other than that indicated by the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules".

The exclusive nature which the nationality must have rules out the utilization of this reservation in cases where the spouses, or one of them, had, at the same time as the nationality of the State utilizing the reservation, that of a third State. It should be noted that the State in which recognition is sought will have to take account of this second nationality even should it conflict with that which it itself attributes to the spouse or spouses in question, something which represents a remarkable departure from a very widely accepted principle.

The final part of article 19(1) represents an application of the theory of equivalence which is a feature of the private international law of, for example, France.

C Public policy (ordre public) (articles 8 to 10 and article 12)

a The general exception of public policy (ordre public) (article 10)

46 The Hague Conference has not succeeded in completely eliminating the general exception of public policy (ordre public) from the relations between its Members as defined in the Conventions it has adopted. Nevertheless, the provisions enshrining this exception have during the last decade been drawn up with an eye to avoiding their over-frequent use.

This concern is reflected in article 10 of the Convention, which provides that "Contracting States may refuse to recognize a divorce or legal separation if such recognition is manifestly incompatible with their public policy (ordre public)"[6] The adverb "manifestly" is not to be

6 Cf. article 5(1) of the Convention on the Recognion and Enforcement of Foreign Judgments in Civil and Commercial Matters; article 16 of the Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants; and article 4 of the Convention on the Law Applicable to Maintenance Obligations in Respect of Children.

found in earlier Conventions; while it is not sufficient to impose a precise restriction on States, it nevertheless indicates the spirit in which the exception of public policy (ordre public) is to be applied.

47 It will also be noted that, read literally, the manifest incompatibility with public policy (ordre public) must occur through the recognition of the divorce (or legal separation) and not through the divorce itself. But, insofar as we are concerned here with the general exception of public policy (ordre public), this distinction remains a theoretical one: no doubt it is the introduction of the foreign divorce into the legal system of the State in which recognition is sought which alone can clash with the public policy (ordre public) of that State, but this "collision" could perfectly well result from the actual contents of the decree (e.g. in the case, previously referred to, of a divorce granted on racial or religious grounds).

It will, however, be more clearly seen that a clash with the public policy (ordre public) of the State in which recognition is sought may sometimes result from the conditions under which the divorce was obtained in the State of origin and sometimes from the trouble which its recognition would cause in the State in which recognition is sought (even if it does not in itself contain anything incompatible with public policy (ordre public), when we come to examine two other grounds for the refusal of recognition which are merely special cases of the exception of public policy (ordre public): insufficient protection of the rights of the defence (article 8) and the incompatibility of decisions (article 9).

b Insufficient protection of the rights of the defence (article 8)

48 Article 8 provides that recognition can be refused "If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case".

Stress has already been laid in the Provisional Report on the draft Convention (paragraph 6, page 18) on the fact that this wording differs from that which, in other Hague Conventions, resulted from the same concern to protect the rights of the defence, such wording itself differing from convention to convention. The text as it stands calls for the following comments:

i The two requirements laid down in article 8 ("the taking of adequate steps" and "the affording of a sufficient opportunity") are cumulative and not alternative. It was made crystal clear during the discussions at the Eleventh Session that if one of the two were not satisfied recognition might be refused.

ii Article 8 seems to rule out any necessary link between the accomplishment of the procedural formalities laid down by law and the satisfactory nature of the steps taken to give notice of the proceedings to the respondent and to afford him a sufficient opportunity to present his case. Theoretically, in consequence, recognition might be refused on the basis of this provision even if the formalities laid down by law were in fact carried out; on the other hand, recognition can not be refused solely on the grounds that they were not, if it be shown that the respondent was nevertheless given notice of the proceedings against him and afforded a sufficient opportunity to present his case. But it must be supposed

that these two hypotheses would arise only exceptionally, since the former amounts to holding the protection afforded by the procedural law of the State of origin to be insufficient, whilst the second, on the other hand, would hold a procedural irregularity in that State to be of but slight significance.

iii It is certain, however, that recognition cannot be refused on the sole ground that the respondent failed to appear, nor, on the other hand, granted without verification of whether the requirements of article 8 were satisfied, simply because the parties appeared in the proceedings in the State of origin or were "deemed" to have done so. It may perfectly well happen, in the first case, that the respondent has not appeared even though "adequate steps" were taken to give him notice of the proceedings; whilst in the second case the respondent's appearance will not necessarily imply that he was afforded a sufficient opportunity to present his case (if, for example, he was not allowed sufficient time for the preparation of his case between notification of the proceedings and the hearing, or if there was no grant of alimony pendente litem or no legal aid despite the respondent's being without means).

A more delicate question, at any rate so far as the first condition is concerned, is whether recognition can be refused on the ground that the respondent did not have actual notice of the proceedings even though "adequate steps" were taken to this end. Could it not be said in such a case that the respondent "was not afforded a sufficient opportunity to present his case"? We do not think so, for this second condition, although, as has been seen, it supplements the first, concerns proceedings which have already been instituted, whereas the "appropriate steps" relate rather to the institution of the proceedings.

It is in any event certain that recognition can not be refused on the grounds that the respondent has not presented his case, so long as he was "afforded a sufficient opportunity" of doing so.

c Incompatibility with previous decisions (article 9); Lis pendens (article 12)

49 Article 9 allows Contracting States to "refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in which recognition was sought, or is recognized, or fulfils the conditions required for recognition, in that State".

As the Secretary-General of the Conference emphasized at the Eleventh Session, this constitutes an application of the exception of public policy (ordre public). If it is expressly mentioned in the Convention (cf. the much wider scope of article 5(3) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters), this is in order to avoid "distending" that exception. This observation can serve as a guide to the interpretation of the provision in respect of various points; these will be dealt with below, together with the fairly numerous difficulties to which this interpretation can give rise.

i Under this provision, recognition may be refused of decrees (whether judicial or, as the case may be, legislative, administrative or religious) granting a divorce or legal separation in another Contracting State. Since only such decrees are covered by the Convention, the question can arise in respect of them alone.

In practice, this means that foreign decrees dismissing proceedings for divorce or legal separation (negative decrees) fall outside the provisions of article 9. Such decrees may certainly be incompatible with decrees made in the State in which recognition is sought; but if recognition is refused on this ground, it will be in accordance with the common law of the State in which recognition is sought or with other conventions which that State has concluded and not by virtue of the Hague Convention. This same observation holds good with respect to the provisions relating to findings of fault or to ancillary orders pronounced on the making of a decree of divorce; as will be seen (paragraph 53 below), the recognition of a divorce or legal separation does not extend to such findings or orders, so that the question of a refusal to recognize them cannot arise in the context of the application of the Convention.

ii On the other hand, the earlier decree may constitute an obstacle to recognition, whether such decree granted a divorce or legal separation or refused it. Thus, a decree dismissing proceedings for divorce will justify a refusal to recognize a subsequent foreign decision granting a divorce on grounds already vainly advanced in the earlier proceedings.

iii The decree which stands in the way of recognition may either have been made in the State in which recognition is sought or in another State, provided that, in this latter case, it is recognized, or fulfils the conditions required for recognition, in that State (end of article 9). This rather complicated form of words finds its explanation in the differences that exist between the legal systems of the Contracting States so far as concerns the way in which recognition is obtained (see paragraph 52 below). In countries where recognition is automatic, a foreign decree which fulfils the conditions for recognition is virtually recognized as soon as it is made and will in fact be recognized by the authority before which it is raised without any special procedure. In countries where a special procedure is necessary for recognition, the decree, which will not be recognized for so long as such procedure has not taken place, may "fulfil the conditions required for recognition" and in consequence prevent recognition of a subsequent decree with which it is incompatible. It should also be made clear that the refusal to recognize may be based on any previous decision which is recognized or fulfils the conditions for recognition, whether this be by virtue of the Convention or under the common law of the country in which recognition is sought or by virtue of any international agreement to which it is a party.

iv It is of course necessary that the earlier decree be incompatible with the decree the recognition of which is refused. The Convention itself lays down the limits within which such incompatibility is conceivable, when it provides that the earlier decision must have been one "determining the matrimonial status of the spouses" or, as the French text has it "ayant pour objet principal l'état matrimonial des époux". We shall revert to this notion of "objet principal"; let it suffice here to stress that it quite rightly allows it to be held that incompatibility exists even where the earlier decree is not one of divorce or legal separation. For example, a divorce or legal separation acquired in a foreign country is incompatible with an earlier decree of nullity, even though strictly speaking this is not res judicata, since the object of the two proceedings is not the same. Similarly, a decree of legal separation would be incompatible with an earlier decree of divorce, though the converse is not the case. It is more difficult to say whether an earlier decision dismissing proceedings for legal separation or divorce is incompatible with

a more recently pronounced decree of divorce in the first case and legal separation in the second. In strict law, the two decisions would not be irreconcilable; but if the grounds relied upon in the two successive proceedings were exactly the same, recognition of the later decision would without doubt conflict with the public policy of the State in which recognition is sought and would, it seems, justify a refusal of recognition on the basis of article 10.

v According to the French text of article 9, there is no incompatibility justifying a refusal of recognition unless the earlier decision had as its objet principal th. matrimonial status of the spouses. The draft Convention spoke of a decision "statuant à titre principal sur l'état des époux". The change, which was made at the request of the Belgian delegation, and solely in order to avoid a supposed reference to the technical distinction between principal and ancillary claims, was regarded as being purely a question of tidying up the draft and no equivalent change was made in the English text, which continued to speak of a decision "determining" the status of the parties, when the English draft was similarly tidied up by the substitution of the words "matrimonial status of the spouses" for "status of the parties". It was emphasized, however, in the Report on draft Convention (sections 7-4, on page 19), that it was going rather far to rule out a refusal of recognition where the earlier decision had determined the status of the spouses as a preliminary or interlocutory issue, in connection, for example, with succession or the affiliation of a child; and the Rapporteur added that it would fall "to the Conference, at the Eleventh Session, to decide whether this was not going too far". The Conference stated that it had not intended to alter the substance of the provision, but it nevertheless seems open to question, for example, whether a decision rejecting an application for maintenance based on the applicant's being the defendant's spouse, on the grounds that the marriage was null and void, would leave room for the recognition of a subsequent foreign decree of legal separation or divorce.

vi Finally, we would emphasize that in order to constitute an obstacle to recognition, the decision rendered or recognized in the State in which recognition is sought must antedate the decision the recognition of which is sought. It is not the order in which the proceedings were instituted that counts, but the chronological order in which the decisions were delivered.

The Convention does not say, however, whether the earlier decision must be a final one. A foreign decision will only be recognized or fulfil the conditions for recognition if it is "legally" effective in the State of origin (end of article 1; see paragraph 14 above), which seems to imply that it has neither been set aside nor forms the subject of an appeal which is pending. But the question is more delicate with respect to a decision delivered in the State in which recognition is sought; in practice, however, it seems that the risk of incompatibility between the foreign decision and a "local" decision which has already been delivered but against which an appeal has been lodged, will suffice, on the general ground of public policy (ordre public) to warrant a refusal to recognize the former.

50 It is the specific purpose of article 12 of the Convention, which deals with proceedings pending in another Contracting State, to reduce, if not to eliminate entirely, the risk of incompatible decisions being given. It provides that "Proceedings for divorce or legal separation

in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State".

This provision allows the courts of a Contracting State to stay a petition for divorce or legal separation which has been brought before it, for so long as previously instituted proceedings in another Contracting State relating to the matrimonial status of either party to the marriage are pending. This avoids the making of a decree of divorce or legal separation either after a foreign judgment but incompatible with it, which would constitute an obstacle to its recognition in foreign countries by virtue of the provisions of article 9, or before the foreign judgment, in which case it would constitute an obstacle to the recognition of the latter if the two decisions should prove to be incompatible or which would mean that recognition in the State in which the later decision was delivered, although it could not be refused by virtue of the provisions of article 9, could conflict with the public policy (ordre public) of the State in which recognition was sought.

It will be noted that the provision does not expressly require, in order for the proceedings to be suspended, that the foreign proceedings invoked should have been commenced first, but this does not cause any difficulty, since such suspension is in any event optional. We would emphasize too that the optional nature of the provision does not render it useless, since under the common law of certain States the plea that the issue is pending before a foreign court may in principle be inadmissible - this has traditionally been the case in France, for example, and it has not so far been clearly and categorically renounced.

D Exclusion of a review of the merits (last paragraph of article 6)

51 The last paragraph of article 6 provides that "Without prejudice to such review as may be necessary for the application of other provisions of this Convention, the authorities of the State in which recognition of a divorce or legal separation is sought shall not examine the merits of the decision".

The principle which is enshrined here is gradually being accepted into the common law of the States represented at the Conference; it is in any case to be met with in all bilateral conventions concerning the recognition and enforcement of judgments, as well as in the Hague Convention dealing therewith (article 8).

Like that Convention, moreover, the Convention on the Recognition of Divorces and Legal Separations reserves the possibility of an examination of the merits, should it prove necessary for the purpose of the application of its other provisions. We are concerned here solely with cases where the exercise by the authorities of the State in which recognition is sought of that degree of supervision which is allowed by the Convention involves such an examination (e.g., a verification of the facts upon which the jurisdiction was based, or where the respondent has not appeared, an examination of the findings of fact upon the basis of which jurisdiction was assumed, or, again, an examination of a foreign decision concerning an earlier decision delivered or recognized in the State in which recognition is now sought, or of the public policy (ordre public) of the latter, insofar as recognition may be refused if it would conflict with such public policy).

IV THE MACHINERY FOR, AND THE EXTENT AND EFFECTS OF RECOGNITION (second paragraph of article 1 and article 11)

A The machinery for recognition

52 The Convention does not lay down any procedure for the recognition of divorces and legal separations. This was done deliberately. It was in fact recalled, during the discussions, that whilst such a procedure was necessary in certain of the States represented, in others the authority to which the foreign decision is submitted (an official of the Registry of Births, Marriages, Deaths and Divorces or some other civil servant or an officer of the court) must regard it as of legal effect without any prior procedures being necessary, once it fulfils the factual conditions for recognition, something which the authority concerned will himself check (except where the raising of an objection might involve the institution of proceedings).

It was not intended that the Convention should unify these various types of machinery for recognition. They will consequently continue to operate in accordance with the law of each State. It will, however, be recalled that, under article 9, account must be taken in the State in which recognition is sought not only of decisions that are recognized, but also of those which fulfil the conditions for recognition. This rule is binding both on States which do not require any special procedure for recognition and upon those States which do (see paragraph 49 above).

B The extent of recognition (second paragraph of article 1)

53 The second paragraph of article 1, to which reference has already been made, provides that "The Convention does not apply to findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children".

It follows that, in terms of the Convention, recognition attaches only to the principal object of the foreign decision, i.e. to the dissolution or relaxation, as the case may be, of the marital tie. Those matters which are expressly mentioned as excluded are, moreover, merely illustrative of the kind of orders not covered by recognition under the Convention. Thus, in addition to orders for alimony pendente litem or for maintenance ("orders relating to pecuniary obligations") or orders relating to the custody of children, recognition under the Convention also does not extend to orders relating to the family dwelling, to the residence of one or other of the spouses, to the granting or withholding of authorisation for one of the spouses to continue to bear the other's name, etc.

But it must of course be borne in mind that in certain of the Contracting States such orders might be recognized, or even be enforced, by virtue of the common law of such country or by virtue of other international conventions (articles 17 and 18; and see paragraph 59 below).

C The effects of recognition (article 11)

54 Article 11 provides that, "A State which is obliged to recognize a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognize that divorce".

The purpose of this provision is to remove the obstacle which the general private international law of certain States represented at the Conference (e.g. Austria and Switzerland) places in the way of the remarriage of a divorced spouse, even if the divorce is recognized, once the law applicable to the marriage does not itself recognize that divorce. It is thus intended to guarantee that the recognition of the divorce will produce at least that effect which is regarded as indispensable, i.e. the capacity on the part of each former spouse to contract a valid new marriage.

But, having recalled this, there must be attributed to the provision neither more nor less than what it actually says.

a No more must be attributed to it than what it actually says: by this we mean that those obstacles to remarriage which result from the law applicable thereto under the private international law of the Contracting State, other than the non-recognition of the divorce by that law, may perfectly well be taken into consideration by that State and will entitle it to prohibit the remarriage in question.

b Nor must less be attributed to it than what it actually says: it is essential to make it clear that the Convention, by its express reference to capacity to contract a remarriage, does not intend by doing so to restrict the effects of recognition thereto. The "essence" of the decision which is recognized - stripped of any findings of fault or ancillary orders (see paragraph 53 above) - in other words, the dissolution or relaxation, as the case may be, of the marital tie, produces all those effects which necessarily and directly flow therefrom. For example, a spouse divorced in a Contracting State will not be able, in another Contracting State, to claim to succeed to the other spouse as the surviving partner to the marriage; nor will such spouse be able to rely on rights arising from the matrimonial regime that obtained during the subsistence of the marriage

V STATES HAVING MORE THAN ONE SYSTEM OF LAW (articles 13 to 16)

55 It has already been recalled that certain of the States represented at the Conference have two or more systems of law applicable to divorce or legal separation, systems of law applicable either to distinct territorial entities (as in the United States) or to different categories of persons, generally defined by their religion (as in the U.A.R. and Israel). This situation may lead to an only partial application of the Convention if the State concerned declares its wish to limit its application to certain only of its systems of law (articles 23; and see paragraph 21 above). But whether this limitation has been made or not, it also necessitates an adaptation or interpretation of those provisions of the Convention which relate to connecting factors founding jurisdiction and to the law applicable; furthermore, this last-named point may equally well arise in connection with a State having more than one system of law which is not a Party to the Convention, since it may be necessary to take account of its law on divorce or legal separation for the purpose of applying the Convention (e.g. article 7).

Such is the purpose of articles 13 to 16 of the Convention.

A Position where the State of origin has more than one system of law and jurisdiction (articles 13(3) and 14)

56 As we know, the jurisdiction of the State of origin, rests on habitual residence, on domicile, on nationality, or on a combination of these factors (see paragraphs 24 et seq.), as the case may be.

a With respect with the first two of these, articles 13 provides: "In the application of this Convention to divorces or legal separations obtained or sought to be recognized in Contracting States having, in matters of divorce or legal separation, two or more legal systems applying in different territorial units - ...any reference to domicile or residence in the State of origin shall be construed as referring to domicile or residence in the territory in which the divorce or separation was obtained." In practice, for example, a divorce granted by a court in Reno which had assumed jurisdiction by virtue of the respondent's habitual residence (article 2(1)) would, in terms of the Convention, have to be recognized if that residence were situated within the state of Nevada, but not if it were in New York or San Francisco: it is easy to see the importance of this provision in the struggle against "forum shopping".

b No distinction with respect to jurisdiction, on the other hand, is drawn between the nationals of a State having two or more legal systems applying in different territorial units. Article 14(1) provides that in such cases article 2, sub-paragraph 3 (which confers jurisdiction on the State of which the two spouses are nationals - see paragraph 28 above) "shall apply where both spouses were nationals of the State of which the territorial unit where the divorce or legal separation was obtained forms a part, and that regardless of the habitual residence of the spouses". In practice, this means that a divorce granted in Reno between two spouses who are American citizens and habitually reside in New York will fall within the ambit of article 2, sub-paragraph 3 Similarly, article 14(2) provides that sub-paragraphs 4 and 5 of article 2 (it will be recalled that these provisions take account of the petitioner's nationality combined with other factors, for the purpose of conferring jurisdiction on the State of origin) "shall apply where the petitioner was a national of the State of which the territorial unit where the divorce or legal separation was obtained forms a part". For example, the divorce obtained by an American citizen having his habitual residence in Nevada will be entitled to recognition even if he originated from New York.

B States which have more than one legal system or applicable law (article 13(1) and (2) and articles 15 and 16)

57 This problem can arise in respect of both Contracting States and other States, and in each case the "multiplicity" may be either territorial or personal.

a Where the State in which a divorce or legal separation was obtained or the one in which recognition is sought has two or more legal systems applying in different territorial units, any reference to the law of the State of origin is to be construed as referring to the law of the territory in which the divorce or separation was obtained (article 13(1)); it is difficult to find an example of such a reference in the Convention, except for article 3, which provides for domicile to be ascertained in

accordance with the law of the State of origin. In addition, any reference to the law of the State in which recognition is sought is to be construed as referring to the lex fori (article 13(2); such a reference might be regarded as implicit in article 10, which concerns public policy (ordre public)).

b Where a State has two or more legal systems applicable to different categories of persons "any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State" (article 15). We thus have here a renvoi to the rule of the system of conflict of personal laws of the State in question for the purpose of indicating which system of personal law is applicable; this is a much more complex question than the one of different systems of territorial law within the same State, and it consequently could not be directly settled by the Convention.

c Finally, the same solution (i.e. a renvoi to the rules of the system of conflict of territorial or personal law) is adopted in article 16 in respect of Contracting States other than the State in which the divorce or legal separation was obtained or in which it was sought to have it recognized and in respect of States which are not Contracting States and which have two or more legal systems of territorial or personal application.

VI DECLARATION CONCERNING CERTAIN CATEGORIES OF A CONTRACTING STATE'S NATIONALS (article 22)

58 Independently of the question of their having more than one system of law, certain Contracting States (and notably the United Kingdom) have a complex system of nationality in the sense that not all persons having that nationality have the same legal status.

In order to provide for this situation, article 22 lays down that "Contracting States may, from time to time, declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention".

It was explained, in the course of discussions, that the object of this provision was not to enable a State making the declaration for which it provides to deprive certain of its nationals of the status of a national within the meaning of the Convention, but, on the contrary, to authorize the other Contracting States not to regard the categories of persons covered by such a declaration as having that status (hence, for example, a divorce obtained in a State which has made such a declaration, between two spouses having its nationality but falling into a category covered by the declaration, would not be entitled to recognition by virtue of article 2(3)).

VII RELATIONSHIP BETWEEN THE CONVENTION AND OTHER SOURCES OF LAW

59 The Convention states to what extent it can, in each State, co-exist with the common law of that country or with other conventions.

a Article 17 provides that the Convention "shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations". As we have

already remarked earlier, the wish to facilitate such recognition triumphed over the desire for a uniform solution. It is easily imaginable that the opposite might have occurred, and that is why we think it would have been necessary to make clear what was desired if such a solution had been sought. The solution that was adopted seems to us to be the right one, because whilst the provisions of the Convention constitute a major advance as compared with the common law in certain countries, they are, on the other hand, in relation to certain countries a retreat in respect of certain points, and such a retreat would not have been welcomed in the countries concerned.

A party who seeks to have a divorce or legal separation recognized should rely on the common law where this is more favourable. But it seems to us impossible to say in advance in a general fashion that in this or the other country the common law is more or less favourable than the Convention, precisely because the one may be more favourable in respect of one point and the other more liberal in respect of another. It seems to us impossible, as was written with respect to the Hague Convention on the Enforcement of Judgments (see the Report by Mr Fragistas in Actes et Documents de la Session extraordinaire de 1966, paragraph 14, page 387), to combine the most favourable provisions of both. He who seeks to have a decree recognized must rely either on the common law or on the Convention.

b The multiplication of international conventions has an ever-growing tendency to engender conflicts. Most of the Hague Conventions of the last 15 years contain one or more provisions dealing with this point, but it is worthy of note that each has adopted a different solution. [7]

The Convention on the Recognition of Divorces and Legal Separations deals with the question in article 18, and this provision too differs from its predecessors. It is the result of a compromise arrived at by the Delegates of the 25 countries represented at The Hague in October 1968. A number of these pointed out that there was already in existence, independently of the old 1902 Convention, the Nordic Convention of 6th February 1931 Containing Certain Provisions of Private International Law on Marriage, Adoption and Guardianship amended by the Agreement of 26th March 1953 and the Athens Convention of 14th September 1966, drawn up by the Commission Internationale de l'Etat civil on the "reconnaissance des décisions relatives au lien conjugal". Now all the Signatory States of these last two Conventions are Members of the Hague Conference and were represented as such at the Eleventh Session.

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7 See in particular article 11 of the Convention of 15th April 1958 Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children; article 28 of the Convention of 5th October 1961 Concerning the Powers of Authorities and the Law Applicable to the Protection of Minors; article 8 of the Convention of 5th October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents; article 12 of the Convention of 15th November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; article 25 of the Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; article 11 of the Convention of 25th November 1965 on the Choice of Court; article 24 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

They wished to be able to maintain the aforementioned Conventions in being as between themselves, even if they had to modify their provisions, because they met their own special requirements. It was in these circumstances and essentially in order to meet this desire that article 18 was adopted.

One can not fail to notice, however, that article 18 is particularly liberal in its provisions and at the same time somewhat vague.

The first paragraph of article 18 declares the primacy of other conventions to which one or several Contracting States are Parties and which contain provisions relating to the subject-matter of the Convention over the latter. No limitation has been placed on this, as has usually been done in Hague Conventions so far, such as by allowing this liberty to Contracting States only for the present, or in respect of particular subjects, or, again, insofar as the recognition of divorces and legal separations is favoured. It would perhaps have been difficult to do otherwise, since divorce is notably a special subject in itself and because, as we have pointed out earlier, it is hard to say in advance that one convention is more favourable than another.

The freedom allowed to States in principle is, however, restricted by the second paragraph of article 18, which recommends to States that they should refrain from concluding other conventions on the same matter incompatible with the terms of the present Convention. It is precatory, not mandatory in nature, but we do not doubt that, having regard to diplomatic usage, it will be respected unless such States rely on "special reasons based on regional and other ties", in accordance with the provision of that same paragraph. The regional ties of which article 18 speaks are those to which the Scandinavian Delegates and the members of the Commission Internationale de l'Etat Civil referred at the Eleventh Session. The Hague Conference attempted in this way to reconcile the existence of a certain measure of regionalism, so far as might be absolutely necessary, with the provisions of the Convention. But it is certain that the efficacity of the text adopted will be the greater the more signatories there are and that there will be the fewer derogations from it.

The last part of article 18 merely preserves rights acquired under the present Convention, something which went without saying.

VIII FINAL CLAUSES (articles 25 et seq.)

60 Articles 25 et seq. of the Convention contain provisions some of which are habitually to be met with in the Hague Conventions.

Most of these provisions have already been commented on (article 26: States which may sign the Convention - paragraph 11 above; article 27: entry into force - paragraph 23 above; article 29: limited application to certain legal systems - paragraph 21 above; article 30: period of validity of the Convention - paragraph 23 above).

There remains to be mentioned only article 25, concerning the making of the reservations allowed by the Convention (at the time of ratification or accession, or when notifying an extension of the Convention in accordance with article 29: see on this point paragraph 20 above), and

their withdrawal; and article 31, which confers on the Ministry of Foreign Affairs of the Netherlands the task of giving notice to the States represented at the Eleventh Session and to States which have acceded to the Convention of those matters, such as signatures, ratifications, the entry of the Convention into force, accessions, extensions, denunciations, reservations, withdrawals and declarations, listed in article 31.

Paris, October 1969

Pierre Bellet

Berthold Goldman

INDEX ACCORDING TO THE ARTICLES OF THE CONVENTION

* This table refers to the paragraph numbers, not to the pages of the Report.

ANALYTICAL TABLE OF CONTENTS

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