

EXPLANATORY REPORT

The purpose of this Convention is to resolve, as far as possible, difficulties arising from the non-recognition of decisions concerning the matrimonial bond, especially those granting divorce, outside the country where those decisions were given.

Article 1

In the first place this Article determines the scope of the Convention. It was framed as broadly as possible.

There was discussion as to whether the Convention should or should not apply to decisions relating to the nullity of a marriage. It was decided that it should, partly because there are some States whose domestic law, though stricter with regard to the dissolution of the matrimonial bond, is more liberal on the question of annulment, and also because some laws, such as the German, make provision for annulment without retroactivity (*Aufhebung*).

It will be seen that Article 17 reserves the right of each Contracting State to restrict the scope of the Convention by a unilateral declaration.

The Convention applies to decisions made by both judicial and administrative authorities. In the Commission's opinion, Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which uses the word "tribunal", does not preclude the recognition of decisions of a jurisdictional nature pronounced by administrative authorities.

The expression "relating to" covers decisions granting and decisions dismissing petitions.

The Convention applies to all decisions concerning the matrimonial bond, whatever the nationality of the parties involved. Accordingly, for the Convention to apply, there is absolutely no need for one or both of the parties to be nationals of a Contracting State.

Under the Convention, a decision given in a Contracting State that fulfils the conditions laid down in Article 1 is to be recognised in the other Contracting States as carrying the same authority as in the State where it was given. However, this provision does not imply that a decision which is enforceable in the State where it was given is also enforceable in the State where it is invoked. This is because, under Article 7, recognition applies only to the main provisions of the decision relating to the matrimonial bond itself – and not to accessory or interim provisions relating, for example, to questions of family property – and those main provisions by definition do not involve enforcement. Doubts could arise with regard to the recording of the decision in civil status registers, particularly in those States where such recording is regarded as a measure of enforcement.

In order to avoid any disputes on the latter point, the matter is expressly regulated by Article 8.

The conditions that a decision must fulfil in order to be recognised, set out as items (1), (2) and (3) in Article 1, are cumulative. Under the broad conception of public policy that prevails in some States, it might be thought that the conditions amount to a single condition, namely that of public policy. But it seemed preferable to specify all three, mainly in order to limit the number of cases of refusal of recognition.

Item (1) For the purposes of this provision, "decision recognised" should be taken to mean one which has been expressly recognised by the authority referred to in Article 6. Implied or provisional recognition, granted for example by a competent authority in fiscal or inheritance matters or even by

a civil registrar, does not fall within this category. The text does not require the decision to concern the same parties or be on the same subject, since two decisions may be incompatible even though they do not concern the same parties or have the same subject matter.

Item (2)

The Convention permits refusal of recognition when it is clear that one of the parties, though duly summoned, has not in fact had an opportunity to present his or her case.

Item (3)

In order to prevent improper or over-extensive reliance on public policy, the Convention emphasises that recognition must not be refused unless the decision is manifestly contrary to public policy in the country where it is invoked.

Article 2

This Article lays down the principle that all the tribunals of the Contracting States are to be taken to be competent. Being familiar with their respective laws, the member States of the ICCS trust one another and can therefore obviate the casuistry inherent in criteria of jurisdiction and the complications created by such a system. A single exception has been made to this principle, namely where both spouses are nationals of the State where the decision is invoked. It seemed only natural that in such an eventuality the requested State should be able to refuse recognition if its rules of competence have not been complied with. The fact that the final phrase of Article 2 employs the present indicative signifies that the nationality of the persons concerned is to be determined at the time when the decision is invoked.

It will be seen that the text does not deal with the problem of dual nationality; in such cases the wording used allows but does not oblige the State where the decision is invoked to decide that its own nationality shall prevail.

Article 3

In certain countries a foreign decision will be refused recognition, sometimes in the name of public policy, because it applied a law other than the one which was applicable according to the rules of conflict of laws of the country where the decision is invoked. Article 3 limits such cases of refusal of recognition.

In drafting item (1), particular attention was paid to the case of decisions dismissing petitions. The main object was to prevent nationals of a Contracting State from being deprived of the possibility of filing a divorce petition in their country of origin, when a petition filed by them has been dismissed in another Contracting State on substantive or formal grounds.

In contrast to Article 2, Article 3 (1) is drafted in the past tense because here it is a question of verifying the choice of applicable law that was made in the course of earlier proceedings. For example, in the case of nullity of a marriage, nationality must be determined as it was at the time of celebration of that marriage.

Item (2), which incorporates a provision found in numerous international conventions, calls for no special comment.

Article 4

This provision covers the case, probably uncommon but by no means inconceivable, in which two foreign decisions are simultaneously invoked with a view to recognition.

This hypothetical case differs from that envisaged in Article 1, item (1); for example, if a more recent foreign decision has been recognised in a Contracting State through ignorance of a previous foreign decision on the same subject, Article 1, item (1), and not Article 4, will be applied.

Like Article 1, this Article concerns only cases of express recognition by the authority referred to in Article 6.

Article 5

In accordance with the Convention's aim of facilitating recognition, this Article excludes any review of the merits of a foreign decision. The requested court has only to verify that the conditions laid down by the Convention are fulfilled.

Article 6

This provision relates to the designation in the Contracting States of the authority responsible for verifying that the decision invoked conforms to the Convention.

This Article must be read in conjunction with Article 13. It follows that those States – such as France and the Netherlands – which accept that foreign decisions relating to personal status can have provisional effects in their territory without a prior express decision, will not be obliged to change their system; in those States, a civil registrar will therefore be able to remarry persons divorced abroad, or even make entries concerning the foreign decision in the civil status registers, without a prior decision granting recognition.

However, taking account of foreign decisions in this way does not constitute “recognition” within the meaning of this Convention. Such express recognition can stem only from a decision pronounced by the authority designated in Article 6. It is only after such a decision that the foreign judgment can no longer be called in question (second paragraph of Article 7).

Article 7

Provisions relating to fault attaching to the parties, or their good faith, are closely linked to the decision itself, which explains why Article 7, first paragraph in fine, specifies that they are to be treated in the same way. In this respect, the word “provisions” should be taken to mean not only the operative part of the decision as such, but also any of the grounds recited which, because the operative part is silent on the subject, are decisive. The concept of custody of children is not the same in the legislation of all the Contracting States: in its narrowest interpretation, the expression means, at the very least, control of the child's person.

Article 8

This Article must not be interpreted “a contrario”; in those States where foreign decisions are entered in civil status registers without prior express recognition, the practice may therefore be continued.

Article 9

The text resolves an important problem which has often given rise to difficulties. It lays down the logical principle that recognition of a decision pronouncing the dissolution or the annulment of a marriage means that from the point of view of possible remarriage the two persons concerned will be regarded as unmarried.

For example, Belgium will be bound under Article 9 to permit the marriage of Spaniards divorced in the Netherlands, even though their national law does not permit it.

Because of the close connection between recognition of a divorce and capacity to marry, it was found impossible to separate them. Once a State recognises a divorce between two spouses, it is only natural that it should draw the logical conclusions from that attitude and permit the marriage of such divorced persons, even if divorce does not exist in the law governing the personal status of one of them.

It should be observed that the text of Article 9 imposes an obligation only on the recognising State, and not on the State where the decision dissolving or annulling the marriage was given, however desirable and logical it might appear to provide for an obligation on the latter's part. Although Article 9 does not expressly mention the non-existence of a marriage, it does cover that eventuality as well. It will also be seen that under Article 18, item (2), a State may reserve the right to restrict the scope of Article 9 as far it is concerned.

The 1902 Hague Convention Governing Conflicts of Laws Concerning Marriage will continue to be binding upon its signatories, at least in relation to the other signatory States which have not acceded to the ICCS Convention.

Article 10

This Article deals with the issue of *lis pendens* and provides that an authority subsequently seised of a petition identical to one already lodged with another authority shall refrain, at least provisionally, from giving a decision on the merits.

The expression "even *proprio motu*" signifies that if neither of the parties enters a plea of *lis pendens*, the court must then of its own accord refrain from giving or defer a decision; in such cases it will be for the law of the requested country to specify the procedure to be followed.

The second paragraph of Article 10 implicitly provides for two possibilities. On the one hand, if on the expiry of the one-year time-limit the authority previously seised has not yet given a decision, the proceedings may be resumed by the authority subsequently seised; but, on the other hand, the latter authority must also refrain from giving a decision, even though proceedings have been resumed, if, before it has given its decision, the authority previously seised gives one of its own in the meantime.

Article 11

The idea of assimilating refugees and stateless persons to the nationals of a State, which is expressed in this Article, is to be found in other international agreements.

The wording used echoes that of the Convention to facilitate the celebration of marriages abroad, signed at Paris on 10 September 1964.

Article 12

This Article calls for no comment.

Article 13

See the explanations given for Article 6.

Articles 14 and 15

These Articles call for no comment.

Article 16

This Article enables Contracting States to apply the rules relating to recognition laid down by the Convention to the enforcement in their territory of accessory provisions of a judgment (custody of children, maintenance, damages).

The question was raised whether it was appropriate to make provision in the Convention for a State to reverse its decision to extend, by a declaration of withdrawal. It was argued in favour of such a provision that it would be likely to encourage declarations of extension. The Commission considered it unnecessary to include such a provision, since a State could, when making the declaration mentioned in Article 16, always reserve the right to withdraw it unilaterally by a contrary declaration.

Articles 17 à 21

These Articles call for no comment.