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Recent Treaties and Statutes

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Recent Treaties and Statutes

DRUG CONTROL—PROTOCOL AMENDING THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961—PROTOCOL STRENGTHENS THE AUTHORITY OF THE INTERNATIONAL NARCOTICS CONTROL BOARD

The Single Convention on Narcotic Drugs, 1961,¹ constituted a major step toward international acceptance of responsibility² for the control of licit and illicit drug traffic.³ The Single Convention achieved a unified codification⁴ of existing multilateral treaties in the field⁵ and created the International Narcotics Control Board (INCB),

1. Single Convention on Narcotic Drugs, 1961, *opened for signature* March 30, 1961, [1967] 2 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 (effective for the United States December 13, 1964) [hereinafter cited as Single Convention].

2. "The obligations which derive from the existence of the contemporary situation of drug dependence are twofold: effective national controls and international cooperation to maximize national efforts." Bassiouni, *The International Narcotics Control System: A Proposal*, 46 ST. JOHN'S L. REV. 713, 716 (1972).

3. The 1970 Report of the International Narcotics Control Board stated: "Any assessment of the present degree of drug abuse throughout the world must conclude that the gravity of the situation has deepened during the year. Misuse of narcotic and other dangerous substances has escalated sharply in a number of countries and the outlook is profoundly disquieting." U.N. Doc. E/INCB/9 (1970).

4. Single Convention, art. 44.

5. A chronological list of major international efforts to control narcotics begins with The Hague Convention of 1912. The Convention enunciated several general principles, including the control of production and distribution of raw opium, which have remained the foundation of subsequent drug control efforts. The absence of administrative machinery, however, weakened The Hague Convention considerably. International Opium Convention, Jan. 23, 1912, 38 Stat. 1912 (1915), T.S. No. 612, 8 L.N.T.S. 187.

The Geneva Convention of 1925 attempted to provide the necessary administrative machinery missing from The Hague Convention of 1912. The Geneva Convention of 1925 required governments to furnish to a Permanent Central Opinion Board annual statistics concerning the production of opium, the manufacture, consumption and stocks of narcotic drugs, and quarterly reports on imports and exports. Significantly, the Board was authorized to recommend an embargo on the export of drugs to any country that threatened to become a

center of illicit traffic. International Opium Convention, Feb. 19, 1925, 81 L.N.T.S. 317.

In an effort to carry out the principle of limiting the use of narcotic drugs to medical and scientific purposes, the Narcotics Convention of 1931 required noncontracting parties as well as parties to the Convention to furnish annual advance estimates of narcotics needed for these purposes. These estimates were examined by an international body of experts, the Drug Supervisory Body, which was authorized to establish estimates for countries failing to furnish them. Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Stat. 1543 (1933), T.S. No. 863, 139 L.N.T.S. 301.

After World War II the United Nations assumed the initiative in the drug control field. The Paris Protocol of 1948, which supplements the Narcotics Convention of 1931, was designed to close the gaps in the existing control system created by discoveries in the field of synthetic drugs. The Paris Protocol required the parties to inform the Secretary General of any drug capable of producing addiction that was not covered by a previous treaty. If the World Health Organization (WHO) determined that the drug was addictive, the drug then became subject to appropriate control under the Narcotics Convention of 1931. Protocol Bringing Under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as Amended by the Protocol Signed at Lake Success on 11 December 1946, Nov. 19, 1948, [1951] 2 U.S.T. 1629, T.I.A.S. No. 2308, 44 U.N.T.S. 277.

There still remained the problem of actually limiting the production of raw opium to medical and scientific purposes. A plan for the reorganization of the opium trade into an international monopoly was proposed, but the principal opium-producing and drug-manufacturing countries could not agree on three key points: the price of opium, an effective means of international inspection and a method of financing the monopoly. A compromise resulted in the Opium Protocol of 1953, which limited production and use of opium to medical and scientific needs. Production for export was limited to seven countries, and the parties agreed not to permit the import of opium from any state not a party to the Protocol. The Protocol did not become effective until 1963, and has had limited effect because three of the seven exporting countries are not parties. Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, *opened for signature* June 23, 1953, [1963] 1 U.S.T. 10, T.I.A.S. No. 5273, 456 U.N.T.S. 56. See Bassiouni, *supra* note 2, at 722-28; Bevans, *International Conventions in the Field of Narcotic Drugs*, 37 TEMP. L.Q. 41, 42-53 (1963).

6. The requirement in article 4 of the Single Convention that the parties take all necessary steps to limit the production to medical and scientific purposes is the most forthright statement in fifty years of drug legislation. Waddell, *International Narcotics Control*, 64 AM. J. INT'L L. 310, 316 (1970).

The drug problem is difficult to control at the production end, however, since a very small plot of the poppy plant can supply a large number of users. For example, it has been estimated that one or two per cent of the land that is commonly being used to grow poppies can supply the entire United States

granting that body the greatest control over the production⁶ of drugs⁷ ever given to an international body. The Single Convention, however, had several obvious weaknesses.⁸ Implementation depended on state cooperation and the willingness of the parties to enact domestic enforcement procedures.⁹ The Single Convention contained no firm international commitments to limit the production of opium;¹⁰ decisions concerning opium production were left to the individual parties subject only to general guidelines against overproduction. The Single Convention limited the authority of the INCB primarily to making recommendations and requests.¹¹ In addition, information on which the INCB could act under the Single Convention was restricted

market. See *Hearings on Executive J Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 30-31 (1972) [hereinafter cited as *1972 Hearings*]. Thus control over the production of drugs is not as significant as it may seem.

7. One obvious omission from the Single Convention is the failure to include psychotropic substances. The Convention on Psychotropic Substances, 1971, was enacted to fill this gap in drug legislation. E/Conf. 58/6 (1971). For a discussion of the Convention on Psychotropic Substances and a comparison with the Single Convention see Bassiouni, *supra* note 2, at 740-48.

8. See Bassiouni, *supra* note 2, at 731.

9. For instance, the controls on production are largely indirect; there are no provisions for the assignment of quotas or ceilings on production. Instead, the parties agree to take measures to insure compliance with the treaty, "[h]aving due regard to their constitutional, legal and administrative systems." Single Convention, art. 35. See also Single Convention, art. 36.

The INCB has limited authority under the Single Convention to request information and explanations, make public declarations that a party has violated its obligations, and, under article 14(2), make a recommendation to parties that they impose embargoes on imports and exports against an offending country. See note 11 *infra*.

10. Article 4(1)(c) merely provided that the "[p]arties shall take such legislative and administrative measures as may be necessary" to limit the production of drugs to medical and scientific purposes. Single Convention, art. 4(1)(c) (emphasis added).

11. For instance, the INCB could only recommend an embargo to the other parties (art. 14(2)); it could make requests for additional information and an explanation if it had reason to believe that the aims of the Single Convention were being endangered seriously by reason of the failure of any country or territory to carry out the provisions of the Single Convention (art. 14(1)(a)); and it could request that parties wishing to begin production of more than five tons of opium not do so (art. 24(2)(a)(ii)). See, e.g., *Hearings on International Aspects of the Narcotics Problem Before the Subcomm. on Europe of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess. 72 (1971) [hereinafter cited as *1971 Hearings*].

almost completely to that received from governmental sources.¹² Due to reporting delays, any overproduction¹³ was often in the stream of illicit traffic before the INCB could act. Finally, escape clauses weakened international sanctions applicable to individual offenders; each party could use its own law to punish an offender and could refuse extradition if the party determined that the offense was not "sufficiently serious."¹⁴ In an effort to remedy these weaknesses, the United States in March of 1971¹⁵ proposed¹⁶ several amendments¹⁷ to the Single Convention,¹⁸ most of which related to strengthening the authority of the INCB.¹⁹ Under the proposed amendments the INCB was to be given the authority to make direct inquiries of any party about the cultivation and production of opium inside its borders. The INCB could act on the basis of all information it received, regardless of origin, and also would have the authority to conduct local

12. See, e.g., Single Convention, art. 14(1)(a).

13. Article 20 required the parties to furnish statistical returns on production or manufacture, utilization, consumption, imports and exports, seizures and stocks of drugs. Except for returns concerning imports and exports, which were to be prepared quarterly, these returns were prepared only annually, however, and could be furnished to the INCB as late as six months following the year to which they related. Single Convention, art. 20(2)(a).

14. Article 36 provides that "the Party shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious." Single Convention, art. 36(b)(iv). This provision was not changed by the recent amendments. See note 29 *infra* and accompanying text.

15. Letter from George Bush, Permanent Representative of the United States to the United Nations, to the Secretary General, Mar. 18, 1971, in U.N. Doc. E/4971(L) (1971).

16. Article 47 provides that any party may propose an amendment to the Convention, and establishes a process through which amendments pass for consideration. Single Convention, art. 47.

17. The two main objectives of these amendments were to establish controls adequate to insure compliance with limitations on production and manufacture, and to provide adequate inducements and assistance to parties so that they could comply effectively with their treaty obligations. See Bassiouni, *supra* note 2, at 733; *Hearings on S. 509, S. 694, S. 1188, S. 1944, S.J. Res. 78 and S. Con. Res. 8 Before the Senate Comm. on Foreign Affairs*, 92d Cong., 1st Sess. 106 (1971) [hereinafter cited as *July 1, 1971 Hearings*].

18. For a statement of the objectives of these proposed amendments by Harvey R. Wellman, Special Assistant to the Secretary of State for Narcotic Matters, see *1971 Hearings, supra* note 11, at 106.

19. The United States also proposed that the membership of the INCB be increased from eleven to thirteen persons so that better geographic representation could be achieved. This amendment was accepted.

investigation²⁰ of suspected drug-related activities. In addition to the estimates of consumption required by the Single Convention,²¹ each party would be required to submit an annual estimate of its opium production and could not produce in excess of its estimate. Under the United States proposal, the INCB also would have the authority to impose an embargo on the import and export of narcotic drugs by any country or territory determined to be in danger of becoming a center of illicit traffic. Finally, the INCB could recommend to United Nations authorities that financial and technical assistance be provided for a state attempting to fulfill its obligations under the Single Convention. A plenipotentiary conference was convened in March 1972 to consider the amendments and most were accepted without change. In final form the amendments strengthen both the authority and enforcement powers of the INCB and the machinery for the extradition of drug offenders. The amendments also encourage the parties to provide general rehabilitative measures for drug abusers in lieu of punishment, make provisions for technical and financial assistance to the parties and permit the INCB to utilize additional sources of information. *Protocol Amending the Single Convention on Narcotic Drugs, 1961*, Executive J, 92d Cong., 2d Sess. (1972).²²

Pursuant to the accepted amendments, the INCB will endeavor to limit cultivation, production, manufacture and use of drugs to medical and scientific requirements.²³ If the INCB finds that a party has not limited its opium production in accordance with its estimate,²⁴ the INCB may deduct all, or a portion, of the overproduction from that party's allotted production for the next year.²⁵ The Protocol expands

20. Combined with the greater permitted number of sources of information, this amendment would help alleviate the delay problem so that the INCB could begin action immediately. It would also increase the effectiveness of the INCB's enforcement authority.

21. Single Convention, art. 19(1)(a).

22. Executive J, 92d Cong., 2d Sess., 118 CONG. REC. 14, 853 (daily ed. Sept. 14, 1972) [hereinafter cited as Protocol].

23. Protocol, art. 2(4). Note that originally this was a general obligation of the parties, and has now been made a function of the INCB as well. *See* note 10 *supra*.

24. Under the Single Convention the parties are required to submit estimates of the amount of drugs to be consumed for medical and scientific purposes. Single Convention, art. 19(1)(a). The amendments provide that each party also must submit an estimate of the approximate amount of opium it will produce, and the party is obligated not to exceed this estimate. Protocol, arts. 9(1)(f), (5).

25. Protocol, art. 11(2). Unfortunately, the problem enunciated by the United States (*see* note 20 *supra* and accompanying text) that the delay in

the sources of information on which the INCB may act to include United Nations organs and specialized agencies, and certain inter-governmental and international nongovernmental organizations.²⁶ The INCB does not have the right of local investigation,²⁷ however, nor is there a mandatory embargo provision²⁸ as the United States had proposed. Although certain exceptions are allowed,²⁹ article 14(2) of the Protocol strengthens the extradition provisions of the Single Convention³⁰ and thus makes unnecessary the amendment of bilateral extradition treaties that do not cover narcotics offenses.³¹ Finally, article 14(1)(b) of the Protocol states that the parties may require, either as alternatives to punishment or in addition to punishment, that drug abusers undergo programs of treatment, education, rehabilitation and social reintegration³² in conformity

exercising control by the INCB weakens the INCB's power to control illicit traffic is not solved. The only restraints on overproduction within any one-year period are expressed in general terms. *See, e.g.*, Protocol, art. 11(1).

26. These international nongovernmental organizations must have "direct competence in the subject matter." Protocol, art. 6(1)(a).

27. If, on the basis of information received from the expanded sources of information, the INCB has objective reasons to believe that the aims of the Convention are being endangered seriously by reason of the failure of any party to carry out provisions of the Single Convention, it may propose to the government concerned that a study of the matter be carried out in its territory by such means as the government deems appropriate. Protocol, art. 6(1)(c).

28. The recommendatory nature of the embargo provision of the Single Convention remains unchanged. Single Convention, art. 14(2). *See* note 11 *supra* and accompanying text. The State Department has indicated, however, that little was lost in the defeat of these two proposals. 1972 *Hearings, supra* note 6, at 51.

29. The party may still refuse extradition if the competent authorities consider that the offense is not "sufficiently serious." Protocol, art. 14(2)(b)(iv).

30. Under the terms of the Protocol, "cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery, . . . brokerage, dispatch in transit, transport, importation and exportation of drugs, [and] [i]nternational participation in, conspiracy to commit and attempts to commit, any of such offenses, and preparatory acts and financial operations in connexion with" such offenses shall be "deemed to be included as an extraditable offence in any extradition treaty existing between Parties." Protocol, arts. 14(1)(a), 14(2)(a)(ii).

The parties may consider the Single Convention as the legal basis for extradition if no extradition treaty exists between them. Protocol, art. 14(2)(b)(ii).

31. 1972 *Hearings, supra* note 6, at 46.

32. The Single Convention encouraged parties to punish violators of the Convention with "imprisonment or other penalties of deprivation of liberty." Single Convention, art. 36(1).

with article 15(1) of the Protocol.³³

The amendments strengthen the authority of the INCB and provide international uniformity in the treatment of drug traffickers and drug abusers. Such international standards promote effective control of worldwide licit and illicit drug traffic primarily by providing a common foundation on which parties can build detailed bilateral agreements. The Single Convention and the Protocol retain a number of weaknesses. The amendments continue the approach developed in earlier treaties by placing on national governments³⁴ the principal responsibility for controlling narcotics. The INCB can recommend that an embargo be imposed against an offending party,³⁵ but the actual decision to impose an embargo is made by national governments. In most instances national governments, relying on the "sufficiently serious offense" clause,³⁶ may deny extradition of offenders. Furthermore, because of the inherent delay in the enforcement scheme,³⁷ actual implementation of the INCB's enforcement duties under the Single Convention still depends primarily on the cooperation of the parties. Cooperation and decision making in turn depend on the internal conditions³⁸ of the country, which often make it difficult for the country to carry out its obligations under the Single Convention. These flaws, characteristic of multilateral agreements,³⁹ are largely a result of compromises made at the conference

33. Articles 15 and 16 place an affirmative duty on the parties to take measures for the prevention of drug abuse and the "early identification, treatment, education, after-care, rehabilitation and social reintegration" of drug abusers. Protocol, arts. 15, 16.

34. "The Amending Protocol continues to rely on the indirect scheme of control depending too significantly on governmental cooperation without direct enforcement sanction or even independent fact-finding machinery." Bassiouni, *supra* note 2, at 749. See Waddell, *supra* note 6, at 321.

35. See notes 11 & 30 *supra* and accompanying text.

36. See notes 14 & 29 *supra* and accompanying text.

37. See notes 20 & 25 *supra* and accompanying text.

38. These problems are either political, economic, social or some combination thereof. For instance, the recent decision of the Turkish Government to ban the cultivation of opium poppies involved all three. It was a difficult decision both economically and socially since the primary growers of the poppy in Turkey are low income farmers who have been growing the poppy legally for hundreds of years. These factors made the ultimate decision politically hazardous. See generally W. SPONG, HEROIN: CAN THE SUPPLY BE STOPPED?, Report to the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 16 (1972) [hereinafter cited as 1972 Report].

39. See Goodrich, *New Trends in Narcotics Control*, 1960 INT'L CONCILIATION 181, 190-91 (No. 530).

stage, and represent both important issues of national sovereignty⁴⁰ and differing opinions of the severity of the drug problem. The Single Convention and Protocol, however, may lay the foundation for bilateral agreements, which generally are less susceptible to weakening compromise. A bilateral agreement is more likely to provide detailed provisions for enforcement, since a country may be more willing to restrict its sovereignty in relation to one country than to grant concessions to a large number of countries with differing political orientations. Furthermore, bilateral agreements are strengthened by factors peculiar to the two nations involved. For example, Turkey recently announced that it would forbid all opium poppy planting by June 1973.⁴¹ This law is the result of persistent negotiations between the United States and Turkey, the threat by the United States to withhold aid from Turkey,⁴² and the United States promise to

One characteristic weakness of many multilateral treaties that has not plagued the Single Convention is the problem of reservations. *See generally* W. BISHOP, *INTERNATIONAL LAW* 132 (1971). The Single Convention specifically established to which articles parties could make reservations, and what kind of reservations. Single Convention, arts. 49, 50.

40. *See generally* W. STANKIEWICZ, *IN DEFENSE OF SOVEREIGNTY* 127 (1969).

41. Turkish Opium Decree, June 30, 1971, in *July 1, 1971 Hearings, supra* note 17, at 74. *See also* Statement by Prime Minister Erim of Turkey, June 30, 1971, *id.* at 72-74; 1972 Report, *supra* note 38, at 16-17.

42. "It is the sense of the Congress that effective international cooperation is necessary to put an end to the illicit production, smuggling, trafficking in, and abuse of dangerous drugs. . . . [T]he President is authorized to conclude agreements with other countries to facilitate control of the production, processing, transportation, and distribution of . . . narcotic drugs Notwithstanding any other provision of law, the President is authorized to furnish assistance to any country or international organization . . . for the control of the production of, processing of, smuggling of, and traffic in, narcotic and psychotropic drugs. The President shall suspend economic and military assistance furnished under this chapter or any other Act . . . with respect to any country when the President determines that the government of such country has failed to take adequate steps to prevent narcotic drugs . . . produced or processed . . . in such country, or transported through such country . . . from entering the United States unlawfully. Such suspension shall continue until the President determines that the government of such country has taken adequate steps to carry out the purpose of this part." Foreign Relations Authorization Act of 1972, § 503, 22 U.S.C.A. § 2291 (Supp., 1973), *formerly* pt. I, ch. 4, § 401, 75 Stat. 434 (1961).

Cutting off foreign aid, however, often will not be the best method for obtaining the cooperation of the country. Such action may create internal political pressures that will make it difficult for the country to take the desired

increase aid and give technological assistance for crop substitution.⁴³ Although multilateral treaties such as the Single Convention and the Protocol are essential in providing a framework for international acceptance of responsibility for control of the drug problem, bilateral agreements must continue to provide the primary vehicle for effective international drug control.

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action. Statement by Harvey Wellman, Special Assistant to the Secretary of State for Narcotics Matters, in *July 1, 1971 Hearings, supra* note 17, at 103.

43. A further problem for the United States now is whether such threats and promises will be necessary in other poppy-growing countries such as Burma, Thailand and Laos to keep them from filling the void left by Turkey's ban. *See* N.Y. Times, July 1, 1971, at 1, col. 1.

An additional reason for cooperation may come from within the country itself; a major factor in the recent French cooperation in breaking up illicit processing plants in the Marseilles area was the French realization that she also had a heroin-addiction problem. N.Y. Times, Jan. 7; 1970, at 1, col. 1. *See also* *July 1, 1971 Hearings, supra* note 17, at 32.

Spring, 1973

JURISDICTION—THE EEC CONVENTION ON JURISDICTION OF COURTS AND ENFORCEMENT OF JUDGMENTS—EFFECTS ON BRITISH COMMON LAW PRINCIPLES

Economic integration and expanded trade have led to increased legal contacts among the nationals of Common Market Member States.¹ This increase in economic activity necessitated the establishment of rules to govern the relationship among the courts of Member States.² Historically, bilateral agreements between Member States established the bases for recognition and enforcement of judgments rendered in foreign courts.³ The lack of unanimity among these bilateral agreements,⁴ however, required the formulation of a multi-lateral Common Market agreement. The resulting Convention, which became effective on January 1, 1973,⁵ establishes common bases of jurisdiction and simplifies domestic procedures for the recognition of foreign judgments.⁶ The new procedures have effected significant changes in the individual Member States, especially in Great Britain. The Convention bases the general competence of courts on the domicile of the defendant and guarantees recognition of the judicial decisions of any Member State in all other Member States without additional proceedings. *Convention on Jurisdiction of Courts and Enforcement of Judgments in Civil and Commercial Matters*, 2 CCH COMM. MKT. REP. ¶ 6003 (1968) (unofficial English text).

1. *E.g.*, [1965-1969 Transfer Binder] CCH COMM. MKT. REP., NEW DEVELOPMENTS ¶ 9243 at 8509 (1968). The Member States, as of January 1, 1973, are: Belgium, Denmark, France, Germany, Great Britain, Ireland, Italy, Luxembourg and the Netherlands. Great Britain, Ireland and the Netherlands officially became members on January 1, 1973.

2. "It is an obstacle to close economic relations if the enforcement of private legal claims is unduly complicated, time consuming and expensive. It is the more so if trade relations take the form of an instituted regional arrangement: 'A true common market presupposes that each national of a member state enjoys the same protection of his person and rights in the territory of another member state as the latter's own nationals.'" Hay, *The Common Market Preliminary Draft Convention of the Recognition and Enforcement of Judgments—Some Considerations of Policy and Interpretation*, 16 AM. J. COMP. L. 149 (1968).

3. *Id.* at 171.

4. For a discussion of the lack of unanimity see Hay, *supra* note 2.

5. The Convention was signed by the original six Common Market Member States on September 27, 1968. The three new members, Denmark, Great Britain and Ireland, adopted the Convention when they signed the Accession Treaty for Membership.

6. The purposes of the Convention are found in its preamble. The unofficial English text is found in 2 CCH COMM. MKT. REP. ¶ 6003 (1968) [hereinafter cited as Convention]; Hay, *supra* note 2, at 171-72.

Member States were unable to achieve multilateral recognition of their judgments within the Common Market prior to the Convention.⁷ In 1959, pursuant to article 220⁸ of the European Economic Community Treaty,⁹ representatives and experts of the original Member States began negotiations that led, in 1964, to a draft convention on the recognition and enforcement of judgments. This draft eliminated the use of certain exorbitant jurisdictional bases¹⁰

7. Since many courts were distrustful of the capability of courts of another state, there was a belief that the recognition and enforcement of foreign judgments could be established only through treaties between countries that had confidence in each other's courts. Early history showed very little progress in multilateral recognition of foreign judgments. For example, Dutch efforts in 1874 and, particularly, Italian efforts in 1881 to formulate an international convention had no practical results. Lorenzen, *The Enforcement of American Judgments Abroad*, 29 *YALE L.J.* 188, 189 (1920). Recent developments demonstrate the Member States' distrust of foreign courts. At the 1968 Hague Conference on Private International Law, the original Member States demanded regional, rather than international, agreements concerning judgments rendered in foreign countries. Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 *HARV. L. REV.* 1282, 1283 (1969).

8. 2 *CCH COMM. MKT. REP.* ¶ 5251 (1967). Article 20 sets forth certain subjects on which Member States may negotiate to insure uniform, legal guarantees to all nationals. It provides in part: "Member States shall, in so far as necessary, enter into negotiations with each other with a view to ensuring for the benefit of their nationals . . . the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of the ordinary courts of law (*décisions judiciaires*) and arbitral awards."

9. The European Economic Community Treaty was signed by the original Member States in Rome on March 25, 1957. It became effective on January 1, 1958. 1 *CCH COMM. MKT. REP.* ¶ 151 (1973).

10. Exorbitant bases of jurisdiction are created to allow courts to assume jurisdiction by virtue of the nationality of one of the parties or of some other nationalistic criterion. Examples are the domicile of the plaintiff or presence of the defendant's assets within the jurisdiction. 1 *A. CAMPBELL, COMMON MARKET LAW* § 9-4 (Supp. No. 3 1972). Exorbitant jurisdiction is treated in Convention ¶ 6007. Although ¶ 6007 prohibits the use of the following exorbitant jurisdiction provisions against domiciliaries of Member States, the provisions may be exerted against domiciliaries of foreign countries: Belgium, article 15 of the Civil Code and articles 52 and 53 of the Law of March 25, 1876, Concerning Jurisdiction; the Federal Republic of Germany, section 23 of the Code of Civil Procedure; France, articles 14 and 15 of the Civil Code; Italy, articles 2, 4(1) and 4(2) of the Code of Civil Procedure; Luxembourg, articles 14 and 15 of the Civil Code; and the Netherlands, articles 126(3) and 127 of the Code of Civil Procedure.

against the domiciliaries of Member States, *e.g.*, the assertion of jurisdiction solely on the basis of the plaintiff's nationality, regardless of the defendant's nationality or the situs of the transaction that gave rise to the cause of action.¹¹ The Extraordinary Session of the Hague Conference, which met at The Hague in 1966, advocated the complete abolition of exorbitant bases of jurisdiction. In response to this pressure, the final draft, concluded in 1968, permits Member States and foreign countries to enter agreements to refuse recognition and enforcement of judgments based on exorbitant jurisdiction.¹² The specific provisions of the Convention can be grouped under two major headings—the jurisdiction of courts, and the recognition and enforcement of judgments. First, a Member State court has jurisdiction over any civil or commercial action brought against a natural or legal person domiciled in that state¹³—irrespective of nationality. This general rule is limited by special situations in which a defendant may be sued in a Member State other than his state of domicile.¹⁴ Additional provisions state that the courts of a Member State have exclusive jurisdiction over matters concerning real property, corporations, public records, patents and trademarks and enforcement of judgments, regardless of domicile.¹⁵ The Convention also permits, within very narrow guidelines, the formulation of agreements on jurisdiction between contracting parties.¹⁶ Under the second major heading of the Convention—the recognition and enforcement of

11. Nadelmann, *supra* note 7.

12. Convention ¶ 6063. For an exhaustive analysis of article 59 of the Convention and its relationship to judgments rendered in jurisdictionally improper forums see Nadelmann, *supra* note 7.

13. Domicile of a party is determined under domestic law of the state where the action is brought. Convention ¶ 6056.

14. For example, a defendant may be sued on a contract in the courts of the state in which the contract was to be performed. If a claim is based on a tort injury, defendant may be sued in courts of the state in which the injury was sustained. A claim based on the operation of a branch office, agency or other establishment may be maintained in the courts of the state where the facility is located. Convention ¶ 6009. In addition, an action may be maintained in courts other than those of the defendant's domicile if there are codefendants and one defendant is sued in the court of his domicile, or if there are suits pending in different states that may be consolidated. Convention ¶¶ 6010(1), 6025-26.

15. Convention ¶ 6020.

16. Convention ¶¶ 6016, 6019. An agreement may derogate from the Convention if: (1) the agreement was entered after the dispute arose; (2) the agreement permits the parties to bring suit in additional courts not specified by the Convention; or (3) the agreement is not prohibited by state law.

judgments—the general rule is that decisions¹⁷ rendered by courts of one Member State are to be recognized by other Member States without additional proceedings¹⁸ or review of the legality of the decision.¹⁹ Member States, however, will not enforce decisions if the defendant was not properly served with process, if recognition is against the public policy of the Member State or contravenes provisions of private international law, or if the decision conflicts with a previous decision concerning the same parties rendered by the enforcing court.²⁰ Decisions rendered in courts of Member States generally are enforced in other Member States after a writ of execution has been issued.²¹ The Convention lists the courts in each Member State to which a request for a writ of execution must be delivered,²² as well as those courts in which appeals concerning issuance of the writ must be filed²³ and the courts that will hear those appeals.²⁴ Although the terms and conditions of the request for the writ are governed by the law of the state in which enforcement is sought,²⁵ the Convention requires specific documents for enforcement of a foreign decision.²⁶ In civil and commercial matters, the Convention supersedes certain bilateral treaties regarding mutual recognition of foreign judgments.²⁷

Great Britain's entry into the Common Market and resulting adherence to this Convention²⁸ has affected British principles concerning the jurisdiction of its courts and the courts of Member States.²⁹ First,

17. Under the terms of the Convention, "decision" means "any decision rendered by a court of a Contracting State regardless of its designation, such as decree, judgment, order, or writ of execution, as well as a determination of the court costs by the clerk of the court." Convention ¶ 6029.

18. Convention ¶ 6030.

19. Convention ¶ 6033.

20. Convention ¶ 6031.

21. Convention ¶¶ 6035, 6055.

22. Convention ¶ 6036.

23. Convention ¶ 6041.

24. Convention ¶ 6045.

25. Convention ¶ 6037.

26. Convention ¶¶ 6050-53.

27. Convention ¶ 6059.

28. For discussions of the Accession Treaty and the legal problems it will cause for Great Britain, see Bowyer, *Englishing Community Law*, 9 COMM. MKT. L.R. 439 (1972); Mitchell, Kuipers & Gall, *Constitutional Aspects of the Treaty and Legislation Relating to English Membership*, 9 COMM. MKT. L.R. 134 (1972); 9 COMM. MKT. L.R. 94 (1972).

29. It is extremely important to note that the Convention binds British law only if a judgment rendered in a Member State is sought to be enforced in Britain,

since British jurisdiction actually is acquired by personal service on the defendant,³⁰ domicile never had been recognized in Great Britain as a basis for jurisdiction.³¹ Under the Convention, however, Great Britain must recognize the domicile of the defendant as the basis for jurisdiction in its own courts and in the courts of Member States.³² Thus the Convention eliminates some traditional bases of jurisdiction exerted by British courts over a defendant.³³ On the other hand, the Convention grants British courts additional jurisdiction over a defendant when he is not served with process within the territorial jurisdiction of the court.³⁴ For example, a British court now has competence to hear an action brought against a nondomiciliary

or a judgment rendered in Britain is sought to be enforced in a Member State. Convention ¶ 6064. The Convention does not affect British common law principles governing judgments rendered in foreign countries and sought to be enforced in Great Britain.

30. Castel, *Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada*, 17 MCGILL L.J. 11, 33 (1971). *E.g.*, Singh v. Rajah of Faridkote, [1894] A.C. 670, 684. *See also* Emanuel v. Symon, [1908] 1 K.B. 302.

31. H. READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 160 (1938); 1 THE SUPREME COURT PRACTICE ¶ 11/1 (3d ed. 1973) [hereinafter cited as PRACTICE]. It is necessary to note also that the term domicile does not have a uniform meaning throughout the world. To a civil lawyer, domicile means habitual residence, but it is the equivalent of a person's permanent home at common law. G. CHESHIRE & P. NORTH, *CHESHIRE'S PRIVATE INTERNATIONAL LAW* 154 (1970).

32. *See* note 13 *supra*.

33. For example, jurisdiction based on service of process on an alien defendant while he is present in Britain no longer is valid because an action may be brought only in defendant's domicile. PRACTICE ¶ 11/1/17. Jurisdiction no longer may be maintained on the basis that a contract in dispute was made in Britain, or that its breach occurred in Britain. PRACTICE ¶¶ 11/1/10-13. Furthermore, a British court no longer has jurisdiction to issue an injunction or mandamus against an alien defendant in Britain. PRACTICE ¶ 11/1(i). An indispensable nondomiciliary defendant no longer can be made a party to an action properly brought against a person served with process in Britain. PRACTICE ¶ 11/1(j).

34. An example of the procedural changes in jurisdiction of British courts as a result of the Convention concerns controversies based on tort claims. Prior to accession to the Common Market, British courts had jurisdiction over a tort action if the tort occurred within their jurisdiction. PRACTICE ¶ 11/1(h). The current law is that British courts have jurisdiction to determine tort claims if the defendant is domiciled in Great Britain or if the defendant is a domiciliary of a Member State and the injury occurred within the jurisdiction of the British court. Convention ¶ 6009(3).

defendant if a contract was, or is to be, performed in Great Britain, if the plaintiff is an alimony recipient domiciled in Great Britain, or if one of several defendants is sued in Great Britain.³⁵ Secondly, the Convention has affected British recognition of the exercise of jurisdiction by Member State courts. Formerly, the British courts acknowledged the in personam jurisdiction of a foreign court over a defendant only when the defendant was present in the foreign country or made a voluntary appearance in the court proceedings.³⁶ The Convention, however, forbids British courts to question the jurisdiction of the Member States' courts to render any judgment that is sought to be enforced in Great Britain.³⁷ The Convention also has affected British recognition and enforcement of judgments rendered in Member States. Prior to Britain's entry into the Common Market, all foreign judgments would be enforced in Great Britain if a domestic action was brought on the foreign judgment³⁸ or if the judgment was obtained in a foreign country to which the British Foreign Judgments (Reciprocal Enforcement) Act 1933³⁹ had been applied.⁴⁰ The Convention has not altered the operation of these two principles in relation to foreign judgments rendered outside the Common Market.⁴¹ The effect of these principles as they pertain to judgments

35. Convention ¶¶ 6009-10.

36. This practice reflects again the common law principle that jurisdiction is based on service of process within the territorial jurisdiction of the court. *See, e.g., Societe Cooperative Sidmetal v. Titan Int'l, Ltd.*, [1966] 2 Q.B. 828.

37. Convention ¶¶ 6031-33. Jurisdiction of a foreign court is not listed among the exceptions that may be alleged to deny recognition of a foreign judgment in a Member State court.

38. PRACTICE ¶ 71/1/2(iv).

39. 23 & 24 Geo. 5, c. 13, at 143 (1933).

40. PRACTICE ¶ 71/1/2(ii). In 1933, the United Kingdom passed legislation authorizing treaty negotiations and giving Parliament the power to bar recognition proceedings for judgments from countries denying substantial reciprocity to judgments from British courts. Foreign Judgments (Reciprocal Enforcement) Act 1933, 23 & 24 Geo. 5, c. 13, § 9, at 151-52.

41. For a judgment rendered in a foreign country to be enforced, the judgment not only must be final and for a specified sum of money, but also must not contravene public policy. PRACTICE ¶ 71/1/5. The procedure for enforcement under the Foreign Judgments (Reciprocal Enforcement) Act 1933 is for the petitioning judgment creditor to make application for enforcement ex parte to the Practice Master in the Queen's Bench Division. PRACTICE ¶ 71/2/1. On filing of an affidavit, the judgment must be registered. PRACTICE ¶¶ 71/3, 71/3/1. The affidavit must support the registration and be exhibited with a translated, certified copy of the judgment. The affidavit also must state that the applicant is entitled to the judgment, that it has not been satisfied and that if it

rendered in Member States in which the court relied on exorbitant jurisdiction, however, has been modified.⁴² The Convention provides that a Member State may not exert exorbitant jurisdiction over a domiciliary of another Member State.⁴³ Therefore, a judgment rendered in a French court under article 14 or 15 of the Civil Code, exorbitant jurisdiction provisions, against an American domiciled in Great Britain will not be enforced by British courts on the ground that the French court lacked jurisdiction. The Convention, however, does allow Member States to exert certain exorbitant jurisdiction over any domiciliary of a foreign country.⁴⁴ For example, an American domiciled in the United States but having assets in Great Britain may be sued in a French court under article 14 or 15 of the Civil Code. If the French plaintiff petitions for enforcement in Great Britain, the British courts must recognize and enforce the French judgment.⁴⁵ Great Britain, however, may enter an agreement with the United States to refuse recognition of judgments based on exorbitant jurisdiction of Member States against domiciliaries of the United States.⁴⁶ By permitting Member States to refuse recognition of judgments based on exorbitant jurisdiction against domiciliaries of foreign countries, the Convention has taken a major step toward the elimination of the use of exorbitant jurisdiction.⁴⁷ New rules recently have been enacted to amend the Rules of the Supreme Court⁴⁸ to conform to the provisions of the Convention according recognition of judgments not based on exorbitant jurisdiction.⁴⁹ Rule 8 amends

was registered it would not be set aside. The names and addresses of the parties also are required. Notice of registration must be served on the debtor who must file a summons supported by an affidavit to contest the registration. PRACTICE ¶¶ 71/8-71/9/2. Absent a challenge to registration or when the challenge is determined, execution on the judgment will issue. PRACTICE ¶¶ 71/10-71/13/2.

42. See note 11 *supra*.

43. Convention ¶ 6007.

44. See note 11 *supra*.

45. See notes 20 & 21 *supra* and accompanying text.

46. Convention ¶ 6063.

47. Nadelmann, *supra* note 7, at 1282.

48. Although the Rules of the Supreme Court pertain to all British courts, the jurisdiction of the High Court of Justice and of the Court of Appeals will be affected most by the changes resulting from adherence to the Convention. For a discussion of the jurisdiction of the High Court of Justice and the Court of Appeals see CCH 1972 COMM. MKT. MKT. DOING BUS. IN EUR. ¶¶ 24,054, 24,059.

49. STAT. INSTR. 1972, No. 1898 [hereinafter cited as Amendment No. 1898]. The Rules of the Supreme Court became effective on January 1, 1973. Amendment No. 1898.

Order 71 of the Supreme Court Rules⁵⁰ by prescribing the procedure for enforcement of European Community judgments. This new procedure for recognition and enforcement of judgments applies only to Common Market Member States, but it is similar to the current procedure, under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which applies to judgments from all other foreign countries. Judgment creditors may make *ex parte* application for registration of Community judgments to the High Court.⁵¹ An affidavit supporting the registration application must contain a translation of the judgment and the enforcement order from the Member State court.⁵² If the judgment sought to be enforced is for a sum of money, the affidavit also must state: (1) the name, occupation and last known domicile of the judgment debtor; (2) that the European Court⁵³ has not suspended enforcement of the judgment; and (3) that the judgment has not been satisfied.⁵⁴ On receipt of the application and the affidavit, the judgment is registered in the Central Recording Office.⁵⁵ When registration is complete, notice of the registered Community judgment and enforcement order is sent to all persons against whom the judgment was entered.⁵⁶ Judgment debtors then have 28 days within which to make application for variation or cancellation of the registration on the ground that the judgment has been wholly or partially satisfied.⁵⁷ An Execution Order on the judgment is issued by the High Court either 28 days after the date of the registration notice, or after a determination has been made on any application to vary or cancel the registration.⁵⁸ New Order 114⁵⁹ permits the High Court,

50. PRACTICE ¶ 71.

51. Amendment No. 1898 ¶ 8/(4)/17. A judge or a master of the Queen's Bench Division has the power to rule on the petition. Amendment No. 1898 ¶ 8/(4)/16. The High Court of Justice is the branch of the English Supreme Court of Judicature that exercises original jurisdiction.

52. Amendment No. 1898 ¶ 8/(4)/18.

53. The European Court of Justice is the high court of the European Economic Community; it is responsible for final interpretation of Community law. *See generally* 2 CCH COMM. MKT. REP. ¶¶ 4635, 4656 (1968).

54. Amendment No. 1898 ¶ 8/(4)/18(2). The sum of money must be expressed in English currency or a foreign currency calculated at the rate of exchange on the date the judgment originally was given.

55. Amendment No. 1898 ¶ 8/(4)/19.

56. Amendment No. 1898 ¶ 8/(4)/20.

57. Amendment No. 1898 ¶¶ 8/(4)/20, 22. The 28-day limitation period generally runs from the date of the notice. The High Court, however, may allow the period to run from a later date.

58. Amendment No. 1898 ¶ 8/(4)/21.

59. Amendment No. 1898 ¶ 11/1.

the Court of Appeals, or any party to refer questions on the interpretation or validity of Community law to the European Court.⁶⁰ The Order for Reference to the European Court may be made at any point in the proceedings.⁶¹ New Form 109 specifies that the Order must set out the questions on which the preliminary ruling of the European Court is sought and that the proceedings in the British court must be stayed pending the ruling.⁶² These changes in British law concerning enforcement of judgments rendered in Member States will not have a substantial effect on British procedure.⁶³ According to British common law, a final judgment of a competent court will not be recognized or enforced in Great Britain if it was obtained by fraud, was given contrary to natural justice or would be contrary to British public policy.⁶⁴ These grounds for nonrecognition of a foreign judgment are essentially those found in paragraphs 6031 and 6032 of the Convention as grounds for denial of recognition and enforcement. Thus Great Britain may continue to utilize its common law principles to deny recognition and enforcement of judgments rendered in Member States as well as in countries outside the Community.

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60. Amendment No. 1898 ¶ 11/2.

61. Amendment No. 1898 ¶ 11/1.

62. Amendment No. 1898 ¶ 12.

63. A. CAMPBELL, *supra* note 10.

64. PRACTICE ¶¶ 71/9/1 & 2.