



Explanatory Report to the European Convention on Information on Foreign Law

London, 7.VI.1968

I. The European Convention on information on foreign law was prepared, within the framework of the Council of Europe, by a Committee of Governmental Experts set up for this purpose by the European Committee on Legal Co-operation (CCJ). The Convention was opened for signature by the member States of the Council of Europe on 5th June 1968, on the occasion of the Vth Conference of European Ministers of Justice in London.

II. The text of the explanatory report by the Committee of Experts is presented here as amended and completed by the European Committee on Legal Co-operation.

Introduction

1. At the present time, when the movement of persons and goods across the European frontiers is increasing daily, the development of international exchanges and economic and social relations is resulting in an interpenetration of laws and the attendant need to take foreign law into consideration. It often happens that, under a rule of conflict of laws, a court is called upon to apply a principle of foreign law, particularly in questions of contract and of family law or of the status and capacity of persons.

For this reason, the question of "information on foreign law" ⁽¹⁾ was selected by the *Ad Hoc* Committee on Legal Co-operation, which had been asked to prepare an extended legal programme for the Council of Europe, as a subject to which priority should be given, and it was placed as the seventh item in this legal programme (see Appendix to Resolution (63) 29 of the Committee of Ministers).

2. This question was then submitted to the Third Conference of European Ministers of Justice in Dublin (26th to 28th May 1964) and discussed on the basis of a report presented by the French delegation and a supplementary report by the German delegation. In their Resolution No. 2, the Ministers of Justice recommended that a thorough study of the question be made by the European Committee on Legal Co-operation (CCJ) or one of its subsidiary organs and that a multilateral convention be prepared on the subject in due course.

This Resolution No. 2 was submitted to the CCJ which, at its first meeting, decided to recommend that the Committee of Ministers appoint a committee of experts.

The Committee of Ministers approved this proposal at their 136th Meeting.

(1) Originally the expression "proof of the foreign law" was used. Subsequently, however, the term "information" came to be preferred as, in certain States, the substance of the foreign law does not need to be "Proved" as such, but rather brought to the "knowledge" of the court with a view to its application.

The terms of reference of the Committee of Experts, as proposed by the CCJ and approved by the Committee of Ministers were:

"To examine in detail the problem of information on foreign law with a view to the drafting of a multilateral convention on the subject, bearing in mind the need for courts in member States to be able to obtain accurate information on foreign laws quickly".

3. Early in its proceedings the Committee of Experts held a general discussion aimed at establishing the principles upon which the Convention should be based.

4. After this discussion, during which the Committee of Experts examined all the particular aspects of the problem of information on foreign law (including the point whether rules of foreign law ought to be considered by the *lex fori* as questions of fact or of law, it was decided to limit the work of the Committee to the problem of information on foreign law in the strict sense of the term, without prejudice to the possibility of later developments which might arise out of the application of the Convention.

5. The Convention does not include an Article relating to responsibility in the case of an incomplete, false or erroneous reply, since it was considered that this question was a matter for the internal law of each country.

Consequently, this Convention does not prevent a State from solving the problem of responsibility by means of its internal law.

A State could, for example, decide to exclude, in certain circumstances, its responsibility or that of its officials.

Commentaries on the Articles of the Convention

Article 1

6. This article specifies the obligations of Contracting Parties and the scope of the Convention.

7. The term "field" is used to avoid difficulties in interpretation which could arise if the term "law" were used, in view of the fact that the term "field" has a wider meaning; it enables any court, irrespective of its nature, to obtain information on questions in civil and commercial fields and also, in conjunction with Article 4 (3), to request information on rules pertaining to other branches of law, where such rules have a bearing on a civil or commercial question. The nature of the court or of the proceedings do not determine the scope of the Convention.

8. The term "civil and commercial fields" also covers labour law to the extent to which the regulation of labour comes under the rules of civil law. If this last condition were not satisfied, information on labour law could be obtained only by virtue of paragraph 3 of Article 4.

9. Under paragraph 1, information could also be requested on a rule of law previously but no longer in force, on the assumption that the paragraph referred to does not stipulate that the law must be in force at the time of making a request.

10. The term "decide" which appears in paragraph 2 of this article was used in order not to prejudice the form which an agreement might take or the arrangement which might be concluded between the parties concerned.

11. The provisions of paragraph 2 do not preclude the possibility of working out at a later date and within the framework of the Council of Europe an additional agreement aimed at extending the provisions of the Convention to fields other than those referred to in paragraph 1. If such were the case, the Convention does not prevent the setting up, if necessary, of another type of machinery for the exchange of information.

Article 2

12. This article deals essentially with the machinery required for the application of the Convention.

It was nevertheless recognised that the existence of a transmitting agency in each Contracting State could greatly facilitate the implementation of the provisions of the Convention.

It was not possible to provide for the establishment of a centralised system with a single agency appointed in each State, both to receive requests for information from abroad and to transmit requests from national authorities, particularly because, in certain States, the administration of justice is decentralised. It was necessary to set up a more flexible system which would allow each State to make whatever domestic arrangements it deemed necessary for implementing the Convention. However, each State is obliged to set up or appoint a single agency to receive requests for information from other States. The same agency will also be responsible for acting on such requests.

13. On the other hand, the setting up of an agency or agencies to transmit requests from national authorities to other States is optional. Each State may therefore choose one of the following systems :

- (a) set up or appoint one or more transmitting agencies or
- (b) give its receiving agency the function of transmitting agency as well; or
- (c) allow requests to be transmitted abroad direct by the judicial authorities from which they emanate.

14. With regard to paragraph 3 of this article, it was agreed that the first communication should be made by Contracting Parties not later than the time of depositing their instruments of ratification, acceptance or accession. Any subsequent change in the name or address of the receiving agency should also be communicated to the Secretary General of the Council of Europe.

Article 3

15. This article specifies which bodies are competent to make requests for information.

The possibility of a request being made independently of any judicial proceedings has been ruled out.

Two conditions must be satisfied : the request must come from a judicial authority and it must be made in connection with proceedings that have already been initiated : these proceedings, in civil and commercial matters, may be contentious or non-contentious.

16. The phrase "even when it has not been drawn up by that authority" refers, *inter alia*, to cases in which the request is drawn up by the parties or drawn up by them in accordance with the judicial authorities' instructions; the word "emanate" implies that the request need not actually be drawn up by the judicial authority; it is then sufficient that it should have been authorised by that authority. In cases where the request is not drawn up by the judicial authority, Article 4 (4) applies.

17. The condition laid down in paragraph 1 of this article, namely that requests for information shall always emanate from a judicial authority, implies that the settlement of the case requires, in the opinion of the judicial authority, that requested information be obtained. The fact that the request must be made or approved by the judicial authority guarantees that no unnecessary requests would be made.

18. The term "judicial authority", which also appears in other international conventions, was not defined in the Convention. It will, therefore, be understood according to the law of the requesting State.

In order to facilitate the application of the Convention, paragraph 2 gives States which do not set up or appoint transmitting agencies the opportunity to inform other States which of their authorities are to be regarded as judicial authorities within the meaning of Article 3. Such a provision also occurs in Article 24 of the European Convention on Mutual Assistance in Criminal Matters.

19. The question whether the prosecuting authorities (or similar bodies representing the public interest) having regard to their functions, should be considered to be a judicial authority for the purposes of the Convention is left to the discretion of the Contracting Party to which the prosecuting authorities belong.

20. If it is permissible under municipal law, an arbitral tribunal may obtain information through a national judicial authority.

21. In order to achieve a more extensive exchange of information, paragraph 3 permits Contracting Parties to extend the Convention by agreement. In these agreements the Contracting Parties may make such provisions as may be necessary for the adaptation of this Convention.

Article 4

22. This article deals with the content of requests for information.

It will be seen from the text that such requests must be formulated in as concrete a manner as possible. They must be based on the facts of the case and, as far as possible, avoid asking questions of too general a nature.

23. Paragraph 3 is by way of being complementary to paragraph 1 of Article 1. It provides that a request for information may cover points effecting other than civil and commercial fields, where such points have a bearing on a question of civil or commercial law which must be the main object of the request.

24. Paragraph 4 refers to requests which are not drawn up by the judicial authorities themselves (see paragraph 16 above). The term "decision" must not be interpreted as meaning that an interlocutory decision is necessary in every case the authorisation of the request also constitutes a "decision". It is for each country to decide what form this authorisation should take.

Article 5

25. This article deals with the transmission of a request for information, which can be sent directly by the judicial authority if the State from which it emanates has no transmitting agency.

Article 6

26. This article lays down the procedures open to receiving agencies for drawing up replies to requests for information.

27. Paragraph 1 relates to cases in which the reply is drawn up within the State administrative framework. The word "official" should be interpreted as allowing the receiving agency to have the replies drawn up by a private body, in which case the body would have to be commissioned officially.

28. The words "appropriate cases or for reasons of administrative organisation" are intended to allow each State to choose freely, having regard in particular to its domestic arrangements, whichever of the two procedures indicated in Article 6 is the more suitable in any individual case.

The fact that the State is, however, allowed to use at will the procedures laid down in paragraphs 1 and 2 of this article should not be used as means for systematically leaving the reply to a private body or a qualified legal expert, thus creating a certain lack of balance in the financial consequences of the Convention in view of the provisions of Article 15.

29. Paragraph 3 of this article specifies the steps to be taken by the receiving agency, in cases where it might decide to invite a private body or a qualified legal expert to furnish the reply. However, the provisions of paragraph 3 need not apply if the requested State does not intend to call for the reimbursement of costs arising out of these procedures.

Article 7

30. This article deals with the contents of the reply.

It will be seen from this article that the reply must furnish the information which the court will be able to use in order to reach its decision.

The reply may also be accompanied by explanatory commentaries and may take the form of a statement on the application, in the requested State, of the relevant rules. The person or the body drawing up the reply is not obliged to provide such a statement, even if the requesting authority so desires.

However, the reply must not only be "impartial" but also "objective", that is to say, it must refrain from suggesting a settlement of the case which has given rise to the request.

31. The term "as appropriate" occurring in the second sentence of this article means that the body or person drawing up the reply may, depending on the law in the country concerned and in order to give a correct reply, base the reply:

- (a) on legal texts or
- (b) on judicial decisions or
- (c) on legal texts and judicial decisions.

If necessary, these texts and decisions will be annexed to the reply.

32. In order to make the reply as complete as possible the body or person concerned may draw attention to any factor outside the civil and commercial field, deemed likely to have a bearing on the applicable law, and which may be necessary for the full information of the questioner, even if this factor was not expressly mentioned in the request.

33. It did not seem advisable to include in the Convention any particular wording for the reply.

Article 8

34. The rule contained in this article was inserted in order to stress the desire of the Convention to respect the courts' independence.

Article 9

25. This article establishes the principle according to which the reply must be sent through the same channels as those used for the transmission of the request.

Article 10

36. This article prescribes the obligations of the receiving agency with regard to replies.

37. Paragraph 2 deals, in particular, with the function of the receiving agency in cases where, in accordance with Articles 6 (2), the reply is to be drawn up outside the administrative framework of the State. In such cases the receiving agency is not required to check the substance of the reply ; consequently any responsibility there may be falls not on the State but on the person or body drawing up the reply.

Article 11

38. This article provides for certain exceptions to the obligation to take action on requests for information established in Article 10.

It seemed preferable, where the interests of the requested State are affected by the dispute, to release it from the obligation to reply, in order to avoid doubt being cast on the impartiality of its reply or obliging it to offer assistance, which might be prejudicial to its own interests, to the foreign judicial authority. The expression "its interests are affected" is sufficiently broad, so that not only the fact that the requested State is a party to the dispute, but also the fact that its interests are involved or are affected by the settlement of the dispute justifies a refusal to furnish information on request. The term "interests" covers not only financial interests but also, for example, economic or political interests.

39. The formula contained in this article was based on Articles 4 and 11 of the Hague Convention of 1st March 1954 on Civil Proceedings.

40. The requested State is not obliged to reply to any request for information e.g. if the requesting authority does not agree to the costs (see paragraph 3, Article 6) or in the case of a refusal to furnish additional information (see Article 13), etc.

Article 12

41. This article was included with the view of speeding up, as far as possible, the procedure for exchanging information.

Article 13

42. This article enables the body or person responsible for drawing up the reply to request additional information.

It was not felt essential to include a provision to the opposite effect (i.e. the person or body receiving the reply and requiring an explanation of it), as this would constitute a new request for information and therefore no provision would be needed in the Convention.

43. Paragraph 2 deals with the procedure to be followed in transmitting requests for additional information. According to this rule, such requests, from the bodies or persons referred to in either paragraph 1 or paragraph 2 of Article 6, should be transmitted to the authority from which the original request emanated, through the receiving agency.

Article 14

44. This article deals with the language in which requests and replies are drafted.

45. Article 14 applies also to the supplementary information provided for in Article 13. Consequently, the reply by the requesting body to the request for additional information shall be translated into the language of the requested State.

46. Paragraph 2 of this article enables the Contracting Parties to use a language for the exchange of information other than those of the requesting or requested countries. The parties themselves will decide on the form to be taken by their agreement on this matter.

Article 15

47. This article deals with the costs of supplying information.

A distinction was made between:

- (a) replies furnished in accordance with Article 6 (1)
- (b) replies provided by a private body or lawyer (see paragraph 2 of Article 6).

No charge will be made for costs under (a), but the State making the request would pay those under (b), namely the *honorarium* or fee of the body or lawyer preparing the reply (see also paragraph 29 above).

48. According to the principle upon which this Article is based, the requesting State (and not the receiving agency or the foreign transmitting agency, or the foreign judicial authority which drew up the request) will be responsible for the payment of costs.

49. Article 15 does not settle the following two problems

- (a) procedure for payment, i. e. to whom (receiving agency, lawyer etc.) the *honorarium* should be paid;

- (b) procedure for recovery of costs within the requesting State.

With regard to the problem referred to under (a) above, it did not seem necessary to make express provision in the Convention for the procedure to be followed. As to the problem referred to under (b), it is a matter for the internal law of each country.

Article 16

50. This article was included in the draft Convention to make allowance for certain constitutional considerations in certain federal States.

51. This article stipulates *inter alia* that the use of the provision must be justified on constitutional grounds, not merely for reasons of convenience.