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## By the International Institute for the Unification of Private Law transmitted to the Consultative Assembly

### Report

#### 1.

The Secretary-General of the International Institute for the Unification of Private Law, by virtue of the powers granted him under Article 3 of the Agreement signed on 12th January 1954 between the Council of Europe and the Institute, has the honour to submit the attached Report to the Secretary-General of the Council, with the request that he will lay it before the Consultative Assembly at its next Session.

The object of the Report is to draw attention to the practical results achieved through co-operation between the Council and the Institute and to suggest lines along which such cooperation may develop in the future.

#### **1.1. Results of co-operation between the two Organisations**

This co-operation began before the signature of the Agreement on 12th January 1954, and the latter accordingly did no more than recognise a de facto arrangement that had already produced very promising results. The successive stages in this co-operation may be summarized as follows:

- a. The Secretary-General of the Council of Europe informed the President of the Institute, by letter dated 18th August 1950, that, at a meeting held on the 3rd of that month, the Council's Committee of Ministers had considered the question of establishing a complex of agreements on civil procedure between the Member States of the Council. In his letter the Secretary-General of the Council of Europe, who had been instructed to get into touch with the Institute, expressed the view that it would be useful, inter alia, if a Report could be prepared covering the following points: (a) the work already done on the subject of civil procedure by the various international organisations, both public and private; (b) matters of civil procedure that could most appropriately be given priority in considering joint action to be taken in the Council of Europe; (c) the form that such joint action should take (private international law conventions, uniform legislation, the harmonisation or co-ordination of national legislation, etc.). At its XXVIIIth Session in October 1950 the Governing Council of the Institute agreed to undertake the work, and a study was accordingly carried out by its Secretariat. A report was sent to the Secretary-General of the Council of Europe in 1951, setting out the various aspects of civil procedure in connection with which the establishment of international agreements or the modification of existing agreements appeared desirable. The first of these was the delimitation of international jurisdiction, and here the Institute was in favour of establishing uniform regulations, no official attempt at uniformity in this connection having ever been made at European level. The report went on to lay down various principles for the guidance of national legislatures when drawing up such regulations. Next, the Institute suggested the desirability of proposing the adoption by the Member States of the Council of certain provisions covering procedure; these included regulations to guarantee legal and judicial protection for the rights of the nationals of all the Member States within one another's territories, to safeguard the rights of defendants, allowing them sufficient time in which to enter an appearance in court, and to provide for any judge hearing a case who may not be fully cognisant of the relevant legislation in another country, to obtain all the information he requires from a member of the bench of that country. With a view to suggesting measures to improve the system of arbitration procedure, the report dealt



separately with the following aspects of the problem: 1° the contractual bases of the jurisdiction of an arbitration court (arbitration clauses) ; 2° the establishment of permanent tribunals by international agreement or internal legislation; 3° arbitration procedure; 4° the enforcement of awards. Another aspect of civil procedure in which the report was in favour of uniform international regulations concerned the recognition and enforcement of judgements given in foreign courts, including arbitration awards. The report also referred to the desirability of regulations covering the international repercussions of bankruptcy. After this review of the questions which might be dealt with by international regulations enforceable between the Member States of the Council of Europe, the Institute in its report turned its attention to the best means of bringing such regulations into force. These varied according to the questions themselves. In some cases, a multilateral convention was recommended while in others the adoption by the various States of a model law involving no obligations at international level was preferred. In some other cases the Institute thought bilateral conventions more appropriate. The report suggested that the matters dealt with should be divided into two groups; those on which the Hague Conference had already prepared conventions or draft conventions and those which it had not dealt with at all. The first group could, it was suggested, most suitably be entrusted to the Hague Conference for further action while the second, especially matters of arbitration procedure, could be considered by the Institute which had already done a certain amount of work on them. The report and its appended documents was discussed by the legal experts of the Committee of Ministers, and the latter decided to defer any decision until the results of the VIth Session of the Hague Conference on Private International Law, called for October 1951, were known.

- b. The Consultative Assembly of the Council of Europe, at its Ordinary Session in 1950, discussed the Report presented by the Committee on Legal and Administrative Questions and, on 25th August, made a Recommendation in favour of the preparation of a multilateral convention on the reciprocal treatment of nationals. The Assembly, in view of the link established between the Secretariat-General of the Council of Europe and the Institute, recommended that the Committee of Ministers ask the Institute to be so good as to initiate a preliminary study of a draft convention of this kind. The President of the Institute informed his Governing Council of this Recommendation at its XXVIIIth Session in October 1950, and was authorised to put such a study in hand. The work thus begun in 1950 by the Secretariat of the Institute was completed by the beginning of 1951, and a set of articles representing a preliminary draft of a multilateral agreement, and accompanied by an explanatory memorandum and a number of supporting documents, was drawn up. The Institute took as its basis the draft prepared by the Economic Committee of the League of Nations presented to the 1929 Paris Conference, revised in the light of the comments and criticisms made during that Conference and in accordance with more recent bilateral treaties. With certain exceptions, it proposed the adoption of the principle of assimilation to the status of nationals, on which the League of Nations' draft was based, in relation to the exercise of most civil rights, as well as to the enjoyment of judicial and administrative safeguards. In the case of certain activities, it made assimilation conditional on establishment and occasionally on residence for a minimum period. This draft was discussed at a meeting of the Working Party of the Committee on Legal and Administrative Questions held in Rome in March 1951. The Working Party accepted in its broad lines the Institute's draft although with certain noteworthy amendments, particularly in regard to the admission of foreigners. The draft thus revised and amended was submitted by the Committee on Legal and Administrative Questions on 5th May 1951 to the 3rd Ordinary Session of the Consultative Assembly, which approved it and recommended its adoption to the Committee of Ministers. The latter then instructed a Committee of governmental experts to prepare a final draft of a Convention and this Committee, on which the Institute was represented by its Secretary-General, completed its task in 1955. The European Convention on Establishment was duly signed by the Foreign Ministers at Paris on 13th December 1955.
- c. In 1951 the Secretariat of the Council of Europe consulted the Institute with regard to a draft Convention prepared by the Council on the Constitution of European Private and Public Companies. This proposed that private companies should be constituted under the relevant national legislation according to the principles of private international law and that, once a European Companies Office had verified that certain conditions had been fulfilled, they should be allowed to operate in all countries signatories to the Convention, on the same terms as national companies. Public companies, whose capital would be subscribed by the Governments, would be given the status of corporate bodies in law in all the signatory countries. The Institute prepared a short Opinion containing its comments on the general outline of the proposal and certain specific provisions. A Sub-committee of the Committee on

Legal and Administrative Questions was instructed to examine the subject and met at the Institute's headquarters in Rome in April 1952 when it went into all the provisions in detail. It requested the Institute to examine two points:

1. the legal position of the American companies set up by the Federal Government of the United States (Federal Corporations);
  2. the internal legislation of the Member States of the Council of Europe so as to see exactly how far European companies would be guaranteed against certain measures of execution within the territory of the Member States. In 1953 the Secretariat of the Institute prepared a memorandum on Federal Corporations in the United States which was forwarded to the Secretariat of the Council of Europe. This marked the end of co-operation between the two bodies on this subject as the work was not carried any further.
- d. In Opinion No. 13/14 (1955) on the Special Message of the Committee of Ministers which it adopted at its 7th Ordinary Session, the Consultative Assembly defined the role of the Council of Europe in the legal and administrative fields with regard, in particular, to the question of harmonisation and unification of national laws. After welcoming the suggestion of the Committee of Ministers that the work of unifying and harmonising national laws should be pressed forward and after discarding the idea of a general unification over the entire field of legislation or the establishment of a general and systematic plan for the work that the Council of Europe might undertake during the next few years, the Assembly expressed the view that three draft uniform laws prepared by the Institute were of sufficient interest for a study to be undertaken to determine whether the laws of the Member States could be unified on the basis of these drafts. The three drafts were as follows:
1. A draft of uniform international provisions on compulsory third-party insurance for drivers of motor vehicles;
  2. A draft uniform law on the liability of inn-keepers for loss of or damage to goods belonging to guests ;
  3. A draft uniform law on arbitration in respect of international relations of private law. With regard to the first of these, the Committee on Legal and Administrative Questions instructed a Sub-committee to prepare a draft European Convention covering compulsory insurance for drivers of motor vehicles. The Sub-committee considered the Benelux Treaty of 7th January 1955 and the common provisions appended to it, all of which were based on a draft prepared by the Institute, and endeavoured to improve them. The draft Convention and common provisions were unanimously approved by the Committee on Legal and Administrative Questions and presented to the Consultative Assembly at its 8th Ordinary Session in October 1956. The Assembly approved them and recommended their adoption to the Committee of Ministers, which accepted the recommendation and instructed a Committee of governmental experts to prepare a final text. This was completed by February 1958. A second Sub-committee was instructed by the Committee on Legal and Administrative Questions to examine the draft uniform law on the liability of inn-keepers. The Sub-committee devoted two sessions to the question and finally, in October 1956, presented a Report to the Plenary Committee suggesting that the United Kingdom Act of 1956 and the Institute's draft should be taken as a basis and that the other countries should be invited to amend their legislation relating to hotels to bring it into line with these. At its 8th Ordinary Session the Assembly adopted a draft Recommendation proposing that the Committee of Ministers should appoint a Committee of Experts to prepare a European Convention, on the basis of the two texts referred to above, laying down a uniform law on the liability of inn-keepers. The Committee of Ministers accepted the Recommendation, and the Committee of Governmental Experts which it instituted held its first session in December 1957. The draft uniform law on arbitration in respect of international relations of private law prepared by the Institute was examined by a third Sub-committee set up by the Committee on Legal and Administrative questions. The Sub-committee devoted four sessions to the consideration and revision of this draft, article by article, and the revised text, which differed slightly from that originally prepared by the Institute was approved by the Legal Committee in December 1957 and by the Consultative Assembly in January 1958. The Assembly recommended that the Committee of Ministers should appoint a Committee of Experts to consider the possibility of reaching an international Agreement on this question, and its recommendation was accepted.
- e. The Institute also collaborated, though to a lesser degree, in the work done by the Council in connection with a European Convention on the establishment rules for corporate bodies (legal persons). The Institute helped in the preparation of memoranda both on the draft as a whole and on

certain specific questions: it was also represented on the Committee of Experts by an expert consultant. Conclusions.— The experience of seven years of active co-operation, both before and after the signature of the Agreement between the two organisations, has shown the usefulness to each of their joint work in pursuit of common aims. The method followed was laid down in the Agreement and makes the Institute responsible for the preliminary study required in the case of each proposal for unification, while the various bodies and committees of experts belonging to the Council of Europe are given the task of preparing the final text with due regard to the requirements and special interests of the various Governments and professional groups which the uniform law will affect. This has proved a practical system. The Secretary-General of the Institute would accordingly like to suggest that it should continue to be followed in the future, although without prejudice to the right of the Institute to present any proposals it may have drawn up for the use of the Member States of the Council to Governments for their approval at ad hoc diplomatic conferences convened either by itself or by one of the States belonging to it supported by the Council of Europe. Under the " Statut Organique " of the Institute, any proposals arising out of its work may be presented direct to Governments for their approval. It is also felt that regular discussions between the Institute and the Consultative Assembly's Legal Committee on their respective endeavours in the field of unification and harmonisation of laws would also be of considerable value.

### **1.2. Prospects of future co-operation**

Considerable possibilities are open to the Council of Europe in the field dealt with in this Report. The Council includes among the members of its Assembly very highly qualified representatives of the legislature of each of its Member States and is hence peculiarly well adapted to undertake work of this kind. It possesses all the essential qualifications for work on legislation at international level. Consequently, when proposals for uniform legislation drawn up by the Legal Committee and debated in the Consultative Assembly are presented to the national parliaments for ratification they have already, in a sense, received the preliminary approval of some members of those parliaments.

The fact that the Council of Europe is privileged to possess a permanent body of a parliamentary character may prove to be the means of bringing these attempts at the unification of laws to a successful conclusion. It is suggested that the Inter-Parliamentary Consultative Council set up by the Benelux countries to ensure liaison between the Committee on the Unification of Law and their respective Parliaments and thus facilitate the ratification of agreements signed by their Governments would be a proper subject of examination by the Council of Europe. One of the main obstacles preventing the work of unification is the delay that usually occurs in the ratification of international conventions.

For several years the Institute has been considering the problem of the discrepancies in the interpretations given to uniform legislation, and the Consultative Assembly has found an extremely interesting approach to this problem by considering the most radical of all solutions, namely, the creation of a European Supreme Court. While this approach deserves success, it should be realised that the adoption of other less drastic measures capable of preventing discrepancies in the judicial interpretation of Conventions on uniform laws would not be without their uses. One such measure might be the establishment of a service providing reciprocal information on the legal decisions taken in the respective States with regard to the application of uniform legislation. The Secretariat of the Institute has already begun a compendium of the decisions given by national courts with reference to several Conventions on uniform legislation and also publishes regular summaries of legal decisions in its Yearbook.

The preparation of a list of subjects requiring to be studied as a step towards the approximation of laws in the Member States of the Council is not among the purposes of this Report.

In the opinion of the Institute, the choice of subjects should follow a definite order of priority based on their respective importance and their logical sequence from the legal point of view. One useful way of laying a solid foundation for a long-term programme of work in this matter would be preliminary discussions, either, for example, between representatives of the Legal Committee and of the Governing Council of the Institute or else in the form of a Round Table Conference of experts invited to examine the whole problem of the approximation of laws between the Member States of the Council of Europe.

Opinion No. 13/14 (1955) of the Consultative Assembly, to which reference has already been made, also mentions a number of subjects, some of which have already been considered by both the Council and the Institute. The Report on the possibility of establishing international regulations in respect of certain aspects of civil procedure, prepared by the Institute at the request of the Council, also lists a number of subjects which will be found in the first part of this Report.

Lastly, reference must be made to a Memorandum prepared by the Institute, at the request of the Italian Government, and addressed to the six Member States of the European Economic Community. The Memorandum reviews the matters on which the Rome Treaty explicitly provides for an approximation of laws between the Six or which appear to require such approximation if the Common Market is to operate successfully.

The Memorandum was originally written for the countries of the Community, but there can be no doubt that the question is also of importance to the other European States which, while remaining outside the Community, nevertheless maintain important economic relations with the Six. This means that it is impossible to conceive of an approximation of laws between the States of the Community without leaving it open to the other European States to associate themselves with it. Any attempt to encourage "closed" systems of unification would run the risk of increasing rather than reducing existing discrepancies. It would therefore seem highly desirable for any questions that the Economic Community may decide to examine with a view to an approximation of laws to be examined simultaneously by the Council of Europe to see whether a similar approximation would not be possible on a wider scale.

It is clear from the foregoing that the question of co-ordinating the work done in the legal field by the European Economic Community and the Council of Europe merits close examination.

The Institute will always be glad to give any help it can towards work done on any subject coming within its terms of reference.

Signed: Mario MATTEUCCI, Secretary-General.