the proceedings before judgment is delivered".[189] The Regulation introduces thus a shift of logic. The direct consequence is that the defendant who did not challenge the decision in its State of origin loses the possibility of later raising Art. 34 (2) for opposing its recognition. The possibility of obtaining a legal remedy in the State of origin is thus seen as capable of compensating, if not as being equivalent, to the possibility given of organizing one's defence at the beginning of the proceedings. The regulation tends to concentrate most of the litigation in the State of origin:[190] all procedural issues should be examined by priority in the State where the litigation occurred whose courts are better placed for assessing them. There are positive and negative aspects to this choice. On the one hand, the former conception had the disadvantage of favouring the defendant's passivity.[191] Though being actually aware of the proceedings, he could fail to appear and to challenge the decision and simply raise the violation of his right to a fair hearing at the stage of enforcement. On the other hand, the actual conception imposes more procedural costs on the defendant who must search for legal remedies in the State of origin and, if he did not succeed in this State, pursue the proceedings later on in the State of enforcement.[192] The financial consequence is the same for the claimant who must defend the appeal in the State of origin before applying for enforcement.

58 Art. 34 (2) encourages the defendant to challenge the judgment in its State of origin. Since the provision does specify the nature of the legal remedies concerned, it should be understood as referring to all means provided by the law of the State of origin to set aside the judgment, be they ordinary or extraordinary.[193]

59 The obligation for the defendant to challenge the judgment in its State of origin is only imposed on him "when it was possible for him to do so". The court seized with recognition will have to consider whether the defendant was in fact in a position to appeal in the State of origin. This decision will rely on a combination of legal and factual elements. The procedural law of the State of origin comes firstly into account: the court seized with recognition should be informed of the legal remedies and of the conditions at which they are opened under that foreign law. In this respect, two points should be underlined. First, the explanatory memorandum proposed by the Commission states that the debtor should have been "in a position to appeal in the State of origin on *grounds of a procedural irregularity*".[194] As a consequence, only the legal remedies which can be used to challenge the decision on the ground of procedural irregularity will come into consideration.[195] This influences as well the general assessment

189 *Minalmet GmbH v. Brandeis Ltd*, (Case C-123/91) [1992] ECR I-5661 para. 19; OLG Karlsruhe [2001] I.L.Pr. 208 ("the contravention of article 27 (2) Brussels Convention is not cured if the debtor failed to lodge a possible appeal against the default judgment").

190 Commission Proposal COM (1999) 348 final, p. 7 (point 4.2.2.), p. 21 (commentary on section 2), p. 24 (commentary on article 50-51). See also *supra* Art. 34 note 21 (*Francq*).

191 This is why the ECJ construction was generally criticized: *Gaudemet-Tallon* p. 340 para. 418.

192 *Kropholler* Art. 34 note 42.

193 *Layton/Mercer* para. 26.053; *Gaudemet-Tallon* p. 340 para. 418.

194 Commission Proposal COM (1999) 348 final p. 23 (emphasis added).

of the defendant's attitude during the litigation in the State of origin: if he did challenge the decision without raising the procedural irregularity which prevented him from exercising his rights to a fair hearing, he will later be prevented to rely on Art. 34 (2). Second, the procedural law of the State of origin will set the time limit for introducing an appeal. If the defendant challenged the proceedings but his action was rejected because it was introduced too late, it should probably be considered that he did not comply with the conditions of Art. 34 (2) and is thus prevented to raise it. Indeed, he can be considered responsible for not having respected the limitation period set by the procedural law of the State of origin. However, factual circumstances might explain his attitude and reveal that he was not in a position to challenge the decision in due time. Besides the procedural law of the State of origin, the judge seized with recognition will also consider all factual circumstances of the case which might show that it was not possible for the defendant to challenge the decision. For instance, if the defendant did not comply with the time limit set to introduce an appeal, it can be because he received the judgment too late or never received it.[196] If a constant line of case law in the State of origin rejects the arguments which the defendant would have raised to found his appeal concerning his right to a fair hearing, it can be justified to consider that he was not in a position to search for a legal remedy against the decision.

V. Article 34 (3) and (4): irreconcilable decisions

After important changes introduced by the Regulation,[197] the last two points of Art. 34 60
consider the situation where two conflicting judgments are submitted to the judge seized with recognition. The coexistence of both decisions would cause severe disturbance in the rule of law in the legal order of the State addressed, which Art. 34 (3) and (4) tends to prevent.[198] This goal is reached under certain conditions which differ

195 *Leible*, in: *Rauscher* Art. 34 note 40; *Kropholler* Art. 34 note 443.

196 In the system Brussels Convention, the due delivery of the judgment is not required (Cass. [2001] I.L.Pr. 717; Epheteio Thessaloniki [2002] I.L.Pr. 165). If service of the judgment is indeed necessary in order to put the defendant in a situation to challenge the decision, one can wonder whether the Regulation introduced new formalistic conditions rather than simplifying them. The ECJ has indeed ruled that "it is 'possible' for the defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contacts, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given". (ASML Netherlands BV v. Semiconductor Industry Services SEMIS, [Case C-283/05] nyr para. 49). In this case, summons to the hearing had been served on the defendant after the hearing actually took place in the Netherlands. The judgment (rendered in default of appearance) was never served on him. An Austrian order declaring the Dutch judgment "provisionally enforceable" was served on the defendant but did not include a copy of the Dutch judgment. Refering to case law of the ECHR the ECJ considered that is was only possible for the defendant to challenge the judgment in its country of origin if he was aware of the grounds of that judgment. The ruling of the ECJ implies that the judgment should be served on the defendant.

197 *Supra* Art. 34 notes 10-13 (*Francq*).

198 Report *Jenard* p. 45.

according to the origin of the conflicting decisions (2). Despite these differences, some terms receive a common understanding in the two points (1).

61 As for point (2), points (3) and (4) of Art. 34 are related to other provisions of the Regulation which intervene at an earlier stage of the proceedings, namely Arts. 27 to 30. The latter provision tends to avoid the pursuit of proceedings before the courts of two Member States when they are either identical or related. Despite the efficient mechanism set by these provisions, it may occur that decisions which reveal themselves to be contradictory are adopted in different Member States. This would typically occur when the judge is ignorant of the foreign proceedings because the parties do not raise the subject. Parallel proceedings may then be pursued at the same time in different Member Statse or a decision be adopted in one Member State when a decision concerning the same legal dispute had already been rendered in another Member State. The scope of Art. 34 concerning irreconcilable judgments is both narrower and broader than the scope of the provisions concerning *lis pendens* and related actions. It is narrower because neither point 3, nor point 4 of Art. 34 cover the case of related actions. For instance, point 3, whose application is broader than point 4, requires that both proceedings involve the same parties. Art. 28, which concerns related actions does not contain such a requirement. The scope of Art. 34 is broader than that of Arts. 27 to 30 because the decision in conflict with the judgment whose recognition is sought, may fall outside the scope of the Regulation, either because it was rendered in a third State – for Art. 34 (4) – or because it covers subjects excluded from the material scope of the Regulation – for Art. 34 (3) and (4) –.

62 It should be noted from the start that the grounds for refusal provided for by point 3 and 4 of Art. 34 are mandatory.[199] If the irreconcilability is proven, the judge has no choice but to refuse recognition. In other words, he does not keep any margin of appreciation in order to assess the level of disturbance caused by the coexistence of the two decisions in its legal order.

1. Definition

a) Judgment

63 Two judgments are involved: one whose recognition is sought under chapter III of the Regulation and another with which the first one is in conflict. The judgment whose recognition is sought should be understood within the meaning given to this term by Art. 32 of the Regulation. Concerning the judgment with which a conflict occurs, the Regulation only states that it must have been "given" in the forum, in another Member State or in a third State depending on the factual setting. Proceedings which are merely pending in the State seized with recognition for instance do thus not justify a refusal.

199 *Italian Leather SpA v. WECO Polstermöbel GmbH & Co.*, (Case C-80/00) [2000] ECR I-4995 para. 52.

This does not solve the question whether the second judgment should have become *res judicata* or not. The Jenard Report explains that the experts left the question to the discretion of the court in which recognition is sought.[200] Since the Regulation merely states that the judgment must have been "given", a requirement as to *res judicata* would add conditions to the provisions.[201] This position is adopted by the ECJ in the *Italian Leather* case where it states that it is "unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance. As Art. 27(3) Brussels Convention, following the example of Art. 25, refers to judgments without further precision, it has general application".[202] In this case, two decisions on interim measures reached opposite solutions: the Italian decision had granted the measures while the German court had refused it. From this decision, it can be deduced that interim decisions are concerned as final and conclusive decisions as well as decisions which have *res judicata*. But the ECJ left open the question of whether the irreconcilability between the decisions should be asserted regarding their respective status.[203] Indeed in the Italian Leather case, it was only seized with two decisions of equal status and underlined that an *interim* judgment granting the measure conflicted with an *interim* measure refusing it.[204] 64

The ECJ has had the opportunity to clarify that settlements do not come into consideration in the application of Art. 34 (3). According to the Court, the provision is only concerned with judicial decisions actually given by a court and settlements are excluded from this category because of their "essentially contractual" nature.[205] The same solution should be valid for Art. 34 (4) because the terms of the reasoning apply in the same way for this provision. The Court has indeed underlined that the conflict between decisions is problematical insofar as it involves the solution adopted by a judicial body "on its own authority".[206] In another decision, the ECJ seems to imply that anti-suit injunctions are not covered by Art. 34 (3) and (4).[207] It is true that the conflict between an anti-suit injunction and a decision on the merits is not solved by point 4 of Art. 34, since the cause of action differs. But such a case could find a solution in point 3 of Art. 34 because this provision only requires the two decisions to be rendered between the same parties. A conflict between two anti-suit injunctions (rather theoretical between Member States because of the limited number of States where such a measure can be obtained) would simply be solved according to the general lines of the last two points of Art. 34. If this statement of the Court can be doubted, the decision reached the effective situation that anti-suit injunctions are prohibited in the 65

200 Report *Jenard* p. 45.

201 *Leible*, in: *Rauscher* Art. 34 note 44; *Gaudemet-Tallon* p. 344 para.422.

202 *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, (Case C-80/00) [2000] ECR I-4995 para. 41.

203 *Infra* Art. 34 note 69 (*Francq*).

204 *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, (Case C-80/00) [2000] ECR I-4995 para. 47.

205 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case 414/92) [1994] ECR I-2237 para. 18.

206 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case 414/92) [1994] ECR I-2237 para. 17.

207 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd. and Changepoint SA* (Case C-159/02), [2004] ECR I-3565 para. 30: recourse to such measure "is liable to give rise to situations involving conflicts for which the Convention contains no rule" (emphasis added).

"Brussels system"[208] and that such conflict of decisions should therefore never occur. The conflict which would arise between a Member State judgment and an arbitration award entitled to recognition in the State addressed is not covered by the Regulation. A conflict between the State obligations under the Regulation and under the New York Convention can thus occur. German authors submit that the solution of Art. 34 (4) should be applied by analogy.[209] Even if this proposition constitutes a sound solution in practice, it does not avoid the conflict between the Regulation and the New York Convention, because as long as the text of Arts. 33 and 34 is not modified, giving priority to the earlier arbitration award which is entitled to recognition in a Member State infringes the obligation of that State under the Regulation.

66 As stated before,[210] the judgments referred to by Arts. 34 (3) and (4) do not need to have been rendered pursuant to the Regulation. Concerning the judgment whose recognition is sought, the only condition, due to Arts. 32 and 1 of the Regulation, is that the judgment was adopted in a Member State and covers civil and commercial matters.[211] The same is true concerning the second judgment. If point 3 of Art. 34 covers the conflict with a decision from the forum, it is not required that the latter decision was adopted in the framework of the "Brussels system".[212] Furthermore, under point 4, the second judgment might come from a third State.

b) Irreconcilable

67 The refusal grounds set by points 3 and 4 of Art. 34 only apply as long as the decisions are irreconcilable. The meaning of this term is to be defined with respect to national law, is it not left to the understanding of the judge. The ECJ provided an autonomous interpretation in the case *Hoffmann v. Krieg*. Two decisions are irreconcilable if they "entail legal consequences that are mutually exclusive".[213] This does not mean that they must concern exactly the same legal problem. For instance, in the case *Hoffmann v. Krieg* referred to the ECJ, the decisions involved concerned maintenance on the one hand and divorce on the other hand, but were judged irreconcilable because the maintenance order necessarily presupposed the existence of the matrimonial link which was dissolved by the other decision.[214] A difference of substantive or procedural law is not

208 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd. and Changepoint SA* (Case C-159/02), [2004] ECR I-3565 para. 31.

209 *Kropholler* Art. 34 note 60; *Peter Schlosser* Art. 34-36 para. 29.

210 *Supra* Art. 34 note 60 (*Francq*).

211 *Unic Centre SARL (A Company) v. The London Borough of Brent & Harrow Trading Standards Service*, I.L.Pr. [2000] 462 (Q.B.D., *Newman* J.): Forfeiture proceedings are a civil matter falling within the scope of the Brussels Convention. A forfeiture order is thus a judgment within the meaning of article 34 (3) which could potentially be opposed to a foreign judgment on the existence of a trade mark infringement.

212 See for instance *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645 para. 25, considering the irreconcilability between a maintenance order rendered in a Member State pursuant to the Brussels Convention and a divorce decree rendered in the Member State where recognition was sought.

213 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645 para. 22.

even necessary, nor is it a reason for justifying tolerance towards conflicting judgments.[215] What is to be considered is the effect of the two judgments. Of course, the margin of discretion of the judge is not totally erased since he will have to assess whether from his point of view the legal consequences of the decisions are mutually exclusive. However, the position traditionally adopted in France according to which irreconcilability is a matter totally left to the discretion of the judge of the facts and not submitted to the control of the Cour de cassation can probably no longer be maintained.[216]

National case law and Reports on the Brussels Convention provides a few clear ex- 68
amples. The judgment allowing damages for breach of contract is irreconcilable with another judgment declaring the contract invalid.[217] The judgment rendered in a third State dismissing an action against a person domiciled in the EC conflicts with a judgment rendered in a Member State against the same person and concerning the same cause of action.[218] A decision granting maintenance on the ground of paternity conflicts with a decision refusing to recognize the paternity.[219] Two judgments concerning different contracts between the same parties are not irreconcilable even though it would have made sense to gather the proceedings before one single court.[220] A decision accepting the jurisdiction of the Court of the forum and a foreign decision on the merits are not irreconcilable.[221] The decision requesting the seller to pay damages because of the lack of conformity of the object sold is reconcilable with a foreign decision condemning the purchaser to pay the price: both could be simultaneously executed by way of set-off.[222]

A difficult question is whether the irreconcilability should be assessed concerning the 69
respective status of the decisions. Indeed, it can be sustained that a provisional decision is not necessarily irreconcilable with a decision on the merits.[223] This is the position adopted by the French Cour de cassation which gave priority to a German decision on the merits rather than to the national provisional decision.[224] The other way around, a foreign provisional decision would probably have been considered as irreconcilable with a forum decision on the merits. Some authors and case law suggest that the irreconcilability might also depend on whether the decisions are still open for re-

214 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645 para. 24.

215 *Italian Leather SpA v. WECO Polstermöbel GmbH & Co.*, (Case C-80/00) [2000] ECR I-4995 para. 42; *Layton/Mercer* para. 26.060.

216 *Gaudemet-Tallon* p. 343 para. 420 referring to Cass. Bull. civ. 1977 I n°. 401.

217 Report *Jenard* p. 45.

218 Report *Schlosser* p. 131.

219 OLG Hamm IPRax 2004, 437 with note *Geimer* (419).

220 Trib. civ. Liege JMLB 1994, 929.

221 Cassaz. RDIPP 1995, 732.

222 This is the judgment on the merits which gave rise to the decision of the Cour de cassation (Cass. Bull. civ. 1977 I n°. 401).

223 *Layton/Mercer* para. 26.061.

224 Cass. Bull. civ. 1996 I n°. 201.

view.[225] Should the final foreign decision or the forum decision receive priority when the latter is still subject to appeal? Surely, once the forum decision has been overturned, the refusal ground of Art. 34 (3) no longer exists.[226] The question is what should be done in the meantime, especially since Art. 37 does not allow the judge seized with recognition to stay proceedings in such a situation. The same problem arises in the conflict between two Member State decisions. When only one of them is final, should they be considered as irreconcilable knowing that this conflict might disappear after the exercise of the means of appeal? The autonomous interpretation of the ECJ does not yet offer a clear answer and it can be expected that further preliminary rulings will be requested on this question.

2. Conditions of application

a) Conflict with a local judgment: Art. 34 (3)

70 Besides the conditions deriving from the definition of irreconcilable judgments, Art. 34 (3) actually imposes only one condition in case of a conflict with a judgment rendered in the State seized with recognition: it must have been rendered between the same parties. This condition is to be constructed in the same way as in Art. 27. This should include the person who did not participate in the first litigation but succeeds to the rights of one of the parties. As stated before, the condition will have the effect of excluding from the scope of Art. 34 (3) related actions which would involve different parties or not exactly the same parties.

71 Art. 34 (3) has the effect that the local judgment will be given automatic priority. The local judgment will prevail, irrespective of which judgment was given first or which proceedings were started first. This solution is easy to apply as long as the local judgment exists at the time when the foreign judgment is adopted or its recognition is requested. What should happen when the local judgment is rendered after the foreign judgment? Some authors suggest that the question is not addressed by the Regulation since it requests the local judgment to be "given" at the time when the foreign decision is considered.[227] Furthermore, since the foreign judgment receives automatic recognition under the Regulation, a local judgment given later cannot affect its status. The ECJ, however, favours another position. In the case *Hoffmann v. Krieg*, the Court considered that a local divorce decree was irreconcilable with a maintenance order from another Member State although it was aware of the fact that the local judgment was rendered later.[228] Pursuant to this decision, many authors sustain that the refusal ground set by Art. 34 (3) has *ex nunc* effect from the date of adoption of the local judgment.[229]

225 *Layton/Mercer* para. 26.061; *Kropholler* Art. 34 note 53 with further references.

226 OLG Hamm IPRspr. 1981 Nr. 187.

227 *Heuzé*, «Jugements en matière civile et commerciale (compétence, reconnaissance et exécution)», Juri-dictionnaire Joly Communautaire (2002) para. 164; *Gothot/Holleaux* para. 280.

228 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645 paras. 23, 25.

229 *Kropholler* Art. 34 note 54; *Layton/Mercer* para. 26.069 (see however p. 926, para. 26.070: when the two are in the same terms and the proceedings which gave rise to the local judgment were started after the adoption of the foreign judgment, priority should be denied to the local judgment because it was given in contradiction with the principle set in the case *Jozef de Wolf v. Harry Cox B.V.*, (Case 42/76) [1976] ECR 1759. The latter case refuses the opportunity to a party who has already obtained a judgment in a Member State to start new proceedings against the same defendant on the same problem in another Member State); *Leible*, in: *Rauscher* Art. 34 note 43; *Gaudemet-Tallon* p. 345 para. 424.

The conflict between a local judgment and a third State judgment is not addressed by point (3) of Art. 34 nor by its point (4). Such a conflict should be solved with respect to national rules of recognition and enforcement of foreign judgments. 72

b) Conflict with judgment given in another Member State: Art. 34 (4)

Point 4 of Art. 34 sets stricter conditions than point 3. Indeed, besides the conditions deriving from the definition of irreconcilable judgments, four conditions should be fulfilled before recognition or enforcement can be denied: the conflict occurs with an earlier judgment rendered in another Member State, both judgments involve not only the same parties but also the same cause of action and finally the earlier judgment must fulfil the conditions necessary for its recognition in the Member State addressed. The identity of parties and of the cause of action receives the same meaning as in Art. 27. The conditions that the earlier judgment must fulfil will be found in the Regulation since both judgments come from Member States and involve the same cause of action. If one of them falls in the spatial and substantive scope of application of chapter III of the Regulation, so does the other one. 73

Priority is given to the earlier judgment. The moment to be considered in order to assess the anteriority of one of the two judgments is much debated. The date when recognition is sought is irrelevant as both judgments benefit automatic recognition. The date when the proceedings commenced should also be considered irrelevant for two reasons.[230] Firstly, Art. 34 (4) is not a sanction of the violation of Art. 27. Second, the question of the relevant moment should be solved with respect to the logic followed in Art. 33. A judgment cannot produce in the requested State more effects than it has in its State of origin. As a consequence, a judgment cannot be automatically recognised before it produces any legal effect in the State where it was rendered, and two judgments cannot be considered irreconcilable before each of them starts producing its legal effect according to the procedural law of the State of origin. This date, which can coincide with the date when the judgment was rendered but does not necessarily do so, should determine which is the earlier judgment.[231] 74

The conflict arising between two irreconcilable judgments rendered in two Member States and presented for enforcement in a third Member State is not addressed by the Regulation when these judgments do not involve the same parties and the same cause of action. The question, which should be of minor practical relevance thanks to the 75

230 *Kropholler* Art. 34 note 57.

231 *Geimer/Schütze* Art. 34 notes 180 and 181; *Kropholler* Art. 34 note 57 (not mentioning a possible difference between the date where the judgment is rendered and the moment when it produces legal effects).

mechanism set by Art. 27 to 30, remains difficult since following the strict wording of the Regulation, both judgments are entitled to recognition.[232]

c) Conflict with judgment given in a third State, Art. 34 (4)

76 Judgments rendered in third States can also provide a ground for denying recognition to a judgment issued in a Member State when the four conditions mentioned above are fulfilled.[233] The identity of the parties and the cause of action should also be interpreted in regard of Art. 27, despite the foreign origin of one of the decisions. Those terms should indeed keep the same meaning throughout the provisions of the Regulation. The conditions for its recognition that must be fulfilled by the judgment given in a third State will be found in an international convention or in national law. The purpose of this provision was actually to avoid diplomatic complications with third States.[234]

77 The conflict with a judgment issued in a third State is treated just like the conflict with a judgment given in another Member State. Priority is given to the earlier judgment. This raises again the question of the date to be considered in order to assess the anteriority of the foreign judgment but in slightly different terms. Indeed it is not sure that the judgment issued in a third State benefits from automatic recognition in the Member State addressed. Should that foreign judgment be taken into account for the purpose of Art. 34 (4) from the date where it benefits recognition or enforcement in the Member State addressed, which will probably occur at the end of specific proceedings?[235] Or from the date when the judgment was given?[236] On the one hand, the first position is coherent with the notion of irreconcilability: it occurs only between two judgments which have legal effects in the Member State addressed. On the other hand, this position obviously favours the judgment adopted in a Member State, which benefits from automatic recognition, and it is not fully in line with the wording of Art. 34 (4), which requires the judgment given in a third State to fulfil the conditions necessary for its recognition, not to have actually completed the process of recognition or enforcement. Of course, the anteriority can be assessed in the same way in case of conflict with a judgment issued in a third State, as in the case of a conflict with a judgment rendered in another Member State,[237] when the State addressed offers automatic recognition to all foreign judgments.[238]

232 *Layton/Mercer* para. 26.081-26.082 (proposing various solutions).

233 *Supra* Art. 34 note 73 (*Francq*).

234 Report *Schlosser* para. 205.

235 In favour of this position *Heuzé* (fn. 227) para. 165; *Gothot/Holleaux* para. 283.

236 In favour of this position *Gaudemet-Tallon* p. 348 para. 429.

237 *Supra* Art. 34 note 75 (*Francq*).

238 Such is the case in Belgium: Loi du 16 juillet 2004 portant code de droit international privé, M.B., 27.7.2004, p. 57344, Art. 22, § 1, second line of paragraph.

Article 35

(1) Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.
(2) In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.
(3) Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Bibliography

Bälz/Marienfeld, Missachtung einer Schiedsklausel als Anerkennungshindernis i. S. v. Art. 34-35 EuGVVO und § 328 ZPO?, RIW 2003, 51

Geimer, Nachprüfung der internationalen Zuständigkeit des Urteilsstaates in Versicherungs- und Verbrauchersachen, RIW 1980, 305

id., Die Sonderrolle der Versicherungssachen im Brüssel I-System, in: FS Andreas Heldrich (2005), p. 627
van Hoek, Erkenning van vonnissen in het privaatrecht: een studie naar de grenzen van de wederzijdse erkenning, NIPR 2003, 337
Michael Johannes Schmidt, Die Einrede der Schiedsgerichtsbarkeit im Vollstreckbarerklärungsverfahren von EuGVÜ und Lugano-Übereinkommen, in: FG Otto Sandrock (1995), p. 205
Schütze, Die Nachprüfung der internationalen Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen, RIW 1974, 428.

I. General purpose

1 Recognition of judgments shall, as a matter of principle, be automatic under the Brussels I regime. With an expeditious recognition, featuring as low a number of grounds of refusal as possible, a general review of whether the original court that had rendered a judgment had in fact jurisdiction to do so, would be irreconcilable. Accordingly, in order to foster and strengthen the principle of automatic recognition Art. 35 very much restricts the possibilities of a review as to jurisdiction.[1] The main rule is contained in (1) by *argumentum e contrario* and expressly enforced in (3) 1: Only insofar as (1) (or another rule in the Regulation) expressly allows for a review of the original court's jurisdiction by the court which is applied to for recognition. The language employed in (3) 1 ("may" instead of "must") should be regarded not as softening this rule but as a matter of politeness.

2 The direct and principal aim of the Brussels system was not initially to unify the rules of direct jurisdiction. This became merely an adjunct, to ensure the swift and near-automatic recognition and enforcement of judgments rendered in the adhering States. However, the practical result was that the focus shifted away from the court requested to enforce a judgment (as had been the position under traditional *conventions simples* dealing with recognition and enforcement only) to the court initially seised of the original cause of action: an aggrieved party is encouraged to seek redress in the original jurisdiction, not in the recognising or enforcing court.[2] By then it is too late and – as (3), (1) make clear – illegitimate to object to the original court's jurisdiction.[3] If a court in a Member State is seised of an action under jurisdictional rules common to all the Member States there is little room for complaint at the subsequent stage of recognition and enforcement.[4]

3 The Report *Jenard* succinctly described the *rationale* underlying Art. 35: "The very strict rules of jurisdiction laid down in Title [today: Chapter] II, and the safeguards granted in Art. 20 [today: 26] to defendants who do not enter an appearance, make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given. The

1 *Layton/Mercer* para. 26.085.
2 *Newton* p. 165.
3 Cf. only Aud. Prov, Valencia AEDIPr 2004, 764, 765; *Newton* p. 165.
4 Report *Evrigenis/Kerameus* para. 78; *Newton* p. 165 et seq.; *van Hoek*, NIPR 2003, 337, 343.

absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed that this court correctly applied the rules of jurisdiction of the Convention [today: Regulation]. The absence of any review as to whether the court in which the judgment was given had jurisdiction avoids the possibility that an alleged failure to comply with those rules might again be raised as an issue at the enforcement stage."[5]

The *règlement double* is a credible pledge by the Member States to refrain from exercising exorbitant jurisdiction to the detriment of defendants domiciled in other Member States and thus aims at preventing the externalising of the costs of national legislation to the detriment of such defendants.[6] 4

Art. 35 in its entirety supports and enhances the axiomatic principle laid down in Art. 34: Unless a rule in the Regulation itself expressly permits refusal of recognition on a specific ground recognition has to be granted and the court in the second state is bound to recognise the judgment without reviewing it.[7] But even the exceptions might generate repercussions in the state of origin as was amply demonstrated in the *Gruber*-case: After the ECJ had given judgment[8] the Austrian OGH decided on the distribution which Austrian court it ordered to be competent. But eventually the OGH expressly allowed for the defendant invoking lack of international jurisdiction and for a full review of the jurisdictional rules for consumer contracts in order to avoid these issues to be addressed only in a later stage in another Member State where recognition or enforcement will be sought.[9] 5

Occasionally attempts to rephrase and to reformulate the content of Art. 35 end up with the assertion that Art. 35 implements a presumption that the court of origin had jurisdiction; in the light of (1) and (3) 1 such a presumption ought to be irrefutable.[10] Yet this approach gives Art. 35 a positive reading whereby a negative rule of non-review would suffice. The said presumption adds nothing of value beyond what can already be discerned from the rules *per se*, and might, in fact, become a possible source of misinterpretation. Thus, for the sake of caution one should refrain from asserting 6

5 Report *Jenard* p. 46.
6 *Whincop*, (1999) 23 Melbourne U. L. Rev. 416, 425 et seq., 431; *Tung*, 23 Mich. J. Int'l. L. 31, 49 (2001); *Mankowski*, in: *Claus Ott/Hans-Bernd Schäfer* (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 138 et seq.; cf. also *TSN Kunststoffrecycling GmbH v. Jurgens* [2002] 1 All ER (Comm) 282, 284 (C. A., per *Rix* L. J.); *LoPucki*, 84 Cornell L. Rev. 696, 759 (1999).
7 *Layton/Mercer* para. 26.085.
8 *Johann Gruber v. Bay Wa AG*, (Case C- 464/01) [2005] ECR I-439 = RCDIP 94 (2005), 493 with note *Jude*; note by *Mankowski*, IPRax 2005, 503.
9 OGH JBl 2005, 594, 596 with note *Pfersmann*.
10 E.g. Report *Evrigenis/Kerameus* para. 78; *Jeantet*, CDE 1972, 375, 411; *Bartlett*, (1975) 24 ICLQ 44, 45 et seq.; *Weser* para. 285; *Martiny*, in: Handbuch des Internationalen Zivilverfahrensrechts, vol. III/2 (1984), ch. II note 160.

such a presumption. Relying on a mutual trust that the courts in the partner states applied the relevant jurisdictional rules correctly[11] is different from a presumption.

II. Legislative history

7 From the very outset Art. 35, which was formed as Art. 28 Brussels Convention, was part of the Brussels regime. The cascade of Accession Conventions saw the number of Sections of Chapter II which were referred to on the rise. Insofar as the evolution of the protective sub-regimes that left their marks and traces in the legislative history of the Article, Art. 28 always followed suit if a special jurisdictional sub-regime called for escort and support at the level of recognition and enforcement.

8 The case is a special one with the Lugano Convention. Its Art. 28 acquired an additional second paragraph (with consequential renumbering of the following paragraphs to paras. 3 and 4) which does not re-appear either in the subsequent versions of the Brussels Convention nor in the Brussels I Regulation. Art. 28 (2) Lugano Convention expressly preserved Artt. 54b (3) and 57 (4) Lugano Convention.[12] Both rules referred to do not have a counterpart in the Brussels regime but are concerned with particularities which can only occur in the Lugano regime: Only the Lugano regime was confronted with the necessity to define its relationship with the Brussels regime and did so in its Art. 54b. Accordingly, both Artt. 54b (3) and 57 (4) Lugano Convention deal with the specific relationship to the Brussels regime. Art. 28 (2) was deemed appropriate to accompany these other Articles[13] and to address any ensuing problems in the transitional period.[14] A need to mirror this could not possibly arise within the Brussels I system itself. Quite unlike the ordinary grounds of refusal, Art. 28 (2) of the Lugano Convention is discretionary.[15]

III. Limited and restricted review of jurisdiction

1. Principle of non-review of jurisdiction

9 The principle of non-review of jurisdiction is expressly laid down in (3) 1. It applies indiscriminately whether the court of origin based its jurisdiction on grounds taken from the Regulation or on grounds taken from national law.[16] Indirectly, even the incorrect application of national law, in cases where by right the Regulation rules should have governed the case is sanctioned.[17] But courts who are only asked for recognition must not censure their fellow courts in other Member States unless this is expressly requested. However blatantly wrong the violation of the jurisdictional rules

11 Cf. only Report *Jenard* p. 46; BGH IHR 2005, 259, 260.

12 For applications in practice see BGE 123 III 374; 127 III 186.

13 Report *Jenard/Möller* para. 16 sub 5.

14 *Möller*, in: *Jayme* (ed.), Ein internationales Zivilverfahrensrecht für Gesamteuropa (1992), p. 300.

15 Report *Jenard/Möller* para. 82.

16 *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 2.

17 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1967 para. 32.

applied or not-applied might be the court addressed with recognition is only permitted to intervene in the limited instances provided by (1) or elsewhere.[18] The judgment debtor must appeal in their state of origin if he wants to challenge the decision on the basis of jurisdictional.[19] This applies to errors of fact and to errors in law likewise.[20]

Generally, confidence and trust must prevail that the court of origin has applied the (mostly uniform) rules on jurisdiction correctly.[21] Trust and confidence as cost-reducing mechanisms[22] shall work their while also here.[23] This excludes any forum bias improperly favouring judgment debtors who are resident in the state where recognition is sought.[24] In addition, a possible source of misapplication of the Regulation is avoided insofar as review by the court in which recognition is sought, would by no means guaranteed to be of superior quality to the application of the jurisdictional rules by the court of origin.[25] 10

If the court of origin has incorrectly assumed that it has jurisdiction in many instances Art. 26 will be violated simultaneously. Although this second mistake does not carry any additional and independent weight but must be treated as a consequential matter, that is, necessarily flowing from the first mistake as to the assumption of jurisdiction and therefore subject to the principle of non-review by the court addressed.[26] Art. 26 must not be implemented to circumvent the principle of non-review. However, even if this did not follow from (3) 1, it can be derived from Art. 36. In any event the judgment debtor will, beyond the strict limits defined by (1), not be heard with any defence that the court of origin incorrectly assumed international jurisdiction.[27] 11

Jurisdiction in Art. 35 means international jurisdiction. This does not imply, however, that courts before which recognition of a foreign judgment is sought, might feel invited to investigate as to whether the court of origin was competent in terms of local jurisdiction or venue. Such investigation is clearly ruled out by Art. 36 and the limited grounds of refusal of recognition exhaustively listed in Artt. 34; 35.[28] The Hamburg court asked to recognise a Marseille judgment must not care whether instead of the 12

18 *Layton/Mercer* para. 26.087; *Geimer/Schütze* Art. 35 note 3.

19 *Geimer/Schütze* Art. 35 note 5; *Tschauner*, in: BBGS Art. 35 note 1 (2005); *Kropholler* Art. 35 note 4.

20 BGH IHR 2005, 259, 260; *Geimer/Schütze* Art. 35 notes 13 et seq. *Kropholler* Art. 35 note 1.

21 Cf. only Report *Jenard* p. 46; BGH IHR 2005, 259, 260; *Wolfgang Lüke*, in: FS Rolf A. Schütze (1999), p. 467, 482; *Leipold*, in: FS Akira Ishikawa (2001), p. 221, 228 et seq.; *Rosner* p. 171.

22 Seminal *Ripperger*, Ökonomik des Vertrauens (1998).

23 *Mankowski* (fn. 6), p. 118, 138.

24 *Mankowski* (fn. 6), p. 118, 138.

25 *Mankowski* (fn. 6), p. 118, 138.

26 Cass. 11 April 1995 – D 736/95; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 1.

27 Cf. only CA Orléans in: Digest I-28 B-2; *Geimer*, WM 1976, 830, 837; *Born/Fallon*, J. trib. 1983, 181, 230; *Martiny* (fn. 10), ch. II note 162.

28 Cf. only Hoge Raad S&S 2007 Nr. 1 p. 14; *Geimer*, WM 1980, 305, 309; *Martiny* (fn. 10), ch. II note 179; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 2; *Geimer/Schütze* Art. 35 note 44; *Kropholler* Art. 35 note 1; *Leible*, in: *Rauscher* Art. 35 note 4.

Marseille court it should have been a Toulouse or Bordeaux court to give the judgment.[29]

13 A further exception to the rule of non-review, additional to the exceptions contained in (1) is to be found in the transitional rule of Art. 66 (2).[30] In this way, the *prima facie* assertion that (1) is exhaustive[31] receives some refinement.

2. Sections of Chapter II referred to

a) Generalities

14 (1) allows for a review of jurisdiction but in very limited instances only.[32] (1) refers only to selected Sections of Chapter II. This list is exhaustive insofar as references to Chapter II are at stake. Other grounds of jurisdiction other than those expressly referred to must not be reviewed. In this regard (3) 1 is unambiguously clear and unequivocal and allows no room for misunderstandings. Art. 36 completes the overall picture. In understanding the role of Art. 36 it must be appreciated that (1) confines the court addressed to reviewing questions of jurisdiction only; the court addressed may not go further by reviewing the substance if the judgment.[33]

15 The court addressed with recognition must review of its own motion, *ex officio*, whether the court of origin has obeyed Sections 3, 4 and 6 of Chapter II.[34] It must not wait for an extra application by the judgment debtor or alike. Insofar, this same standard applies under Art. 34. Yet the court addressed need not conduct an investigation into this matter.[35] It must not even invite the parties to submit their respective facts although, by virtue of (2), the court is permitted to review the factual ground asserted by the court of origin.

16 Contentions that the review established by (1) will only become effective in higher instances but not at first instance[36] are plainly wrong insofar as simple recognition is concerned. It is not by chance or fortuitously that these contentions refer to Artt. 41; 45 in this context.[37] The differentiation should be clear: Insofar as enforcement is

29 *Kropholler* Art. 35 note 1.

30 Cf. on this rule in detail Art. 66 notes 15-22 (*Mankowski*).

31 Cf. only Report *Evrigenis/Kerameus* para. 79; *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1967 para. 31; OLG Zweibrücken OLG-Report Koblenz/Saarbrücken/Zweibrücken 2001, 349, 350; OLG Zweibrücken NJOZ 2004, 785, 787; Rb. Rotterdam NIPR 2001 Nr. 60 p. 126.

32 Cf. only *Xandra Ellen Kramer*, NIPR 2000, 26, 30.

33 *Layton/Mercer* para. 26.086.

34 OLG Köln RIW 1990, 229 = NJW-RR 1990, 127; *Droz* para. 534; *Martiny* (fn. 10), ch. II note 165; *Layton/Mercer* para. 26.089; *Tschauner*, in: BBGS Art. 35 note 7 (2005); *Kropholler* Art. 35 note 6.

35 *Layton/Mercer* para. 26.089.

36 *Geimer*, RIW 1980, 305, 306; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 5; *Geimer/Schütze* Art. 35 note 16; *Kropholler* Art. 35 note 6; *Leible*, in: *Rauscher* Art. 35 note 6.

37 For references see last fn.

applied, Art. 41 bars any review at first instance. But insofar as simple recognition is at stake, a counterpart to Art. 41 generally does not exist. The case is different, though, where a declaration of recognition is sought after separately, since in this event Art. 33 (2) expressly refers to the rules contained in Sections 2 and 3 of Chapter III. But where recognition is not the formal cause of action, Art. 33 (2) firmly establishes an *argumentum e contrario* that automatic and incidental recognition, as such, does not follow the specific rules particularly designed for enforcement and that thus Artt. 41; 45 are not applicable. This gains ample support if the prospects of an appeal are taken into account: With regard to enforcement, a system of appeals is institutionalised, whereas in the case of automatic and incidental recognition, the ordinary means of appeal remain the popular choice.

17 The proviso that jurisdiction must be reviewed with regard to Sections 3, 4 and 6 of Chapter II stems from the belief[38] that *insofar*, i.e. to this limited and expressly confined extent, public policy is engaged and touched upon.[39] This is the case only to the extent that the rules referred to are applicable on their own merits. Accordingly, (1) cannot be applied if the recognition of a provisional measure is sought, since in this area of provisional measures Art. 31 establishes a particular regime touching upon, in particular, the generally exclusive nature of Artt. 15-17.[40]

b) Insurance and consumer cases

18 The first two Sections of Chapter II referred to are Sections 3 and 4 which concern insurance and consumer cases respectively. The court addressed thus has to review as to whether the court of origin assumed its jurisdiction in contradiction to, and in violation of, Artt. 15-17 or Artt. 8-14 respectively.[41] The protective regimes themselves therefore get accompanying protection with a second-tier of recognition and enforcement. They are regarded with such imminent importance, since they grant generally exclusive jurisdiction, that courts should not tamper with them, and that those rules should be reviewed as to whether they have applied these rules correctly. In particular, this sets a high standard for the recognition and enforcement of a default judgment which is entered into against a consumer outside the state where the consumer has his domicile. Circumventing the protective regime by simply suing in a court which is convenient from the entrepreneur's point of view therefore made quite unattractive and an unappealing strategy.

19 Without (1), entrepreneurs would take less caution, if at all, and would feel inclined to adopt the strategy of suing consumers in their (i.e. the entrepreneurs') home countries in the expectation that the consumer would not find the away game worth entering into appearance and that claimants in turn would obtain default judgments but for Art. 26. Fellow travelling courts familiar with an enterprise of local and regional im-

38 Critically e.g. *Geimer/Schütze* Art. 35 note 9.

39 *Arthur Bülow*, RabelsZ 29 (1965), 473, 505; *Hans Arnold*, AWD 1969, 89, 92.

40 *Xandra Ellen Kramer*, NIPR 2000, 26, 31.

41 Cf. only OLG Frankfurt IPRspr. 2001 Nr. 169 p. 340-342 (with note *Mankowski*, EWiR Art. 22 EuGVÜ 1/01, 427); OLG Stuttgart NJW-RR 2001, 858.

portance could then cause severe harm by creating external effects on consumers in other countries. Yet (1) disables such a strategy. The courts in the consumers' home states can step in to protect their countrymen. The externalisation should therefore not occur. [Consumers are protected against an own strategy of seemingly rational rational desinterest[42] turning into irrational if not disastrous apathy. *Mutatis mutandis* the same applies in insurance cases.

20 However, the exception provided for insurance and consumer cases often gets questioned for the alleged lack of a convincing *ratio*.[43] The critics nonetheless overlook the decisive point as spelled out above. They argue for instance, that it appears illogical to review jurisdiction in a simple consumer case, for example one which, concerns the purchase of a vacuum-cleaner which does not threaten the consumer's solvency whereas jurisdiction in a multi-million-Euro-lawsuit, the outcome of which could render either party bankrupt, is not reviewed.[44] But the defendant in a – dramatically speaking – life-threatening multi-million-Euro-lawsuit is not very likely to adopt a strategy of rational apathy but will feel inclined to fight the matter to death (if it is permitted to follow up on the metaphor), which is quite contrary to the attitude of a consumer-defendant in an ordinary small-claim lawsuit abroad. The consumer might not think it worth their the effort – while the defendant in the multi-million-Euro-lawsuit certainly will.

21 Insofar as review of jurisdiction is permitted the court that is addressed ought to make a full assessment as to whether the court of origin had jurisdiction. This involves both defining the respective parts of the jurisdictional rules involved and a proper conclusion for the purposes of the concrete case pursuant to (2) based on the factual findings of the original court. The final decision of the court addressed might become quite extensive since this court has to assess jurisdiction and has to reason its judgment as though it was the original court giving judgment.[45] Nonetheless it should be emphasised that this still does not amount to a direct application of the jurisdictional rules since the court addressed is not itself deciding the case, but only a means of controlling and monitoring the decision rendered by the court of origin.[46]

42 On rational apathy as consumers' preferred strategy in cross-border cases bearing in mind the ordinarily small amounts at stake, *Mankowski*, MMR-Beilage 7/2000, 22, 32; *id.*, in: Internet und Recht (Wien 2002), p. 191, 212; *id.*, in: *Ruth Nielsen/Sandfeld Jacobsen/Trzaskowski* (eds.), EU Electronic Commerce Law (København 2004), p. 125, 142-145.

43 *Schütze*, RIW 1974, 428, 429; *Kaye* p. 1504; *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ notes 9 et seq.; *Schack* para. 840; *Geimer/Schütze* Art. 35 note 8; *Geimer*, in: FS Andreas Heldrich (2005), p. 627, 642; *Kropholler* Art. 35 note 7; *Leible*, in: *Rauscher* Art. 35 note 6.

44 *Schütze*, RIW 1974, 428, 429.

45 Fine examples are provided by OLG Frankfurt IPRspr. 2001 Nr. 169 p. 340-342 and OLG Stuttgart NJW-RR 2001, 858.

46 *Van Hoek*, NIPR 2003, 337, 343.

If the courts in the state where the court of origin is located, had international jurisdiction, it does not matter that the court of origin might not have been competent in terms of local jurisdiction or venue. Local jurisdiction is, with regard to the exception, not a matter of review since the Regulation is only concerned with transborder cases and will not erect barriers to recognition that is previously unknown to the national laws of the Member States.[47] 22

c) Cases of exclusive jurisdiction under Art. 22

Expressly preserved for is also Section 6 of Chapter II, translated into plain English: expressly preserved for are the cases of exclusive jurisdiction under Art. 22. This coincides with the general emphasis on truly exclusive jurisdiction and Art. 22 in particular. The court which disregards Art. 22 and decides a case which should have been exclusively the business of another court in another Member State, must not feel home and dry as to the recognition of the result it reached. 23

One source for possible conflict was often identified with Art. 22 (2) 2:[48] In order to determine the seat of a company each court shall apply its rules of private international law and not the autonomous definition established by Art. 60. Yet in practice, divergence should not occur, at least if courts have been appraised of the recent authorities correctly. After *Centros*, *Überseering* and *Expire Art*[49] the Member States of the EU have in fact a uniform conflicts rule that determines the seat of companies in intra-Community cases: the place of incorporation and the statutory seat prevail,[50] the *siège réel* vanishes. Art. 22 (2) 2 does not make an exception to this rule.[51] Formerly there was some controversy between the Report *Jenard*[52] and the prevailing opinion in legal writing[53] as to whether a court should be censured for correctly basing its exclusive jurisdiction under the then Art. 16 (2) of the Brussels Convention in conjunction with 24

47 *Geimer*, WM 1976, 830, 839; *id.*, RIW 1980, 305, 309; *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 11; *Geimer/Schütze*, Art. 35 notes 44, 52; *Tschauner*, in: BBGS Art. 35 note 1 (2005); *Kropholler* Art. 35 note 9; *Leible*, in: *Rauscher* Art. 35 note 6.

48 Cf. only *Layton/Mercer* para. 26.091; *Kropholler* Art. 35 note 13.

49 *Centros Ltd. v. Erhvervs- og Selskabsstyrelse*, (Case C-212/97) [1999] ECR I-1459; *Überseering BV v. Nordic Construction Co. Baumanagement GmbH*, (Case C-208/00) [2002] ECR I-9919; *Kamer voor Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, (Case C-167/01) [2003] ECR I-10155.

50 Cf. in detail on these connecting factors *Jochen Hoffmann*, ZVglRWiss 101 (2002), 283.

51 *Mankowski* in: *Rauscher* Art. 22 note 30; *Benedetelli*, RDIPP 2002, 879, 910 et seq.; *id.*, in: *Meeusen/Pertegás/Straetmans* (eds), Enforcement of International Contracts in the European Union (2004) para. 8/26; *id.*, (2005) 16 Eur. Bus. L. Rev. 55, 73; *Gerhard Wagner*, in: *Lutter* (ed.) Europäische Auslandsgesellschaften in Deutschland (2005), p. 223, 265; *Leible*, in: *Hirte/Bücker* (eds.), Grenzüberschreitende Gesellschaften (2005), § 11 note 9; *Schillig*, IPRax 2005, 208, 217 et seq.; cf. also *Rehm*, in: *Eidenmüller* (ed.), Ausländische Kapitalgesellschaften im deutschen Recht (2004) § 5 note 120.

52 *Report Jenard* p. 35.

53 *Christian Wolf*, in: BBGS Art. 28 EuGVÜ note 12 (Dec. 1997); *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 16; *Schlosser* Artt. 34-36 note 32; *Kropholler* Art. 35 note 13; *Leible*, in: *Rauscher* Art. 35 note 9.

its own private international law if the private international law of the state where recognition is sought would identify the seat of the respective company elsewhere. This controversy should not be enlivened anymore.

25 Sometimes a restrictive interpretation is advocated for: The violation of Art. 22 shall induce the court to order a mandatory refusal of recognition only in the event that the courts of a third Member State (i.e. another Member State besides the state of origin and the state where recognition is sought) were vested with exclusive jurisdiction under Art. 22; in the event that exclusive jurisdiction was only vested in the courts of the state where recognition is now sought, it is argued that a refusal of recognition should be treated as discretionary since only the jurisdiction to adjudicate of the state presently concerned was at stake and this state is not required to insist on such jurisdiction.[54] This restrictive interpretation is ill fitting with the wording of (1)[55] and is irreconcilable with the emphasis the Regulation has throughout Art. 22. Underling rationale is the respect for the *Community* rule. The single Member State is not entitled to dispose of Art. 22 since it lacks the respective competence as Art. 22 is not a home-made rule which would be at the disposal of national instances.[56]

26 In the exceptional circumstance that the court of origin having rendered judgment and a court in another Member State have exclusive jurisdiction under Art. 22 an auxiliary conflicts rule is required. Two approaches are feasible each based on a different rule of the Regulation: The first gives priority to the court first seised[57] drawing firm support from Art. 29. The latter would treat the entire matter outside (1) since the court of origin itself was blessed with exclusive jurisdiction under Art. 22. Recognition could only be refused if the actual judgments collide in which case the yardstick that is applicable clearly should be Art. 34 (3), (4). Since the matter has already generated at least one judgment the latter approach seems preferable. Technically, one could object to the first approach that (1) does make reference to, and does not preserve, Art. 29.

27 The construction of Art. 22 is decisive for another reason with regard to (1): If Art. 22 is read literally it can only vest exclusive jurisdiction in the courts of Member States. Consequentially, recognition must be granted if a non-Member State could claim exclusive jurisdiction based on its national law.[58] The same applies if the courts of the non-Member State were exclusively competent measured by the yardstick found in the national law of the state addressed with recognition.[59] So far everyone is in complete and utter agreement. Yet if one sticks with the literal reading and does not apply

54 *Geimer*, WM 1976, 830, 838; *id.*, in: *Zöller*, ZPO Art. 35 note 10; *Geimer/Schütze* Art. 35 notes 56 et seq.

55 *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 15; *Leible*, in: *Rauscher* Art. 35 note 7.

56 So correctly (concrete in another context) *Geimer/Schütze* Art. 35 note 59.

57 *Kropholler* Art. 35 note 13.

58 Cf. only *Geimer/Schütze* Art. 35 note 60; *Leible*, in: *Rauscher* Art. 35 note 8.

59 *Geimer/Schütze* Art. 35 note 60.

Art. 22 by way of analogy to cases where the respective connecting factor is located in a non-Member State,[60] matters will end here. If one however follows the so-called doctrine of *effet réflexe* and is inclined to restore exclusive jurisdiction to the respective non-Member State, where a connecting factor named in Art. 22 is localised,[61] matters could be different. The somewhat striking result of the latter approach could be that recognition of a Member State's judgment may be mandatorily refused if a 'connection' as defined in Art. 22 exists with a non-Member State.[62] Indirectly, a non-Member State would prevail over a Member State. This result heavily militates against the doctrine of *effet réflexe*. An analogy to Art. 22 in favour of non-Member States must not even indirectly and consequentially pierce the principally exhaustive regime of Arts. 34, 35.[63]

The opposite phenomenon can be seen in the case in which a court in a non-Member 28
State gave judgment whereas measured by the standards of the Brussels I Regulation Art. 22 would have vested exclusive jurisdiction in the courts of a certain Member State. Recognition of such a judgment is not governed directly by Artt. 32 et seq, since the judgment in question is not from a court in any Member State. Yet the policy

60 Cf. only Report *Jenard/Möller* para. 54; Report *Almeida Cruz/Desantes Real/Jenard* para. 25; OGH SZ 74/75 = ZfRV 2002, 115 = JAP 2001/2, 246 with note *Frauenberger-Pfeiler*; *Geimer*, NJW 1976, 441, 443; *Mota de Campos*, Doc. Dir. Comp. 22 (1985), 73, 121; *Teixeira de Sousa/Moura Vicente* p. 113 et seq.; *Czernich/Tiefenthaler*, wobl 1999, 255, 257 et seq.; *Mari* p. 148 et seq.; *Rechberger/Frauenberger-Pfeiler*, ZZP Int 6 (2001), 3, 22; *Béraudo* JCl Droit international fasc. 631-50 para. 27 (2002); *Wenner*, in: FS Walter Jagenburg (2002), p. 1013, 1022-1025; *Tiefenthaler*, in: *Czernich/Tiefenthaler/Kodek* Art. 22 note 7; *Teixeira de Sousa*, IPRax 2003, 320, 322 et seq.; *Geimer/Schütze* Art. 22 notes 13 et seq.; Art. 25 note 5 (*Queirolo*); *Mankowski*, in: *Rauscher* Art. 22 notes 2a et seq.

61 Art. 22 note 10 (*Lima Pinheiro*) and *Droz* p. 14 et seq., 108 et seq.; *Bariatti*, RDIPP 1982, 484, 502; *Gothot/Holleaux* para. 37; *Grundmann*, IPRax 1985, 249; *Luzzatto*, Jus 1990, 9, 13 f; *Bernasconi/Gerber*, SZIER 1993, 39, 55; *Hausmann*, in: *Wieczorek/Schütze* Art. 16 EuGVÜ Rn 7; *Carrascosa Gonzálex*, in: *Calvo Caravaca* Art. 25 BC note 7; *Calvo Caravaca/Carrascosa González*, Derecho Internacional Privado I (2002) 119, II (2000) 443; *Gaudemet-Tallon*, in: Liber amicorum Georges A. L. Droz (1996), p. 85, 95 et seq.; *ead.* Para. 100; *Boschiero*, in: Appunti sulla riforma del sistema italiano di diritto internazional privato (1996), p. 130 et seq.; BBGS/*Safferling* Art. 16 EuGVÜ Rn 2 (1997); *Gottwald*, in: Münchener Kommentar zur ZPO Art. 16 EuGVÜ note 6; *Fasching/Simotta*, Kommentar zu den Zivilprozessgesetzen I² (2000) Vor §§ 83a, 83b JN note 158; *Grolimund*, Drittstaatenproblematik des europäischen Zivilverfahrensrechts (2000) para. 429; *Kropholler* Art. 22 note 7; *id.*, in: FS Murad Ferid (1988), p. 239, 241 et seq.; *Schack* para. 316; *Fernández Arroyo*, in: FS Erik Jayme (2004), p. 169, 178, 186; *Layton/Mercer* para. 19.010; *Bernard Audit*, in: Mélanges en l'honneur de Paul Lagarde (2005), p. 19, 34; *Fentiman*, (2005) 64 Cambridge L. J. 303, 304; *Mourre/Lahlou*, RDAI 2005, 509, 519.

62 Drawing that consequence indeed *Grundmann*, IPRax 1985, 249, 253.

63 To the same result *Geimer/Schütze*, Internationale Urteilsanerkennung p. 322; *id.*, Art. 35 notes 63-65; *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 14; *Rosner* p. 172; *Kropholler* Art. 35 note 11.

expressed in (1) should generate a duty not to recognise such a judgment.[64] This duty is implanted into the national rules on recognition and enforcement, technically by virtue of Art. 10 EC Treaty.

d) Nexus with Art. 24

29 (1) must be seen in some triangular context with the Sections referred to on the one hand and to Art. 24 on the other. Insofar as the court of origin could rightfully base its jurisdiction on Art. 24 because the defendant had entered into an appearance without invoking the lack of jurisdiction of the court, the respective Sections are not violated. Whether Art. 24 co-exists as an additional option besides the respective Sections is a question to be answered by the respective Sections themselves. In this case Art. 22 responds in the negative, as it does also in regard to the second clause of Art. 24.

30 The case is more difficult with regard to Sections 3 and 4, though. An express proviso taking account of them is not to be found in the second clause of Art. 24. This silence is often interpreted as an *argumentum e contrario* that Art. 24 applies fully fledged in consumer or insurance matters.[65] Whilst there is undeniably some strength in this argument, policy reasons call for a more differentiating result, namely that Art. 24 should not operate to the typically weaker party's detriment.[66] Yet the split of opinion on this point should be recognised.[67] Nonetheless, this divergence of thought is irrelevant in any event where the judgment debtor had not entered an appearance at all.[68]

31 In any event Art. 35 relieves the principally protected defendant of any burden to enter an appearance in the court of origin.[69] But if the protected party, as defendant, enters an appearance he would be better advised if he challenged jurisdiction in his state of origin, particularly on appeal, therefore complying with the requirements set by Art. 24 and preventing any detrimental consequences.[70]

e) Restriction in cases where non-review would be in the consumer's favour?

32 Policy reasons are also invoked at another intricate point: Should (1) be teleologically reduced in cases where the non-review of jurisdiction would be in either the consumer's, the policyholder's, the insured's or the beneficiary's favour?[71] If the party protected by the special regime has obtained a judgment in a *forum* which would not have

64 *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 14; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 8; *Kropholler* Art. 35 note 12; *Leible*, in: *Rauscher* Art. 35 note 8.

65 E.g. OLG Koblenz RIW 2000, 636 = IPRax 2001, 334; Art. 24 note 24 (*Calvo Caravaca/Carrascosa González*).

66 *Mankowski*, IPRax 2001, 310. Cf. also Art. 17 note 15 (*Nielsen*).

67 Cf. also CA Douai Clunet 118 (1991), 160, 161 with note *André Huet*; CA Luxembourg Pas. lux. 1990-1992, 157 = [1993] I. L. Pr. 55.

68 Cf. OLG Stuttgart NJW-RR 2001, 858, 859.

69 *Geimer/Schütze* Art. 35 note 27.

70 *Geimer/Schütze* Art. 35 note 28; *Tschauner*, in: BBGS Art. 35 note 1 (2005).

71 In favour of such an exception *Grunsky*, JZ 1973, 641, 646; *Geimer*, RIW 1980, 305, 306 et seq.; *Schlosser* Artt. 34-36 note 32; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 5; *Geimer/Schütze* Art. 35 notes 20, 47 et seq.; *Layton/Mercer* para. 26.090; *Tschauner*, in: BBGS Art. 35 note 5 (2005); *Leible*, in: *Rauscher* Art. 35 note 6.

72 *Layton/Mercer* para. 26.090.

73 Commission Proposal, COM (1999) 348 final p. 25.

74 *Supra*, Art. 35 notes 19-20 (*Mankowski*).

75 *Geimer/Schütze* Art. 35 note 21.

76 *Geimer/Schütze* Art. 35 note 21.

been open to him under the special regime then the judgment obtained by the protected party would receive an unfavourable level of recognition and enforcement if it did not gain recognition elsewhere. At first glance this appears strikingly illogical.[72] Additional support might be drawn from the draftsmen's reasoning why Section 5 (labour cases) was not added to the catalogue of reviewable Sections, namely that such addition would disfavour the employee who is the claimant in the vast majority of cases.[73]

Thirdly, the *ratio* behind (1) is to protect the typically weaker party against the detri- 33
mental consequences of rational apathy, i.e. against the consequences of inactivity on the stronger party's side,[74] as the consumer-claimant cannot be said to be inactive at all as they have initiated the proceedings. It appears to amount to a *venire contra factum proprium* if the protected party first sues in a certain state and afterwards claims that the courts of this very state lacked jurisdiction.[75] In the event that the protected party's application was dismissed in the original *forum* this dismissal will ordinarily not represent a judgment as to the merits of the claim but be seen as procedural decision lacking the power of dismissing the claim as such although this depends on the procedural rules of the original *forum*.

On the other hand, the professional party, i.e. the entrepreneur or the insurer, does not 34
need protection by law[76] since it has the financial means to defend the claim and will always do so where it believes such defence is worth the effort. Furthermore, professional parties will only occasionally go the extra-mile to let the typically weaker party apply for recognition or enforcement in another state after obtaining a judgment elsewhere. In such matters, they will ordinarily comply with the judgment in order to retain their reputation in the market.

In practice, a true conflict will be very rare since Art. 24 operates at least against the 35
opposition to the protected party. If the entrepreneur or insurer does not invoke a lack of jurisdiction albeit appearing in court, the special regime would not be violated. Only in the unlikely and unprofessional event that the professional party did not appear and was not represented in court then a default judgment will raise the issue – and even then only if the consumer etc. does not seize upon the option established in his favour to sue in his home country. [The jurisdictional rules benefit the protected party with a *forum actoris*, and the other, logical option is the defendant's home country, plus the third option to be derived from Art. 15 (1) or Art. 8 (1) respectively in conjunction with Art. 5 (5) of the *forum* in another State where the defendant has an establish-

ment. Where a well advised consumer in his right mind should sue can only be left to the imagination. Although, the jurisdictional rules are designed and weighed in the protected party's favour that any true conflicts become highly unlikely.[77]

f) Disposition of the protection granted?

36 Only one step further from the last issue discussed is whether the wording in Art. 35 must be strictly adhered to, even if a non-review was in the protected party's favour. From this, a seemingly small, but fundamental question arises: Does the typically weaker party, at whose protection Art. 35 is aimed, have the right to waive the protection granted to it pursuant Art. 35?[78]

37 The answer does not come as a simple conclusion. This is an issue at law to be considered by the court of its own motion without the interference by any party. It is concerned with a teleological reduction of the rule in its entirety and operates at an abstract level independent from the concrete case and the weaker party's mindset. Although in regards to a possible waiver, the protected party's mindset would be of considerable importance.

38 *Prima facie* it appears convincing to reconsider whether the protected party really wants such protection. An unwarranted protection would seem paternalistic. Yet second thoughts reveal that another time if only at another level the informational problem reappears which is so typical for weaker parties. Only a free and informed waiver could count, and an investigation would be necessary if the party had enough data to make an informed decision (or whether they received adequate counsel). Any right to dispose of the protection on the protected party's side clashes with Art. 35, which is to be applied by the court pursuant to its own motion. This disposal would re-introduce some kind of application if only in the negative. The following scenario would be startling: The court dismisses recognition of its own motion on the basis of the lack of jurisdiction of the original court, and afterwards the consumer-defendant asks the court to waive this issue? Furthermore, a right to waive would introduce a split in (1) since such right will not exist if Art. 22 is at issue.

39 The opposite approach might argue that Art. 17 (1) indicates that a consumer can dispose of the jurisdictional protection granted to them by way of agreement after an argument has arisen, although the constellation envisaged by Art. 17 (1) is fairly different and easily distinguishable: In this Article no court must operate of its own motion, and it concerns an entirely different matter. The consumer is asked to conclude an agreement, which at most times is in an distinct manner and fashion that will make the consumer think about his opposition's possibly hidden agenda. At least the

77 *Layton/Mercer* para. 26.090.

78 *Pro Geimer*, RIW 1976, 145, 147; *id.*, WM 1980, 305, 307; *id.*, in: FS Andreas Heldrich (2005), p. 627, 642 et seq.; *Geimer/Schütze* Art. 35 notes 17 et seq.; tentatively also *Martiny* (fn. 10), ch. II note 180. *Contra Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 10.

issue of jurisdiction does not get drowned in a flood of issues. This differs vastly from the situation where recognition is sought. The jurisdictional point will be only one amongst others, where the consumer and his advisers are faced with the task in deciding whether a court in another state properly assumed that it had jurisdiction. This is an *ex post*-situation with its very own features as opposed to the *ex ante*-calculation of feasible options in the situation envisaged by Art. 17 (1).

The main argument on which the policy concerning the disposition of the protected 40
party is based, is as follows: Suppose that the original court dismissed the stronger party's claim but did not have jurisdiction to do so. Then, it is argued, that a review and the insuing non-recognition would give the stronger party a chance to try its luck again in another Member State and to apply for recognition for a second time if it is favourable to obtain a judgment there.[79] Although the convincing power of such an argument disappears at closer inspection as the argument does not properly take into account the limited range of heads of jurisdiction available to the stronger party under the protective regimes. In principle, the only jurisdiction where the stronger party can sue the weaker party is the weaker party's state of domicile pursuant to Artt. 12; 16 (2). A genuine range of options does not exist, and the stronger party could only such at its own risk and peril if it filed its claim elsewhere. Hence, the alleged danger does not have a high probability occurring, that is if it exists at all.

3. Sections of Chapter II not referred to

a) Labour cases (Section 5 of Chapter II)

The reference to the Sections of Chapter II are carefully and deliberately chosen. They 41
mirror a plan developed by the draftsmen. It is apparent that between Sections 3, 4 and 6 that Section 5 is missing. Section 5 consists of Artt. 18-21 on labour contracts and is not left out by mistake. At first glance one might feel tempted to think otherwise as Artt. 18-21, in their present form, are a new entry in the Regulation and have no direct predecessor in the Brussels Convention which could have prompted a simple (but erroneous) transformation of the Sections referred to in Art. 28 (1) of the Brussels Convention into Sections of the Regulation. Yet the draftsmen did not fall victim to schematism but considered whether to refer to Section 5 in addition to the other sections before omitting Section 5 on purpose. As to a justification for this omission the argument is raised that under Section 5 the employee is ordinarily the claimant and therefore would get the better of the rules on recognition and enforcement if the jurisdiction of the court rendering the judgment was not scrutinised.[80]

79 *Geimer/Schütze* Art. 35 note 18; *Geimer*, in: FS Andreas Heldrich (2005), p. 627, 643 fn. 72.

80 Commission Proposal, COM (1999) 348 final p. 25.

42 This argument is far from convincing.[81] Firstly, it discounts any claims against the employee by the employer, however rare those events might be in practice. In the area of claims for damages, the factual situation might be different, though,[82] only if one is prepared to let such claims fully fall under Art. 18.[83] Secondly, it treats employees differently and less favourably than consumer and insurance policyholders or insured persons.[84] The parallel nature of the three regimes, which strive for protecting typically weaker parties, in an integral point that undermines the protection granted to employees to a certain extent, perpetuating the inadequate protection the Brussels and Lugano Conventions afforded to employees. It generates a split between the rules on jurisdiction on the one hand and the rules on recognition on the other hand. Whereas, for example, Art. 18 tries to follow Art. 8 and Art. 15 to the letter, even including the badly fitting *caveat* in favour of Art. 5 (5), Art. 35 (1) does not follow this route and deviate from it to the employees' detriment. Thirdly, it stands to reason that it is inappropriate that (1), in the event that the typically weaker party is the claimant, does not appear likewise in insurance or consumer matters. The correct approach, if one likes to implement such reasoning at all,[85] would have been to restrict (1) generally.[86] In summary, the suspicion might be justified that political agreement could simply not be reached as to the inclusion of Section 5 in (1).[87]

b) Agreements on jurisdiction (Section 7 of Chapter II)

43 Furthermore, Section 7 is not referred to in (1), either. The court concerned with recognition must not scrutinise whether the court rendering the judgment might have neglected addressing an agreement on jurisdiction which purportedly deprived it of jurisdiction.[88] Thus, jurisdiction clauses do not get protection at this level of recognition and enforcement. The claimant who sues the defendant in the "wrong" or "forbidden" *forum* in breach of the agreement between the parties may get away with it. Although,

81 *Droz/Gaudemet-Tallon*, RCDIP 90 (2001), 601, 648; *Junker*, RIW 2002, 569, 577; *Rosner* p. 130; cf. also *Leible*, in: *Rauscher* Art. 35 note 12; *Geimer/Schütze* Art. 35 note 14; *de Sousa Gonçalves*, in: Estudos em Memória do Professor Doutor António Marques dos Santos (2005), p. 35, 54-59.

82 *Droz/Gaudemet-Tallon*, RCDIP 90 (2001), 601, 648; *Junker*, RIW 2002, 569, 577; *Rauscher*, Internationales Privatrecht (2nd ed. 2002) p. 438; *Tschauner*, in: BBGS Art. 35 note 14 (2005); *Leible*, in: *Rauscher* Art. 35 note 12.

83 At least insofar as they can be attributed a contractual nature they are within Artt. 18-21 whereas this is doubtable to say the least insofar as they are based on tort; see in more detail *Mankowski*, in: *Rauscher* Art. 18 note 2.

84 *Droz/Gaudemet-Tallon*, RCDIP 90 (2001), 601, 648; *Junker*, RIW 2002, 569, 577; *Tschauner*, in: BBGS Art. 35 note 14 (2005); *Leible*, in: *Rauscher* Art. 35 note 12.

85 *Contra* e.g. *Junker*, RIW 2002, 569, 577.

86 See *supra* Art. 35 notes 32-35 (*Mankowski*).

87 *Vlas*, WPNR 6421 (2000), 745, 751; *Rosner* p. 130.

88 Report *Schlosser* para. 188; OLG Koblenz NJW 1976, 488 = IPRspr. 1975 Nr. 171; App. Milano RDIPP 1979, 518; CA Dijon D. S. 1979, 383 with note *Droz* = Clunet 103 (1976), 146 with note *Holleaux*; *Mezger*, RIW 1976, 345, 348; *Geimer*, WM 1976, 830, 838; *Kerr*, EuR 1980, 353, 359; *Collins* p. 112; *Martiny* (fn. 10), ch. II note 169; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 9; *Layton/Mercer* para. 26.089; *Tschauner*, in: BBGS Art. 35 note 8 (2005); *Kropholler* Art. 35 note 14.

only as far as the exclusive jurisdiction conferred upon the court chosen by virtue of Art. 23 (1) 3 is of a lesser degree and of lesser dignity than the exclusive jurisdiction vested in a court pursuant to Art. 22. The exclusive jurisdiction under Art. 23 in this case becomes – *sit venia verbo* – or second class. If the court of origin fails to fulfil its duty[89] to give due respect to an agreement on jurisdiction, the defendant's remedy exclusively lies in challenging the jurisdiction in the state of origin, rather than in opposing the recognition and enforcement of the judgment in other Member States.[90] On the other hand, the court addressed must not positively review whether the court of origin could have based international jurisdiction on a jurisdiction clause.[91]

(1) considers it foremost the defendant's obligation and burden to invoke the agreement on jurisdiction. If the defendant enters into appearance without alleging to the court it's of lack jurisdiction due to the derogative effect of the agreement, this will amount to founding jurisdiction under Art. 24.[92] If the defendant decides to fight it in the "wrong" place so be it. On the other hand, it cannot be said that Art. 23 was excluded since it lacked a typically weaker party[93] because this explanation would not cover the exclusion of Art. 22.

4. Conventions under Article 72

Insofar as Art. 72 expresses respect for the bilateral duties resulting from conventions 44
the state has concluded and in good faith, (1) draws the consequences from such respect. Member States which are bound by treaty towards non-Member States not to recognise can fulfil their obligations under the respective treaties; (1) thus avoids possible conflicts in this regard.[94] The underlying preference has its basis in Art. 72 itself, with this rule retaining what was permitted under Art. 59 Brussels Convention, and the respective exception to the rule of (3) 1 is only consequential[95] for otherwise Art. 72 would be deprived of any sensible meaning. Since Art. 72 does not permit EU Member States to conclude any further conventions with non-Member States that comprise obligations of non-recognition of Member State judgments, the phenomenon might not be short-lived but is fairly limited to a handful of bilateral conventions.[96] Art. 59 Brussels Convention was only sparely used so that in turn the exception indirectly confirms the rule of automatic recognition.[97]

89 As spelled out e.g. in Report *Schlosser* para. 188.

90 *Layton/Mercer* para. 26.089; *Geimer/Schütze* Art. 35 note 5.

91 OLG Koblenz NJW 1976, 488 = IPRspr. 1975 Nr. 171; App. Milano DRIPP 1979, 518; *Mezger*, RIW 1976, 345, 348; *Martiny* (fn. 10), ch. II note 169.

92 *Elefanten Schuh GmbH v. Pierre Jacqmain*, (Case 150/80) [1981] ECR 1671, 1700 para. 10; *Hannelore Sommer v. Spitzley Exploitation SA*, (Case 48/84) [1985] ECR 787, 800 para. 24; *Mankowski*, in: *Rauscher* Art. 23 note 1a; Art. 23 note 171 (*Magnus*).

93 But cf. so *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 9.

94 *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 10.

95 *Kropholler* Art. 35 note 15.

96 Cf. Art. 72 note 1 with fn. 1 (*Mankowski*).

97 Hof Amsterdam NIPR 2001 Nr. 130 p. 261.

45 If the state in which the court addressed has assumed a bilateral obligation mentioned in Art. 72 the court will need to consider three issues:
- whether the defendant was domiciled in the particular non-Member State with which the bilateral convention exists;
- whether the court of origin could only have founded its jurisdiction on a ground of exorbitant jurisdiction which in intra-Community cases would be disallowed by the list in Art. 3 (2), and
- whether the jurisdiction of the court of origin was based on the presence of property within the jurisdiction in the circumstances specified in Art. 59 Brussels Convention.[98]

46 Art. 59 Brussels Convention and Art. 72 both require that the exorbitant head of jurisdiction was the *ratio decidendi* of the judgment for which recognition is sought, and that this cannot be substituted with a "sensible" head of jurisdiction. If and insofar jurisdiction could have been based on another head of jurisdiction, not militating against basic standards of fairness in a like manner, (1) does not accordingly come into operation.[99]

5. Further inadmissible grounds of review

a) Exclusive jurisdiction under national law

47 Grounds for exclusive jurisdiction under national law do not constitute an obstacle and hindrance in the way of recognition.[100] Even if the court addressed had exclusive jurisdiction vested in it by the rules of its own law, the Regulation takes strict and absolute precedence and rules out any reference to national law. National law is rendered inapplicable throughout, and hypothetical jurisdiction does not gain any protection and preservation.

b) Disregard of an agreement to arbitrate or else to submit to ADR

48 (1) does not mention the case in which a judgment conflicts with an arbitration agreement. This carries a strong *argumentum e contrario*. That the court of origin paid disrespect to the arbitration agreement shall not matter and shall not constitute a ground for refusal of recognition of its own.[101] The judgment, in any event given by a

98 *Layton/Mercer* para. 26.093.

99 Report *Jenard* Art. 59; *Martiny* (fn. 10), ch. II note 194; *Kropholler* Art. 72 note 2.

100 Cf. only *Martiny* (fn. 10), ch. II note 166.

101 Report *Evrigenis/Kerameus* para. 62; Cass. JCP G 2001 II 10787 with note *Kaplan/Cuniberti* = RCDIP 90 (2001), 172, 173 with note *Muir Watt* = Rev. arb. 2001, 507 with note *Idot* = RGDA 2001, 126 with note *Heuzé*; BGE 127 III 186, 187 et seq.; OLG Celle RIW 1979, 191; OLG Hamburg IPRax 1995, 391 (with note *Mansel* at p. 362); OLG Stuttgart IPRax 1987, 369; App. Milano RDIPP 1991, 1040; *The "Heidberg"* [1994] 2 Lloyd's Rep. 287, 310 (Q. B. D., Judge *Diamond* Q. C.); *Hascher*, Rev. arb. 1991, 697, 703; *Michael Johannes Schmidt*, EWS 1993, 388, 395et seq.; *id.*, in: FG Otto Sandrock (1995), p. 205, 208-212, 218-222; *van Houtte*, (1997) 13 Arb. Int. 85, 88; *Besson*, in: Études en l'honneur de Jean-Francois Poudret (Lausanne 1999), p. 329, 343-345; *Poudret*, in: FS Otto Sandrock (2000), p. 761, 769 f; *Beraudo*, 18 (1) J. Int. Arb. 13, 22 (2001); *Loquin*, RTD com. 2002, 47 et seq.; *Bälz/Marienfeld*, RIW 2003, 51, 52; *Schlosser* Art. 1 note 25; *Geimer/Schütze* Art. 35 notes 33-43; *Gómez Jene*, IPRax 2005, 84, 90; *Pörnbacher*, in: BBGS Art. 1 note 21 (2005); cf. also Art. 1 note 41 (*Rogerson*).
Contra *Briggs*, (1991) 11 Yb. Eur. L. 521, 529; *Weigand*, EuZW 1992, 529, 531et seq.; cf. also *Hartley*, (1991) 16 Eur. L. Rev. 529, 532.

court in a Member State, and is not an award from an arbitrator. Accordingly, Art. 1 (2) (d) does not come into operation.[102] [The sideroad *via* invoking that public policy of the court of the state addressed with recognition would be violated, is effectively blocked by (3) 2.[103]

This result would jeopardise arbitration agreements if the claimant and the court seised 49
are only bold and haphazard enough, draws severe criticism in particular from the London arbitration market. Yet in law, it is inevitable – if at first sight only. One should throw a second glance and widen the spectrum by taking into account the 1958 UN New York Convention on the Enforcement of Arbitral Awards.[104] Insofar as this Convention claims application in areas where the Brussels I Regulation also applies, the Convention takes precedence over the Regulation by virtue of Art. 71. In these cases the outcome depends on the weight attributed to Art. II (3) 1958 New York Convention. Art. II 1958 New York Convention is generally recognised as a rule of uniform substantive law which ought to be applied even beyond the smaller area of enforcement of arbitral awards. If and insofar Art. II (3) 1958 New York Convention obliges the court charged with recognition to take account of the arbitration agreement and to treat the matter as being exclusively transferred to the realm of arbitration, recognition of the judgment given despite the arbitration agreement ought to be refused.[105] Art. II (3) 1958 New York Convention is to be applied directly and without a deviation *via* national public policy.[106] In any event, Art. II (3) 1958 New York Convention must be invoked by either party and is not open for the court applying it of its own motion.[107]

c) Disrespect of Art. 63 (1)

The Luxembourg exception in Art. 63 (1) does not feature amongst the grounds of 50
jurisdiction to be reviewed, either. If the court of origin has neglected a defence raised under Art. 63 (1) and rendered judgment in spite of such defence, the courts in other Member States and even in Luxembourg nevertheless are bound to recognise and

102 Cf. only *Geimer/Schütze* Art. 35 note 39; *Geimer*, in: FS Andreas Heldrich (2005), p. 627, 645 et seq.; *Mankowski*, in: *Rauscher* Art. 1 note 31a.

103 OLG Celle RIW 1979, 131; *Killias*, (2002) 4 Eur. J. L. Reform 119, 131; *Bälz/Marienfeld*, RIW 2003, 51, 53; *Mankowski*, in: *Rauscher* Art. 1 note 31a.

104 *Mankowski*, in: *Rauscher* Art. 1 note 31c.

105 *Hascher*, (1997) 13 Arb. Int. 43, 60 et seq.; *Béraudo*, 18 (1) J Int Arb 13, 26 (2001); *Mankowski*, in: *Rauscher* Art. 1 note 31c; cf. also *Muir Watt*, RCDIP 90 (2001), 174, 175.

106 Favouring such an alternative approach *Schlosser*, (1991) 7 Arb. Int. 227, 234; *Michael Johannes Schmidt*, in: FG Otto Sandrock (1995), p. 205, 218 et seq.; *van Houtte*, (1997) 13 Arb. Int. 85, 88.

107 *Kaplan/Cuniberti*, JCP G 2001, 1797, 1798.

enforce this judgment since Art. 35 (1) does not refer to (1).[108] Art. 63 is only applicable in the context of jurisdiction, not in the context of recognition and enforcement.[109] The same applied under the Lugano Convention to the Swiss reservation, the *privilegium Helveticum*, contained in Art. Ia of Protocol No. 1 to the Lugano Convention[110] as long as it was in existence.

IV. Factual ground of review: facts as ascertained by the court of origin, (2)

51 The court concerned with issues of recognition is not entitled to assert the facts as to jurisdiction *de novo*. It is not even entitled to re-examine facts or to discuss newly arisen facts. It may not re-open the findings of fact upon which the original court acted in accepting jurisdiction.[111] This shall prevent the defendant from delaying recognition and enforcement by raising fresh factual issues or challenging factual holdings.[112] Furthermore, it shall avoid recourse to a time-wasting duplication in the exceptional cases where a re-examination of the jurisdiction of the court of origin is permitted.[113]

52 Consequentially, (2) even disallows the parties from submitting new facts to the court at least insofar as they could have been raised in the original proceedings.[114] Insofar (2) amounts to a precluding effect. The parties should have argued their respective facts in the original proceedings and are not to re-visit the issues afresh, if the original court had jurisdiction and in front of another court which lacks the power and competence to alter the outcome of the initial proceedings as such. This even encompasses pleadings of facts which would not be contradictory, but only supplementary to the findings of the original court.[115] Unfortunately, the ECJ evaded an answer when the respective question was raised before it concerning whether a court addressed could take account of new evidence which a party sought to rely on to establish that he was a consumer and therefore illustrating that the court of origin had accepted jurisdiction in breach of Section 4 of Chapter II.[116]

108 CA Luxembourg Pas. lux. 2000, 200; Cour sup. Luxembourg Pas. lux. 1974, 425 = RCDIP 64 (1975), 662 with note *Droz*; Cour sup. Luxembourg Pas. lux. 1976, 230; *Geimer*, WM 1976, 830, 837; *Hubeau*, J. trib. 1977, 402; *Kaye* p. 525; *Justé*, TBH 1992, 899, 901; *Kropholler* Art. 63 note 3; *Burgstaller/Neumayr* Art. 63 note 4 (Oct. 2002); Art. 63 note 9 (*Mankowski*).
Erroneously *contra* CA Luxembourg Pas. lux. 1991, 157, 160 et seq.; Prés. Trib. arr. Luxembourg RCDIP 64 (1975), 660, 661 and *de Bournonville*, J. trib. 1977, 249; *id.*, J. trib. 1977, 402.

109 *Lagarde*, RCDIP 64 (1975), 665, 666; Art. 63 note 9 (*Mankowski*).

110 Cf. CA Paris 13 October 1999 – Société Ocean Line c/ Société Tati et Société AIG Europe; *Newton* p. 233.

111 *Layton/Mercer* para. 26.086.

112 Report *Jenard* p. 46; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 11.

113 Report *Jenard* p. 46.

114 *Geimer*, NJW 1975, 1086, 1087; *id.*, RIW 1976, 145, 147; *Kropholler* Art. 35 note 21.

115 AG *Pierre Léger*, Opinion in Case C-99/96, [1999] ECR I-2280, I-2294 para. 59; *Kropholler* Art. 35 note 21.

116 *Hans-Hermann Mietz v. Intership Yachting Sneek BV*, (Case C-99/96) [1999] ECR I-2277, I-2319 para. 57.

For the purposes of (2) it does not matter whether the court under its national rules of proceedings would investigate facts *ex officio* or whether the parties are called upon to submit the facts. Either road is blocked and unavailable to the court addressed. 53

The factual findings of a court that are not open for review comprise, among others, the defendant's domicile or habitual residence or the content of a contract in question (e.g. which obligations ought to be performed where). On the other hand a place of delivery of goods or of the performance of services or a place where a certain activity was exerted or generated consequences do not matter[117] since they cannot establish jurisdiction under the Sections of Chapter II referred to. The case is different if the findings concern the habitual working place or the direction of marketing activities, features which star amongst the prerequisites of the rules referred to. Relevant facts, for example, are the agreed duration and period of a tenancy (with regard to Art. 22 (1) subpara. 2) or the purpose for which goods or services are acquired by a person (with regard to Art. 15 (1)).[118] 54

The wording of (2) does not distinguish between facts which are in favour of, and facts which are opposed to, recognition. Despite the lack of such distinction it is sometimes alleged that (2) should be restricted to the latter class of facts.[119] The underlying argument can be summarised as follows: (2), like Art. 35, altogether attempts at enhancing the prospects of recognition. Accordingly, it would appear reconcilable with the purpose of the rule to allow such argument regarding the existence of facts, which would only enhance and augment such prospects.[120] Methodologically this approach amounts to a teleological reduction of the wording. Whereas it would indeed be compatible with the said purpose, it would run counter to the second purpose of (2), to prevent the court addressed from re-opening the procedure with regard to facts that possibly establish jurisdiction. Accordingly, (2) should be taken literally and not made object of the proposed reduction.[121] 55

Nonetheless, a careful and cautious reading of (2) is requested: The court addressed is only bound by the finding as to facts. It is by no means bound by the conclusions of law which the court of origin had based its factual findings.[122] Otherwise, Art. 35 would be rendered nugatory and deprived of any sensible meaning. Insofar a strict distinction has to be made between the single and separate steps in the process of legal reasoning: (2) 56

117 Not properly recognised by *Layton/Mercer* para. 26.095.

118 *Leible*, in: *Rauscher* Art. 35 note 16.

119 *Geimer*, RIW 1976, 145, 147; *Geimer/Schütze* Art. 35 note 45.

120 Cf. *Geimer*, NJW 1975, 1086, 1087; *id.*, RIW 1976, 145, 147; *id.*, WM 1976, 830, 839; *Geimer/Schütze* Art. 35 note 45.

121 *Martiny* (fn. 10), ch. II note 175; *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 22; *Tschauner*, in: BBGS Art. 35 note 15 (2005); *Kropholler* Art. 35 note 23.

122 BGHZ 74, 248, 252; OGH ZfRV 1999, 75, 78; *Goldman*, RTDE 1971, 1, 33; *Droz* para. 537; *Martiny* (fn. 10), ch. II note 174; *Schlosser* Artt. 34-36 note 33; *Layton/Mercer* para. 26.095; *Geimer*, in: FS Andreas Heldrich (2005), p. 627, 643; *Tschauner*, in: BBGS Art. 35 note 16 (2005); *Kropholler* Art. 35 note 22.

does not govern both the *praemissio* and the *conclusio* as such. Domicile, consumer, insurance cover of specific risk, dissolution of a corporate body, tenancy etc. are legal concepts not facts.[123] Although, the interpretation of contracts should be regarded as an issue concerning facts.[124]

57 If and insofar as the court of origin has not asserted the facts underlying its assumption of jurisdiction, particularly because judgment was given in a summary procedure (e.g. as an Austrian *Zahlungsbefehl*) there are no findings as to facts which could possibly be binding in a strict sense.[125]

V. Jurisdiction does not form part of public policy, (3) 2

1. General rule

58 Ingenious minds could feel tempted to think that what cannot be attained at the front door might be gained by the backdoor, i.e. to declare the jurisdictional regime of the Brussels I Regulation in its entirety to be part of the public policy of the state of the court addressed. (3) 2 takes care of, and addresses, such an attempt. It firmly shuts and forcefully locks the backdoor. Courts addressed have to respect this policy decision.[126] They are not allowed to submerge jurisdictional issues in Art. 34 (1).[127]

59 The victims, to whose detriment (3) 2 operates, are defendants domiciled outside the EU and thus are subjected to jurisdiction pursuant to national rules, including the exorbitant heads of jurisdiction banned in intra-EU cases by Art. 3 (2).[128] (3) 2 guarantees that judgments rendered where the court can base its competence only on such an exorbitant head of jurisdiction are fully recognised within the EU without a further review as to jurisdiction.[129] Insofar (3) 2 does not suffer the slightest exception.[130]

2. The human rights issue

60 If (3) 2 is construed as a strict rule, public policy is excluded even in the event that the court of origin incorrectly based its jurisdiction on an exorbitant ground of jurisdiction derived from the national law of the state of origin.[131] Excessive extraterritorial reach ought to be sanctioned in such cases.

123 *Droz* para. 537; *Martiny* (fn. 10), ch. II note 174; *Schlosser* Artt. 34-36 note 33.

124 *Schlosser* Artt. 34-36 note 33.

125 OLG Stuttgart NJW-RR 2001, 858, 859.

126 Cf. only Trib. Sup. AEDIPr 2003, 802; BGH IHR 2005, 259, 260; OLG Hamburg ZfJ 1992, 547; OLG Frankfurt IPRax 2002, 523.

127 CA Luxembourg Pas. lux. 2000, 200, 203; Aud. Prov. Vizcaya AEDIPr 2004, 769, 770; cf. also *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1967 para. 32.

128 Cf. only *van Hoek*, NIPR 2003, 337, 344.

129 Sharply criticised by *von Mehren*, Rec. des Cours 167 (1980 II), 9, 98 et seq.; *id.*, 81 Col. L. Rev. 1044, 1054 et seq. (1981).

130 Cf. only BGH IHR 2005, 259, 260; *Schlosser* Artt. 34-36 note 30c.

Yet such a strict construction[132] raises major concerns and particularly so if and insofar 61
it collides with the guarantee of due process expressed by Art. 6 Human Rights Convention.[133] The Human Rights Convention could be regarded as a fundamental basic and core of a pan-European public order,[134] which as *lex superior*, takes precedence even over a rule like (3) 2 established by a Community Regulation. If the Human Rights Convention is acknowledged to form part of the constitutional law of the European Union[135] as Art. 6 (2) EU Treaty demonstrates[136] it clearly outranks the secondary legislation. Under this precondition it gains priority and primacy. That under national law the Human Rights Convention might only have the rank of "simple" legislation must cede to Art. 6 (2) EU Treaty.[137]

Insofar as the Brussels I Regulation is concerned it can be said to encompass an 62
inherent *caveat* that its rules apply only insofar as they are compatible with the Human Rights Convention.[138] In addition, if a state violates its obligations under the Human Rights Convention by issuing a judgment exercising unfair jurisdiction contrary to Art. 6 Human Rights Convention, any other state recognising such judgment can be said to violate its own obligations under Art. 6 Human Rights Convention by deepening and enhancing the resulting injury.[139] An irrefutable presumption that a judgment

131 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1967 para. 33.

132 *Gottwald*, in: Münchener Kommentar zur ZPO Art. 28 EuGVÜ note 3; *Hüßtege*, in: *Thomas/Putzo* Art. 35 note 1. This approach draws quite some support from *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1967 para. 33.

133 *Schlosser*, RabelsZ 47 (1983), 525, 529; *id.*, in: FS Wilfried Kralik (1986), p. 287, 295 et seq.; *id.*, IPRax 1992, 141; *id.*, Artt. 34-36 note 30; *id.*, in: FS Andreas Heldrich (2005), p. 1007, 1010; *Bajons*, ZfRV 1993, 45, 52; *Matscher*, IPRax 2001, 428, 433; *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 3; *Leible*, in: *Rauscher* Art. 35 note 5.

134 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1965 et seq. paras. 25-27; *Sudre*, in: *Tavernier* (ed.), Quelle Europe pour les droits de l'homme (Bruxelles 1996), p. 39; *Nascimbene*, RDIPP 2002, 659, 664; *Xandra Ellen Kramer*, NIPR 2004, 9, 13 et seq.; *Thomas Pfeiffer*, in: FS Erik Jayme (2004), p. 675, 684; *Basedow*, in: FS Hans Jürgen Sonnenberger (2004), p. 297, 311-313; cf. also *Pellegrini v. Italy*, [2001] ECHR Rep. VIII 369.

135 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, (Case 222/84) [1986] ECR 1651, 1682 para. 18; *Baustahlgewebe GmbH v. Commission*, (Case C-185/95 P) [1998] I-8417, I-8496 paras. 20 et seq.; *Kingdom of the Netherlands and Gerard van der Wal v. Commission*, (Joint Cases C-174/98 P and C-189/98 P) [2000] ECR I-1, I-61 para. 17; *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1965 et seq. paras. 25-27.

136 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1966 para. 27; *Leible*, in: *Rauscher* Art. 35 note 5; *Tschauner*, in: BBGS Art. 35 note 2 (2005).

137 Doubting *Föhlisch*, Der gemeineuropäische orde public (1997) p. 47; *Voltz*, Menschenrechte und ordre public im Internationalen Privatrecht (2002) p. 261; *Martiny*, in: FS Hans Jürgen Sonnenberger (2004), p. 523, 535 et seq.

138 Cf. *Grolimund*, Drittstaatenproblematik im Europäischen Zivilprozessrecht (2000) para. 734; *Schlosser*, in: FS Andreas Heldrich (2005), p. 1007, 1010.

139 *Schlosser*, in: FS Andreas Heldrich (2005), p. 1007, 1010 with reference to *Pellegrini v. Italy*, [2001] ECHR Rep. VIII 369 para. 40; *Basedow*, in: FS Hans Jürgen Sonnenberger (2004), p. 297, 311-313.

given in another Member State cannot have resulted from a violation of Art. 6 Human Rights Convention would therefore be untenable.[140] In its consequences and as transmitted by EU law, Art. 6 Human Rights Convention thus amounts to a ground of refusal yet embraced in the terms of public policy.[141] On the other side this exception ought to be handled carefully and must not amount to an overall review by creeping in the back door contrary to Art. 36.[142]

VI. Applicability of the Brussels I Regulation

63 Neither Art. 34 nor Art. 35 mention expressly that a judgment has to fall within the scope of the Brussels I Regulation. Yet Artt. 34; 35, as parts of the Regulation regime, can only be triggered off if the Regulation as a whole is applicable. Otherwise recognition, as such, is not governed by the Regulation at all, and cases must be handled outside the Regulation regime in accordance with the rules of the national law of the second state. Hence the Regulation cannot prevent the court from considering whether the judgment, which it is called upon to recognise, falls within the scope of the regime and, to this extent too, the court addressed has power to review the original judgment[143] although such leeway is not expressly provided for in Artt. 34; 35. It is indeed important to distinguish between a decision by the court addressed that states the judgment falls outside the Regulation regime altogether and a decision that the court of origin wrongly assumed jurisdiction under the Regulation regime, with only the latter being indicted by (3) 1.[144]

64 As always, with regard to Art. 1, every court addressed is called upon to seize the point of its own motion, although in practice the matter will arise with the highest probability if the judgment debtor alleges the subject matter of the decision, recognition of which is sought, fell outside the scope of the Regulation regime.[145]

VII. Immunity

65 Immunity and thus jurisdiction over as state or state body defendant in the sense that international law employs, is a matter not dealt with by the Brussels I Regulation and is outside the ambit of the Regulation. It is in fact a prerequisite supposed to exist before one enters into the realm of the Regulation. Technically, it might be said to correspond with Art. 1 (1) to a certain degree. Yet neither (1) nor (3) precludes the court addressed from probing as to whether the defendant was immune and should not have been subjected to the jurisdiction of the original court at all.[146]

140 *Maronier v. Larmer* [2003] 3 All ER 848, 855 (C. A., per Lord *Phillips of Worth Matravers* M. R.); *Thomas Pfeiffer*, in: FS Erik Jayme (2004), p. 675, 684.

141 To the same result *Christoph Engel*, RabelsZ 53 (1989), 3, 49; *Jayme*, Nationaler ordre public und europäische Integration (2000) p. 23 et seq.; *Jayme/Christian Kohler*, IPRax 2001, 501, 502.

142 *Maronier v. Larmer* [2003] 3 All ER 848, 855 (C. A., per Lord *Phillips of Worth Matravers* M. R.).

143 *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 35 note 4; *Layton/Mercer* para. 26.087.

144 *Layton/Mercer* para. 26.087.

145 Cf. *Layton/Mercer* para. 26.087.

VIII. Existence of a decision capable of recognition

The court addressed is also not prevented from scrutinising as to whether the decision 66
for which recognition is sought, is a decision within the bounds defined in Art. 32.[147] This question is not a question of jurisdiction but is related to another prerequisite relating to the regime of recognition and enforcement itself. The restriction gains its relevance in particular with regard to provisional measures obtained *ex parte* since the ECJ[148] does not attribute the quality of a decision falling under Art. 32 to them.[149]

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

I. General purpose

Art. 36 strictly prohibits and rules out any kind of *révision au fond*.[1] This is a pivotal rule 1
for any international instrument on recognition and enforcement[2] or else such instrument would loose much of its point. The court must not review whether the court, having rendered judgment, decided the case correctly. Recognition is by no means even the remotest kind of appeal, and the court concerned with recognition is not superior to the court that decided the case. It would be expensive exercise to position the former court in the latter court's shoes. These shoes would not fit anyhow. The institution of recognition as such demands that review must be restricted and limited if recognition was to make any sense at low cost level.

The court of a State in which recognition of a foreign judgment is sought must not 2
examine the validity of that judgment; it may not substitute its own discretion for that of the foreign court nor refuse recognition if it considers that a point of fact or of law has been wrongly decided.[3] This makes recognition as expeditious as possible and simultaneously enhances legal security.[4]

146 *Geimer*, in: *Zöller*, ZPO, Art. 35 note 32; *Tschauner*, in: BBGS Art. 35 note 3 (2005); cf. also *Mankowski*, RIW 2004, 587, 596.

147 *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 36 note 2; *Tschauner*, in: BBGS Art. 36 note 6 (2005).

148 *Bernard Denilauler v. Couchet Frères SARL*, (Case 125/79) [1980] ECR 1553, 1571 para. 17; *Mærsk Olie & Gas A / S v. Firma M. de Haan en W. de Boer*, (Case C-39/02) [2004] ECR I-9657, I-9702 para. 50.

149 *Kodek*, in: *Czernich/Tiefenthaler/Kodek* Art. 36 note 2; *Tschauner*, in: BBGS Art. 36 note 6 (2005).

1 Cf. only OLG Saarbrücken NJW 1988, 3100; OLG Saarbrücken IPRax 1990, 232; OLG Saarbrücken IPRspr. 2001 Nr. 181 p. 381; Hof 's-Gravenhage NIPR 2002 Nr. 124 p. 236; Rb. Rotterdam NIPR 2002 Nr. 129 p. 242; Aud. Prov. Navarra AEDIPr 2004, 758, 759; *Tschauner*, in: BBGS Art. 36 note 1 (2005).

2 Report *Jenard* p. 46.

3 Report *Jenard* p. 46.

4 *Tschauner*, in: BBGS Art. 36 note 1 (2005).

3 Mutual trust and confidence in the principal validity of decisions rendered by courts in other Member States have supplanted control and serve as a kind of cost-reducing mechanism.[5] The judiciary in the Member States is deemed equivalent and equally apt to decide cases which assertion in turn vastly disposes of a necessity for review and control. Whereas control freaks and Leninists[6] might go berserk, European ideology demands so.

4 The need for an express rule to avail this arose because of the national procedural rules of some of the original Member States, in particular France, who provided for a *révision au fond*, whilst this institution was unknown in, and did not find favour with, the laws of the other Member States.[7] Irony had it that France judicially abolished the *révision au fond* as early as 1964,[8] well before the Brussels Convention was completed and since. Art. 36 is applicable only in the theatre of recognition whereas its counterpart in the area of enforcement is Art. 45 (2).[9]

II. Legislative history

5 From the very beginning, the present rule was formed as Art. 29 of the Brussels Convention and has remained unchanged since 1968. The wording has been retained to the letter. None of the Accession Conventions altered it, nor did the Lugano Convention.

III. No review as to the material result or the applicable law

6 The court addressed must not question the validity of the original decision.[10] It must not re-decide the case by stepping into the shoes of the original court. It must not refuse recognition for the simple reason that it would have decided the case differently had it been called upon to decide the case at all.[11] It is not entitled to review the substantive or legal soundness of the conclusions drawn by the original court, nor to refuse recognition if it believes to have discovered a substantive or legal defect.[12] Examples are easily provided: For instance, the court addressed must not hear an objection challenging the quantum of damages[13] or the validity of a guarantee con-

5 *Bartlett*, (1975) 24 ICLQ 44, 55; *Borchers*, 40 Am.J. Comp. L. 121, 130 (1992); *Mankowski*, in: *Claus Ott/Hans-Bernd Schäfer* (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 138.

6 Remember the famous *dictum* attributed to *Lenin*: "Trust is good, but control is better."

7 Cf. only *Kropholler* Art. 36 note 1.

8 Cass. JCP 1964 II 13590 with note *Bertrand Ancel* = RCDIP 53 (1964), 344 with note *Batiffol* = Clunet 91 (1964), 302 with note *Goldman*.

9 *Tschauner*, in: BBGS Art. 36 note 3 (2005).

10 Cf. only *Layton/Mercer* para. 26.099.

11 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935, I-1968 para. 36.

12 Report *Evrigenis/Kerameus* para. 80; *Tschauner*, in: BBGS Art. 36 note 4 (2005).

13 CA Paris 21 September 1995 – *SA Société Française BK v. Hatzatz Hae d'Umin*, published in: *Kaye*, Casebook p. 437.

firmed and enforced by the court of origin,[14] or the existence of a tort[15] or that remarriage was taken into account for assessing the amount of maintenance awarded.[16] Insofar the defendant is precluded with such challenges[17] and might have missed the appropriate point of defending his case in the state of origin.

7 The court addressed is not entitled to scrutinise whether the court of origin applied the correct substantive law, either. It is not to review whether the court of origin reached the proper conclusions as to private international law and as to which law is the *lex causae*,[18] nor is it invited to cross-check whether the court of origin correctly ascertained the *lex causae* found to be applicable.[19] Matters of diverging conflicts rules are completely outside the exhaustive catalogue of grounds of refusal of recognition contained in the Brussels I Regulation. Even Art. 27 (4) Brussels Convention (which however was dead letter law in practice) has been erased.[20]

8 Objections going to the substance of the original decision must be dismissed. This also includes objections grounded on findings of substance made on the basis of procedural rules.[21] Such ought to be concluded from the systematical context with Art. 34 (2) where a ground for refusal exceptionally is based on procedural issues. This in turn indicates that procedural issues are also covered by the principle of non-review as expressed in Art. 36 if and insofar as they do not fall under express exceptions like Art. 34 (2). Yet the content or range of such exceptions are a matter of construing the exceptions. Accordingly, dismissing an objection that a judgment was contrary to, and is irreconcilable with, an earlier judgment because the court of origin disrespected the *res iudicata* effect of the earlier judgment[22] might be too summary an action in the light of Art. 34 (3), (4) if the earlier judgment was not a decision rendered by court in the state of origin.[23] If the court of origin reassuringly affirmed that the plaintiff was believed to exist, the judgment debtor might not challenge the judgment in the court addressed with the allegation that the plaintiff company had been dissolved.[24] Furthermore, the court addressed is not called upon to re-interpret the factual setting found by the court of origin.[25]

14 Rb. Haarlem NIPR 2002 Nr. 281 p. 468.

15 OLG Zweibrücken NJOZ 2004, 785, 787.

16 CA Liège JMLB 1984, 391.

17 Cf. only OLG Köln IPRspr. 2001 Nr. 186 p. 402.

18 *Cf. only OLG Saarbrücken IPRspr. 2001 Nr. 180 p. 379; von Bar*, JZ 2000, 725, 726.

19 BGH IPRax 1984, 202, 204.

20 Cf. the *argumentum e contrario* to be drawn from the existence of Art. 27 (4) Brussels Convention e.g. by *Günter H. Roth*, IPRax 1984, 183.

21 Cf. BGH NJW 1992, 627, 628; Aud. Prov. Madrid AEDIPr 2004, 768, 769; *Tschauner*, in: BBGS Art. 36 note 4 (2005).

22 Rb. Brussels Digest I-29 B-2.

23 Cf. *Layton/Mercer* para. 26.100 fn. 98.

24 BGH NJW 1992, 627, 628.

25 *Tschauner*, in: BBGS Art. 36 note 4 (2005).

9 Complete or partial compliance by the defendant with the judgment, i.e. ordinarily in the event of a judgment for payment that the judgment debtor has at least partially accomplished payment, is not a matter of review at the stage of recognition and enforcement; this ought to be left to the later stage of execution of the enforcement order where all the remedies the law of the state where execution is sought, are open to the defendant in this regard.[26] This applies even if the defendant alleges to have paid the substantial part of the judgment debt before the date when the appellate court in the state of origin had made it's decision.[27]

IV. Judgments allegedly obtained by fraud

10 Judgments allegedly obtained by fraud are most problematic. Strictly applying the principle of non-review to them at first glance appears to conflict with elementary principles of justice. On the other hand, the mere allegation of fraud should not allow the defendant to re-open the case effectively, at least in the court addressed. The line of compromise is clear in theory, but rather thin, and ought to be finely tuned in practice: Only insofar as public policy under Art. 34 (1) is involved and violated recognition might be refused;[28] beyond that a review is not permitted.[29]

11 Where the original court in its judgment ruled precisely on the matters in which the defendant seeks to review in challenging a judgment on the ground of fraud, the Regulation precludes the court addressed from reviewing that conclusion of the foreign court.[30] If a remedy lies in the case of fraud in the state of origin it will normally be appropriate to leave the defendant to pursue his remedy in that State as the courts there are likely to be better able to assess whether the original judgment was procured by fraud.[31] Only a by-note might indicate that the latter might be of little use in the event of a wholesale corrupt judiciary – an event, of course, one never hopes to encounter in the Member States of the EU.

V. Provisional findings of facts for the purpose of provisional measures

12 Provisional findings of facts for the purpose of provisional measures are of a different kind. On their face they bear the hallmarks of inconclusiveness. Accordingly, the court hearing the main action is not bound by them but may review the facts *de novo* and completely afresh as it likes and deems appropriate. This applies even if the findings are directly on point.[32] This is by no means a departure from the principle of non-review since the trial of the main action will normally involve a fresh appraisal and fresh evaluation of the issues and without review of the provisional measure.[33]

26 BGH RIW 1983, 615 = WM 1983, 655; BGH RIW 1984, 485 = WM 1984, 750.

27 BGH RIW 1983, 615 = WM 1983, 655; BGH RIW 1984, 485 = WM 1984, 750.

28 *Layton/Mercer* para. 26.099.

29 BGHZ 74, 248, 251; *Interdesco SA v. Nullifire Ltd.* [1992] 1 Lloyd's Rep. 180, 187 (Q. B. D., *Phillips* J.).

30 *Interdesco SA v. Nullifire Ltd.* [1992] 1 Lloyd's Rep. 180, 187 (Q. B. D., *Phillips* J.).

31 *Interdesco SA v. Nullifire Ltd.* [1992] 1 Lloyd's Rep. 180, 188 (Q. B. D., *Phillips* J.).

32 *Layton/Mercer* para. 26.100.

Article 37

(1) A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.
(2) A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

I. General Outline

Art. 37 grants the court the discretionary power to stay the recognition proceedings if an appeal has been lodged in the state of origin against the judgment whose recognition is sought. 1

A similar provision is to be found in Art. 46, which allows a court to stay the proceedings at the stage of an appeal against an order authorising enforcement. Although both provisions pursue similar goals, there exist clear differences between the two rules, which therefore need to be addressed separately. Three important differences exist between the possibility to grant a stay under Art. 37 and under Art. 46. First, the court may under the former provision grant a stay on its own motion. Under Art. 46, the party appealing against the decision authorizing enforcement must apply for a stay of the proceedings. Second, the stay may under Art. 37 only be granted if an appeal "has been lodged". It is not enough that the time limit for the appeal has not yet expired, whereas under Art. 46 the power to stay proceedings applies also to cases where an ordinary appeal has not been lodged if the time limit for such an appeal has not yet expired. Another difference concerns the possibility, which is recognised by Art. 46 (3) to make enforcement conditional on the provision of a security. 2

33 *Layton/Mercer* para. 26.100.

II. Legislative history

3 Art. 37 already appeared in the original Brussels Convention as Art. 30. The text has not been modified in the Brussels I Regulation, save for the substitution of the reference to the 'Contracting State' by 'Member State'. A similar provision appears in Art. 30 Lugano Convention.

4 (2) was added to the Brussels Convention by Art. 14 of the 1978 Accession Convention. The reference in the second paragraph to "the State of origin" was added by Annex I (d) (4) to the 1989 Accession Convention in lieu of "the State in which the judgment was given" in order to bring the text in line with the Lugano Convention.

III. General rule: stay of recognition proceedings pending appeal

1. Purpose

5 Under the Brussels Regulation, unlike in some national legal systems, foreign judgments can be recognised even if they are not *res judicata* in the continental sense of the phrase, i.e. if they are still susceptible of appeal.[1] If the judgment whose recognition is sought is still susceptible to be overturned or otherwise modified in appeal in its country of origin, it may be premature to give it effect in the country in which recognition is sought. Hence the possibility is given to the recognition court to stay the recognition proceedings once the judgment has effectively been challenged in the country of origin.

6 As the Court of Justice has explained, the purpose of Art. 37 is "to prevent the compulsory recognition or enforcement of judgments [...] when the possibility that they might be annulled or amended in the state in which they were given still exists".[2]

7 Art. 37 can be used in proceedings under Art. 33 (3) in which an incidental question of recognition has been raised. In that case, the court before which the foreign judgment is raised, may stay the entire proceedings, at least if the issue of the recognition of the judgment is central to the dispute it must solve.[3] The *Jenard*-Report only mentioned this hypothesis when discussing Art. 37.[4] Hence it has been suggested to limit the possibility of granting a stay to the hypothesis of an incidental recognition.[5] However, Art. 37 does not make any distinction between incidental recognition and proceedings under Art. 33 (2) for a declaration of recognition. It would further be odd that a court could grant a stay when the issue of recognition is raised incidentally but could not do so if the judgment creditor applies for a declaration of recognition. It is therefore submitted that the possibility granted by Art. 37 should receive the broadest application.[6]

1 For a comparative overview of the requirements for recognition of foreign judgments, see *Gerhard Walter/Baumgartner*, in: *Gerhard Walter* (ed.), Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions, Civil Procedure in Europe, Vol. III (2000), p. 21.

2 *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2188 paras. 30/31.

3 Hence it is erroneous to say that the stay affects the recognition as such. Rather it is the proceedings on the merits which are stayed pending resolution of the appeal: *Geimer/Schütze* Art. 37 note 5; *Leible*, in: *Rauscher* Art. 37 note 5.

4 Report *Jenard* p. 46.

5 *Leible*, in: *Rauscher* Art. 37 note 2; *Geimer/Schütze* Art. 37 note 1; *Kropholler* Art. 37 note 2.

When granting a stay, the court will follow the rules of its own law to determine which form the stay should take.[7] It is not necessary to limit the stay in time. Rather, the stay should extend for the whole duration of the appeal proceedings in the country of origin. 8

2. Ordinary appeal

Art. 37 only envisages a stay in cases where the judgment has been subject to an 'ordinary' appeal in the country of origin. The concept of 'ordinary appeal' has never been defined in the European texts. There is no doubt, however, that this concept must receive an autonomous definition.[8] This has been confirmed by the Court of Justice which held in the *Riva* case that "[t]he expression 'ordinary appeal' within the meaning of Articles [37 and 46] must be defined solely within the framework of the system of the Convention itself and not according to the law either of the State in which the judgment was given or of the State in which recognition or enforcement for that judgment is sought".[9] 9

In that case a judgment creditor had attempted to enforce an Italian judgment in Belgium. The judgment debtor, a Belgian partnership, challenged the enforcement by indicating that it had brought an appeal before the Corte di cassazione (*ricorso per cassazione*) in Italy. Under Italian law, such an appeal does not have the effect of suspending the enforceability of the judgment. 10

The Court indicated that the recognising court should be able to stay the proceedings "whenever reasonable doubts arise with regard to the fate of the decision in the State in which it was given".[10] Drawing on this general observation, the Court held that an appeal is ordinary in the sense of Art. 37 if (i) it may result in the annulment or 11

6 In this sense, *Gaudemet-Tallon* para. 450 and *Layton/Mercer* p. 944. In practice, even if one limits the applicability of Art. 37 to the incidental recognition, it may be possible to grant a stay under Art. 46 in proceedings under Art. 33 (2) for a declaration of recognition; *Leible*, in: *Rauscher* Art. 37 note 2; *Kropholler* Art. 37 note 2.

7 In Germany, § 148 ZPO.

8 For further comparative explanations on the various appeals proceedings in the Member States, see *Tsikrikas*, ZZP Int. 4 (1999), 171; *Ferrand*, Cassation française et révision allemande: essai sur le contrôle exercé en matière civile par la Cour de cassation française et par la Cour fédérale de Justice de la République fédérale d'Allemagne (1993); *Geeroms*, 48 Am. J. Comp. L. 201(2000).

9 *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2188 para. 28.

10 *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2188 paras. 33/34.

amendment of the original judgment and (ii) there is a specific time period for appealing which starts by virtue of the judgment.[11] With this second requirement, the Court selected only those appeals whose exercise parties can reasonably foresee because they constitute a normal procedural development.[12] Since Art. 37 only applies when the judgment has effectively been challenged in the country of origin, the second requirement loses much of its significance.[13]

12 The question whether an appeal has any suspensive effect on the enforceability of the judgment should, in principle, not be taken into account to decide whether the appeal can be characterised as 'ordinary' in the sense of Art. 37.[14] The same may be said of the question whether the appeal is of right or subject to leave of appeal by the court or to any other specific requirement.

13 On the basis of this definition appeals, which depend on events unforeseeable at the time of the original trial or on action taken by persons extraneous to the original proceedings who are not bound by the period for making an appeal, are not ordinary appeals. One can refer to the ‹*requête civile*› as is known in the laws of Belgium and Luxemburg,[15] to the ‹*révision*› known in French law,[16] or to the *Wiederaufnahmeklage* existing under German law.[17]

14 An appeal to the Court of cassation in France, Belgium or Luxemburg appears to be on the other hand an ordinary appeal even though as a matter of French or Belgian internal law, these appeals are considered to be 'extraordinary'.[18] The same can, however, not be said of an appeal to the court of cassation 'in the interests of the law', i.e. an appeal introduced by the public prosecutor. The decision of the Court following such an appeal has indeed no effect on the position of the parties, it only serves to redress *in abstracto* what appears to be a legally wrong decision.[19]

11 *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2188 et seq. paras. 32-41. It may be that under the national law of the Member State the time period starts not when the judgment is issued but when it is notified to the parties.

12 The Court referred to "any appeal which forms part of the normal course of an action and which, as such constitutes a procedural development which any party must reasonably expect"; *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77)[1977] ECR 2175, 2189 paras. 35/48.

13 *Gothot/Holleaux* p. 186 para. 336; *Kropholler* Art. 37 note 4.

14 *Leible*, in: *Rauscher* Art. 37 note 3; *Kropholler* Art. 39 note 3.

15 Art. 1132 Belgian Code Judiciaire; Art. 617 Nouveau Code de Procédure Civile in Luxembourg.

16 Arts. 593 ff. NCPC. Confirming that a French 'recours en révision' is not an ordinary appeal within the meaning of Art. 46: *Interdesco S.A. v. Nullifire Ltd.* [1992] 1 Lloyd's Rep. 180, 189 (Q.B.D., *Phillips* J.). See also Art. 618 NCPC.

17 §§ 578 et seq. ZPO. See *Geimer/Schütze* Art. 37 note 10 and *Kropholler* Art. 37 note 3.

18 Confirming that an appeal to the French Court de Cassation is an ordinary appeal in the sense of Art. 37: Trib. Comm. Liège JMLB 1984, 289; Rb. Brussels J. trib. 1978, 283; CA Luxembourg Pas. Lux. 2000, 200-204 (the last two decisions were based on Art. 38 of the Convention, now Art. 46 of the Regulation). The same applies to an appeal to the Italian Corte di Cassazione: Rb. Antwerpen Digest I-38 B-4.

The mere lodging of a complaint with the authorities, against parties who are involved in the proceedings in the country of origin, does not as such constitute an ordinary appeal. The same can be said of a request filed with an arbitration tribunal.[20] 15

Finally, it has been said that in case of doubt, the concept of 'ordinary appeal' should be interpreted broadly.[21] 16

3. Discretion to stay

As the text suggests, Art. 37 only grants the court a discretionary power to stay the proceedings. Hence, a party cannot claim to have a right to have the recognition proceedings suspended simply because the judgment has been challenged in the country of origin. 17

The Court of Justice indicated that the power to stay should be used "whenever reasonable doubts arise with regard to the fate of the decision in the State in which it was given".[22] 18

Even though the Court of Justice has not yet fully developed the criteria on which the discretion is to be exercised, it is submitted that, given the overall goal of the Regulation of achieving a "rapid and simple recognition and enforcement of judgments from Member States",[23] courts should use their discretion so as to give *prima facie* effect to the foreign judgment pending the result of the appeal abroad.[24] A stay will therefore only be granted in exceptional cases. In deciding whether the stay should be granted, courts should take into account the degree of prejudice likely to be suffered if the application is or is not stayed.[25] 19

Under Art. 46, the Court has held that when deciding whether to grant a stay of proceedings, a court may take into account only such submissions as the party lodging the appeal against the decision authorising enforcement of a judgment was unable to make before the court of the state in which the judgment was given.[26] Since Art. 46 and 37 pursue the same goal, (i.e. preventing that the potential effects of the appeal in the country of origin from being pre-empted by the judgment being given immediate effect in the Member State in which recognition is sought) it may be that the Court's 20

19 Art. 1089 Belgian Code Judiciaire. See over this special form of challenge, the opinion of A-G *Reischl*, (Case 43/77) [1977] ECR 2199, 2200 and the opinion of the German government, (Case 43/77) [1977] ECR 2178-2180.

20 OLG Hamm RIW 1994, 243.

21 *Kropholler* Art. 37 note 4; *Geimer/Schütze* Art. 37 note 12.

22 *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2188 paras. 32/34.

23 Recital (2).

24 See *Layton/Mercer* para. 26.108.

25 See e.g. *Petereit v. Babcock International Holdings Ltd.* [1990] 2 All ER 135 = [1990] 1 WLR 350 (Q.B.D., Judge *Anthony Diamond* Q.C.), a case decided on the basis of Art. 46.

26 *B. J. van Dalfsen and others v. B. van Loon and T. Berendsen*, (Case C-183/90) [1991] ECR I-4743.

decision, which has been criticized, should also apply to the court deciding whether or not to stay proceedings on the basis of Art. 37.

21 The exclusion of arguments put forward before the court of origin would not necessarily prevent the court addressed from making an assessment of how likely it is that the judgment will be reversed in the country of origin. This would, however, require an examination of the various arguments put forward to substantiate the challenge brought, in the State of origin, against the judgment whose recognition is sought.[27] Needless to say, the court before which recognition is sought is not necessarily equipped to proceed with such an examination. The Court of Justice seemed to make a reference to the examination of the merits of the appeal when it described the test as based "on the possible effect of the appeal".[28] Given the difficulty of this examination, the court addressed should, however, at most, only take into account the probable outcome of the appeals proceedings when it is clear that the judgment will not stand in appeal or that the appeal is frivolous and will be dismissed without more.

22 For the sake of the efficiency of proceedings, courts should be encouraged, before addressing the issue of a possible stay, to consider whether all requirements for recognition are met. It is only when the answer to this question is positive that the stay should be considered.[29]

IV. Specific provision for the United Kingdom and Ireland

23 The second paragraph of Art. 37 concerns the specific situation of judgments given in the United Kingdom or Ireland. The laws of these Member States provide for various possibilities of obtaining that a judgment be reviewed, which are not necessarily subject to strict time limits. Further, as a rule a judgment issued in these Member States can still be enforced even if one party has lodged an application for review. Finally, the law of these Member States give appellate courts a wide discretion in deciding whether or not to allow a judgment to be appealed.

24 In view of these important differences,[30] Art. 37(2) provides that English appeals can only be treated as ordinary appeals where the appeal has the effect of suspending the enforcement of the judgment.

27 In one instance, a Belgian court attempted to review the arguments put forward by the party who had challenged the French judgment before the French Cour de cassation: Trib. Comm. Liège JMLB 1984, 289. In another case, a court refused to stay the proceedings because the reasoning given in the foreign judgment appeared serious and logic, so that it was unlikely that it would be overturned in appeal: TGI Nivelles RTD fam. 1995, 70. The nature of the proceedings (enforcement of maintenance orders, where any delay can be catastrophic for the plaintiff) may explain why the court was reluctant to stay proceedings.

28 *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2189 paras. 35/41.

29 In this sense, Report *Jenard* p. 47.

30 Which were reviewed in the Report *Schlosser* para. 204.

As noted in the Report *Schlosser*, "continental courts will have to use their discretion in such a way that an equal balance in the application of the Articles [37 and 46] in all Contracting States will be preserved. To this effect they will have to make only cautious use of their discretionary power to stay proceedings, if the appeal is one which is available in Ireland or the United Kingdom only against special defects in the judgment or which may still be lodged after a long period".[31] 25

Section 2
Enforcement

Introductory remarks to Artt. 38-52

I. Recognition and enforcement in the case law of the Court of Justice

The very first purpose of the Brussels Convention elaborated under Art. 220 of the Treaty establishing the European Economic Community was to make the recognition and enforcement of judgments from Member States more rapid and simple.[1] Recognition, and particularly enforcement, has been the main target envisaged by the Brussels Convention. Insofar the present Section 2 (Enforcement) of Chapter III (Recognition and Enforcement) may be qualified as the heart of the whole text of the Brussels I Regulation. However, the practical relevance of the Convention has turned out otherwise: the clear majority of cases decided by the Court of Justice in respect of the Brussels Convention deal with jurisdictional issues rather than recognition or enforcement. Also the scholarly discussion on the Brussels Convention and its normative progeny seems to follow a comparable degree of attention. Nevertheless it should be added that several ECJ opinions on enforcement, even if less numerous than the ones on jurisdiction, approach basic notions and functions of enforcement of foreign judgments under both the Brussels Convention and the Brussels I Regulation. 1

31 Report *Schlosser* para. 204.

1 See now Recital (2): "Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities *with a view to rapid and simple recognition and enforcement* of judgments from Member States bound by this Regulation are essential" (italics are by the present author).