Chapter III
Recognition and enforcement
Section I
Recognition

Article 32

For the purpose of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgement may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

I. General Outline 1

II. Legislative history 3

III. Commentary
1. "... Any judgment" 4
2. "... from a court or tribunal ..." 7
3. "... Of a Member State ..." 11
4. No requirement as to the nature of the court of origin's jurisdiction 14
5. Specific situations 16
6. No requirement of finality 18
7. Provisional and protective measures 20
8. Judgments by default 26
9. Procedural orders 29
10. Judgments dismissing a claim 32
11. Judgments on judgments 33
12. Settlements and transactions 38
13. Decision in contentious and non-contentious matters 40

I. General Outline

1 Art. 32 defines the scope of the free movement of judgments within the European judicial area. It must be read together with Art. 1 of the Regulation which outlines the material scope of the Regulation. Only judgments which qualify both under Art. 1 and Art. 32 may benefit from the Regulation's liberal rules on recognition and enforcement, provided the judgment was given in proceedings which were instituted after the entry into force of the Regulation. The domicile and nationality of parties is, however, not relevant.[1] Art. 32 gives a broad definition of what judgments are, which must, however, be qualified to take into account specific situations.

---

1 See, however, Art. 72 of the Regulation relating to the application of bilateral treaties.

2 The definition given in Art. 32 is not only useful to determine the scope of application of Chapter III. It should also serve as a reference whenever the Regulation refers to the concept of 'judgment'.[2]

II. Legislative history

3 Art. 32 already appeared in the original Brussels Convention (Art. 25). 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. 26 of the Lugano Convention.

III. Commentary

1. "… Any judgment"

4 The question whether a judgment is capable of recognition or enforcement under the Regulation must be decided on the basis of an independent interpretation of the European regime. Reference to national law cannot be decisive.[3]

5 The form or the name given to the judgment by the court of origin is not material to decide whether a particular decision is a "judgment" for the purposes of Art. 32.[4] Judgments issued in shortened form, without a full description of the reasoning followed by the adjudicating court, should also be recognised and enforced.[5] The court addressed may have regard to other documents, such as pleadings submitted by the parties, to exercise its control over the grounds of refusal.

6 Artt. 33 ff. of the Regulation may obviously only be applied if the decision falls within the scope of application of the Regulation.[6] This will be the case if the dispute brought before the court of origin was principally concerned with an issue which belongs *ratione materiae* to the Regulation.[7] The fact that the court of origin also decided, incidentally,

2 See Opinion of A-G *Gulmann* in Case C-414/92 [1994] ECR I-2239, I-2243 para. 21.

3 This has not been confirmed by the ECJ but follows at least implicitly from *Mærsk Olie & Gas A / S v. Firma M. de Haan en W. de Boer*, (Case C-39/02) [2004] ECR I-9657, para. 45.

4 At the very least, the decision should have been issued on paper, since the party who seeks recognition or enforcement must, under Art. 53, produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

5 In this sense, *Kropholler* Art. 32 note. 13. See Rb. Rotterdam NIPR 1996, 442 (enforcement allowed in the Netherlands of a German „*Versäumnisurteil*").

6 See above the commentary on Art. 1 (*Rogerson*). The French Court of Cassation has held that in order to determine whether a *Mareva* injunction issued by an English court falls within the scope of the Regulation, the fact that violation of this injunction gave rise to criminal sanctions was not relevant (Cass. Clunet 132 [2005], 112).

7 The Hoge Raad has decided that a French '*ordonnance*' setting up a limitation fund under Art. 11 of the 1976 Convention on Liability for Maritime Claims constituted a decision within the ambit of Art. 32 (Hoge Raad NJ 1998, Nr. 489).

an issue which falls outside the scope of application of the Regulation, does not exclude the application of the Regulation.[8] When deciding upon the recognition or enforcement of a judgment, the court addressed is not bound by the determination made by the court of origin as to the applicability of the Regulation.[9] The court addressed may in other words decide that the dispute falls outside the scope of the Regulation even if the court of origin applied the Regulation.[10] Decisions awarding costs to one party will likewise be recognised and enforced when the underlying dispute related to a subject matter falling within the material scope of the Regulation.[11]

2. "… from a court or tribunal …"

7 The Regulation applies only to decisions issued by courts or tribunals. Although the Regulation does not provide a definition of what constitutes a court or a tribunal, it is understood that this covers any judicial authority acting independently from other organs of the State and whose decisions are taken following a procedure having the characteristics of a judicial proceedings, i.e. based on the respect for the principle of due process.[12]

8 According to the Court of Justice, "… in order to be a 'judgment' for the purposes of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between parties."[13] Hence, a default judgment issued by an English court cannot benefit from the Regulation's rules on recognition and enforcement since under English law, when the defendant does not appear, the plaintiff's claim will be accepted without any examination by the court.[14] A mere claim form issued by the plaintiff and registered by the court does not constitute a judgment.

8 Cass. RCDIP 73 (1984), 501.

9 See *Kropholler* Art. 32 note 3 and *Briggs/Rees* p. 432 (these authors make a distinction between two situations, one in which the adjudicating court has not decided the question of the civil or commercial nature of the dispute and the second one in which the adjudicating court has expressly held that the claim was within Art. 1 of the Regulation).

10 Differences of opinion will not arise often as the scope of application of the Regulation must be interpreted autonomously. See on the issue *Gaudemet-Tallon* para. 364 and the references.

11 See, however, App. Trieste Digest I-31-B3 – holding that a decision on costs should be fully recognized even though the underlying dispute falls only partially within the material scope of the Regulation.

12 Compare with the broader definition given in Art. 2 (d) of the Insolvency Regulation, according to which a court is "the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings".

13 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case C-414/92) [1994] ECR I-2237, I-2255 paras. 17 and 18.

14 See *Cuniberti*, RCDIP 89 (2000), 786, 788-789.

9 A decision taken by an administrative body could conceivably satisfy the requirements of Art. 32. This will be the case provided the administrative body performs a judicial function and satisfies the requirements of independence and due process that are at the heart of the adjudicatory process.[15]

10 If the court or tribunal satisfies the requirements of independence and due process, it does not matter whether the court sits in civil, commercial, administrative or even criminal proceedings. The Regulation could be applied to a decision issued by a criminal court, awarding damages to a victim.[16] The Regulation also applies to the decisions of bar authorities when establishing the fees due to an attorney for the legal services rendered, provided the decision has been declared enforceable or otherwise been ratified by judicial authorities.[17] The determination of costs by an officer of the court (in Germany the '*Rechtspfleger*') following the adjudication of a dispute could also qualify as a judgment if under then relevant provisions of law, the officer must decide on the substance of the matter.[18]

3. "... Of a Member State ..."

11 The Regulation only applies to judgments issued by courts of Member States.[19] This means that the court or tribunal must have been established by the sovereign decision of one Member State. For the recognition and enforcement of judgments issued by courts of third states, one must therefore have regard to the domestic rules of each Member State.

12 This has been confirmed by the ECJ in *Owens v. Bracco* in which the Court held that the Regulation can only be applied to judgments issued by courts of Member State.[20]

15 See *Bariatti*, RDIPP 2001, 6.

16 See Art. 5 (4) of the Regulation.

17 See LG Karlsruhe RIW 1991, 156 = IPRax, 1992, 92 and Trib. Bruxelles Gaz. Pal. 1981 somm. 78 (applying the Brussels Convention to the decision taken by the president of the Paris bar, which had been confirmed by a French court). Compare with OLG Koblenz RIW 1986, 469 = IPRax 1987, 24 (the decision of the President of a bar association does not, as such, constitute a judgment). See in general the distinctions made by *Kropholler* Art. 32 note 9.

18 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case C-414/92) [1994] ECR I-2237, I-2255 para 16. See e.g. OLG Saarbrücken IPRax 1990, 207 = [1992] I.L.Pr 146 (allowed the enforcement in Germany of two French decisions awarding the plaintiff costs of the dispute). Compare with Pres. Rb. Maastricht NJ 1982, Nr. 466 (holding that a German *Kostenrechnung* is not to be considered a judgment as referred in Art. 32. The *Kostenrechnung* had been drawn up by the plaintiffs themselves, as notaries).

19 See Art. 299 EC Treaty for the geographical scope of European law in general. For judgments issued by the courts of Gibraltar, see *Briggs/Rees* 429.

20 *Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA*, (Case C-129/92) [1994] ECR I-117, I-152 paras. 17 and 18. See also Trib. Paris Clunet 120 (1993), 599.

13 The rules of Chapter III can not be applied to arbitral awards,[21] or to judgments given by ecclesiastical courts. Decisions rendered by international courts or tribunals, such as the European Court of Human Rights or the European Court of Justice are also excluded from the scope of Chapter III.[22] Whether the Regulation applies to a decision issued by a court established by a Member State but sitting outside the Community's borders, remains contested.[23]

4. No requirement as to the nature of the court of origin's jurisdiction

14 The Regulation can be applied without regard to the nature of the jurisdiction exercised by the court of origin. It is not required that the court of origin took jurisdiction based on the Regulation, nor that the defendant was domiciled or otherwise established in a Member State.[24] The fact that the court of origin took jurisdiction based on one of the grounds of jurisdiction excluded from the scope of the Regulation[25] does not disqualify the decision. This follows from the fact that the court addressed is in principle barred from reviewing the jurisdiction of the court of origin. The possibility to use the Regulation scheme to obtain the recognition or enforcement of a judgment obtained against a party who does not have a domicile in a Member State, has been heavily criticized, for it gives a 'European-wide' effect to a judgment which is based on

21 The Regulation will not apply either to judgments given by courts of Member States which purport to annul, modify or otherwise enforce arbitral awards. According to the ECJ, "by excluding arbitration from the scope of the Convention [now Regulation] on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts" (*Marc Rich & Co. AG v. Società Italiana Impianti PA*, (Case C-190/89) [1991] ECR I-3855, I-3900 et seq. para 18). See *Arab Business Corp. Int. Finance & Investment Co. v. Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep. 485 (Q.B.D.) (no application of the Regulation to a judgment enforcing an award). The question whether the Regulation can be applied to a judgment which, after having excluded an arbitration agreement, rules on the merits, remains open. See on this issue, *Audit*, (1993) 9 Arb. Int. 1, pp. 1-25 and *van Haersolte-van Hof*, 18 (1) J. Int. Arb. 27 (2001). Comp. Cass. RCDIP 90 (2001), 172 (The Court holds that a German judgment must be enforced in France notwithstanding the fact that the contract between parties provided an arbitration agreement. Apparently, the insurer had, however, failed to raise the arbitration agreement before the German court) and *The Ivan Zagubanski* [2002] 1 Lloyd's Rep 106 (Q.B.D.).

22 For the effects of judgments issued by the ECJ, see Artt. 244 and 256 EC Treaty. The same applies for the decisions issued by the Central Commission for Navigation on the Rhine operating on the basis of the Convention of Mannheim (http://ccr-zkr.org/). For the specific situation of judgments issued by the courts of Andorra, see *Gaudemet-Tallon* para. 357 and references quoted.

23 See on this *Gaudemet-Tallon* para. 358.

24 *Gaudemet-Tallon* para. 354; *Gothot/Holleaux* para. 236; *Kropholler* Art. 32 note 4. See e.g. CA Aix Clunet 107 (1980), 335 (application of the Regulation to a judgment issued by an Italian court whose jurisdiction was established on the basis of Italian domestic rules).

25 See Art. 3 (2) and Art. 4 (2) of the Regulation, together with the list of 'exorbitant' jurisdiction grounds annexed to the Regulation.

the exorbitant and long arm jurisdictions of national laws.[26] One should, however, not forget that the eviction of long arm jurisdictions requires a reciprocity which is only guaranteed among EU Member States.

15 Similarly the Regulation can be applied even if the dispute which led to the decision was purely domestic.[27]

5. Specific situations

16 The Regulation takes account of specific situations in some Member States. Art. 65 has neutralised the effects of some grounds of jurisdiction in Germany and Austria. To avoid any doubt, Art. 65 (2) provides that judgments given in other Member States by virtue of those excluded grounds of jurisdiction must nonetheless be recognized and enforced in those two Member States according to the Regulation. Similarly, the other Member States will also recognise the effect given by German and Austrian law to judgments against third parties.

17 Art. 62 of the Regulation extends the benefit of the recognition and enforcement mechanism to decisions issued by the special administrative service put in place in Sweden.[28]

6. No requirement of finality

18 The Regulation does not require that a judgment be final or conclusive to enjoy the benefit of Chapter III. Accordingly, Art. 32 of the Regulation is not limited to decisions which definitively terminate a dispute in whole or in part, but also applies to decisions which are susceptible of appeal or of another challenge. The Jenard Report states that the omission of any requirement that the judgment be final was deliberate.[29]

19 It follows that a judgment which is only provisionally enforceable is in principle entitled to recognition and enforcement under the Regulation.[30]

26 See e.g. *Briggs/Rees* pp. 427-428. In these authors' view, the result is "scandalous".

27 In *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, (Case 49/84) [1985] ECR 1779, the Court applied the Regulation to a purely domestic judgment issued in Belgium, enforcement of which was sought in the Netherlands.

28 A similar provision appeared in Art. V*bis* of the 1978 Protocol to the Brussels Convention. It concerned the Danish institution. Since Denmark is not bound by the Regulation, this provision has disappeared from the Regulation.

29 Report *Jenard* p. 43.

30 See, however, Artt. 37 and 46 of the Regulation, which allow the court addressed to stay the recognition or enforcement proceedings if the judgment is challenged in the State of origin.

7. Provisional and protective measures

20 Art. 32 of the Regulation is drafted in very general terms. Accordingly, there is no reason to exclude provisional measures from the benefit of Chapter III.[31] This is important given that under Art. 31 of the Regulation a court may give (limited) extraterritorial effect to the provisional and protective measures it orders.

21 There is, however, one important limitation on the possibility to export such orders to other Member States. In *Denilauler*, the Court of Justice indeed held that:

"Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by [Chapter III]".[32]

22 The Court stressed that the liberality of the regime set up under Chapter III of the Regulation was only possible because of the protection afforded to the defendant in the original proceedings. According to the Court, for recognition or enforcement to be possible, it is essential that before the judgment is delivered, an *inter partes* procedure takes place – or could have taken place if the defendant had chosen to appear.[33] It is unclear whether provisional decisions issued *ex parte*, which are excluded from the Regulation, could benefit from a bilateral recognition and enforcement scheme or could be recognized or enforced under a Member State's national law.[34] It is also unclear whether a provisional order issued *ex parte* becomes entitled to recognition and enforcement under the Regulation if the defendant has sought to have it set aside in the State of origin.[35]

23 Following the *Denilauler* judgment, it was decided that an order granting an attachment could not be recognized if it has been given without an opportunity for the defendant to appear in court.[36] In *EMI Records*, the English High Court held that an

31 See *Maersk Olie & Gas A / S v. Firma de Haan en W. de Boer*, (Case C-39/02) [1991] ECR I-9657, para. 46. See, however, *Virgin Aviation Services Limited v. CAD Aviation Services* [1991] I.L.Pr. 79 (Q.B.D.) (holding that a Dutch provisional order allowing the attachment of debts was not a judgment within Art. 32).

32 *Bernard Denilauler v. SNC Couchet Frères*, (Case 125/79) [1980] ECR 1533, 1571, para. 18. See also *Maersk Olie & Gas A / S v. Firma de Haan en W. de Boer*, (Case C-39/02) [2004] ECR I-9657, para. 50.

33 The Court's decision has been criticized, see e.g. *Donzallaz* pp. 172 et seq.

34 See *Gaudemet-Tallon* para. 435 (positive) and *Kropholler* Art. 32 note 23 (hesitant).

35 See OLG Karlsruhe ZZP Int. 1996, 89.

36 CA Paris Clunet 123 (1996), 145 (refusal to allow the enforcement of an Italian decision allowing *ex parte* the attachment of the assets of the French defendant). See also Cass. RCDIP 83 (1994), 688 (refusal to enforce an Italian decision ordering *ex parte* the defendants to pay a certain amount to a bank, without possibility for the defendants to appear in court or be heard), Trib. Luxembourg CDE 1985, 477 (holding that an Italian judgment appointing a sequestrator to hold the shares owned by an Italian company in a Luxemburg company, was not entitled to recognition as it had been issued *ex*

injunction issued by a German court prohibiting an English company from reproducing and distributing the masters tapes of a music group, could not be registered for enforcement since the injunction had been delivered *ex parte* and it could be enforced without prior service upon the defendant.[37] In *Stolzenberg*, the French Court of Cassation held that a provisional Mareva injunction issued by an English court could be recognized in France.[38]

24 A decision ordering provisional or protective measures is, however, entitled to recognition and enforcement under the Regulation if, after it has been granted *ex parte*, the defendant has the possibility to challenge the order before it is enforceable. In *Hengst Import*, an Italian company had obtained an order for payment (*decreto ingiutivo*) from a court in Italy, following summary proceedings brought *ex parte*. Once such an order is issued, it must be served on the defendant who may oppose the order. The Court held that since the order is not enforceable without the authorization of the court which can only be given after expiry of the period for opposing the order, the order at issue was a judgment capable of recognition and enforcement "since there could have been an *inter partes* hearing in the State where it was made before recognition and enforcement were sought in the Netherlands".[39]

25 Since decisions ordering provisional measures *ex parte* do not fall within Chapter III of the Regulation, costs awarded to one party following such a decision cannot be recognized or enforced under the Regulation.[40] Since the ECJ referred in general terms to the need for the decision to be *inter partes*, one can wonder whether the *Denilauler* case law also applies to judgments on the merits.[41]

8. Judgments by default

26 The Regulation applies likewise to judgment by default. Art. 34 (1) even provides a specific ground of refusal for this type of judgment.

parte) and BGH IPRax 1999, 371 („als ‚Entscheidungen' im Sinne des Artikels 25 EuGVÜ können auch einsweilige Verfügungen anerkannt werden, wenn sie aufgrund eines zweiseitig angelegten Verfahrens ergehen").

37 *E.M.I. Records v. Modern Music Karl-Ulrich Walterbach GmbH* [1992] 1 All ER 616 (QB).

38 Cass. Clunet 132 (2005), 112. In that case, the injunction had been obtained after a preliminary hearing where the defendants had been heard.

39 *Hengst Import BV v. Anna Maria Campese*, (Case C-474/93) [1995] ECR I-2113, I-2127 para. 14. See also *Maersk Olie & Gas A / S v. Firma de Haan en W. de Boer*, (Case C-39/02) [1991] ECR I-9657, para. 50: an order made by a Dutch court to set up a limitation fund and to provisionally fix the amount to which the liability of a party would be limited, comes within the scope of Art. 32 because even though it was taken at the conclusion of an initial phase of the proceedings in which the defendant was not heard, the order did not have any effect prior to being notified to the defendant who may then challenge the decision.

40 Rb. Breda NJ 1987, Nr. 184 (holding that costs awarded by a German court following an ‚*Einstweilige Verfügung*' could not be enforced under the Convention).

41 This question has been raised, but not solved by A-G *Strikwerda* in NJ 1998, Nr. 489.

27 It may not always be easy to ascertain whether a particular decision was rendered by default or must be considered *ex parte*. This is in particular the case with the various types of orders for payment.[42] The distinction is important since judgments issued *ex parte* do not benefit from the Regulation's smooth mechanism of recognition and enforcement.

28 The judgment issued by the ECJ in the case *Klomps* illustrate the difference in the framework of German summary proceedings for the recovery of debts (‚*Mahnverfahren*').[43] In that case, a German creditor had issued an order for payment (‚*Zahlungsbefehl*') against a Dutch debtor. After service of process of this order according to the rules prescribed by German law, the debtor failed to lodge an objection. The creditor then obtained an order for enforcement ('*Vollstreckungsbefehl*'), which was later challenged by the debtor. It is clear that while the order for payment does not constitute a decision, an enforcement order must be considered to be a decision in the sense of Art. 32.[44] It will be a decision by default if the debtor has failed to lodge an objection. In order to characterize the decision, the court addressed must follow the rules of the State where the decision was rendered.

9. Procedural orders

29 According to the Schlosser Report, "interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings", should be excluded from the benefit of Chapter III of the Regulation.[45]

29 Orders made to set a hearing date or to establish the order in which parties will present their evidence or submit their written pleading or to establish that certain evidence is admissible, are therefore excluded from the scope of the Regulation.[46] In any case, the relevance of such orders for the legal order of the state addressed is minimal, if not non-existent, as they relate to matters of procedural law of the state of origin.[47]

30 A court order appointing an expert and entrusting him to examine a building and report on its quality does, however, affect the parties' position and rights. Before issuing such an order, the court will indeed at the very least verify that the party requesting the appointment of an expert, has a credible case to make. As such, it should not be ex-

42 See the comparative analysis in *Rechberger/Kodek*, Orders for Payment in the European Union (2001) p. 274.

43 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593.

44 See e.g. CA Paris Dalloz 1990 IR 99 (allowing the enforcement of a German *Vollstreckungsbefehl*); Hof Antwerpen Limburgs Rechtsleven, 1998, 12 (id.).

45 Report *Schlosser* para. 187.

46 A decision determining, for the purposes of Art. 27 of the Regulation, at which time a court has been seized of a dispute, should be entitled to recognition in the other Member States. See *Bariatti*, RDIPP 2001, 10.

47 *Donzallaz* p. 178, para. 2171.

cluded from the scope of the Regulation.[48] Since the coming into force of the Evidence Regulation,[49] priority must be given to this instrument in order to obtain evidence located in another Member State. Hence, judgments ordering the audition of witnesses or the production of documents should be deemed to fall outside the Regulation.[50]

31 Court orders establishing the costs of the dispute and awarding one party costs may be recognized and enforced under the Regulation.

10. Judgments dismissing a claim

32 Whether Art. 32 applies to a foreign judgment dismissing a claim is unclear. In principle, nothing prevents a party from applying to have such a judgment recognized or enforced. The Regulation does not make any distinction in respect of the outcome of the foreign proceedings. There is no doubt that the Regulation applies to a judgment holding that the plaintiff's claim could not be sustained on the merits, as it is a determination of the parties' rights.[51] It could also be that the proceedings were dismissed for lack of jurisdiction. In both cases, the judgment is entitled to recognition.[52] One could, however, be more hesitant to hold that a judgment dismissing a claim for a mere procedural reason – *e. g.* a failure to comply with a time limit or to provide security for costs – is entitled to recognition.[53] In any case, it is difficult to see how a party could benefit from the recognition of such a judgment.

48 See to that effect *CFEM Façades SA v. Bovis Construction Ltd.* [1992] ILPr 561 (QB) (the High Court reached the decision that a French order appointing an expert to inspect a building in London and authorizing the plaintiffs to carry out emergency work, could be registered for enforcement in England. The Court held, however, that the parts of the French order concerning the questioning of the witnesses and the preparation of the accounts and costs did no more than regulate procedural matters and hence were not susceptible of enforcement). Compare with OLG Hamm RIW 1989, 566 = [1989] ECC 442 (holding that a French order appointing an expert and entrusting him to inspect an industrial installation in Germany, fell outside Art. 32).

49 Council Regulation 1206/2001/EC of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

50 See OLG Hamburg IPRax 2000, 530. Compare with *Layton/Mercer* para. 24.033 (according to whom such orders do not need to be excluded from the ambit of Art. 32. These authors are of the opinion that such orders should not be susceptible of enforcement).

51 See *Briggs/Rees* p. 430 and *Layton/Mercer* para. 24.035. Compare with Art. 2 (4) the Brussels II*bis* Regulation (judgments dismissing a petition for divorce are not entitled to recognition under the Brussels II*bis* Regulation).

52 See e.g. Cass. Clunet 125 (1998), 142 (holding that a German judgment must be recognized in France in so far as it has upheld the validity and enforceability of a choice of court clause. The Court, however, did not refer to the Regulation, but only to a provision of French law) and Trib. com Bruxelles RDCB 1990, 801. Compare with *Linke*, in: Jurisdiction and Enforcement of Judgments in Europe (1993), p. 185 (who holds the opinion that judgments dismissing a claim for lack of jurisdiction cannot benefit from Chapter III of the Regulation).

53 According to the Schlosser Report, decisions "on procedural matters are not binding, as to the substance", in other Member States (Report *Schlosser* para. 191).

11. Judgments on judgments

33 It has always been accepted that a judgment awarding a declaration of enforceability of a foreign judgment cannot, on its turn, be the object of further recognition or enforcement proceedings. This is expressed in the French maxim *exequatur sur exequatur ne vaut*.

34 This general rule holds for judgments granting a declaration of enforceability in respect of a judgment given in a third state as well as in respect of a judgment given in another Member State. The rationale behind the principle is that when a court authorizes the enforcement of a foreign judgment or accepts that the judgment may be recognized, it must verify whether the judgment complies with the requirements laid down in the Regulation. This examination will prove pointless if the decision which is sought to be recognized or enforced is itself a decision authorizing enforcement of yet another decision. In that case, the court addressed will not be in a position to review e.g. the compatibility of the original decision with its own public policy.

35 The same rule must apply when the foreign judgment whose recognition or enforcement is sought, has been subject to enforcement proceedings which led to the issue of an new judgment incorporating the first decision (*actio judicati*).[54] The position may be different, however, when the judgment incorporating the foreign decision, also contains an independent decision, such as the granting of interests.[55]

36 However, it must be accepted that since the Regulation provides uniform rules on the recognition and enforcement of foreign judgments, the decision of the first court addressed cannot be ignored by other courts which are seized of a request for a declaration of enforceability. These courts must take into account the fact that the first court addressed did not find any cause under the Regulation to refuse to recognize or enforce the decision. This assessment is particularly concerned with whether a defendant has been served in due time with the document instituting the proceedings.[56]

37 A plaintiff who has already obtained a judgment in a Member State, may not elect to sue on the original cause of action instead of seeking to have the judgment recognized or enforced.[57] The Court held that:

"The provisions of the Convention ... prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement

54 In this sense, *Gaudemet-Tallon* para. 365; *Kropholler* Art. 32 note. 15 and *Layton/Mercer* para. 24.04.

55 See e.g. OLG Hamm RIW 1992, 939 (the court granted a declaration of enforceability of an English court decision enforcing a GAFTA arbitral award, since the judgment contained not only a declaration of enforcement of the award but also an independent order for payment, including interest after the award was issued).

56 Art. 34 (2) Regulation.

57 *Jozef de Wolf v. Harry Cox BV*, (Case 42/76) [1976] ECR 1759.

under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State."[58]

12. Settlements and transactions

38 In *Solo Kleinmotoren*, the Court held that since settlements in courts are essentially contractual in that their terms depend first and foremost on the parties' intention, such settlements do not qualify as judgment in the sense of Art. 32.[59]

39 However, consent judgments may probably be regarded as judgments for the purpose of Art. 32 since a court will operate a certain control before issuing such a judgment.[60]

13. Decision in contentious and non-contentious matters

40 The Regulation applies whether the court of origin was seized of a dispute or acted in a non-contentious matter (*‚freiwilligen Gerichtsbarkeit' / ‹juridiction gracieuse›*).[61] The latter may be the case when the court appoints a liquidator for a company.[62]

41 Following the distinction made by the Court in *Solo Kleinmotoren*, it must be accepted that such a decision can only be entitled to recognition if the court has decided on its own authority, without merely taking over what the petitioner submits.[63]

---

58 *Jozef de Wolf v. Harry Cox BV*, (Case 42/76) [1976] ECR 1759, 1768 (operative part).

59 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case C-414/92) [1994] ECR I-2237, I-2255 paras 17 and 18. According to the CA Paris [1999] I.L.Pr. 386, "the concept of decision implies ... that the issuing authority must have had a true power to determine the content of that decision and should not have been limited to the acceptance of a private law instrument... In the case ... of an instrument issued by a judicial authority, its classification depends on finding out whether the foreign judge did in fact exercise any volition in relation to the relationship submitted to him. An instrument cannot be characterized as a decision unless after noting the agreement of the parties, or the wishes of one of them, the judge has been able to proceed to the verification of the infringement or respect of a legal rule, thus exercising a control over the issues submitted to him".

60 See the Opinion of A-G *Gulmann* in Case C-414/92 [1994] ECR I-2239, I-2244 et seq. paras 29 and 30. In *Landhurst Leasing plc v. Marcq*, [1997] E.W.J. n° 1490, the English Court of Appeal held that a Belgian judgment entered by consent was within Art. 32 of the Regulation. According to Beldam, L.J., "If a party agrees to a judgment being entered by conceding the issues, the judgment is no less an authoritative judgment than a judgment entered in default which is quite clearly within Article [32]". See Cass. RCDIP 87 (1998), 326 and Clunet 124 (1997), 1026 (no application of the Regulation to the enforcement in France of a settlement concluded by parties in England without intervention of the English courts) and BGH IPRspr. 1992, Nr. 228, p. 555.

61 *Gaudemet-Tallon* para. 369; *Gothot/Holleaux* para. 242-243 and *Kropholler* Art. 32 note 8.

62 See the examples given by *Bariatti*, RDIPP 2001, 8 (*Bariatti* refers e.g. to the decision of a court appointing a third party to determine the price of goods under Italian law).

63 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case C-414/92) [1994] ECR I-2237, I-2255 paras 17 and 18.

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgement be recognised.
3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

I. General Outline 1
II. Legislative history 2
III. Commentary
1. The concept of 'recognition' of foreign judgments 3
a) The various effects of judgments 3
b) The law applicable to the effects of foreign judgments 7
c) Effects of judgments falling outside the Regulation 12
2. The principle: automatic recognition 15
3. Declaratory proceedings (Art. 33(2)) 20
a) 'Any interested party' 22
b) A dispute 26
c) Positive declaration 28
4. Recognition as an incidental issue (Art. 33 (3)) 31
5. Partial recognition 37

I. General Outline

1 Art. 33 establishes the principle of the automatic recognition of foreign judgments. If a question arises as to whether a foreign judgment should be recognized, the issue can be resolved either by proceedings specifically directed to that issue (under Art. 33 (2)) or, if the issue arises incidentally in the framework of other proceedings, pursuant to Art. 33 (3).

II. Legislative history

2 Art. 33 already appeared in the original Brussels Convention (Art. 26). 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. 26 of the Lugano Convention.

III. Commentary

1. The concept of 'recognition' of foreign judgments

a) The various effects of judgments

3 The Regulation does not provide a definition of what is meant by 'recognition' of a foreign judgment. The Jenard Report usefully points to the two defining characteristics of the recognition, as follows:

"Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given."[1]

4 Although every lawyer will be influenced by its national law when discussing the exact meaning of the recognition under the Regulation, it is possible to state that to recognize a foreign judgment involves accepting to give it two effects.[2] The first one is a positive one. The State addressed accepts to consider that what the court of origin has decided constitutes a valid determination of the rights and obligations of parties.[3] If the court of origin has ordered a party to pay damages because the party has been found in breach of a contract, courts in other Member States should accept that the parties were bound by a contract and that this contract has been breached.

5 The limits of the authority enjoyed by a judgment in other Member States must be determined by the law of the State of origin.[4] As the laws of Member States still diverge on the content of the authority of judgments,[5] the principle of the extension of a judgment's effects in other Member States may give rise to difficulties in practice.

6 Beyond its authority, the judgment can also be invoked to block further proceedings on the same cause of action.[6] In practice, a judgment within the ambit of Chapter III of the Regulation will constitute a sufficient basis for a plea of *res judicata*.

b) The law applicable to the effects of foreign judgments

7 It also follows from the extract of the Jenard Report reproduced above that the national law of the adjudicating court is decisive to determine the effects of a judgment in the other Member States.[7] This means that the State addressed must also accept that a

1 Report *Jenard* p. 43. This definition was quoted by the ECJ in *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 666 para. 10.

2 See in general the discussion by *Kropholler* Art. 33 notes 11 et seq.; *Gaudemet-Tallon* pp. 300-303; *Layton/Mercer* para. 845-848; *Leible*, in: *Rauscher* Art. 33 notes 4-10.

3 This is referred to as the *materiellen Rechtskraft* in the German doctrine and as the *force obligatoire* in the French doctrine. The English concept of "authority" of the judgment appears to constitute a good approximation of these concepts.

4 *Infra* Art. 33 notes 7 et seq. (*Wautelet*).

5 See the comparative overview by *Stürner* in: FS Rolf Schütze (1999), p. 913 et seq.

6 This is referred to as the *autorité de chose jugée négative* in French doctrine and as the „*Präklusionswirkung*" in the German doctrine.

judgment issued in another state may have legal consequences unknown in the legal system of the State addressed.[8] The only limitation to the extension of those consequences lies in the public policy clause (Art. 34(1).

8 In practice, the State addressed must therefore accept that a judgment against the principal debtor is also effective against a surety if the legal system of the State of origin attaches such consequence to its judgment, even though under the law of the State addressed the surety would not be affected by the judgment.[9]

9 One will therefore make reference to the effects of the judgment in the State of origin to determine whether the judgment qualifies for *res judicata*, estoppel or any other preclusive doctrine in the State addressed.

10 This explains why the English Court of Appeal held in *Boss Group Ltd. v. Boss France SA* that a decision issued by a French court in the context of provisional proceedings could not give rise to issue estoppel as the judgment was "in no way binding in France on any court that might deal there with the matter on a substantive basis".[10]

11 When deciding upon the effects of a judgment, a court will take as a first reference point the terms of the judgment itself.[11] Additional evidence may be admitted but only to clarify the terms of the judgment, not to add to the substance thereof.[12]

c) Effects of judgments falling outside the Regulation

12 The Regulation does not purport to regulate all the consequences of judgments issued by courts of Member States in other Member States. It must be accepted that a judgment may be called upon for other consequences than its authority.

7 This has been referred to as the doctrine of the *Wirkungserstreckung*, see *Kropholler* Art. 33 note 9. Compare with Recital 22 of the Preamble of the Insolvency Regulation, according to which "Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States".

8 In the context of enforcement proceedings, the Court of Justice has held that a foreign judgment which has been recognised must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given: *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 666 para. 11.

9 Example given in Report *Schlosser* para. 191.

10 *Boss Group Ltd. v. Boss France SA* [1997] 1 WLR 351, 359. Compare, however, with the decisions of the same Court of Appeal in *Berkeley Administration Inc. v. McClelland*, [1995] ILPr 201 (C.A.) and *Berkeley Administration Inc v. Mc Clelland (No2)* [1996] ILPr 772 (C.A.) in which the Court of Appeal did not consider it necessary to refer to French law in order to determine the extent to which a French judgment was entitled to recognition.

11 See *The Tjaskemolen (now named 'Visvliet')* [1997] 2 Lloyd's Rep. 476 (Q.B.D.).

12 *Landhurst Leasing plc v. Marcq* [1998] I.L.Pr 822 (the court held that evidence that the defendant had submitted to a consent judgment on the basis that the claimant had agreed only to enforce the judgment against the amount in a particular bank account, was not admissible).

13 This is for instance the case when a party relies on a foreign judgment as evidence of a fact, *e.g.* that a witness appeared before the foreign court on a certain day or that an expert has presented his findings to the court. A foreign judgment holding that a party is the sole owner of specific assets could serve as the basis for a warranty claim in another State.

14 All these consequences are left untouched by the Regulation. The national law of the State addressed must therefore be applied to determine under what conditions a foreign judgment may entail such consequences, if any.[13]

2. The principle: automatic recognition

15 Art. 33 (1) provides that judgments issued in one Member State are automatically recognized in other Member States without any prior proceedings or formal steps. This principle, which is one of the cornerstones of the European judicial area, is known as the recognition *de plano*, `*de plein droit*' or *ipso iure*.[14] The automatic nature of the recognition does not mean, however, that judgments from other Member States are awarded the same treatment as domestic judgments.

16 To appreciate the extent of this principle, one must remember that judgments issued in other Member States may be refused recognition under the Regulation if this is justified under one of the grounds of refusal. In practice, foreign judgments will therefore be subjected to some form of examination, either in the framework of a principal action for recognition (see hereunder nr. 3) or incidentally (see hereunder nr. 4). Further, the party who relies on a foreign judgment must comply with the formal requirements laid down in the Artt. 53 ff. of the Regulation and in particular with the need to produce an authentic copy of the judgment.[15]

17 Hence, the automatic character of the recognition only means that a party who wishes to rely on a foreign judgment must not undergo some formal procedure or have the judgment be registered in the other Member State prior to relying on the foreign judgment. Rather, the judicial intervention is postponed until such moment as the foreign judgment is either presented for recognition (Art. 32 (2)) or relied upon to justify a res judicata exception. In this sense, the word 'special' appearing in Art. 33 (1) must be taken to denote any procedure other than that which is provided for in paragraphs 2 and 3 of Art. 33.

18 It has been said that the automatic recognition amounts to "a presumption in favor of recognition, which can be rebutted if one of the grounds for refusal listed in Article [34] is present".[16] The automatic recognition can only be likened to a presumption of this

13 See *Gothot/Holleaux* para. 252; *Kropholler* Art. 33 note 17.

14 See Cass. [1997] ILPr 173. See, however, *Kaye* pp. 1376-1382 (the author argues at great length that it is inaccurate to refer to the principle laid down in Art. 33 (1) as one of 'automatic' recognition).

15 Art. 53 (2) of the Regulation also requires that the party who relies on the foreign judgment produces a certificate filled by the court of origin.

type in so far as the Regulation removes all traditional procedures for recognition which were provided for in the laws of the Member States. In this respect, the recognition granted to judgments from other Member States still differs from that awarded to domestic judgments.

19 A direct consequence of the automatic nature of the recognition is that the foreign judgment is deemed to be effective at the same time in the state of origin as in the other member States.[17] A more indirect consequence is that at least according to the ECJ, a party who has obtained a judgment on the merits in one Member State is precluded from applying to obtain another judgment on the same cause of action and against the same party in another Member State.[18] In the *de Wolf* case, a party had obtained a judgment in Belgium ordering a company established in the Netherlands to pay an invoice. Instead of requesting the enforcement of this decision, the Belgian plaintiff brought fresh proceedings in the Netherlands in respect of the same cause of action. Although the Court of Justice seemed more concerned with the need to avoid the existence of conflicting decisions, its judgment cannot be explained but by the fact that the authority of the Belgian decision was automatically recognized by the Dutch courts.

3. Declaratory proceedings (Art. 33(2))

20 Art. 33 (2) allows an "interested party" to apply to the court for a declaration that a judgment given in another Member State be recognised (*«action en déclaration de reconnaissance»*/*„Antrag auf positive Feststellung der Anerkennungsfähigkeit"*). Experience with the Regulation and the texts which have preceded it has shown that the possibility to obtain a declaration on the recognition of a foreign judgment is rarely used. In the vast majority of cases, a foreign judgment will be recognized incidentally in the framework of other proceedings.[19] Nevertheless, a party may have a good reason to pursue such principal action for recognition. This may be the case when uncertainty remains on whether some grounds of refusal are met. As long as the foreign judgment has not been examined by a court in the State addressed, its effects in that State remain subject to a future (negative) decision by a court. Further, some judgments do not lend themselves to enforcement and may more appropriately be subject to proceedings to obtain a declaration of recognition. This is the case with a judgment awarding a declaration on certain rights or the position of parties (so-called „*Feststellung* and *Gestaltungsurteile*").

21 Art. 33 (2) refers to the procedures provided in sections 2 and 3 of the Regulation. Procedure on the application is therefore *ex parte*.[20] The application for a declaration on the recognition may be made jointly with an application for a declaration of en-

16 Report *Jenard* p. 43.

17 *Geimer/Schütze* Art. 33 note 16.

18 *Jozef de Wolf v. Harry Cox BV*, (Case 42/76) [1976] ECR 1759.

19 *Infra* Art. 33 notes 31 et seq. (*Wautelet*) on this possibility.

20 See the criticism on the *ex parte* nature of the proceedings by *Geimer/Schütze* Art. 33 note 104. Compare with *Gothot/Holleaux* para. 394 (who argue that *ex parte* proceedings are well suited to the

forceability.[21] Certain rules of Sections 2 and 3 will not prove adapted to a request for a declaration on the recognition of a foreign judgment. This is the case with Art. 39 (2) of the Regulation, which deals with the domestic jurisdiction of the court. It is generally suggested to leave the petitioner the possibility to seize the court of his domicile or of his choice.[22] As is the case with enforcement proceedings, the court seized may only examine whether the formal requirements for recognition are met. The review of the various refusal grounds is only possible if an appeal is lodged against a decision granting a declaration.

a) 'Any interested party'

22 Art. 33(2) reserves the right to request a declaration of recognition to a party showing an interest. According to the Jenard Report, the expression 'on the application of any interested party' implies that "any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order" for its recognition.[23]

23 Although the Court of Justice has yet to rule on this question, it is generally accepted that the circle of interested parties will not be limited to those parties who were directly involved in the proceedings in the state of origin.[24] A party who was not involved in the litigation in the state of origin may indeed have an interest in obtaining a judgement on the status of the foreign decision. This may be the case for the warehouse holding goods which were subject to a dispute between two parties before the courts of another Member State. Although the warehouse has no right to benefit from a judgement as to which party holds title to the goods, there are good reasons why it should be entitled to obtain a declaration on the status of the foreign judgment.

24 One should therefore adopt a broad reading of the requirement of interest.[25] It is submitted that in doing so, courts in the State addressed should not look at their national law to define who is entitled to request a declaration on the recognition of a foreign judgment. Whether an applicant's interest qualifies him to obtain a declaration under Art. 33 (2) must be assessed using a community definition.[26] On the other hand, national law remains decisive to determine whether an applicant under Art. 33(2) has an interest to obtain a declaration.[27]

need for a party to obtain within a reasonable time period a decision on the status of the foreign judgment).

21 *Kropholler* Art. 33 note 5.

22 *Kropholler* Art. 33 note 8; *Gaudemet-Tallon* para. 439; *Gothot/Holleaux* para. 398.

23 Report *Jenard* p. 49 (this statement concerned the possibility to request the enforcement of a foreign judgement. It is submitted that is applies likewise to requests for recognition).

24 *Geimer/Schütze* Art. 33 note 94; *Gaudemet-Tallon* para. 440.

25 *Gaudemet-Tallon* para. 440; *Gothot/Holleaux* para. 395.

26 See *Layton/Mercer* para. 26.005; *Gaudemet-Tallon* para. 440.

27 It is unclear whether one should apply the law of the State addressed or look at whichever system of law is indicated by the choice of law rules of the court.

25 Using this double rule, one may suggest that under a community reading of the required interest, *assignees* of persons who were parties to the original proceedings may request a declaration pursuant to Art. 33(2). The question whether one person is indeed an assignee will be assessed by reference to national law. Similarly, a surety such as a guarantor of a contractual obligation may also request a declaration to obtain the recognition of a foreign judgment which has held that the guaranteed obligation is void, even though the guarantor has not participated in the proceedings before the court of origin. Finally parties who have been subrogated in the rights of a party to the original proceedings may also request a declaration under Art. 33 (2).[28]

b) A dispute

26 Art. 33 (2) refers to a 'dispute'. This should not be taken to mean that the issue of the effects of the foreign judgment is necessarily examined within proceedings already ongoing. It would be difficult to reconcile this with the fact that proceedings to obtain a declaration on the recognition are brought *ex parte*, at least in the first stage.

27 The reference to a dispute rather indicates that parties must have disagreed on the issue of the recognition of the foreign judgment.[29] Existence of a dispute may be demonstrated by evidence of behavior of one of the parties concerned which is inconsistent with the foreign judgment, such as the fact that the judgment debtor refuses to give effect to a request made by the judgment creditor to obtain payment or to recognize that a contract has been avoided. For a dispute to exist, it must possess a certain degree of reality. It does not appear to be sufficient that the party requesting the declaration merely entertains doubts as to the status of the judgment.[30] In any case the various procedural requirements existing in national laws – such as the requirement that the petitioner shows an «*intérêt*» or an „*Interesse*" – will prevent a purely hypothetical request.[31]

c) Positive declaration

28 Art. 33 (2) only refers to the possibility to obtain a declaration to the effect that a judgment "be recognized". Does this mean that the Regulation does not permit a party to seek a declaration that a judgment not be recognized? This is what the Jenard Report seems to imply, justifying the imbalance by the fact that the simplified procedure put in place by the 1968 Convention "was evolved solely to promote the enforcement of judgments, and hence their recognition".[32] The fact that the Brussels IIbis Regulation refers specifically to the possibility of obtaining a declaration of non-recognition suggests that the drafters of the Brussels I Regulation meant to exclude the possibility of obtaining a negative declaration.[33] However, this also suggests that issuing a declara-

28 See C.A. Paris RCDIP 70 (1981), 121.

29 Compare with *Kropholler* Art. 33 note 4 (according to whom it is not required that „die Anerkennung ausdrücklich bestrittten wurde").

30 Compare with the liberal interpretation suggested by *Gothot/Holleaux* para. 395.

31 *Kropholler* argues that the special 'Feststellungsinteresse' required under German law for declaratory proceedings is not necessary to obtain a declaration under Art. 33 (2): *Kropholler* Art. 33 note 4.

32 Report *Jenard* p. 43. See e.g. *Van den Broeck v. Ranieri*, Hof Hertogenbosch NIPR 1994, 157.

33 See to that effect, *Geimer/Schütze* Art. 33 note 85; *Leible*, in: *Rauscher* Art. 33 note 13.

tion of non-recognition does not contradict the fundamental tenets of the European judicial area. Hence, it is suggested that the exclusion of requests for a declaration of non-enforcement should be reviewed.[34]

29 The fact that an applicant may not directly request a declaration to the effect that a foreign judgment not be recognized, should not deprive the court of the possibility of dismissing an application for a positive declaration of recognition if it finds that recognition is not warranted. In that case, the court's decision will come close to a negative declaration.

30 It has been suggested that since the Regulation does not prohibit the request for a negative declaration, such a request should be possible if the national law of the court addressed so allows.[35]

4. Recognition as an incidental issue (Art. 33 (3))

31 Art. 33 (3) confirms that a court seized of a dispute may also decide incidentally on the recognition of a foreign judgment which is relevant for the outcome of the dispute with which the court is principally concerned. In the absence of such a provision, courts would be required to stay their proceedings while they await the outcome of an application for a judgment to be recognized under Art. 33 (2).

32 Art. 33 (3) creates jurisdiction to rule incidentally on the recognition of the foreign judgment both *ratione materiae* as *ratione loci*.[36] Who bears the burden of proof in this respect, must be decided by the national law of the court seized.

33 It does not appear to be necessary for the existence of that jurisdiction that the incidental issue of recognition be decisive for the proceedings with which the court is principally concerned. The English and German texts of the Regulation seem to imply that such as is necessary. Other language versions are more flexible. In any case, a court will refrain to pass a judgment, even incidentally, on a judgment which is wholly unrelated to the proceedings with which it is principally concerned.

34 While Art. 33 (2) specifically refers to the rules of 'Sections 2 and 3' of Chapter III, a similar reference does not appear in Art. 33 (3). Nonetheless it is accepted that the provisions of those sections will apply *mutatis mutandis* to the incidental recognition.

34 TGI Paris Clunet 120 (1993), 599 granted the plaintiff's request for a negative declaration and decided that several Italian decisions were not entitled to recognition in France, in particular because they contradicted earlier judgments issued by the courts of Delaware. In doing so, the court followed the majority opinion in the French literature (see *Gothot/Holleaux* para. 402; *Lagarde*, RCDIP 78 [1989], 534-537; *Pluyette*, Etudes offertes à Pierre Bellet [1991] pp. 443 ff.).

35 *Kropholler* Art. 33 note 7; *Kaye* p. 1397.

36 *Gothot/Holleaux* para. 388.

This means that a party claiming incidental recognition will have to comply with the general provisions of Artt. 53-56 of the Regulation, in particular the requirement to produce the relevant documents.[37]

35 Before granting incidental recognition, the court will review the various grounds of refusal listed in the Artt. 34 and 35 of the Regulation.

36 The question arises whether the decision to grant incidental recognition enjoys itself *res judicata*. It is generally said that a court called upon to make a declaration of recognition or to issue an order for enforcement will not necessarily be absolved from considering, on its own motion if need be, whether one of the grounds specified in Arts. 34 and 35, exists, merely because another court has accorded (or denied) incidental recognition to the judgment[38] It is submitted, however, that in so far as the court seized incidentally of the recognition issue has verified the requirements for the recognition, its decision should bind a court subsequently seized of proceedings under Art. 33 (2) or Art. 39. A judgment under Art. 33 (3) will indeed possess all necessary characteristics to enjoy res judicata on the issue of recognition. To deny it the status of final and conclusive decision on this question would give the party opposing the recognition an undue possibility to challenge the decision.

5. Partial recognition

37 Art. 48 of the Regulation provides for the possibility to obtain a partial enforcement of a foreign judgment, provided the judgment is severable. Although the Regulation does not contain a similar provision for the recognition, it is accepted that such partial recognition is possible.[39] This follows necessarily from the fact that some judgments will contain issues which fall outside the scope of application of the Regulation, while other issues falls within this scope. It also follows from the fact that a judgment may be held to contradict a ground of refusal only for part of the ruling.

38 When requesting a declaration of recognition, the applicant may limit the scope of its request to part of the foreign judgment.

37 *Kropholler* Art. 33 note 10.

38 See *Layton/Mercer* para. 26.011; *Kropholler* Art. 33 note 11.

39 *Leible*, in: *Rauscher* Art. 33 note 11; *Geimer/Schütze* Art. 33 notes 66-67; *Layton/Mercer* para. 24.043; *Kropholler* Art. 33 note 10; *Gothot/Holleaux* para. 392.

Article 34

A judgment shall not be recognised:
(1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
(2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
(3) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
(4) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

I. Purpose and interpretation 1

II. Legislative history 10

III. Art. 34 (1): Public policy 14
1. Content 15
2. Conditions of application 19
3. Applications within the limits set by the ECJ 20
a) Substantive public policy 20
b) Procedural public policy 28
4. National Case Law and future developments 33

IV. Art. 34 (2): Protection of the defaulting defendant 36
1. Definitions 38
a) Document instituting the proceedings or equivalent document 38
b) Defendant 42
c) Judgment 43
2. Conditions of application 44
a) Judgment by default 44
b) Service effected in sufficient time and in such a way as to enable the defendant to prepare his defence 46
aa) A condition of time 47
bb) A condition concerning the circumstances of service 53
c) The obligation for the defendant to challenge the decision in its country of origin 57

V. Article 34 (3) and (4): irreconcilable decisions 60
1. Definition 63
a) Judgment 63
b) Irreconcilable 67
2. Conditions of application 70
a) Conflict with a local judgment: Art. 34 (3) 70
b) Conflict with judgment given in another Member State: Art. 34 (4) 73
c) Conflict with judgment given in a third State, Art. 34 (4) 76

Bibliography

Ulrich Becker, Grundrechtsschutz bei der Anerkennung und Vollstreckbarerklärung im europäischen Zivilverfahrensrecht (2004)
Matthias Koch, Unvereinbare Entscheidungen im Sinne des Art. 27 Nr. 3 und 5 EuGVÜ und ihre Vermeidung (1993)
Lenenbach, Die Behandlung von Unvereinbarkeiten zwischen rechtskräftigen Zivilurteilen nach deutschem und europäischem Zivilprozessrecht (1997)
Lindacher, Europäisches Zustellungsrecht, ZZP 114 (2001), 179
Lopes Pegna, Il nuovo procedimento per l'esecuzione delle decisioni in materia civile e commercial degli Stati membri della Comunità Europea, Riv. dir. int. 2001, 621
Mansel, Vollstreckung eines französischen Garantieurteils bei gesellschaftsrechtlicher Rechtsnachfolge und andere vollstreckungsrechtliche Fragen des EuGVÜ, IPRax 1995, 362
Merlin, Riconoscimento ed esecutività della decisione straniera nel regolamento «Bruxelles I», Riv. dir. proc. 2001, 433
Micklitz/Rott, Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr44/2001 (II), EuZW 2002, 15
Mosconi, Un confronto tra la disciplina del riconoscimento e dell'esecuzione delle decisioni straniere nei recenti regolamenti comunitari, RDIPP 2001, 548
Münch, Ausländische Tenorierungsgewohnheiten kontra inländische Bestimmtheitsanforderungen, RIW 1989, 18
Péroz, La réception des jugements étrangers dans l'ordre juridique français (2005)
Reig Fabado, La ejecución en el Convenio de Bruselas: el problema de Derecho aplicable al carácter ejecutorio de la sentencia, La Ley Unión Europea 29 de diciembre de 1999, 1
Requejo Isidro, Sobre ejecución y exequátur, La Ley Unión Europea 30 de septiembre de 1999, 7
Herbert Roth, Herausbildung von Prinzipien im europäischen Vollstreckungsrecht, IPRax 1989, 14
id., Konkretisierung unbestimmter ausländischer Titel, IPRax 1994, 350
id., Anerkennung von Entscheidungen nach Art. 34 Nr. 2 EuGVVO bei Verweigerung der Annahme des zuzustellenden Schriftstücks (Art. 8 EuZVO), IPRax 2005, 438
id., Systembedingt offene Auslandstitel, IPRax 2006, 22
Ansgar Staudinger, Der ordre public-Einwand im Europäischen Zivilverfahrensrecht, EuLF 2004, 273
Kennett, The Enforcement of Judgments in Europe (2000)
Sánchez Jiménez, Ejecución de sentencias extranjeras en España: Convenio de Bruselas de 1968 y procedimiento interno (1998)
Peter Schlosser, Die transnationale Bedeutung von Vollstreckbarkeitsnuancierungen, in: FS Kostas Beys (Athen 2003) p. 1471
Smyrek, Einheitlicher Rechtsraum – nur in der Theorie?, RIW 2005, 695
Stadler, Die Revision des Brüsseler und des Lugano-Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen – Vollstreckbarerklärung und internationale Vollstreckung, in: *Peter Gottwald* (ed.), Revision des EuGVÜ/Neues Schiedsverfahrensrecht (2000), p. 37
Wastl, Die Vollstreckung deutscher Titel auf der Grundlage des EuGVÜ in Italien (1990).

I. Purpose and interpretation

1 Art. 34 enumerates the main grounds for non-recognition or non-enforcement. It should be read in relation with Artt. 35, 36, 61 and 71. The nature of the criteria enumerated in Art. 34 could be discussed: should they be labelled as regularity condi-

tions or as refusal grounds?[1] They are usually simply referred to as "grounds for refusing recognition or enforcement".[2] The precise qualification does not matter as long as the purpose and the resulting interpretation of Art. 34 is clear.

2 The purpose of Art. 34 and of its predecessor, Art. 27 Brussels Convention, derives from the general objectives of chapter III (former title III) dedicated to recognition and enforcement and more generally from the rationale of the regulation itself, i.e. facilitating the circulation of judgments. This general ambition is to be traced back to the Brussels Convention which, according to the wording of Art. 220 EEC Treaty (now Art. 293 EC Treaty), was due to achieve the "simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards".[3] The note sent by the Commission to Member States inviting them to commence negotiations which resulted in the Brussels Convention already mentioned the role of such an instrument in the internal market: "a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible (...) to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships".[4] The idea of a direct link between economic development, legal security and circulation of judgments, as a support to the achievement of the internal market, has evolved and is now embodied in the conception of the European Union as an "area of freedom, security and justice in which the free movement of persons is assured and litigants can assert their rights, enjoying facilities equivalent to those they enjoy in the courts of their own country".[5] The exact meaning of the "area of freedom, security and justice" provided for in Title IV of the EC Treaty, in which the legal basis the Regulation is to be found, as well as its precise implications for the interpretation of the regulation, are not quite clear. But one thing is sure: the circulation of judgments is more than ever seen as a priority and should progressively take place as within a single State.[6]

3 Following the favour reserved by the regulation to the circulation of judgments, Art. 34, which brings an exception to this principle, is to be strictly construed.[7] The refusal grounds are limitative.[8] Two consequences derive from this with regard to the

1 *Gaudemet-Tallon*, p. 305.

2 For instance, *Layton/Mercer* para. 24.011.

3 See as well: Report *Jenard* p. 7, 42 (presenting the free circulation of judgments as "the ultimate objective" of the Convention and the adoption of rules of direct jurisdiction as one means for achieving this goal).

4 Cited in Report *Jenard* p. 3.

5 Commission Proposal COM (1999) 348 final p. 3, 5.

6 See for instance, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143/15.

7 *Solo Kleinmotoren GmbH v. Emilio Boch*, (Case 414/92) [1994] ECR I-2237 para. 20.

8 Commission Proposal COM (1999) 348 final, p. 22, commenting Art. 41 in which the refusal grounds were to be listed: "This article determines the *sole* grounds on which a court seized of an appeal may refuse or revoke a declaration of enforceability."

margin of interpretation left to the national judge. On the one hand, the judge may not use any of the enumerated grounds for controlling an issue which is not mentioned in Art. 34 or, even worse, is excluded by Art. 35 or 36: this would occur for instance, if the national judge was controlling the applicable law, under the heading of public policy. It can already be stated that all grounds for refusal must be interpreted in the light of the prohibition of review as to the substance (Art. 35), which implies that the control exercised by the judge of the State addressed will take place within the respect of the findings of facts and law made by the judge of origin. On the other hand, he has to respect the limits set by the European Court of Justice (hereafter ECJ) in the exercise of its interpretation function. The ECJ has for instance set the frame within which public policy can be called upon.

4 The limitative enumeration provided for by Art. 34 does not exclude the control of conditions that would be imposed by public international law.[9] Limitations imposed on jurisdiction (to adjudicate or to enforce) with regard to immunities are mainly concerned. Should the immunity of the defendant not have been respected in the court of origin, the resulting judgment would not be entitled to recognition in other Member States, although this ground of refusal is not provided for by Art. 34.[9a] Similarly, the enforcement requested against a person who has, after the date of the judgment of origin, acquired an immunity of execution, will be refused.[10] It would indeed be difficult to construe the Regulation as aiming at derogating to Public international law, especially since de ECJ has for long stated that Community law is submitted to public international law.[11]

9 *Geimer/Schütze* Art. 34 notes 6-7; *Kropholler* Art. 33 note 5.

9a Treib Civ. Bruxelles, Reprinted in P. d'Argent, Revue belge de droit international 2007/2, n° 43 et al. (forthcoming): decicling, on the basis of Art. 27 (1) of the Brussels Convention, that it "does not have juniscliction" for enforcing a Greek judgment conclemning Germany to pay clamages to Greek nationals in regard of acts perpetteated by German aremed forces during the Second World Ware. Comp.: *Eirini Lechovritov and others v. Dimosiotis Omospondiakis Dimokratias tis Germanias*, (Case C-292/05 [2007] ECR nyr. 'Civil matteres' wilhin the meaning of Art. 1 of the Brussels Convention "does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the venitory of the first State" (para. 46).

10 *Kropholler* Vor Art. 33 note 5 (citing as an example the private person condemned to reimbursement, who later becomes ambassador).

11 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, (Joined Case 21-24/72) [1972] ECR 1219 paras. 11, 18; *Yvonne van Duyn v. Home Office*, (Case 41/74) [1974] ECR 1337 para. 22; *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, (Case C-286/90) [1992] ECR I-6019 para. 9 ("(...) the European Community must respect International Law in the exercise of its powers and that consequently, Art. 6 must be interpreted and its scope limited, in the light of the relevant rules of International Law of the sea"); *Verhoeven*, Droit de la Communauté européenne (2nd ed. 2001), p. 281. The result was already certain under the Brussels Convention: *Geimer/Schütze* Art. 34 notes 6-7; *Kropholler* Vor Art. 33 note 5.

5 Though very limited in number, the refusal grounds are obligatory. Recognition or enforcement must be denied if any of the grounds apply.[12] The judge of the recognition State has no discretion in this respect. This raises two questions.

6 The first question concerns the subsidiary application of domestic law: when one of the refusal grounds provided for by Art. 34 applies, can the judgment nevertheless be recognised under national law? It has been submitted that the provision should be interpreted "as meaning that the judgment cannot be recognised *under the Convention*"[13] (i.e. the Regulation), leaving the court free to grant recognition or enforcement under the ordinary law. This interpretation was developed for Art. 27 (4) of the Convention which instituted a control of the applicable law on some incidental issues decided upon by the court of origin and excluded from the substantive scope of the Convention by Art. 1. The substance of Art. 27 (4) has been deleted from the Regulation. The question remains however the same: can the Regulation, which is due to favour the circulation of judgments within the EC introduce recognition conditions stricter than those relied upon under domestic law? This proposition leads to the application of the most favourable source of law. It cannot be followed as it relies on a confusion between the applicability of the Regulation and the outcome of the application of its provisions, not allowed by the Regulation,[14] contrary to other international instruments concerned with recognition and enforcement.[15] The applicability of chapter III of the Regulation does not depend on Art. 34 but mainly on Arts. 1 and 32. None of the provisions of the Regulation suggest that its applicability could depend on a "more favourable" condition. Once the regulation applies,[16] its provisions command entirely the recognition or enforcement process, be the result positive or negative: the application of domestic law is therefore excluded.

7 The second question concerns the role of the judge with respect to the control of the refusal grounds listed in Art. 34 or 35:[17] should or could he raise them of its own motion? Art. 41 of the Regulation forbids any review under articles 34 and 35 at the first stage of the recognition or enforcement proceedings. Any initiative of the judge is thus excluded even though the first phase of the proceedings is not contradictory.[18]

12 See the wording of Art. 34: "A judgment *shall not* be recognised [...]".

13 *Hartley*, p. 88; for a similar opinion, cf. *Gothot/Holleaux* para. 297.

14 For other arguments supporting the exclusion of domestic law (mainly: uniformity of interpretation, legal certainty, general balance of the jurisdiction and recognition regime of the Regulation, respect of the other aims of the Regulation such as the proper administration of justice): *Gaudemet-Tallon* p. 351 para. 435; *Stone* p. 153; *Layton/Mercer* para. 24.011.

15 Cf. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (United Nations Conference on International Commercial Arbitration, New York 1958) Art. V (1): "Recognition or enforcement of an arbitral award may be refused ..." and Art. V (2): "This provision is usually interpreted as leaving the judge free to rely on the more favourable domestic law."

16 The opinion of the authors cited above (fn. 13) makes perfect sense if they refers to matters normally excluded from the substantive scope of the Convention and indirectly covered by its Art. 27(4).

17 Of course, the judge has to verify that the formalities listed in article 53 have been completed and therefore makes formal checks on the documents presented in support of the application.

The wording of Art. 41 introduces a fundamental change in comparison with the Brussels Convention. Under Art. 34 Brussels Convention, the application for recognition or enforcement may be refused even though the first stage of the proceedings is unilateral: only the judge can thus raise one of the refusal grounds.[19] Under the Regulation, the judge does not have the discretion any more to control the refusal grounds during the unilateral phase of the recognition or enforcement proceedings.[20] At the second stage of the proceedings, when an appeal is lodged against the decision granting recognition or enforcement, the question remains. Of course, it is likely to be of minor practical importance since one of the parties has, by definition, taken the initiative of raising one or more refusal grounds. But the judge might disagree on the relevance of the refusal ground chosen by the claimant or notice the violation of other grounds. The obligatory character of the refusal grounds, deriving from the first words of Art. 34, implies that recognition or enforcement must be refused if any of them applies. This suggests in turn that each of them needs to be controlled on the initiative of either the parties or the judge. However, under the Brussels Convention, which used the same formulation in the first line of Art. 27, it was usually submitted that the judge "could" raise the grounds on its own motion.[21] Indeed the least that can be derived from the wording of Art. 34 is that the judge, when he is not prevented to do so by Art. 41, may on its own motion take grounds of refusal into consideration.[22] Whether he must do so remains uncertain.[23] According to *Kropholler*,[24] some submit that in the absence of any clear statement of the Convention or Regulation on this point, the question is left to national procedural law: the latter could free the judge of any obligation to control the grounds for refusal on its own motion.[25] The wording of Art. 45, which describes the

18 Commission Proposal COM (1999) 348 final p. 21.

19 Report *Schlosser* para. 190 ("(...) the court *may* of its own motion take into account grounds for refusing recognition *if they appear from the judgment or are known to the court*. It may not however make enquires to establish whether such grounds exist (...)"; emphasis added). Thus the role of the court at the first stage was already limited.

20 For a different view see *Leible*, in: *Rauscher* Art. 34 note 3 (proposing an exception in case of gross violation of public policy or of the exclusive jurisdiction grounds listed in Art. 35). See also fn. 22.

21 See Report *Schlosser* para. 190; *Droz*, Pratique de la Convention de Bruxelles du 27 septembre 1968 (1973) p. 68 note 153; *Dashwood/Halcon/White* p. 39 (the authors do not make any difference between the possibility and the obligation for the court to control the grounds for refusal on its own motion).

22 For a similar position *Ansgar Staudinger*, EuLF 2004, 273, 280.

23 Submitting that the judge must refuse recognition on its own motion when it appears from the document laid before him that one of the refusal grounds apply: *Layton/Mercer* paras. 9.007, 24.011 (the authors apparently consider that such an obligation exists at both stages of the proceedings).

24 *Kropholler* Vor Art. 33 note 6.

25 The French Cour de cassation, for instance, has held that under the Brussels Convention, the judge does not have to control any grounds of refusal other than those raised by the defending party, even public policy: Cass. RCDIP 89 (2000), 52 with note *Ancel*; Cass. RCDIP 94 (2005), 371 with note *André Huet*. As a result of the presumption in favour of regularity of judgments from other EC countries established by the Cour de cassation, at the first as at the second stage of the recognition

role of the judge seized with the appeal, diverges in the various linguistic versions[26] and is therefore of little help. The Explanatory Memorandum of the Proposal clearly rules out any obligation imposed on the judge to control the grounds of Art. 34 on its own motion.[27]

8 The allocation of the burden of proof between the judge and the parties is not directly linked with the possibility for the court to raise the grounds of refusal of its own motion. This is made clear by the Report *Schlosser* which states that "the judge may of its own motion take into consideration grounds for refusing recognition *if they appear from the judgment or are known to the court*".[28] He does not have to search for the elements proving either the regularity or irregularity of the foreign judgment. As a result of the presumption in favour of recognition, it belongs to the party contesting the recognition to prove that one of the grounds for refusal exists.[29]

9 One last point should be underlined in relation with the restrictive nature of the grounds for refusal listed in Art. 34. The limitation of the grounds for refusal as well as the summary procedure set out by Art. 41 are justified by the global regime established by the Regulation, especially its rules on jurisdiction: the mutual trust between courts of the Member States partially relies on the assurance that certain grounds for jurisdiction have been used and that others have been banned in the court of origin. This is not true, however, for judgments that have not been adopted in accordance with the Regulation. They nevertheless benefit from the favourable system of recognition and enforcement of the Regulation whose application depends on the sole

or enforcement proceedings, French courts apparently never raise the grounds for refusal of article 34 on their own motion: *Niboyet/Sinopoli*, Gaz. Pal. 2004, 4, 20-21. However, it is generally considered that under domestic law the judge has to examine grounds for refusal on its own motion when the *ordre public procédural* (international public policy and certain matters that are not at the parties disposal) is involved; for more detail, cf. *Pierre Mayer/Heuzé*, Droit international privé (8th ed. 2004) para. 431.

26 "The court (...) *shall* refuse or revoke a declaration of enforceability only on (...)"; "La juridiction (...) *ne peut* refuser ou révoquer que pour l'un des motifs (...)"; „Die Vollstreckbarerklärung *darf* von dem (...) Gericht nur (...)" (emphasis added). The French and German versions imply a possibility but no obligation.

27 Commission Proposal COM (1999) 348 final, p. 21-22.

28 Report *Schlosser* para. 190; emphasis added. See as well: *Pierre Mayer/Heuzé* (fn. 25) para. 433 in fine ("The principle that the judge has to consider the grounds for refusal of its own motion (...) only means that he shall not grant recognition if the regularity of the foreign decision is not established, even if the defending party does not contest it. It does not impose on him the obligation to enquire whether such grounds exist." The translation is ours).

29 Report *Jenard* p. 43; *Layton/Mercer* para. 9.018; *Leible*, in: *Rauscher* Art. 34 note 3; *Kropholler* Vor Art. 33 note 7; *Droz* (fn 19) p. 68 para. 153 in fine. For examples of application of this principle by national courts in Germany: BGH [2003] I.L.Pr 523; in Belgium: Trib. civ. Liège Act. Dr., 1996, 80; Trib. civ. Bruxelles RGDC 1989, 422. Cf. *Geimer/Schütze* Art. 34 note 1 (no presumption in favour or against recognition deriving from the Regulation influences the allocation of the burden of proof between the parties).

condition that the judgment has been rendered by the tribunal of a Member State. As a result, the judgment taken in a Member State against a defendant domiciled in a third Country will benefit from the recognition regime of the Regulation in other Member States, even though the defendant has not been able to take advantage of the protections established by Chapters I and II of the Regulation, in particular the exclusion of some national rules on jurisdiction provided for by Art. 3 (2). This unequal treatment of defendants domiciled in non-Member States is sometimes severely judged.[30]

II. Legislative history

10 The legislative history of Art. 34 derives from its purpose. Pursuant to the general aim of the Regulation of facilitating the circulation of judgments, the grounds for refusal have progressively been restricted in two ways: some have been narrowed, other have been abandoned. Simultaneously, the ECJ and the explanatory Reports have sometimes clarified the meaning of the provisions in a way that slightly enlarged their scope.

11 The 1978 Accession Convention brought major changes.[31] First, it was specified that a document equivalent to the document which normally institutes the proceedings, delivered in sufficient time to enable the defendant to organize his defence, would also satisfy the requirement of Art. 27 (2) concerning due service in case of default judgment. Second, a point 5 was added to Art. 27, later formally amended by the 1989 Accession Convention,[32] which gives priority to an earlier judgment pronounced in a non-contracting State involving the same cause of action and the same parties if it qualifies for recognition in the State addressed. Point 5 of Art. 27 should be read in relation to Art. 57 of the Convention which underlines that the Convention does not affect other conventions concerning jurisdiction, recognition or enforcement to which the contracting States would be parties (except for those listed in Art. 55 Brussels Convention). But for Art. 27 (5), a judgment given in a third State that would fill the conditions established for its recognition by the domestic law or more importantly, by a bilateral convention signed with that State, would have raised difficult questions when confronted with a later judgment originating from a Member State. The text of the 1968 Convention lacked clarity on this issue and the addition of point 5 avoided diplomatic complications.[33] Since the solution was already evident under international

30 *Briggs/Rees* p. 427-428 para. 7.04.

31 Convention on the Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1978 L304/1.

32 Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic, OJ 1989 L 285/1.

33 Report *Schlosser* para. 205.

law,[34] it cannot be said that the addition of the last point of Art. 27 Brussels Convention added any extra condition for recognition.

12 The transformation of the Brussels Convention into a Community instrument offered the opportunity for other changes. The adverb "manifestly" was introduced to qualify the contradiction between the recognition of the foreign judgment and public policy of the Member State addressed. Concerning point 2 of Art. 34 (point 2 of Art. 27 Brussels Convention), on the one hand, the requirement of a service "duly" effected has been abandoned while on the other hand, the new provision states that service must be made not only in sufficient time but also "in such a way as" to enable the defendant to arrange for his defence. Point 2 of Art. 34 is now centred on the practical possibility for the defendant to arrange for his defence rather than on the regularity of the service. Simultaneously, it is severely restricted: an objection to recognition concerning service of the documents instituting the proceedings can from now on only be raised by the defendant who has appealed in the State of origin when he was in a position to do so. Point 4 of Art. 27 Brussels Convention, concerning the difference of rules of Private international law concerning capacity and personal status between the State of origin and the State addressed, has been deleted. The motivation of this modification might be informative on the Commission's projects with regard to conflict of laws rules: it is due to the fact that these rules of Private international law "are gradually being approximated in the Member States".[35] Eventually the question left open by the Brussels Convention concerning the conflict between two judgments given in different Member States and presented for recognition in a third Member State is solved in Art. 34 (4) by giving priority to the earlier judgment.[36] The solution concerning the conflict between an earlier judgment given in a third State and an EU judgment (Art. 27 (5) of the Convention) is simply extended to the conflict between judgments rendered in Member States other than the State addressed. The only point that has not been changed is point 3 of Art. 34 which literally takes over the solution of Art. 27 (3) concerning the conflict between a judgment given in the State where recognition is sought and a judgment given in another Member State. As the Explanatory Memorandum puts it, the "grounds (for refusal) have been reframed in a restrictive manner to improve the free movement of judgments".[37]

13 The history of Art. 34 also shows a need for clarification sometimes leading to a comprehensive construction of the grounds for refusal. The ground relating to public policy is the best example. Though fraud was considered as a specific ground for non-recognition in the United Kingdom and Ireland, not to be confused with public policy, the Schlosser report states that fraud can constitute an offence against public policy within the meaning of the Regulation.[38] This specification actually encouraged the United Kingdom and Ireland to enlarge their conception of public policy. Another

34 Art. 30 (4) (b) Vienna Convention on the Law of Treaties.
35 Commission Proposal COM (1999) 348 final, p. 23.
36 Highlighting the problem: *Kaye* pp.3249-3250.
37 Commission Proposal COM (1999) 348 final, p. 22. Purely formal modifications, such as the replacement of the term "contracting State" by the term "Member State", have not been mentioned.

example where the comprehensive interpretation finally won is given by the *Krombach* case.[39] From the beginning, the question whether public policy could cover procedural aspects without overlapping the requirement of due and timely process, that was presented as the sole ground for refusal concerning the procedure, appeared as a difficult question.[40] The Krombach decision stated that public policy could in exceptional circumstances, cover the fundamental principle of the right to a fair hearing.

III. Art. 34 (1): Public policy

14 Pursuant to paragraph 1 of Art. 34, recognition or enforcement might be refused if it is manifestly contrary to public policy in the Member State addressed. The content of public policy depends on the national conception of the State where recognition or enforcement is sought (1), which has to respect the limits set by the ECJ (3). The conditions of application of this ground for refusal results similarly from national and European law (2).

1. Content

15 Domestic law will determine what principles and rules belong to public policy. The concept is therefore not uniformly understood among the Member States.[41] However, under the influence of the ECJ, it is likely that striking divergences of national conception will be avoided.[42] Being a domestic notion, public policy will follow the evolution of national conception and be considered at the time when the recognition of the judgment is requested. This is why foreign decisions infringing the prohibition on investment in future options or an exchange control law, itself contrary to EC law, were granted enforcement when they would have once been considered as contrary to public policy.[43] Though being a national concept, public policy also includes the principles of Community law which belong to the "European public policy".[44] Those concepts are progressively identified by the ECJ. Their understanding should indeed not vary from country to country. Public policy, be it constituted of national and community concepts, may have a substantive or procedural aspect.[45]

38 Report *Schlosser* para. 192. On the limited circumstances under which fraud might be alleged, *infra* Art. 34 note 26 (*Francq*).
39 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935.
40 *Gothot/Holleaux* para. 256.
41 For examples see *infra* Art. 34 notes 27, 32, 34 (*Francq*).
42 *Infra* Art. 34 notes 20-32 (*Francq*).
43 BGH [1999] I.L.Pr. 758 (applying a bilateral agreement concluded between Austria and Germany and finding that the prohibition of futures and gaming plea did not form part of German international public policy anymore as assessed on the date on which the enforceability of the Austrian judgment had to be decided); *Westpac Banking Corporation v. Dempsey*, [1993] 3 I.R. 331 (H.C.), *Kaye* p. 3279-3280.
44 *Renault SA v. Maxicar SpA and Orazio Formento*, (Case 38/98) [2000] ECR I-2973 para. 32.
45 *Infra* Art. 34 notes 20-32 (*Francq*).

16 It is only one particular aspect of public policy that comes into consideration under Art. 34 (1), namely international public policy. This narrow concept does not cover all internal rules of public policy but only the core principles and values that cannot be derogated from, even for situations presenting foreign elements. National case law clearly draws the distinction between international and internal public policy[46] and restrains the use of Art. 34 (1) to defend fundamental principles.[47]

17 This is coherent with the prevailing interpretation given from the start to Art. 34 (1) by the *Jenard* Report and confirmed at numerous occasions by the ECJ: it should intervene only in exceptional cases.[48] The *Jenard* Report considered the ground for refusal based on public policy as similar to that adopted in "the most recent convention" of the time. Consequently, the adjunction of the adverb "manifestly" in the Regulation cannot be said to have narrowed down the kind of infringement to public policy required under Art. 34 (or 27 of the Convention): the expectation of a manifest contradiction was included from the start[49] and is coherent with the prohibition of review as to the substance. The restriction of the hypothesis of intervention of public policy to exceptional cases was already prevailing in domestic laws which considered that public policy should be given an «effet atténué» for those situations constituted abroad.[50]

18 Be it or not named «effet atténué», this narrow conception of the already narrow international public policy has three implications. Firstly, it is the effects of the recognition that will be appreciated with regard to public policy, not the judgment: the judge of the State addressed is not supposed to say whether the foreign judgment as such is contrary to public policy, but rather whether the recognition of such a decision would produce effects adversary to public policy.[51] Secondly, those effects should reach a certain level of gravity: the fundamental principle infringed as a result of recognition must suffer a substantial offence.[52] Thirdly, the appreciation of gravity will depend on the existence of rather close links between the situation and the legal order of the State

46 For instance: Hof van Cass. Pas. belge 1985 I 1323 (the principle according to which the civil proceedings have to be stayed pending criminal proceedings does not belong to international public policy, but only to internal public policy); Trib.civ. Liège Act. Dr. [1996] 80 (referring to the narrow definition given by the Belgian Hof van Cass. Pas. belge [1950] I 624); Cass. D. 1997 IR 92 (French international public policy does not oppose a judgment including indexation in a currency other than French Frank).

47 Cassaz. Giust. Civ. 1999 I 3009-3012 with note *Simone* (all principles of the Constitution do not belong to the narrow notion of public policy of Art. 34 (1); also on the ECJ Website under n° 2000/42: http://curia.eu.int/common/recdoc/convention/en/index.htm.

48 Report *Jenard* p. 44; *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86), [1988] ECR 645 para. 21; *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, (Case C-78/95) [1996] ECR I-4943 para. 23; *Dieter Krombach v. André Bamberski* (Case C-7/98), [2000] ECR I-1935 para. 21; *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 26.

49 *Leible*, in: *Rauscher* Art. 34 note 4; *Kropholler* Art. 34 note 4.

50 *Gaudemet-Tallon* p. 321; *Ansgar Staudinger*, EuLF 2004, 273.

51 Report *Jenard* p. 44.

addressed: the closer the links, the easier it is to prove that recognition of the foreign decision within the legal order of the State addressed will lead to intolerable breach of fundamental principles.[53] As a result, the examination of public policy will be lead *in concreto*.[54]

2. Conditions of application

19 The conditions of application of Art. 34 (1), be they substantive or procedural, will be set by domestic law, under the scrutiny of the ECJ. For instance, in France, public policy must be raised in appeal by the defendant, the judge being allowed to restrict his control to the issue raised by the parties.[55] Among the conditions of application of Art. 34 (1), its residual role should be underlined. Public policy should only come into consideration when other grounds for refusal do not apply. Grounds for non-recognition are not overlapping.[56] As a result, Art. 34 (1) can only come into consideration when conditions of application of other grounds for refusal are not met. This is a simple application of the principle *lex specialis derogat generalis*. For instance, the ECJ has expressly excluded the intervention of Art. 34 (1) when Art. 34 (2) or 34 (3) apply.[57] Furthermore, some grounds for refusal can only be addressed under the specific provision devoted to them by the Regulation, so that if this provision does not apply, the same problem cannot be controlled under Art. 34 (1). This is the case of the jurisdiction of the tribunal of origin which can only be scrutinized within the strict conditions of Art. 35.[58] Indeed under the Regulation (as well as under the Convention), it is normally prohibited to review the jurisdiction of the court of origin, with the exception of "certain cases exhaustively listed in the first paragraph of Art. 28" (of the Convention; 35 of the Regulation).[59] Another condition sometimes referred to before a party can raise public policy concerns the question whether that party made use of the means of redress that where at his/her disposal in the State of origin or contested the issues later presented to the tribunal in charge of recognition. It is commonly accepted in Germany that the party who could have appealed against violation of

52 *Dieter Krombach v. André Bamberski* (Case C-7/98), [2000] ECR I-1935 para. 37; *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 30 (mentioning the *manifest* breach of *essential* rules or *fundamental* principles of the State addressed).

53 *Kropholler* Art. 34 note 18 (pursuant to the classic formula of the BGH – BGH IPRax 1994, 350 with note *Herbert Roth* – proposes to check whether taking into consideration the intensity of the links between the situation and the forum, the concrete result of recognition would lead to intolerable contradiction with German fundamental ideas or conception of justice); *Ansgar Staudinger*, EuLF 2004, 273, 275; *Geimer/Schütze* Art. 34 notes 19-22.

54 *CA Paris D.* 1994 *IR* 66; *Trib. civ. Liège Act. Dr.* [1996] 80.

55 *Supra* Art. 34 fn. 26 (*Francq*).

56 *Briggs/Rees* p. 440 para. 7.12.

57 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645 para. 21; *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, (Case C-78/95) [1996] ECR I-4943 para. 23.

58 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 31.

59 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 31.

his/her right to a fair hearing, but did not do so, later loses the right to raise procedural public policy in front of the court seized with the recognition.[60]

3. Applications within the limits set by the ECJ

a) Substantive public policy

20 Examples of applications of public policy in its substantive aspect are relatively rare. This has two reasons. Firstly, in those civil and commercial matters covered by the Regulation, the legal divergences between the Member States are rarely strong enough to bring a contradiction with public policy.[61] Secondly, the prohibition of review as to the substance confines quite drastically the hypothesis in which the tribunal will be able to consider a contradiction with its substantive public policy. The principle established by Art. 36 and reiterated by Art. 45 (2) explains many of the limits imposed by the ECJ.

21 The court seized with recognition or enforcement is not allowed to review the accuracy of the findings of law or facts made by the court of the State of origin.[62] As a consequence, any issue already considered by the court of origin will rarely give rise to a funded objection based on public policy.[63] This is of course linked with the narrow interpretation of public policy, the infringement of which should be manifest. Following this line of thought, the ECJ has even provided a general description of the frame within which public policy could be considered to be infringed: "In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".[64] This frame is valid for the intervention of both substantial and procedural public policy.

22 A mere difference of legislation does not amount to an infringement of public policy.[65] Again, denying recognition on the sole ground that the law applied by the court of origin is different from the law of the forum amounts to a review of the first judgment as to its substance. It would also exceed the limits of the control highlighted before: only the result of the recognition or enforcement, not the judgment itself, is appreciated

[60] *Kropholler* Art. 34 note 14 (with numerous references to case law in footnote 29); *Geimer/Schütze* Art. 34 notes 30; *Leible*, in: *Rauscher* Art. 34 note 18. In France, stating that the position usually adopted about fraud should be generalized to all refusal grounds which could have been raised before the Court of origin: *Niboyet/Sinopoli*, Gaz.Pal. 2004 IV 31. About fraud, see *infra* Art. 34 note 27 (*Francq*).

[61] *Gaudemet-Tallon* p. 322.

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

[63] Cf. *supra* Art. 34 note 19 (*Francq*) in fine. Considering that the question raised had already been judged unfounded by the court of origin and could not therefore justify the application of article 27 (1) Brussels Convention: Hoge Raad, *Hupperichs v. Dorthu*, in *Kaye* p. 3277.

[64] *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 37; *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 30.

with regard to fundamental principles of the State addressed. The same is true for the interpretation of a convention to which both States would be parties: the stricter interpretation accepted in the country of origin does not offend public policy of the forum.[66] For the same reason, alleged errors which would have occurred in the application of the law, be it national or Community law, do not justify either the intervention of public policy. The contrary would amount to criticism of the legal reasoning held by the judge of origin. In this respect, the Court has stated that national and Community law are on equal footing in the Renault v. Maxicar case.

23 In Renault v. Maxicar, the litigation was between a French company, Renault, and an Italian Company, Maxicar, which was condemned in France for forgery. The Italian Company had manufactured and marketed spare parts for Renault cars in breach of exclusive intellectual property rights conferred on Renault by French Law. Italy did not have a law recognising exclusive intellectual property rights on spare parts of cars. Maxicar was condemned in France to pay damages. When Renault sought to enforce the judgment in Italy (five years later), Maxicar contended that enforcement would be a contradiction of public policy. Basically, Maxicar held that French law was contrary to two fundamental principles of Community law, the free circulation of goods and the prohibition of abuse of dominant position. Therefore the judgment applying such law should be denied enforcement on the ground of Italian public policy which is in tune with fundamental principles of Community law. The Court insisted on the well-established narrow interpretation of public policy: disparities between the law applied by the first court and that which would have been applied by the court seized with enforcement, or alleged errors in the application of the law do not justify the recourse to public policy. As a result, enforcement could not be refused "solely on the ground that national or Community law was misapplied".[67] The Court went on to say that "an error of law such *as that alleged in the main proceedings* does *not constitute* a *manifest breach of a rule of law regarded as essential* in the legal order of the State in which enforcement is sought" and that the judgment recognising the existence of intellectual property rights in body parts for cars could not be considered as contrary to public policy.[68] Therefore, the Court did not address further questions concerning the compatibility of French Law with the EC Treaty.

24 It is conclusive that the decision of the ECJ establishes the equality between national and Community law as component parts of public policy within the meaning of Art. 34 (1) of the Regulation. It also illustrates the principles mentioned earlier: only the result of enforcement should lead to infringement of fundamental principles of the State

[65] *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 37; *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 30; see for national application: BGH [2001] I.L.Pr. 425.

[66] OLG Hamburg [1996] I.L.Pr. 497.

[67] *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 33.

[68] *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 34.

where recognition or enforcement is sought, not the legal reasoning of the court which rendered the judgment. But what is more astonishing is the importance attributed by the Court to the principles of Community Law that were at stake, especially with regard to another decision rendered earlier, namely the Eco Swiss China decision.[69] In the latter case, the ECJ was asked to state whether Art. 81 of the EC Treaty was part of public policy which serves as a ground for annulment of arbitration awards in domestic law. Though Art. 34 (1) of the Regulation was not at stake, the ground provided for by the procedural law of the Netherlands was interpreted in a very similar way. The Court decided that "where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down by Art. 81".[70] Even though "annulment of or refusal to recognise an award should be possible only in exceptional circumstances", "according to Art. 3(g) of the EC Treaty (now, after amendment, Art. 3 (1) (g) EC), Art. 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market".[71] The confrontation of the two decisions gives the following results. On the one hand, Art. 81 belongs to public policy within the meaning of domestic law when it serves to oppose arbitral awards. On the other hand, it is not sure whether Art. 82 belongs to national conceptions of public policy when it serves to refuse enforcement of judgments rendered in other Member States. Indeed in the Renault Case, the Court states that the alleged misapplication of Art. 82 did not constitute a manifest breach of a rule of law regarded as essential in Italy.[72] As a result, the established misapplication of Art. 81 is contrary to public policy in one context, but the alleged misapplication of Art. 82 cannot be considered as infringing public policy in another context. The explanation of this apparent contradiction must therefore have something to do with the context. And maybe with the provisions at stake. Art. 34 (1) opposes the recognition of judgments rendered in Member States which present two advantages in comparison with arbitral awards. Firstly, they enjoy a presumption of regularity which could explain that the test of public policy should be even lighter in their case. Secondly, they can be submitted to the system of legal remedies organized by the Treaty, especially the preliminary ruling. Such a possibility is not offered in the framework of arbitration and this consideration seems to have puzzled the ECJ in the Eco Swiss Case.[73] From the comparison between Art. 81 and 82 of the EC Treaty, it comes out that agreements concluded in contradiction with the first one are automatically void, a specification not provided by the latter one. Would this explain why the infringement of Art. 81 EC

69 *Eco Swiss China Time Ltd. v. Benetton International NV*, (Case 126/97) ECR [1999] I-3055.

70 *Eco Swiss China Time Ltd. v. Benetton International NV*, (Case 126/97) ECR [1999] I-3055 para. 37.

71 *Eco Swiss China Time Ltd. v. Benetton International NV*, (Case 126/97) ECR [1999] I-3055 para. 35.

72 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973 para. 34.

73 *Eco Swiss China Time Ltd. v. Benetton International NV*, (Case 126/97) ECR [1999] I-3055 paras. 32-34.

would amount to a manifest breach of a fundamental principle, when the same is not true for Art. 82 EC ? The mutual trust accorded to judgments rendered in Member States and the system of legal remedies offered to the parties in order to raise their claims seems a more convincing explanation.

25 The mere difference between the PIL rules applied by the judge of origin and those which would have been applied by the judge seized with the recognition does not as such lead to an infringement of public policy. Art. 27 (4) Brussels Convention, by allowing the control of the applicable law for substantial issues excluded from the material scope of the Convention, led to thinking that such a control was excluded in other cases.[74] Truly enough, the *in concreto* appreciation is hardly reconcilable with the control of a conflict rule: it is the result of the enforcement that matters, not the legal reasoning of the foreign judge. Thus it is rather the outcome of the application of the law designated by the foreign conflict rule which might infringe the public policy of the requested State. According to some authors, it can never be dismissed that a foreign conflict rule, as such, may contradict the public policy of the State where recognition is sought.[75] Admitting that examples are difficult to find, they refer to the default of application of domestic rules presenting a particularly strong will of application, i.e. international mandatory rules or «lois de police», in particular national competition rules.[76] One author, dwelling upon arguments from the Ingmar decision,[77] considers that those rules excluding the application of the law of third States contained in consumer protection directives, such as Art. 6 of the Directive on unfair terms in consumer contract, would trigger the application of the public policy provisio when not respected.[78] Their position amounts to considering public policy at the recognition stage as a mean of enforcement of national «lois de police». This raises two questions. Firstly, even if public policy were to protect the application of the «lois de police» of the requested State, would it apply because of a contradiction with the content of the «lois de police», or with the applicability rule expressing the will of application of this rule to such a situation? The margin is so narrow between the content of the rule and the conditions of its applicability that they can hardly be differentiated. Therefore, it is difficult to say that public policy in this case would protect a rule of private international law. Second, it is not so sure that public policy and «lois de police» should be so easily confused.[79] At least, all «lois de police» cannot be said to embody principles belonging to international public policy. More fundamentally, the two concepts serve different purposes and cover different kinds of principles, those protected by public policy being more fundamental than those legislative policies protected by «lois de

74 Report *Jenard* p. 44; *Beraudo* para. 103.

75 *Contra Peter Schlosser* Art. 34-36 para. 3.

76 *Geimer/Schütze* Art. 34 note 18; *Leible*, in: *Rauscher* Art. 34 note 19; *Kropholler* Art. 34 notes 12 and 17.

77 *IngmarGB Ltd v. Eaton Leonard Technologies Inc*, (Case C-381/98) [2000] ECR I-9305.

78 *Ansgar Staudinger*, EuLF 2004, 273, 277.

79 Denying recourse to public policy for refusing recognition of a judgment which did not comply with a Belgian «loi de police»: Trib. civ. Liège Act. Dr. [1996] 80.

police».[80] Therefore a contradiction between public policy and a foreign conflict rule may be more realistic in a case of an infringement of fundamental principles not necessarily embodied in international mandatory rules, such as the principle of gender equality.

26 A delicate question concerns the fate of those national conflict rules which could be considered as contrary to Community law. This could occur in the case of a conflict rule infringing Art. 12 EC or constituting a barrier to trade or circulation of persons or services, for instance by reserving some advantages to its nationals.[81] Would such a conflict rule then automatically infringe public policy within the meaning of Art. 34 (1)? As the Renault v. Maxicar case shows, it depends on the status given by the ECJ to the Community principles disregarded by the national conflict rule. Indeed a conflict rule could very well contradict a principle of Community law without justifying recourse to public policy against a judgment having applied this conflict rule. The availability of a means of redress in the Member State of origin, such as the preliminary ruling, would certainly come into consideration, as it did in the Renault v. Maxicar case, and reduce the chances of success of an argument based on public policy at the stage of recognition or enforcement.

27 The possibility of invoking that the judgment was obtained by fraud in the State of origin[82] is also influenced by the availability of means of redress in this State. Though the question was at first debated, especially after the accession of Ireland and the United Kingdom, the Schlosser report confirmed that fraud would be controlled under the heading of public policy.[83] It also sets the limits of the argument: the judge of the requested State should always ask himself whether breach of its public policy still exists in view of the fact that proceedings for redress can be, or could have been, lodged in the courts of the State of origin against the judgment allegedly obtained by fraud. This position, once more, is coherent with the prohibition of review as to the substance. Of course, the judge seized with recognition will have to apprehend elements which might have been already submitted to the judge of origin.[84] This derives directly from the mere existence of a ground for refusal based on public policy. But the public policy

80 This does not mean that public policy and «lois de police» are without connection. For more detail cf. *Francq*, L'applicabilité du droit communautaire dérivé au regard des méthodes du droit international privé (2005) p. 35, 553, 607.

81 The ECJ has not yet condemned a conflict rule as such, but the argument has already been raised (*Jutta Johannes v. Hartmut Johannes*, (Case C-430/97) [1999] ECR I-3475) and since the Court controls any kind of legislation, conflict rules cannot as such be excluded from the scope of its control. The question is raised with regard to article 12 EC by *Leible*, in: *Rauscher* Art. 34 note 19.

82 This conception of fraud is to be distinguished from the «fraude à la loi» existing when factual elements have been manipulated in order to influence the designation of the applicable law. This conception of fraud is usually not considered as part of public policy under article 34 (1): *Béraudo* para. 109 in fine; *Gothot/Holleaux* note 260 in fine. See however CA Paris Clunet 116 (1989) 102 with note *André Huet*.

83 Report *Schlosser* para. 192.

84 *Gothot/Holleaux* para. 260.

argument cannot lead to a control of the findings of law and facts made by the judge of origin. As a result, when the fraud has already been alleged before the judge of origin, it is only in very exceptional cases that it could be accepted as a ground for refusing recognition.[85] When fraud has been discovered after the judgment was rendered and could not therefore be controlled by the judge of origin, the fate of the argument at the recognition stage will depend on the availability of means of redress in the first State. If such means exist and have not been exercised, recognition should not be refused.[86] If such means do not exist, recognition should be refused if fraud is proven before the judge of the requested State.[87] The delicate question comes when means of redress, available in the State of origin, have not been exercised yet but are still open. The judge seized with recognition is only allowed to stay proceedings for ordinary appeals (Art. 46).[88] If such recourses fall into the category of extraordinary means of redress, it seems that recognition must be granted.[89]

b) Procedural public policy

28 The question whether Art. 34 (1) could offer a legal basis for controlling the foreign procedure has been long debated. Both the text of Art. 34 and its traditional interpretation led to think that this kind of control should be excluded.[90] Firstly, it was sustained that Art. 34 (2) was the only provision devoted to the procedural aspects of the judgment: therefore a control of the foreign procedure could only take place within the narrow conditions set by the second point of Art. 34. Secondly, the ECJ insisted that Art. 34 (2) could only be relied on in exceptional circumstances "where the

85 *Béraudo* para. 107; *Gothot/Holleaux* para. 260. The same line of reasoning is basically followed in the United Kingdom: see *Interdesco S.A. v. Nullfire Ltd* [1992] 1 Lloyd's Rep. 180 and the summary in *Kaye* pp. 3268-3276.

86 This explains why the defendant against whom a default judgment was obtained cannot later claim that it was obtained by fraud: he had to raise the argument before the court of the State of origin: Cass. RCDIP 91 (2002), 573 with note *Ancel* = Clunet 130 (2003), 157 with note *André Huet* (a different position should be adopted if fraud was discovered after the expiration of all means of redress in the State of origin). In exceptional circumstances, fraud can be raised at the execution stage by a defendant who did not appeal. Such is the case of a defendant who renounced to introduce appeal because the plaintiff promised him that he would never execute a judgment only due to reassure his (potential) creditors: BGH IPRax 1987, 236, 219 with note *Grunsky*. If an appeal is lodged, the judge seized with the execution remains free to refuse to stay proceedings.

87 *Layton/Mercer* para. 26.024; *Béraudo* para. 110; *Gothot/Holleaux* para. 260; refusing to consider the argument of fraud because it would amount to review as to the substance.

88 See for the autonomous definition given by the ECJ of the notion of "ordinary" appeal: *Industrial Diamond Supplies v. Luigi Riva*, (Case 43/77) [1977] ECR 2175 para. 42: "any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement under the Convention and the lodging of which is bound, in the State in which judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal'".

89 *Gothot/Holleaux* para. 260.

90 *Droz* para. 489; *Gothot/Holleaux* paras. 271-273.

guarantees contained in the law of the State in which the judgment was given and in the Convention itself are insufficient to ensure that the defendant has an opportunity of arranging for his defence before the court in which judgment was given".[91] This statement combined with the restrictive interpretation of Art. 34 (1) suggested that the right to a fair hearing belongs only to the second point of Art. 34.[92] This position however left the defendant victim of gross violation of his right to a fair hearing, deprived of any protection when the limited conditions of Art. 34 (2) were not fulfilled.[93] The ECJ has settled the discussion in the Krombach case.[94] One can even wonder whether the obligation of controlling the foreign procedure outside the narrow conditions of Art. 34 (2) was not already imposed on Member State after the Pellegrini case decided by the ECHR.[95]

29 *Krombach v. Bamberski* represents an important step in the case law of the ECJ concerning the interpretation of the Brussels Convention and Regulation.[96] Mr Krombach was condemned by French Courts for violence resulting in the death of a young girl, Kalinka Bamberski. A civil claim was introduced by the father of the victim before the criminal courts whose jurisdiction was based on the French nationality of the victim. The second peculiarity of these proceedings was that since Mr Krombach refused to appear in person before the French criminal court though he was duly summoned to do so, he was reputed to be contemnor and as such prohibited to be represented by a lawyer. Mr. Bamberski later sought to enforce in Germany the civil judgment condemning Mr. Krombach for damages. Upon appeal from Mr. Krombach, the case ended up before the Bundesgerichtshof which referred two questions to the ECJ. The first was

91 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 para 7.

92 CA Paris Clunet 116 (1989) 100; Cass. Bull. civ. 1986 I n°. 149.

93 For more detail on the various positions defended in the doctrine, cf. *Gaudemet-Tallon* p. 324-325, Different authors had already sustained that a control of the foreign procedure should take place in application of Art. 34 (1). See amongst others *Sinopoli*, Le droit au procès équitable dans les rapports privés internationaux (thèse Paris I 2000).

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

95 *Pellegrini v. Italy*, (Case 30882/96) [2001] D.R. 480. The ECHR held that the Italian Court had breached Art. 6, §1 of the European Convention by authorizing enforcement of a judgment of the Roman Rota and holding that the applicant had had a right to a fair hearing before the ecclesiastical courts. The elements that the Italian courts should have controlled with regard to the foreign procedure go far beyond the procedural elements mentioned in Art. 34 (2) Brussels I Regulation. In the context of Brussels I, this control could only be performed under the heading of Art. 34 (1). Of course, the relationship between the interpretation of Community law (or the interpretation of Convention between Member States) and the interpretation of the ECHR would require more detailed comments. If an appeal is lodged, the judge seized with the execution remains free to refuse to stay proceedings: CA Versailles June 29, 2000, ECJ Website (fn. 47) n°. 2001/32.

96 The following paragraph refers to the provisions of the Regulation though the decision was concerned with the application of the Convention, namely Art. 27 (1) of the Convention and article II of the Protocol of 27 September 1968 on the interpretation Brussels Convention.

whether enforcement could be refused under Art. 34 (1) on the basis that the foreign court accepted jurisdiction on the basis of nationality of the victim, a ground similar to one prohibited by Art. 3 (2) of the Regulation; the second was whether public policy could be considered infringed when the defendant was denied the right to be defended by a lawyer during the proceedings in the State of origin. Without surprise, the ECJ confirmed that Art. 34 (1) cannot be used to control the jurisdiction of the Court of origin.[97] Concerning the second question, the Court asserted the general description of application of Art. 34 (1) mentioned earlier:[98] public policy requires the manifest infringement of a rule or principle considered as fundamental in the Member State where recognition or enforcement is sought.[99] According to the Court, there is no doubt that the right to be effectively defended constitutes one of those fundamental rights since it is considered as such by the constitutional traditions common to Member States, by the European Court of Human Rights and EC law.[100] Hence nothing can preclude the requested tribunal to consider that "the refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right".[101] As the ECJ underlines it, the decision implies that recourse to public policy is possible "in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR".[102] Art. 34 (2) has thereby definitively lost its monopoly with regard to the foreign procedure. All conditions considered by the ECHR as necessary for a fair legal process which could not be controlled under Art. 34 (2) will thus fall under the first point of the same provision.

30 The preceding considerations should not lead to conclude that the control of the foreign procedure under the Brussels Regulation is unlimited. The general limits affecting recourse to public policy explained earlier remain valid with regard to its procedural aspects.[103] In particular, a mere difference of procedure does not amount to

97 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 34.

98 *Supra* Art. 34 note 21 (*Francq*).

99 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 37.

100 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 paras 24-26, 38-39, 42.

101 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 40. Another point concerned the impact of Art. 61 Brussels I Regulation (Art. II of the Protocol of 27 September 1968 on the interpretation Brussels Convention) which expressly recognises the right for persons prosecuted for unintentional offence in a Member State to be represented by a lawyer when they do not appear in person. This provision could be construed as denying the right to be defended to persons prosecuted for intentional offence. Recalling that the right to a fair hearing is a fundamental principle of Community law, the ECJ refused such an interpretation and thus overruled previous case-law (*Criminal proceedings against Siegfried Ewald Rinkau*, [Case 157/80] [1981] ECR 1391 para. 12) on the argument that the aims of the Convention/regulation, i.e. facilitating the circulation of judgments, could not be reached by undermining such an important right (paras. 42-43).

102 *Dieter Krombach v. André Bamberski*, (Case C-7/98) [2000] ECR I-1935 para. 44.

103 *Supra* mainly Art. 34 notes 17-22 (*Francq*).

infringement of public policy. The control must be lead *in concreto*.[104] The residual function of Art. 34 (1) with regard to Art. 34 (2) should also be underlined again.[105]

31 National case law shows that the principle established in the Krombach decision was easily integrated in national legal orders. Domestic judges actually did not wait for the Krombach decision to integrate the requirement of Art. 6 ECHR in the control of public policy within the framework of Art. 34 (1) Brussels I Regulation.[106] Surprisingly, even among Member States, a control of the foreign procedure under the heading of public policy seems necessary. The case *Maronier v. Larmer* brought before the English Court of Appeal offers a perfect example of a situation where the right to a fair trial was not respected in the State of origin although the procedural requirements set by Art. 34 (2) were complied with.[107] Proceedings pending in the Netherlands against a dentist were reactivated after 12 years of suspension due to health problems and bankruptcy of the claimant. Though the defendant had been properly served at the origin of the proceedings, he had in the meanwhile moved to England and lost all contacts with the law firm which first represented him. The defendant was thus never informed of the reactivation of the proceedings although he had taken care of leaving his new address with the City Hall in Rotterdam and the Dutch association of Dentists. As a result, he was not represented during the second part of the proceedings at the issue of which he was condemned for damages and substantial interests. He was first notified of the proceedings when the claimant sought to enforce the decision in England, long after the period for lodging an appeal had expired. Relying on the Krombach decision, the English court of appeal decided that the defendant did not receive a fair trial in the Netherlands, pursuant to the requirement under Art. 6 of the Human Rights Convention and refused enforcement. This kind of rather unusual situation shows that Art. 34 (2) does not always provide a sufficient protection to the defendant with regard to the right to a fair trial.[108] National case law generally respects the exceptional character of the procedural aspect of public policy. The French and German Supreme courts did not hesitate to grant enforcement when the defendant did not prove a manifest violation of his right to be heard and underlined the active part that the defendant should take during the proceedings in the State of origin to present his defence.[109] In particular, the

104 *Those conditions were already respected in the interpretation of the procedural aspect of public policy under domestic law or bilateral conventions in various Member States. See for instance for Germany: BGHZ 48, 327; BGH NJW 1990, 2201; BGHZ 118, 312; for the Netherlands: Hoge Raad NJ 1987 Nr. 481 with note Schultsz.*

105 *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, (Case C-78/95) [1996] ECR I-4943 para. 23. *Supra* Art. 34 note 19 (*Francq*).

106 For instance: Cass. [2000] I.L.Pr. 763 (excessive sums fixed for costs due from the plaintiff in a defamation action, which was not even considered on the merits after he could not pay the significant sum imposed as a security for costs, constitute an obstacle to the plaintiff's access to justice contrary to public policy; the court refers to Art. 6 of the ECHR and Art. 27 (1) Brussels Convention).

107 *W. Maronier v. Bryan Larmer* [2002] I.L.Pr. 685 (C.A., per Lord *Phillips of Worth Matravers* M.R.).

108 The English Court of Appeal stated that it had no information on how Dutch procedural law could allow reactivation after 12 years, without a fresh service to be effected on the defendant (*W. Maronier v. Bryan Larmer* [2002] I.L.Pr. 685 para. 36 [C.A., per Lord *Phillips of Worth Matravers* M.R.]).

omission to introduce appeal in the State of origin, without any convincing explanation, strongly diminishes the chances of raising the public policy ground for refusal in the requested State.[110]

32 Some national procedural peculiarities raise regular doubts in other Member States with regard to public policy. Antisuit and Mareva injunctions in particular have attracted the attention of continental courts.[111] The ECJ recently settled the discussion concerning Antisuit injunctions by declaring them incompatible with the Brussels Convention/Regulation on the ground that injunctions prohibiting one party from bringing an action before the Court of another Member State inevitably constitutes an interference with the jurisdiction of that foreign court.[112] Courts of other Member States would thus legitimately refuse enforcement of such injunctions on the ground of public policy. On the contrary, a Mareva injunction has been held by the French Cour de cassation as constituting a protective measure of a civil nature which does not prejudice any of the debtor's fundamental rights, nor the foreign sovereignty and as such, does not trigger the application of Art. 34 (1).[113] In France, the lack of motiva-

109 Cass. [2005] I.L.Pr. 266 (defendant who had been properly served but did not enter an appearance and was not represented, did not present any elements that prevented him to take part in the original proceedings or to appeal against the English injunction); BGH [2003] I.L.Pr. 523 (although the translation of summons delivered on the German defendant was erroneous, he could at first glance have noticed that the date of the hearing given in the translation did not match the date given in the summons and make further investigation; the basic right to be heard gives the defendant only a reasonable opportunity to take part in the judicial proceedings but does not exclude the defendant's own obligation to cooperate as soon as he is informed of the proceedings instituted against him abroad). The active role that should be taken by the claimant to comply with the defendant's right to be heard has also been underlined: OLG Düsseldorf [2002] I.L.Pr. 71 (claimant must prove that he has done what is necessary to find the plaintiff's address. Otherwise a service by publication in newspapers, though considered legitimate under Dutch law, would be considered as infringing public policy in Germany).

110 *Citibank N.A. v. Rafidian Bank and another* [2003] I.L.Pr. 758 (Q.B.D., *Tugendhat* J.) (two Iraqi State banks were condemned in the Netherlands to pay a substantial debt to Citibank. When Citibank obtained an order for enforcement in England, the defendants failed to appeal within the regular time-limit but applied for its extension on the ground that public policy had been violated in the Netherlands. They claimed that they had been denied access to legal representation because, due to sanctions imposed on Iraq between 1990 and 2003, their assets were frozen. The extension of this time-limit depended a.o. on the chance of success of the appeal against enforcement. The English High Court found that the case of the Iraqi defendant was not strong enough. Indeed at the time of proceedings in the State of origin, the Iraqi banks could have applied for release of their funds and did not do so. Further, no explanation was provided of what were the steps taken to have the Dutch judgment set aside and why they were unsuccessful.)

111 See for instance the facts and legal questions raised in: *Philip Alexander Securities and Futures Limited v. Bamberger, Theele, Kefer, Riedel, Franz and Gilhaus* [1997] I.L.Pr. 73 (Q.B.D., *Waller* J.).

112 *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd. and Changepoint SA* (Case C-159/02), [2004] ECR I-3565 paras. 27, 31.

113 Cass. [2005] I.L.Pr. 266.

tion of foreign judgments is systematically considered as an infringement of public policy since it renders it impossible for the judge to control whether conditions established by the Brussels Convention/Regulation are met in allowing recognition or enforcement.[114] The only mean of redress is to produce documents equivalent to the failing motivation. This interpretation of public policy has been opposed to Belgian and German judgments.[115]

4. National Case Law and future developments

33 National case law is marked by a rather restrictive attitude. Examples show that an argument based on public policy, though often raised, is generally refused. Concerning the procedural aspect of public policy, neither the lack of indication on the possible means of appeal,[116] nor the condemnation of the defendant to pay part of the legal costs paid by the claimant to his lawyers,[117] nor the loss of a stage of appeal for non-compliance with the challenged decision,[118] nor the allocation of interim relief much stricter than those found under domestic law,[119] nor the possibility of curing an irregularity which affected the proceedings at its beginning[120] have been considered as contrary to Art. 34 (1). Concerning the substantive aspect of public policy, a judgment rendered in breach of an arbitration agreement,[121] the use of method for calculating lawyers' fees or damages different or unknown in the requested State[122] and the refusal of set-off[123] have been considered to comply with Art. 34 (1).

34 As stated before, public policy has rather rarely been considered infringed.[124] It can be deduced *a contrario* from different French decisions that a judgment establishing the paternity and condemning the father to pay maintenance would be contrary to public policy if it were only based on the allegations of the mother.[125] Italian Public Policy was considered infringed by a French decision which obliged one party to fulfil a distributorship agreement which had not been authorised under Italian law.[126]

114 The solution is constant since: Cass. Clunet 106 (1979), 280 with note *Holleaux*. The opposite solution has been adopted in Italy, as long as the procedure in the State of origin was contradictory: Cassaz. January 13, 1995, ECJ Website n° 1997/14.
115 *Gaudemet-Tallon* p. 327 para. 405 in fine.
116 Cass. RCDIP 86 (1997), 85 with note *Muir Watt*.
117 Hof Gent Pas. belge 1989, III 162.
118 Cassaz. Giust. Civ. [1999] I 3009-3012 with note *Simone*.
119 OLG Hamm RIW 1985, 973 with note *Linke*.
120 CA Paris RCDIP 84 (1995), 573 with note *Kessedijan*.
121 *Zellner v. Philipp Alexander Securities and Futures Limited* [1997] I.L.Pr. 730 (Q.B.D.); Trib.civ. Liège Act. Dr. 1996, 80.
122 BGHZ 75, 167; Cass. RCDIP 74 (1985), 131 with note *Mezger*.
123 Trib. civ. Bruxelles Pas. belge 1987, III, 80.
124 For a few other examples, cf. *Layton/Mercer* p. 890, n° 26.023; *Béraudo* note 94-100.
125 Cass. D. 1990 IR 108.
126 *See Layton/Mercer* para. 26.023 fn. 8.

35 It has been stated earlier that the ECJ establishes the limits within which national conceptions of public policy might be raised. Its influence on the content of the notion should not be underestimated either. By setting limits to national conceptions of public policy, it progressively identifies what might legitimately be considered as fundamental principles belonging to public policy. By defining what belongs to "Community public policy", which is integrated in the national conceptions for the application of Art. 34 (1), the Court also generates the content of public policy. As a result, a progressive harmonisation of the national conceptions might be expected in the future. The chances for such harmonisation to take place are increased by the fact that the ECJ will be seized with the interpretation of the same notion under different Regulations, namely Brussels II and Insolvency Regulations. For the sake of coherence in the Community legal order, common guidelines of interpretation will have to be followed. Those guidelines will in turn influence national case law[127] and encourage similar interpretations of public policy also outside the scope of the Regulations. Indeed it will be difficult for national tribunals to hold completely different interpretations of such a notion depending upon the legal basis under which it is raised.

IV. Art. 34 (2): Protection of the defaulting defendant

36 The second refusal ground enumerated by Art. 34 is the only one aiming specifically at protecting the right of the defendant to a fair hearing at the stage of recognition or enforcement. If Art. 34 (1) may sometimes protect the rights of the defendant with regard to procedural aspects, it is only in exceptional circumstances and in a subsidiary way, i.e. when the conditions set by Art. 34 (2) are not met.[128] The latter provision, on the contrary, is entirely dedicated to the circumstances enabling the defendant to organize for his defence before the court of origin. This refusal ground is nevertheless submitted to rather strict conditions of application (2 designates here the title 2) (2): the judgment was rendered in default of appearance (2. a); the "defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence" (2. b); and he did not fail "to commence proceedings to challenge the judgment when it was possible for him to do so" (2. c). Before analysing those conditions into detail, a few concepts need to be clarified (1).

37 At an earlier stage of the proceedings, another provision protects the defendant from a decision being taken against him by surprise. Art. 34 (2) should indeed be read in relation with Art. 26 which imposes specific duties on the adjudicating court when the defendant does not appear. In particular, this court should be convinced that the defendant has been able to receive the document instituting the proceedings in sufficient time to arrange for his defence, or at least that all necessary steps have been taken to this end. Reference is made to regulation 1348/2000 on the Service in Member

127 See, for a national decision relying on the Krombach decision in order to construe the notion of public policy under the Insolvency Regulation: *In the matter of Eurofoods IFSC Limited* [2005] I.L.Pr. 37 (S.C.).
128 *Supra* Art. 34 notes 19, 28-30 (*Francq*).

States and to the Hague Convention of 15 November 1965 on Service Abroad which both contain provisions on the protection, by the adjudicating court, of the defendant who does not enter an appearance. Art. 26 ensures that special attention is given to the situation of the defendant before the adoption of a default judgment and the delivery of the certificate mentioned in Art. 53.[129] This helps to understand why the conditions of application of Art. 34 (2) are so strict: a similar control has already been exercised before the adoption of the decision. Two points, however, should be made with regard to the relationship between Art. 34 (2) and Art. 26. Firstly, Art. 26 protects only the defendant domiciled in a Member State, whereas the provision of Art. 34 will concern also the defendant domiciled in third States, since chapter III is applicable to all decisions rendered in a Member State independent, contrary to chapter II, on the location of the defendant's domicile.[130] Secondly, the two provisions apply independently. As the ECJ puts it, "jurisdiction to determine whether the document introducing the proceedings was properly served was conferred both on the court of the original State and on the court of the State in which enforcement is sought".[131] The court seized with recognition or enforcement is thus not bound by the appreciations of the judge of origin under Art. 26 and may come to opposite conclusions.[132]

1. Definitions

a) Document instituting the proceedings or equivalent document

38 The second condition of Art. 34 (2) focuses on "the document which instituted the proceedings" or according to the enlargement of the concept due to the accession of the United Kingdom and Ireland, "an equivalent document".[133] The ECJ never gave a formal definition of that concept but rather a functional one, which helps to identify the relevant document through its function independently of its designation in the foreign legal order. According to the ECJ, the term "document which instituted the proceedings or … equivalent document" means "the document or documents which

129 Similarly, see Art. 18 and Art. 41, (2) (a) Regulation No2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, OJ 2003 L 338/1.

130 Cf. Art. 4 (1) and Art. 32.

131 *Pendy Plastic Products BV v. Pluspunkt Handelsgesellschaft mbH*, (Case 228/81) [1982] ECR 2723 para. 13.

132 In the *Pendy Plastic* case for instance, a certificate indicating that the defendant had not been served, had been issued according to the Provisions of the Hague Convention on Service, but the Dutch adjudicating court had been satisfied that all necessary steps to serve the defendant in sufficient time had been taken, after the claimant produced an extract from the German commercial register and a communication from the local German court showing that according to the files in its possession the defendant's address was the one where service was attempted. However the enforcing court found that the plaintiff had not proved to have taken the necessary measures to discover the defendant's address since the commercial register only mentions the town where the company is established and not its full address. In the circumstances of the case, the defendant had not changed town and according to the enforcing court, the plaintiff should have looked for his new address in that town.

133 Report *Schlosser* p. 125, 128.

must be duly and in due time served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin".[134] Two criteria can be deduced from this definition: the document must necessarily be served before an enforceable judgment can be obtained, and it must enable the defendant to decide whether to defend the action. It is actually due to call on the defendant to prepare his defence.

39 This definition explains why documents served later in the proceedings[135] or documents instituting purely unilateral proceedings[136] are not considered to be documents instituting the proceedings. In the first case, the document is not relevant any more to the decision whether the defendant should defend the case.[137] In the second case, an enforceable judgment can be obtained against the defendant without giving him a chance to assert his rights during the proceedings.[138]

40 However, proceedings which are initially unilateral can be transformed into adversary proceedings if the defendant takes the necessary steps, therefore after having been informed of the initiation of the proceedings. If he fails to do so, the claimant may obtain an enforceable title against him. In this case, the act which informs the defendant of the beginning of the proceedings and thus gives him the opportunity of appearing in court and preparing his defence is considered as the document instituting the proceedings. The ECJ has followed these lines of reasoning about the order for payment („Zahlungsbefehl" at the time of the decision, now „Mahnbescheid") which is delivered by the court after a purely unilateral proceeding, but whose service enables the plaintiff to obtain an enforceable decision if the defendant does not raise any objection which would transform the procedure into a contradictory one.[139] On the

134 *Hengst Import BV v. Anna Maria Campese*, (Case C-474/93) [1995] ECR I-2113 para. 19.

135 Cass. [2001] I.L.Pr. 717 (Due service of the judgment is not required by Art. 27 (2) Brussels Convention); Epheteio Thessaloniki [2002] I.L.Pr. 165 (The Brussels Convention requires only service of the document instituting the proceedings; the defendant must not be summoned at every stage of the proceedings); *Kropholler* Art. 34 note 31 (citing about the extension of the claim: BGH IPRax 2001, 230, 195 with note *Haas*).

136 *Bernard Denilauler v. SNC Couchet Frères*, (Case 125/79) [1980] ECR 1553 para. 17: excluding from the *scope* of title III Brussels Convention "measures ordered by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party".

137 *Kropholler* Art. 34 note 31.

138 *Gothot/Holleaux* para. 263.

139 *Peter Klomps v. Karl Michel*, (Case C-166/80) [1981] ECR 1593 paras. 9, 11. See already CA Paris RCDIP 69 (1980), 124 with note *Mezger*. About the Mahnbescheid: Cass. JCP 1989, jurisp. 359; TS [2003] I.L.Pr. 453 (refusing enforcement of a German enforcement order handed down in a summary proceeding (Mahnverfahren), because no evidence was given with respect to the service of the payment order, rendering it impossible for the Spanish court to control whether it fulfilled the conditions of article 27 (2) Brussels Convention). On the similarity with the appeal against a default judgment ("opposition") raised against order for payment under French Law: *Gothot/Holleaux* note 263 in fine.

contrary, the enforcement order („Vollstreckungsbefehl“, delivered when the order for payment has not been opposed by the defendant) which is in itself enforceable, cannot be considered as a "document instituting the proceedings",[140] even though the defendant holds the right of lodging an objection which will give him access to an adversary proceeding, because such a document must reach the defendant before an enforceable title is obtained. According to Italian civil procedural law, an order for payment («decreto ingiuntivo») must be served on the defendant together with the application for such order, so as to have a period during which the defendant may oppose the order and at the end of which the claimant may obtain an enforceable title if the defendant has not raised any objection. The decreto ingiuntivo, together with its application, are to be considered documents instituting the proceedings, as it is their joint service which enables the defendant to assert his rights and marks the start of the period of time at the end of which the enforceable judgment can be obtained.[141] An order provisionally limiting the liability of a shipowner under the 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships (which refers for procedural questions to the law of the State where the fund is constituted) is also considered as a document that is equivalent to a document instituting the proceedings:[142] although in the case submitted to the ECJ, the order was provisionally adopted at the end of a unilateral procedure, it was notified to the party requesting damages who then had the opportunity of submitting its claim and to transform the procedure into a contradictory one.

41 The two criteria used to identify the document instituting the proceedings seem to have some implications with regard to its content. In order to enable the defendant to assert his rights and to decide whether to defend the action, the document should provide him with some information concerning the most important elements of the claim.[143] This is indeed what is indicated by the ECJ when it states that Art. 34 (2) "may not be relied upon where the defendant appeared, at least if he was notified of the elements of the claim and had the opportunity to arrange for his defence".[144] Obviously he does not need a detailed information about the exact amount of the claim and arguments of the plaintiff. Though Art. 34 (2) does not state this requirement as such,

140 *Peter Klomps v. Karl Michel*, (Case C-166/80) [1981] ECR 1593 paras. 9, 11.

141 *Hengst Import BV v. Anna Maria Campese*, (Case C-474/93) [1995] ECR I-2113 para. 20. The defendant needs to read the two documents together in order to understand the basic elements of the claim and whether the judge has granted the order which indicates that the plaintiff has good chances of success (ibid note 21). For a decision which either contradicts the *Hengst* case law, or deals with one the rare instance in which the "decreto ingiuntivo" is enforceable as such, cf. Cass. Bull. civ. 1994 I n° 176, p. 130.

142 *Maersk Olie & Gas A / S v. Firma M. de Haan en W. de Boer*, (Case 39/02) [2004] ECR I-9657 para. 59.

143 *Leible*, in: *Rauscher* Art. 34 note 28; *Kropholler* Art. 34 note 30. *ASML Netherlands BV v. Semiconductor Industry Services (SEMIS)*, (Case C-283/05), nyr para. 35: "In order for the defendant to have the opportunity to bring proceedings enabling him to assert his reights, (…), he should be able to acquaint himself with grounds of the default judgment in order to challenge them effectively."

144 *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, (Case C-172/91) [1993] ECR I-1963 para. 39.

it derives not only from the functional definition given to the term "document instituting the proceedings" but also from the condition that the defendant should have received this document "in such a way as to enable him to arrange for his defence".

b) Defendant

42 For the purpose of Art. 34 (2), the notion of defendant is to be understood in broader terms than in Art. 26. Indeed it derives from the scope of application of Chapter III and from the formulation of Art. 34 that this provision benefits defendants domiciled in third State, as well as defendants domiciled in the State where the litigation as to the merits occurred. The latter situation, which is initially purely internal, has been specially addressed by the ECJ in the case *Debaecker*.[145]

c) Judgment

43 Only judgments which are likely to be adopted at the end of contradictory proceedings fall into the scope of Art. 34 (2).[146] Moreover, Art. 34 (2) apparently concerns only those judgments adopted in a litigation which was initiated by a specific document. As a result, accessory rulings, such as those on costs, are not treated as judgments for the purpose of this provision.[147]

2. Conditions of application

a) Judgment by default

44 The first condition of application of the refusal ground provided for by Art. 34 (2) is that the judgment must have been adopted in default of appearance of the defendant. The attitude of the defendant is thus relevant in order to decide whether he failed to appear. In this respect, the technical terms of national procedural law (and thus the formal qualification of the judgment under national law) are of no importance. The term "default of appearance" must be interpreted autonomously and the ECJ has provided national courts with general guidelines. As *Kropholler* summarizes it, with respect to the aim of Art. 34 (2), the defendant cannot be considered as having failed to appear as soon as he or his counsel presented arguments before the court from which it can be deduced that he had actual knowledge of the proceedings and enjoyed enough time to prepare his defence.[148]

145 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, (Case 49/84) [1985] ECR 1779 para. 13.

146 *Supra* Art. 34 notes 39-40 (*Francq*).

147 *Kropholler* Art. 34 para. 26 (raising the question whether the title obtained by the lawyer against his own client should be considered as accessory).

148 *Kropholler* Art. 34 para. 27. This conception of the term "appearance" seems to correspond best to the indications given by the ECJ, see *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, (Case C-172/91) [1993] ECR I-1963 para. 39. For a broader conception of the situations in which the defendant made an appearance: *Geimer/Schütze* Art. 34 note 112.

45 The clearest application of this general criterion is provided by the Hendrikman case.[149] The litigation as to the merits concerned an unpaid invoice for stationery ordered in the name of Mr and Mrs Hendrikman by two persons who apparently did not have the authority to do so. Mr and Mrs Hendrikman had not been aware of the proceedings and were represented by lawyers instructed by the same two persons, again without their authority. The ECJ decided that "where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seized on his behalf but without his authority (...), that person must be regarded as a defendant in default of appearance",[150] even though under national procedural law the judgment would not be considered as rendered by default. Indeed in the present case, the defendants were not in a position to actually prepare their defence. The same cannot be said about the defendant in a civil action joined to criminal proceedings, who appeared at the criminal proceedings, not personally but through a counsel he appointed, and defended the criminal case without presenting any plea concerning the civil action for damages.[151] The defendant was aware of the civil-law claim made against him in the context of the civil proceedings and is therefore regarded as having appeared at the "proceedings taken as a whole".[152] In order for the judgment to be given in default of appearance, the defendant must expressly decline to appear in the civil action. Other behaviours are not considered as an appearance in the proceedings. For instance, when the defendant solely contested the jurisdiction of the court which issued a decision at the term of unilateral proceedings (which could have been transformed into contradictory proceedings, had the defendant submitted his claim), he cannot be considered as having entered an appearance.[153] The situation of the defendant who appeared simply in order to contest the way he was informed of the proceedings (for instance, by raising that he was not allowed enough time to prepare for his defence or that the document instituting the proceedings suffers deficiencies which deprived him of the exercise of his right to be heard) is controversial. In Germany, the case-law and the doctrine are divided on this point.[154] Considering that the defendant did not appear when his intervention was limited to the challenge of the service effected upon him encourages defendants to systematically contest the service of the document institut-

149 *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, (Case 78/95) [1996] ECR I-4943.

150 *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, (Case 78/95) [1996] ECR I-4943 para. 18.

151 *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, (Case C-172/91) [1993] ECR I-1963 para. 44.

152 *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, (Case C-172/91) [1993] ECR I-1963 para. 41.

153 *Maersk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, (Case C-39/02) [2004] ECR I-9657 para. 57.

154 Considering the judgment is given in default of appearance: OLG Stuttgart IPRspr. 1983 Nr. 173; OLG Köln IPRax 1991, 114 with note *Linke*; *Kropholler* Art. 34 note 27; *Tschauner*, in: *Bülow/Böckstiegel/Geimer/ Schütze* Art. 34 note 45; considering there is no default of appearance: *Leible*, in: *Rauscher* Art. 34 note 37 (and the case law cited fn. 142); *Geimer/Schütze* Art. 34 note 112; *Peter Schlosser* Art. 34-36 note 20 (citing case-law backing both positions).

ing the proceedings. But a defendant who wants to avail himself of Art. 34 (2) will do so at the latest in appeal since he has to use all possibilities to challenge the judgment in the State where it was rendered. Considering that the defendant appeared when his intervention was limited to the challenge of the service effected upon him means that there will be very few instances where the defendant will manage to meet the two conditions of Art. 34 (2) depending on his behaviour (making no appearance and having used the existing means of redress), when he is actually confronted with a situation in which he was unable to prepare his defence. Besides those opportunity arguments, the ECJ seems to favour a rather broad conception of the term appearance, indicating that in such a situation the judgment would be considered as a default judgment.[155]

b) Service effected in sufficient time and in such a way as to enable the defendant to prepare his defence

46 The second condition is actually twofold, even though its two aspects are sometimes difficult to distinguish from one another. The document instituting the proceedings must reach the defendant not only in sufficient time to enable him to prepare his defence (aa), but also in such a way as to allow him this possibility (bb). The exact reach of the second aspect, introduced when the Brussels Convention was transformed into a Regulation, is uncertain at this stage with only one ruling of interpretation of the ECJ on this point. The introduction of this condition corresponds to the removal of the condition concerning the regularity of the service. Together with the third condition (concerning the obligation for the defendant to challenge the judgment in its State of origin), it constitutes a reaction to the former case law of the ECJ which considered that recognition or enforcement should be refused where service was not duly effected even when the defendant became aware of the proceedings in sufficient time to organize his defence.[156] The aim of these modifications is to ensure that "a mere formal irregularity in the service will not debar recognition or enforcement if it has not prevented the debtor from arranging for his defence".[157] The focus is thus placed on the actual possibility for the defendant to arrange for his defence. This will serve us as a guideline in the interpretation of the remaining conditions.

aa) A condition of time

47 Determining whether the defendant received the document instituting the proceedings in sufficient time to organise his defence raises two questions: when does the limitation period begin and how long should it be? The beginning and the duration of the limitation period require separate analyses.

155 *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, (Case C-172/91) [1993] ECR I-1963 para. 39: Art. 34 (2) "may not be relied upon where the dependant appeared *at least if* he was notified of the elements of the claim and *had the opportunity to arrange his defence*". This statement suggests that where the defendant had no opportunity to arrange his defence, he cannot be considered as having appeared.

156 *Isabelle Lancray SA v. Peters und Sickert KG*, (Case C-305/88) [1990] ECR I-2725 para. 22; *Minalmet GmbH v. Brandeis Ltd.*, (Case C-123/91) [1992] ECR I-5661 paras. 14, 15.

157 Commission Proposal COM (1999) 348 final, p. 23.

48 – Beginning – It is usually considered that the period of time necessary for the defendant to arrange for his defence starts running "from the date on which service was duly effected" upon him, "at his habitual residence or elsewhere".[158] What is critical is thus the moment when the defendant receives or is supposed to receive the document instituting the proceedings and to become aware of them, not the moment when all formalities are completed at the tribunal.[159] Despite the abolition of the term "duly" from the wording of Art. 34 (2), the regularity of the service has thus not lost all relevance. In the case of a service duly effected, one can proceed from the general assumption that the period allowed to the defendant for organizing his defence starts running on the date of the delivery of the documents. It is important for the claimant to be able to rely on this general rule. Otherwise, even when doing everything correctly, he would be totally submitted to the arbitrary behaviour of the defendant who could for instance chose to disappear without leaving any address. Accordingly, the claimant does not have to prove that "the document which instituted the proceedings was actually brought to the knowledge of the defendant".[160] The judge can thus consider that service was effected on time for the defendant to organize his defence even if he never became aware of the proceedings, simply because service was duly effected.[161]

49 If the actual knowledge of the proceedings is not required in the chief of the defendant, it remains the ultimate goal of various provisions of the Regulation – mainly Art. 26 and 34 (2) – to ensure that the defendant was put in a position to prepare his defence and therefore did receive the documents instituting the proceedings.[162] As a consequence, even though it is not expressly stated in the Regulation, the construction of Art. 34 (2) reveals that the claimant is some how expected, though not obliged, to do everything he can to make sure that the documents reach the defendant.[163] The judge seized with recognition remains thus free to appreciate whether, in a particular case, there are "exceptional circumstances which warrant the conclusion that although service was duly effected, it was, however, inadequate for the purposes of enabling the defendant to take steps to arrange for his defence".[164] In this regard he may take all

158 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 para. 19.
159 *Leible*, in: *Rauscher* Art. 34 note 36. Cf. CA Reims Clunet 106 (1979) with note *Holleaux*.
160 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 para. 19.
161 CA Luxembourg Pas. lux. 2000, 227-234, ECJ Website n° 2001/47 (that the defendant did not know of the proceedings is no sufficient ground for refusal when service was duly effected).
162 Before the entry into force of the Brussels I Regulation, the actual knowledge of the defendant concerning the proceedings engaged against him was already considered by French appeal courts as more important than the formal regularity of service: *Niboyet/Sinopoli*, Gaz. Pal. 2004 IV 28.
163 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, (Case 49/84) [1985] ECR 1779 paras 27 and 28. The ECJ (para. 28) states that the claimant has no obligation to take further steps to inform the defendant of the pending action as a result of circumstances which arose after service was effected. But those steps would be taken into consideration in assessing whether service was made in sufficient time and notification to the defendant's new address, for instance, prevents the claimant of a refusal judgment at the stage of recognition (paras. 27 *in fine* and 28). This implies that the defendant should, if he wants to avoid bad surprises, take further steps in case there is any doubt with the service effected.

circumstances of the case into account, including the nature of the relationship between the parties and circumstances which arose after service was duly effected. For instance, between professionals, the absence of the defendant at the time of the delivery of service at the place where he carries his business activities does not deprive him of his right to be heard.[165] The appraisal of those circumstances must be lead *in concreto* independently of the procedural law of the adjudicating or enforcing court. This explains why the ECJ may identify circumstances which could be taken into account in assessing whether the service was effected in sufficient time but may not establish a hierarchy between them or measure their impact in the case at hand. In the *Debaecker* case for instance, the Court reassured the national judge that the fact that the plaintiff learned of the defendant's new address after service was duly effected, and the fact that the defendant was responsible for not having been reached by the documents (since he left without giving his new address) were circumstances to be taken into account in assessing whether service was effected in sufficient time.[166] But the final appraisal of those circumstances remains the task of the judge seized with recognition or enforcement, as none of them leads to an automatic conclusion with respect to the time condition.[167]

50 From those considerations, it derives that a distinction could be drawn between regular and substituted service. In the case of substituted service, such as the "remise au parquet" or the posting of the document on the court's notice board,[168] the defendant has indeed far less of a chance of being actually aware of the proceedings. The claimant (or the judge seized with the litigation as to the merits) should thus take care of adopting all possible additional steps to reach the defendant and count that the period of time necessary to enable him to prepare his defence starts running only after the completion of those additional steps.[169] On the other hand, in the case of regular

164 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 para. 19.
165 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 para. 20.
166 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, (Case 49/84) [1985] ECR 1779 para. 33.
167 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, (Case 49/84) [1985] ECR 1779 para. 32.
168 Refusing recognition because the defendant was served by posting of the document on the court's notice board and had no knowledge of the proceedings engaged against him in Germany: CA Colmar 5.4.2001, n.r., cited in: *Niboyet/Sinopoli*, Gaz. Pal. 2004 IV 26; stating that as a general rule, in the absence of any special circumstances, the posting of documents instituting the proceedings on the court's notice board cannot satisfy the condition of service in sufficient time: OGH RdW 2001, 154; ECJ Website, n° 2001/16 (in the circumstances of the case, the court analyses whether the defendant should have known that proceedings were likely to be engaged against him and therefore left an address with the court or the claimant). This judgment adopted before the entry into force of the Regulation, actually anticipates the second aspect of the condition about the delivery of service, i.e. that it must reach the defendant in a way that enables him to prepare his defence.
169 *Gaudemet-Tallon* p. 335-336 para. 415; *Gothot/Holleaux* para. 268. Such additional steps are mentioned in Art. 19 (2), c) of the Regulation 1348/2000 on Service in the Member States and Art. 15, second line of paragraph.c. of the 1965 Hague Convention on Service Abroad. In both cases, where

service, the defendant has greater chances of being aware of the proceedings and the general assumption mentioned above could be more confidently relied upon.

51 – Duration – From the date on which the defendant is (or is supposed to be) informed of the proceedings, a period of time long enough to enable him to prepare for his defence should elapse. This period covers all the time during which the defendant has the possibility of stating his arguments, i.e. the time running between the beginning of the limitation period (described above) and the adoption of an enforceable decision.[170] What matters is the possibility given the defendant to defend his case from the beginning of the proceedings, not the possibility of contesting an enforceable decision already adopted after a unilateral procedure.[171] The court seized with recognition will thus consider the time elapsed between the service of the writ of summons and the first hearing[172] or the time running until the issue of a default judgment, if a valid notice of appearance entered at any time before the issue of that judgment will actually prevent its adoption, even though this period exceeds the time allowed by the court for appearance.[173]

52 Whether this period of time is sufficient to enable the defendant to organise for his defence is a question of facts left to the determination of the court seized with the recognition. This control is lead *in concreto* with respect to all the factual and legal peculiarities of the case at hand and independently of the requirement of the law applied to the service or the law of the State where recognition is requested and of the opinion of the adjudicating court.[174] National case law reflects the high diversity of factual settings and thus of the assessment of the necessary duration of the time allowed the defendant to organize his defence.[175] Recently for instance, a German Court decided that a period of nine days between the writ and the first hearing was too short for the defendant to obtain a translation of the writ and instruct a lawyer abroad.[176] Other German rulings were satisfied with a period of 7 days considering the special circumstances of the case or the narrow links between the defendant and the State of the adjudicating court.[177] When the document instituting the proceedings have reached the defendant 5 days after the first hearing, the condition of time set by Art. 34 (2) is of course not respected.[178]

bb) A condition concerning the circumstances of service

53 As stated above, the document instituting the proceedings must not only reach the defendant in sufficient time but also in such a way as to enable him to prepare his defence. The two aspects of the condition concerning the considerations that should enable the defendant to prepare his defence are difficult to distinguish from each other: the circumstances surrounding the delivery of the document instituting the proceedings will often determine whether the defendant received it in sufficient time to prepare his defence. For instance, if the documents are delivered in a foreign language, the judge seized with recognition will naturally tend to consider that a longer period of time is necessary for the defendant to organize his defence.[179] The circumstances of the service were thus already the object of a certain control before being singled out as an autonomous condition or a specific aspect of the condition concerning the service by the Brussels I Regulation.[180]

54 This condition should not be confused with the formal regularity of service, which is not as such required. However, since the formal conditions of a valid service are due to ensure that the defendant is put in a situation allowing him to prepare his defence, the regularity of service will of course influence the appreciation made of its circumstances.

---

no certificate of service or delivery is produced, the court will consider whether a period of at least six months has elapsed since the transmission of the documents.

170 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 paras. 10 and 11.

171 *Peter Klomps v. Karl Michel*, (Case 166/80) [1981] ECR 1593 paras. 10 and 11, *Minalmet GmbH v. Brandeis Ltd*, (Case C-123/91) [1992] ECR I-5661 para. 19.

172 OLG Düsseldorf [2002] I.L.Pr. 4.

173 *TSN Kunststoffrecycling GmbH v. Harry M. Jurgens* [2002] I.L.Pr. 599 (C.A., per *Walker* LJ).

174 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, (Case 49/84) [1985] ECR 1779 para. 27; *Pendy Plastic Products BV v. Pluspunkt Handelsgesellschaft mbH*, (Case 228/81) [1982] ECR 2723 para. 13; Cassaz. Foro it. 1998 Col 993-994 (ECJ Website n° 1999/59); Cass. Clunet 108 (1981), 854 with note *Holleaux*; Report *Jenard* p. 40 (about article 20 Brussels Convention: "The question of sufficient time is obviously a question of fact for the discretion of the court seized of the matter"); *Droz* (fn 21) p. 70 para. 158 (submitting that the quality of the parties, be they professionals or consumers, should influence the determination of the length of the period needed to prepare one's defence). Cf. OLG Köln NJW 2002, 360; ECJ Website n° 2002/26 (taking as reference the term fixed by the law of the State where recognition is sought).

175 See the list established by *Layton/Mercer* para. 26.039 fn. 74 concerning cases ranging from 1978 to 2000, from which it can be concluded that a period of one month is normally held sufficient. Below that length of time, it all depends on the facts of the case. A French court decided that a period of 10 days allowed enough time to a French company to prepare its defence in the Netherlands (Cass. Bull. civ. 1977 I n° 401 p. 320), whereas a period of 13 days was held insufficient by a German Court for the protection of a German defendant served in Dutch concerning Belgian Proceedings (BGH NJW 1986, 2197). Among the facts taken into account, holiday seasons seem to justify the need for longer time in order for the defendant to be able to prepare his defence (App. Milano Digest I-27.2-B6.; cf. also TS [2003] I.L.Pr. 11).

176 OLG Düsseldorf [2002] I.L.Pr. 4.

177 *Leible*, in: *Rauscher* Art. 34 note 35 in fine (citing: OLG Düsseldorf RIW 2002, 558; OLG Köln ZMR 2002, 348). Cf. Trib. civ. Liège JMLB 1994, 929.

178 Cass. ECJ Website n° 1998/29.

179 *Kodek*, in: *Czernich/Tiefenthalter/Kodek* Art. 34 note 24 and 29. The need for a translation should not influence the appreciation of the time necessary to organize one's defence or the circumstances of the service where the parties used that language in former commercial transactions or where the defendant is an international firm which can be supposed to practice that language (*Peter Schlosser* Art. 34-36 note 17b).

180 The need for a translation was controlled under the heading of the "regularity" of service (*Leible*, in: *Rauscher* Art. 34 note 33; *Peter Schlosser* Art. 34-36 note 17 b), but the other circumstances concerning the service influenced the assessment of the time to be left to the defendant for organizing his defence.