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

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

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

IV. Specific provision for the United Kingdom and Ireland

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

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

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

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

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

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

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

Section 2
Enforcement

Introductory remarks to Artt. 38-52

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

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

31 Report *Schlosser* para. 204.

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

II. Continuity of interpretation towards a still easier circulation

2 In fact, throughout the whole history of the Brussels Convention, Lugano Convention, and the present Regulation, the number and scope of changes in the text with regard to enforcement have been limited. The desired continuity between the Brussels Convention through the Lugano Convention till the present Regulation has been indeed ensured.[2]

1. Methods of giving effect to a judgment

3 Under the Regulation as well as under the Brussels Convention, there are three methods of giving effect to a judgment rendered in another Member State. Such effect may be brought about through a principal request for recognition, an incidental request for recognition,[3] or a request for exequatur.[4] Only the third one refers to enforcement in the technical sense of the term. The latter also seems to be the most frequent in practice.[5]

2. Common characteristics of all three methods

4 All three methods of giving effect to foreign judgments just mentioned present three common characteristics. The first one is that both recognition (in both its forms) and enforcement require and allow only a limited and narrow set of checks in order for the effects of a foreign judgment to be extended to, and welcome by, another Member State. These checks are the ones enumerated in Art. 34 (manifest contrast to public policy of the forum, missing or improper service of process, irreconcilability with another judgment) and 35 (conflict with mandatory jurisdictional bases in matters relating to insurance, consumer contracts, or individual contracts of employment, or use of exorbitant jurisdictional bases in violation of a particular agreement between Member States). The checks mentioned apply equally to recognition (Art. 35 (1)) and enforcement (Art. 41 sentence 1, 45 (1) (1)). In both instances, it is also stated in identical terms that the foreign judgment may not be reviewed as to its substance (Art. 36, 45 (2)).

3. No requirement for a particular procedural maturity

5 The second common characteristic is that no particular degree of procedural maturity is required in order for a foreign judgment to be either recognized or enforced. The quintessence of both recognition and enforcement consists in geographically expanding the effects of a judgment rendered in a Member State to another one. Of course, a foreign judgment not yet enforceable in the place of rendition cannot become enforceable by merely "transposing" it to another Member State. Both recognition and enforcement suppress, or enlarge, geographical boundaries to the judgment effects. Such a judgment is not allowed to suffer by being "transposed" to another Member State.

2 See Recitals (5), (19).

3 *Inzidentanerkennung* in Germany; see *Leible*, in: *Rauscher* Art. 33 note 17; *Kropholler* Art. 33 note 10.

4 *Gaudemet-Tallon* para. 436.

5 *Gaudemet-Tallon* para. 436.

Therefore, a judgment only provisionally enforceable in the place of rendition may well be both recognized and enforced in another Member State – of course under the same terms of provisional enforcement.[6] But the Brussels I Regulation neither burdens the foreign judgment in question with additional requirements nor sets up any new requirements of its own.[7]

4. Foreign judgments on the merits and on enforceability

6 The third and final common characteristic concerns the original link of the judgment under recognition and enforcement with the EU territory. What is recognized or enforced is a judgment by a court of a Member State in the exercise of its original jurisdiction. As the CJEC stated in *Owens v. Bracco*,[8] any further recognition or enforcement of the judgment which brought about the initial recognition or enforcement of a foreign judgment does not fall under the Regulation. The Regulation itself neither applies to any disputes on the procedural modalities in effectuating a judgment that recognises or enforces a foreign judgment nor does it provide for an exequatur on an exequatur.[9] Should the successful plaintiff in State A, after having made the respective judgment being declared enforceable in State B, still have an interest in making it enforceable in State C as well, then the regular way would be to declare the original judgment rendered in State A enforceable in State C, rather than taking the same step with regard to the judgment on enforceability in State B. In conclusion, the latter judgment would not be the subject matter of enforceability in State C but rather only an additional argument in favor of granting to the judgment rendered in State A enforceability in State C.

5. Unilateral declaration of enforceability

7 The procedure for declaring a judgment rendered in another Member State enforceable elsewhere is initially unilateral. Following the innovation introduced by the Brussels Convention (Art. 34 (1)), the Brussels I Regulation (Art. 41 sentence 2) does not allow the party against whom enforcement is sought either to appear in court or to make any submissions on the application. In a related issue, however, the Regulation is more favourable to the declaration of enforceability than the Brussels Convention:[10] the unilateral declaration of enforceability does not include any review of the grounds

6 See *Droz* para. 551. Cf. BGH IPRax 1994, 367; OLG Düsseldorf IPRax 1998, 478.

7 Insofar only limited scope of application may be identified in this area of enforcement in favor of "judicial fine tuning", or *Einzelfallgerechtigkeit*, as the one proposed by *von Mehren*, Rec. des Cours 295 (2002), 306-308, 313, 341, 370, 377, 379, 398, 399-401.

8 *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, (Case C-129/92) [1994] ECR I-117, I-151 para. 11, I-152 para. 17, I-154 para. 29.

9 See *Gavalda*, Clunet 62 (1935), 107, 113; *Schütze*, ZZP 77 (1964), 287-292; *Kegel*, in: FS Wolfram Müller-Freienfels (1986), p. 377-393; *Kropholler*, Internationales Privatrecht (5th ed. 2004) § 60 III 2.

10 See Art. 41 sentence 1, as opposed to Art. 34 (2) Brussels Convention.

against enforceability under Artt. 34 and 35.[11] Such review is exclusively reserved to the court with which an appeal is lodged under Artt. 43 or 44.

6. Applicability of lex fori on procedural matters

8 Neither the Brussels Convention nor the Brussels I Regulation have really departed from the general rule on the applicability of lex fori on procedural matters.[12] Both normative texts are mainly concerned with the reception for domestic enforcement purposes of a judgment rendered in another Member State. In addition, they have set up a limited number of specific procedural rules, like the ones included in Artt. 53-56 on common provisions for recognition and enforcement. Beyond that, the applicability of national procedural rules remains intact. In some instances there is even a clear and unambiguous reference to national procedural rules. Under Art. 40 (1), "[t]he procedure for making the application shall be governed by the law of the Member State in which enforcement is sought". Under Art. 42 (1), "[t]he decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought". Under Art. 43 (3), "[t]he appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters"; such rules are to be found in national procedural systems. And under Art. 46 (1), precisely how and when an ordinary appeal has been lodged against the judgment requesting its enforcement, should be assessed after the procedural law of the Member State of origin.

7. Exequatur proceedings and proper enforcement

9 Within the juxtaposition just mentioned, the Brussels I Regulation governs the declaration of enforceability in respect of a judgment rendered in another Member State without either touching upon enforcement properly speaking or caring about the real chances of effective enforcement in the second state: "the Brussels Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself".[13] Such enforcement proceedings in the technical sense of the term are subject to national procedural law.

11 See Recital (17): "... the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation."

12 See *Kerameus*, Rec. des Cours 264 (1997), 179, 376-402.

13 *Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami*, (Case C-267/97) [1999] ECR I-2543, I-2571 para. 28. Also *Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur*, (Case 148/84) [1985] ECR 1981, 1992 para. 18; confirmed by *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 665 para. 27.

8. Procedural lex fori and the beneficial effect of EU rules

The case law of the Court of Justice of the European Communities[14] has, however, 10
introduced the limitation that national procedural law, when called upon to application, should not damage, or reduce, the "beneficial effect" (effet utile) of EU rules. Thus, even if under the lex fori an appeal is also granted to third parties interested, the rule under Artt. 37 and 41 should prevail, according to which third parties interested are not allowed to take an appeal[15] or, under Art. 43, according to which no party may avail herself of the lex fori in order to bring forth a complaint which otherwise would have been time-barred.[16]

9. Listing of national courts and the use of annexes

A technical change of the Brussels I Regulation in comparison to the older Brussels 11
Convention consists in relegating several technical matters, such as lists of national legal sources or national authorities, to annexes rather than the text itself. At present, there exist six such Annexes. I: Rules of jurisdiction (Exorbitant jurisdictional bases) referred to in Art. 3 (2) and Art. 4 (2); II: The courts or competent authorities to which the application referred to in Art. 39 may be submitted (Application to enforcement); III: The courts with which appeals referred to in Art. 43 (2) may be lodged (Direct appellate courts); IV: Appeals which may be lodged pursuant to Art. 44 (Further appeals); V: Certificate referred to in Artt. 54 and 58 on judgments and court settlements (Certificate standard form on the identity of judgments and court settlements to be enforced in another Member State; VI: Certificate referred to in Art. 57 (4) on authentic instruments (Certificate standard form on the identity of authentic instruments to be enforced in another Member State).

Accordingly, the Brussels I Regulation addresses enforceability rather than actual enforcement. The latter still remains a field governed by the regular provisions as they are in force and applied in the state of enforcement. The very goal and function of the Brussels I Regulation does not consist in improving the system and practice of enforcement in the second state but rather in granting the same degree of effect to the judgment under consideration in both legal systems, the first system of origin and the second system of actual enforcement. What the Regulation attempts to balance out is the concept and extent of enforceability rather than the enforcement as such, *i.e.* the enforcement as "the end of the law".[17]

14 On the relevance of the case law developed by the Court of Justice of the European Communities both overall and, in particular, with respect to the Brussels Convention see, among other contributions in the same volume, in particular *Schiemann*, in: *Reiner Schulze/Seif* (eds.), Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft (2003), p. 189-195.

15 *Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur*, (Case 148/84) [1985] ECR 1981, 1992 para. 18; *Volker Sonntag v. Hans Waidmann*, (Case C-172/91) [1993] ECR I-1963, I-1999 para. 35.

16 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 670 paras. 30-31.

17 *U. S. v. Nourse*, 9 Pet. 8, at 28, 11 U. S. 268, at 271 (1835, per Chief Justice Marshall).

10. Annexes and notification of their changes

12 The practical usefulness of substituting annexes to provisions becomes clear in the face of Art. 74. Under this provision, any supervening changes or technical amendments to the lists set out in Annexes I-VI are notified by the respective Member State to the Commission which shall adapt the Annexes concerned accordingly.[18] Thus the more complicated and longer procedure of modifying the Regulation itself is avoided.

11. Drafting of an international convention or a Community regulation

13 Although Section 2 of Chapter III on enforcement remained substantially untouched over the years, consecutive accessions, and transformation from an international convention to a Community regulation, some technical details have been more or less modified. In particular, several provisions have changed their location, but not necessarily their meaning, by moving across to other Articles. Accordingly, attention should be granted to exact references including the indication of whether they pertain to the Brussels Convention or the Brussels I Regulation.

14 A particular mention is deserved to 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. In the terms of its Article 1, "[t]he purpose of this Regulation is to create a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement". Accordingly, under Article 5 of the same Regulation, "[a] judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition". The heart of this provision is to recognise and enforce, per the Regulation itself rather than by way of "any intermediate proceedings", the European Enforcement Order "without the need for a declaration of enforceability and without any possibility of opposing its recognition". Here, the main requirement is the adjudication "on uncontested claims".[19] If such condition exists, then the very existence of uncontested claims amounts to eliminating "any intermediate proceedings"[20] on the way to creating a "European Enforcement Order". Such Order is elevated to the level of a truly European enforceable instrument. Its reliance on the fundament of "uncontested claims" makes any further inquiry as to truthfulness or validity superfluous. Dependence on "uncontested claims" guarantees the undisturbed enforcement in all Member States without any further qualification or distinctions.

18 There have already been two such adaptations. First, the 2003 Act of Accession amended the Brussels I Regulation so as to include the rules of national jurisdiction, the lists of courts or competent authorities and the redress procedures of the acceding States. Then, responding to notifications from France, Latvia, Lithuania, Slovenia and Slovakia, Commission Regulation (EC) No 2245/2004 of 27 December 2004, [2004] O.J. L 334/3, has amended, as from 1 December 2005, Annexes I, II, III and IV with respect to the lists of rules of national jurisdiction, the lists of courts or competent authorities that have jurisdiction in the Member States to deal with applications for a declaration of enforceability, the lists of courts for appeals against such decisions, and the enumeration of redress procedures for each purpose.

19 Art. 3 (1) of Regulation No 805/2004.

Article 38

(1) A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
(2) However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

I. General purpose

1. Declaration of enforceability

Art. 38 consists of two paragraphs which have a greatly varied scope of application and, accordingly, present a strongly divergent degree of interest. Paragraph 1 sets the basic conditions of enforcing in a Member State a judgment rendered in another Member State. Under this content and purpose of paragraph 1, it is applicable to all Member States in their capacities as both a judgment-producing State or a judgment-enforcing State. The main idea is to grant enforceability to judgments rendered in another Member State under the sole condition that the judgment under question is already enforceable in the Member State of origin. By contrast, paragraph 2 only addresses the situation in the United Kingdom and, in addition, contemplates the United Kingdom only as a judgment-enforcing, and not a judgment-producing Member State. 1

2. Particularities of the United Kingdom

Paragraph 2 takes into account both a peculiarity of the common law with respect to enforcement of foreign judgments, and the existence of independent judicial areas within the United Kingdom. Regarding the first issue, registration for enforcement of a foreign judgment is held as sufficient, without asking the victorious plaintiff to start fresh proceedings in the United Kingdom on the basis of foreign *res judicata*.[1] Regarding the second issue, paragraph 2 acknowledges the existence of three different legal systems within the United Kingdom (England and Wales, Scotland, and Northern 2

20 *Ibid.*, Art. 1.

1 *See Report Schlosser* paras. 6, 9, 10 *in fine*.

Ireland) and accordingly requires such registration particularly in the area of prospective enforcement, in the wording of (2), "in that part of the United Kingdom".[2]

II. Legislative history

1. History and resistance of the Article

3 While the first paragraph of the Article has remained unchanged over the various adjustments upon the accession of further states to the European Communities, the second paragraph was added on the occasion of the accession of the United Kingdom (1978). Such adjustment was found to be necessary in view of the different legal background of the three new States (United Kingdom, Ireland, Denmark).[3] Neither the accession of further states nor the transformation of the Brussels Convention to the Brussels I Regulation brought about any change in the wording and meaning of Art. 38 (formerly: 31) or, for that matter, had any impact upon its interpretation.

2. Exceptions to legislative continuity

4 Two exceptions from the above[4] discussed legislative continuity of (1) should be mentioned here, although both are not substantial:

a) Order for enforcement and declaration of enforceability

5 As opposed to the versions of the Brussels Convention before the Lugano Convention, the Regulation (Art. 38 (1)) sets now as condition to its operation the enforceable character of the judgment at issue in the Member State of origin.[5] By contrast, the original version of the Brussels Convention (Art. 31 [1]) as well as its subsequent versions after the accessions of (i) Denmark, Ireland and the United Kingdom, and (ii) Greece used the words "the order for its enforcement has been issued" instead of the present words "it has been declared enforceable". The latter formulation was first introduced by the Lugano Convention Art. 31 [1] in order to accommodate a particularity of Swiss law of enforcement.[6] This formulation is less technical and wider and, accordingly, was preferred in all versions of the Brussels Convention after *Lugano*.[7] The same way has been confirmed by the Brussels I Regulation as well.

2 See Report *Schlosser* paras. 11, 209.

3 See Report *Schlosser* paras. 4-16, 206-213.

4 *Supra* Art. 38 note 3 (*Kerameus*).

5 Cf. *infra* Art. 38 note 10 (*Kerameus*).

6 See Report *Jenard/Müller* para. 69. According to the Court of Justice in its judgment *Unibank A / S v. Flemming G. Christensen*, (Case C-260/97) [1999] ECR I-3715, I-3732 para. 20, the two expressions cited in the text ["have an order for its enforcement issued" and "declared enforceable"] are "considered virtually equivalent".

7 *See Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami*, (Case C-267/97) [1999] ECR I-2543, I-2572 para. 33.

b) Contracting State and Member State

Since the Regulation is not an international convention but a EU instrument, the term "a Contracting State" has been replaced throughout in the Regulation by the term "a Member State". 6

III. Particular matters

1. Free movement of judgments and the European territory

The basic idea of the first paragraph consists in extending enforceability of a given judgment from the Member State of origin to the Member State of enforcement. What underlies this idea is the conception of the EU territory as a legally unified territory, within which judgments rendered in any Member State are entitled to free movement to any other Member State. Free movement of judgments is thereby pronounced as the functional equivalent to the other four Community-integrated basic freedoms of movement (people, goods, services, and capital). 7

2. Several conditions

However, this general rule on the enforceability of judgments rendered in a Member State in any other Member State depends on certain conditions, the particular relevance of which may oscillate considerably. Such conditions are the following: 8

a) Operation of a declaration

The enforceability of judgments rendered in another Member State neither is automatic nor operates by virtue of the Brussels I Regulation or otherwise *ex lege*. Art. 38 (1) determines that the foreign judgment must have been "declared enforceable there", *i.e.* in the Member State of the prospective enforcement. Although the text uses the verb "declare", which usually denotes the recognition of something already in existence,[8] it can hardly be denied here that such necessary declaration partakes somehow of a constitutive element.[9] Without, or prior to, such formal declaration of enforceability, no actual enforcement may be forthcoming. On the other hand, under the Regulation such "declaration" is easily obtainable without any review of substance, not even under Artt. 34 and 35.[10] 9

8 Cf. *Gaudemet-Tallon* para. 350: «une simple ‹déclaration›».

9 See *Corinne Bléry*, L'efficacité substantielle des jugements civils (2000) note 539.

10 See Art. 41 sentence 1: "The judgment *shall* be declared enforceable *immediately* on completion of the *formalities* in Article 53 without any review under Articles 34 and 35" (italics added for present purposes). If successful, the application towards the declaration of enforceability will render enforceable the foreign judgment "in the exact terms in which it was given", including identity of the parties. See CA Paris [1999] I. L. Pr. 332 paras. 1, 9.

b) Enforceability in the State of origin

10 Enforceability in the Member State of enforcement requires enforceability in the Member State of origin.[11] The declaration of enforceability expands the geographical scope of enforceability as such but may not, as a matter of principle, substitute enforceability itself. This does not mean that the declaration of enforceability necessarily prevails over existence or non-existence of enforceability, since under Artt. 53 (2) and 55 (1) if the certificate of enforceability is not produced, the court may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production. However, the bottom line of the relationship between enforceability as such and its judicial declaration in the Member State of enforcement is that any [substantial] change of the status of enforceability in the state of origin (such as staying or revocation of enforceability) may have repercussions in the Member State of enforcement.[12]

c) Need for an application

11 In any case, the declaration of enforceability is not delivered by the court or any other competent authority *ex officio* but only "on the application of any interested party". This requirement is spelt out in both paragraphs of the Article, *i.e.* it also covers the registration for enforcement in the United Kingdom. In any event, the application for enforcement must originate with "any interested party". Normally that party would be the victorious plaintiff in the Member State of origin, or the victorious defendant in respect of his counter-claim or judicial costs. The application may also be made by the general or particular successors to the original party.[13] This whole issue is a question of standing which, along with the related issue of the existence of legal interest for such application, is governed by an autonomous interpretation of the Regulation.[14]

d) No other conditions

12 On the other hand, no further conditions are required. Thus, *e.g.*, it is irrelevant "at which stage the [foreign] judgment is (in other words whether it is final and unappealable or irreversible) pursuant to the law under which it was issued, as well as whether the judgment has *res judicata* effects. Moreover, it is indifferent whether the judgment is at the same time also enforceable in accordance with the law applicable in the country where enforcement is requested."[15]

11 See *Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami*, (Case C-267/97) [1999] ECR I-2543, I-3570 para. 23: "[T]he enforceability of a decision in the State of origin is a precondition for its enforcement in the State in which enforcement is sought."

12 See *Droz* para. 548: enforceability in the Member State of origin must be there at the time when the judgment is going to be declared enforceable in the Member State of enforcement.

13 See *Collins* p. 114; *Gothot/Holleaux* para. 343.

14 See *Kerameus/Kremlis/Tagaras* Art. 31 note 7; *Gothot/Holleaux* para. 344.

15 Epheteio Thessaloniki 3299/2000 [2002] I. L. Pr. 165 para. 9. The same judgment (at para. 11) also dismisses equally as irrelevant considerations on substantive claims or late notification of the foreign judgment.

IV. General issues

As already indicated,[16] ECJ judgments on enforcement, even if less numerous than the ones on jurisdiction, approach basic notions and functions of enforcement of foreign judgments, and address general issues. Four of these issues deserve special presentation here. 13

1. Exclusionary character of a declaration of enforceability

Modern scholarship generally admits that it is the creditor's choice, to pursue the enforcement of a foreign judgment on the basis of either an applicable international convention or the domestic law of the state of enforcement. Such choice made by the creditor is binding vis-à-vis all persons involved, provided that the creditor chooses one single set of rules rather than proceeding with a piecemeal or patchwork amalgamation of both. Under the Regulation, by contrast, such choice is not allowed. The Regulation deserves unqualified preference with respect to both domestic rules on enforcement of foreign judgments or bringing a new suit on the underlying claim before the courts of the state of enforcement. In one of the very first opinions handed down by the Court of Justice under the Brussels Convention, it was held that the existence, in a Member State A, of an enforceable judgment in favor of the creditor prevents the latter from bringing a new suit on the same cause of action in a Member State B, even if the fresh adjudication in Member State B proves to be simpler and less expensive than enforcing in Member State B the judgment already rendered in Member State A.[17] Thus, the system of enforcing a judgment in another Member State, as provided by the Regulation, is a closed system which is brought to application as a whole and cannot be disregarded in a particular case on the basis of considerations of convenience or speed.[18] 14

2. Enforcement of a foreign judgment and underlying substantive contexts

If the ECJ in *De Wolf v. Cox*[19] conceived the enforcement of a foreign judgment as the only procedural way of activating a foreign ruling in another Member State, twelve years later it took care of preventing such enforcement from disrupting legal contexts required by considerations of substantive law, even in matters not falling as such within 15

16 *Supra* Introductory remarks to Arts 38-52 note 1 (*Kerameus*).

17 *Jozef de Wolf v. Harry Cox BV*, (Case 42/76) [1976] ECR 1759, 1767 paras. 9-15, with concurring opinion by AG *Mayras*: the provisions on enforcement are indivisible and should not endanger the balance achieved by the Brussels Convention.

18 See *Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami*, (Case C-267/97) [1999] ECR I-2543, I-2571 para. 25: "That enforcement procedure constitutes an autonomous and complete system" (with further references). Also Report *Evrigenis/Kerameus* para. 84 *pr.*; Monomeles Protodikeio Xanthi 347/2003, Harm. 2003, 1306; Monomeles Protodikeio Athens 322/2005, Harm. 2005, 910: exclusive procedure. Cf. Monomeles Protodikeio Thessaloniki 4826/2004, Harm. 2004, 736.

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

the scope of application of the Regulation. In *Hoffmann v. Krieg*,[20] the Court of Justice did not consider as well founded an application as in *De Wolf v. Cox* to declare enforceable a foreign judgment on conjugal maintenance payments if a national judgment in the state of enforcement had pronounced the divorce of the spouses. The Court held that a judgment on conjugal maintenance payments "presupposes the existence of the matrimonial relationship".[21] Against that substantive connection, procedural considerations, such as the husband's failure to take an appeal in time (Art. 36 of the Brussels Convention) against the enforcement order, give way to the impact of a national decree of divorce.[22] Effectively, the expansion of enforceability from the Member State of origin to the Member State of enforcement must take cognizance of the substantive requirements of legal contexts and, for the rest, leave execution itself to be governed by the domestic law of the court in which execution is sought.[23]

3. Declaration of enforceability and merits of the judgment

16 However, the relationship, or even antagonism, between the normative contents of the Brussels I Regulation, on the one hand, and substantive legal rules of the Member States, on the other hand, is a difficult and never-ending exercise. It may be said that in *Hoffmann v. Krieg*[24] the Court was influenced more by the existence of an irreconcilable judgment (*i.e.* the one on divorce) than by the contents of substantive law as such.[25] By contrast, the mere existence of diverging substantive rules as such does not always seem to direct the Court to take particular care of cohesion among relevant substantive rules. *E.g.*, in *Coursier v. Fortis Bank*,[26] the Court held that the term "enforceable" in the first paragraph of what is now Art. 38 of the Brussels I Regulation "is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought, in appeal proceedings brought under Art. 36 of the Brussels Convention [under the Regulation, roughly, Art. 43], to determine, in accordance with its domestic law including the rules of private international law, the legal effects of a decision given in the State of origin in relation to a court-supervised liquidation". By this reasoning, the Court found a French decision closing a court-supervised liquidation for lack of assets as being, in formal terms, enforceable in character and, therefore, subject to declaration of enforceability under Art. 38 (1).[27]

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

21 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 667 para. 13.

22 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 670 et seq. paras. 29-34, in particular paras. 32, 34.

23 See *Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur*, (Case 148/84) [1985] ECR 1981, 1992 para. 18; *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 669 et seq. paras. 27-29.

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

25 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 668 et seq. paras. 21-25.

26 *Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami*, (Case C-267/97) [1999] ECR I-2543.

4. Enforceability of provisional measures

As already indicated,[28] Art. 31 of the Regulation disconnects the availability of provi- 17
sional measures from the existence of jurisdiction as to the substance of the matter. In a consistent way, even provisional, including protective, measures (Art. 31 Brussels I Regulation) may be recognized and enforced in another Member State, provided that the other party was duly summoned and given the opportunity to be heard.[29] Such a requirement underlines the judicial character of provisional measures, and also accompanies them on their itinerary through the Community territory.

Article 39

(1) The application shall be submitted to the court or competent authority indicated in the list in Annex II.
(2) The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

I. General purpose

1. Courts and other authorities

Art. 39 consists now of two paragraphs. The first paragraph requires the submission of 1
the application seeking the declaration of enforceability and refers to Annex II which entails a full list of national courts by alphabetical order of the respective Member States. The alternative reference to (other) "competent authority", obviously not being itself a court, does not seem to materialise under the present enumeration of Annex II since every organ listed here is truly a court.[1] However, the alternative reference to competent authorities other than courts may prove to be useful in the future, in case that any Member State, within its own framework of internal judicial

27 *Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami*, (Case C-267/97) [1999] ECR I-2543, I-2568 para. 14, I-2569 paras.18-33. It appears that a judgment by consent is still a judgment for purposes of recognition and enforcement, while a settlement, even if made before the court, is not. See comments on Art. 58 (*Vékás*) *infra*, as well as the interesting case *Landhurst Leasing PLC v. Marcq*, [1998] I. L. Pr. 822 paras. 30-39, 65 (C. A.). On substantive legal contexts related to the international enforcement of judgments see *Kerameus* Rec. des Cours 264 (1997), 179.

28 *Supra* Art. 31 note 11 *et passim* (*Pertegás Sender*).

29 See *Italian Leather SpA v. WECO Polstermöbel GmbH & Co.*, (Case 80/00) [2002] ECR I-4995; BGH [2001] I. L. Pr. 208, 216; OLG Munich 5.4.2000, Harm. 2002, 259; Monomeles Protodikeio Thessaloniki 10387/2002, Harm. 2002, 1350; *Kropholler* Art. 31 note 20, Art. 32 notes 20-23.

1 Including the lowest Finnish tribunal (käräjäoikeus/tingsrätt).

administration, might like to substitute such other authority thereof to a court referred to in the present form of Annex II.[2]

2. Relevant venue

2 The second paragraph addresses the issue of venue, or local jurisdiction, for the application to be submitted, as it stands in the English text. Two connecting factors, both of them relying on enforcement, are identified for bringing the application to enforcement: either the place of domicile of the party against whom enforcement is sought, or the place of enforcement, which is obviously in terms of prospective enforcement. The final purpose of the whole Art. 39 is to establish rules on venue ope iuris communitarii, by disconnecting this issue from national procedural law.

II. Legislative history

1. Changes between the Brussels Convention and the Regulation

3 Art. 39 reproduces Art. 32 of the Brussels Convention, however with two changes pertaining to the two paragraphs of the Article.

2. Actual changes

4 As already indicated with regard to the relegation of lists from the Regulation itself to corresponding Annexes,[3] the list of national courts competent to receive an application for enforcement constitutes, under the Regulation, is in Annex II. The only direct deviation refers to Portugal, and substitutes the ‹Tribunal de Comarca› to the ‹Tribunal Judicial de Circulo›, as it has been under Art. 32 (1) of the Brussels Convention. We may also observe that, with regard to Belgium, the German denomination of the first-instance court (‚erstinstanzliches Gericht') is added next to the French and Flemish denominations. For the United Kingdom, the legal area of Gibraltar is also added, with reference to the Supreme Court of Gibraltar.[4]

3. Subject-matter competence

5 In substance, subject-matter competence is hereby attributed as a rule to either the first-instance court in a one-person composition, or to its presiding judge, therefore again a one-person court. The only exception is in regard to Italy and Sweden, where the same competence is granted to the «Corte d'appello» or, for that matter, the "Svea hovrätt". This exception makes the Italian and the Swedish regular appellate courts to

2 With regard to Danish and Swedish administrative authorities under Art. V bis of the 1978 Protocol and Art. 62 (Swedish kronofogdemyndighet), cf. the observations by *Gaudemet-Tallon* para. 361.

3 *Supra* Introductory remarks to Artt. 38-52 notes 11-12 (*Kerameus*).

4 Cf. also *Gaudemet-Tallon* para. 439 fn. 14.

both a court of first instance under Annex II for the purposes of Art. 39 (application for enforcement), and an appeal court under Annex III for the purposes of Art. 43 (appeal against the decision on the application for a declaration of enforceability). The exception in regard to Italy has been addressed by the ECJ, which distinguished the two functions of the Italian appeal court on the basis of the type of proceedings to be followed.[5] It concluded that in the latter case the appeal court "must be regarded as sitting in an appellate capacity and thus having power under Art. 2 (2) of the Protocol to request the Court of Justice to give a preliminary ruling on a question of interpretation of the Convention," and now the Regulation.[6]

4. Venue and the applicant's discretion

Paragraph 2 of Art. 39 departs from the graded relevance of the two bases of local jurisdiction, as stated in Art. 32 (2) of the Brussels Convention (first: defendant's domicile; if this is missing, second: place of enforcement). Instead, the choice between the two jurisdictional bases is totally alternative, depending on nothing else than the applicant's discretion. 6

III. Particular issues

1. Authentic and private instruments

The scope of application of Art. 39, taking into account Art. 57 on authentic instruments, also includes authentic instruments. The latter, however, require "the involvement of a public authority or any other authority empowered for that purpose"[7] by the state of origin. Accordingly, an acknowledgment of indebtedness drawn up by the debtor and witnessed, as far as his signature is concerned, by a bank employee does not fall within the concept of authentic instrument. What is missing in this respect, is both the establishment of authenticity by a public authority and the relation of authenticity to the content of the instrument rather than solely its signature.[8] Both these elements are required since, as the Court of Justice held, "instruments drawn up between private parties are not inherently authentic".[9] 7

5 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973, I-3013 et seq. paras. 7-10, I-3018 et seq. paras. 21-23.

6 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973, I-3019 para. 23.

7 *Unibank A / S v. Flemming G. Christensen*, (Case C-260/97) [1999] ECR I-3715, I-3731 paras. 15-18, in particular para. 15. For a comparative treatment of enforceable instruments see *Kerameus*, International Encyclopedia of Comparative Law, vol. XVI, Ch. 10: Enforcement Proceedings (2002) paras. 22-25.

8 *Unibank A / S v. Flemming G. Christensen*, (Case C-260/97) [1999] ECR I-3715, I-3731 para. 17.

9 *Unibank A / S v. Flemming G. Christensen*, (Case C-260/97) [1999] ECR I-3715, I-3731 para. 15.

2. Defendant's domicile

8 The same case decided by the Court of Justice[10] is also indirectly useful in determining defendant's domicile as a jurisdictional basis for the application of enforcement. Although the Court did not address the jurisdictional issue, since it was only secondarily presented by the Bundesgerichtshof, the Advocate General La Pergola correctly pointed out two elements: first, the relevant time for assessing the defendant's domicile is the day of lodgment of the application; and second, a change of defendant's domicile after the application has been lodged has no effect on its admissibility.[11]

3. Heads of exclusive jurisdiction

9 As established, the two alternative jurisdictional bases of defendant's domicile or the place of anticipated enforcement pertain to "the court of competent authority", as this is referred to in Art. 39 (1). Accordingly, this rule on "local jurisdiction" (Art. 39 [2]) does not necessarily fall together with "the courts of the Member State in which the judgment has been or is to be enforced" under Art. 22 (5). Indeed, Art. 39 (2) is narrower and more detailed than the general provision of Art. 22 (5). Therefore, with regard to the application for enforcement as such, the more particular provision of Art. 39 (2) prevails over the more general one of Art. 22 (5). The result is that the creditor may submit his application for enforcement either in defendant's domicile or in the place of (anticipated) enforcement in spite of Art. 22 (5).[12] Concurrently, no prorogation agreements are allowed,[13] and the respective jurisdictional bases have to be considered as exclusive.[14]

4. References among local courts

10 If the application has been erroneously lodged in a court covering neither defendant's domicile nor the place of enforcement, it belongs to the applicable national procedural law to provide for the sanctions. In most cases, a court erroneously addressed might refer the case to another local jurisdiction if the latter is located within the same Member State.[15] Otherwise, i.e. if both defendant's domicile and the place of enforcement are located in another Member State, the probable sanction will be to dismiss the application altogether. In that case, the creditor may present his application afresh in a "correct" Member State.

10 *Unibank A / S v. Flemming G. Christensen*, (Case C-260/97) [1999] ECR I-3715.

11 A-G *La Pergola*, Opinion in Case C-260/97 [1999] ECR I-3717, I-3722 paras. 11, 12.

12 A-G *Lenz*, Opinion in Case C-129/92 [1994] ECR I-119, I-133 para. 39; *Kropholler* Art. 22 note 63; *Mankowski*, in: *Rauscher* Art. 22 note 59.

13 See *Droz* para. 560; *Kerameus/Kremlis/Tagaras* Art. 32 note 3.

14 *Kerameus/Kremlis/Tagaras* Art. 32 note 3.

15 Cf. *Kerameus/Kremlis/Tagaras* Art. 32 note 3.

5. Autonomous interpretation of jurisdictional bases

In any event, both alternatively connecting factors, defendant's domicile and the place of enforcement, are subject to autonomous interpretation since both notions are central to proceeding from jurisdiction to enforcement and, therefore, concern the very operation and function of the Brussels Convention. 11

Article 40

(1) The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.
(2) The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.
(3) The documents referred to in Article 53 shall be attached to the application.

I. General purpose

While Art. 39 terminates *pro tanto* the sequence of constraints applicable ope regulationis on the application for enforcement, Art. 40 takes the next step. It consists of the procedure to be followed in order to make and assess the application for enforcement. According to the applicability of *lex fori* to procedural issues, this procedure is governed, in principle, by the law of the Member State in which enforcement is sought.[1] To this principle of applicability of the *lex fori* the following two paragraphs introduce two limited exceptions in favor of the applicability of two sets of rules drawn from the Regulation itself. The first exception protects the defendant by requiring the applicant to keep open lines of communication between him and the defendant so as to rely for this purpose on rules and practice of domestic notifications exclusively (Art. 40 (2)). The second exception takes care of an authorized and early notification of certain documents by the applicant to the defendant, so as to enable the latter, if he so wishes, to fully defend his position (Art. 40 (3)). Such a defense remains open to the defendant by requiring the applicant to serve to the former, as attachment to the application (Art. 40 (3)), an authenticated copy of the relevant judgment (Art. 53 (1)), together with a certificate of enforceability in the Member State of origin (Annex V). As a counter-burden to the applicant, the latter must make and keep himself accessible by either giving an address for service of process within the same jurisdiction or appoint- 1

1 See the Report *Jenard* p. 49 under Art. 33, subjecting both "the procedure and formalities for making the application" to the *lex fori*, *i.e.* the [procedural] law of the State in which enforcement is sought. Whether to organize an oral hearing depends on the discretion of the court; see BGH IPRax 1985, 101.

ing a representative ad litem (Art. 40 (2)); otherwise, taking resort to the procedure provided by the Hague Convention may be declared as null and void.[2]

II. Legislative history

1. Documents to be produced

2 There is no substantial difference between the Brussels Convention (Art. 33) and the Brussels I Regulation. However, the issue referring to the documents to be produced by the applicant has become a little more complex through a two-step reference in Art. 40 (3) to, first, Art. 53 and, then, from Art. 53 (2) to Art. 54, finally taking care in Art. 53 (2) not to prejudice Art. 55.

2. Authentic copy of the judgment

3 At the bottom line, both texts require, either for recognition or for enforcement, an authentic copy of the judgment under question (Artt. 46 (1) Brussels Convention; 53 (1)). Beyond that, both texts follow partly divergent paths. The Brussels Convention (Art. 46 (1)), in the case of a default judgment, requires also a document establishing that the party in default was served with the document instituting the proceedings or with an equivalent document. Under Art. 34 (2) the same requirement in substance, accompanied by additional elements,[3] is removed from the provisions on documents to be served to the grounds for non-recognition.

4 In particular with respect to enforcement, a document establishing enforceability in the State of origin is also required under both texts. The Brussels Convention (Art. 47 (1)) requires the production of "documents which establish that, according to the law of the State of origin, the judgment is enforceable and has been served",[4] while under the Regulation (Art. 54 with reference to Annex V) a certificate is needed indicating, among other information, the "Date of service of the document instituting the proceedings where judgment was given in default of appearance" (Annex V, sub 4.4).

5 Finally, Art. 55 rather faithfully reproduces Art. 48 of the Brussels Convention on alternative methods of establishing enforceability as well as on the eventual need for a translation.

2 See Monomeles Protodikeio Thessaloniki 511/1994, Harm. 1994, 1409. Still more demanding the same court 28242/1998, Harm. 1999, 973: without such appointment of a representative *ad litem*, the whole application for enforcement is dismissed on procedural grounds. More lenient: Epheteio Thessaloniki 267/1999, Harm. 1999, 718 = EED 1999, 275: the only consequence of not appointing a representative *ad litem* consists in not letting the time period for appeal under Art. 43 (5) run.

3 See *supra* comments on Art. 34 (*Francq*).

4 In its Art. 47 (2), the Brussels Convention also requires the production, "where appropriate, [of] a document showing that the applicant is in receipt of legal aid in the State of origin".

III. Particular issues

1. Exceptions to the applicability of lex fori

As already indicated,[5] Art. 40 (1) submits [t]he procedure for making the application [... to] the law of the Member State in which enforcement is sought". The two exceptions in favor of autonomous rules adopted by the Regulation are included in paras. 2 and 3 of the Article and refer to the applicant giving an address for service of process within the jurisdiction of the court applied to. 7

2. Technical details

Under (1), the applicability of local procedural law is well explained by the unwillingness to enter into the area of technical details in everyday proceedings. Accordingly, the type as well as the denomination of such application for enforcement rely on local procedural law, *i.e.* they are not governed by the uniform law of the Regulation. Indeed, the latter has harmonized the conditions and the consequences of enforceability but not what lies in between, *i.e.* technical issues related to the methods by which the abstract notion of enforceability is altered and concretized towards enforcement as such. Such technical issues include the particulars which the application must contain, the number of copies which must be submitted to the court, the authority to which the application must be submitted, also, where necessary, the language in which it must be drawn up, or whether a lawyer should be instructed to appear.[6] One such technical issue is also the qualification of the application as a first-instance judicial remedy, or rather a method of appeal. Greek opinions rather support a mixed qualification, lying in between the two extremes.[7] 8

3. From the election of domicile to a representative ad litem

With regard to (2), the text has shifted from the election of domicile under the Brussels Convention to a mere notification of an address by the applicant within the local jurisdiction of the court applied to. But again, if the relevant procedural law of the Member State does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem. Thus, the election of domicile, unknown to German law, was finally replaced by the appointment of a representative ad litem.[8] The purpose has been the same throughout the phases of formulating what is now Art. 40 (2). The ECJ early stated such purpose: to "enable the party against whom enforcement has been ordered to lodge an appeal under the Convention without 9

5 *Supra* Art. 40 note 1 (*Kerameus*).

6 The list in the text follows a paradigmatic list established in Report *Jenard* p. 49 under Art. 33. See also *Kropholler* Art. 40 notes 1, 3, 4; *Mankowski*, in: *Rauscher* Art. 40 note 1; *Kerameus/Kremlis/Tagaras* Art. 33 note 1.

7 See *Kerameus/Kremlis/Tagaras* Art. 36 note 4; *id.*, Supplement, Art. 37 note 1; *Pipsou*, in: Liber Amicorum Konstantinos D. Kerameus (2000), p. 333, in particular 343-355.

8 See Report *Jenard* p. 78.

having to embark on formalities outside the confines of his home jurisdiction".[9] Accordingly, the law of the State in which enforcement is sought determines not only the procedural issues connected to making, and dealing with, the application but also the sanction in case of failure to comply with the rules, "provided that the aims of the Convention are respected".[10] With regard to the particular issue referred to it, the ECJ held that, if the lex fori is silent as to the time at which the obligation to give an address for service of process must be fulfilled, then that time is not later than the date on which the decision authorizing enforcement is served.[11]

4. Attachment of required documents

10 Under Art. 40 (3), "[t]he documents referred to in Art. 53 shall be attached to the application". Thus the provision requires a submission including both the application itself and the documents attached. The obvious purpose here is to safeguard a prompt decision on the application in full knowledge of the relevant file. Under both the wording of Art. 40 (3: "shall be attached") and its purpose (prompt clarification of enforceability), non-production of the required documents should result in refusing enforcement. However, the prevailing opinion allows the court to stay the proceedings and concede time to the applicant to produce the documents.[12]

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

I. General purpose

1. No submission on the application

1 Art. 41 corresponds to Art. 34 of the Brussels Convention. Under that provision, its meaning focused on preventing the defendant from making any submissions on the application.[1] However, it stood open to the court to refuse the application if any of the

9 *Fernand Carron v. Federal Republic of Germany*, (Case 198/85) [1986] ECR 2437, 2444 para. 8.

10 *Fernand Carron v. Federal Republic of Germany*, (Case 198/85) [1986] ECR 2437, 2445 et seq. paras. 13-15; cf. also *Pipsou*, in: Liber Amicorum Konstantinos D. Kerameus (2000), p. 333, 361-365.

11 *Fernand Carron v. Federal Republic of Germany*, (Case 198/85) [1986] ECR 2437, 2445 paras. 10, 11.

12 Report *Jenard* p. 50 under Art. 33; *Gaudemet-Tallon* para. 443, p. 361; *Kropholler* Art. 40 note 9; *Mankowski*, in: *Rauscher* Art. 40 note 13; *Kerameus/Kremlis/Tagaras* Art. 33 note 4.

1 The lack of contradictory proceedings also prevents the applicant from submitting, at this first stage of enforcement proceedings, any new claims, should they even be related to the subject matter of the foreign judgment. See *Gothot/Holleaux* para. 357; *Kerameus/Kremlis/Tagaras* Art. 35 note 3.

reasons specified in Artt. 27 or 28 was found to be applicable. Such ex officio applicability of the mentioned Artt. 27 and 28, but not of any other reasons for non-enforcement, proclaimed Artt. 27 and 28 (under the Regulation: Artt. 34 and 35) to be the hard core of national resistance against enforcement of foreign judgments in another Member State.

2. Substantial reduction of review

Under the Regulation, the court is prevented, at this first stage of proceedings on enforceability, from reviewing the foreign judgment even under Artt. 34 and 35. Thus the review of the court, during the first stage, is substantially reduced. Accordingly, the review takes place only with regard to the "completion of the formalities in Art. 53",[2] and the relevance of this stage within the whole system of enforcement of foreign judgments clearly recedes to the pressing demand for rapidity. Therefore, the terms "without delay" in Artt. 34 and 35 of the Brussels Convention have been replaced by the stricter terms "immediately" in Art. 41 sentence 1, or "forthwith" in Art. 42 (1).[3] 2

II. Legislative history

The legislative history of Art. 41 falls almost identically together with the variation of purpose, as explained in the preceding observations.[4] Indeed, the differences of the two successive versions (the last version of the Brussels Convention and the final version of Brussels I Regulation) may be summarized as follows: 3

1. No review under Art. 34 and 35

Principally, while the Brussels Convention allowed review of the foreign judgment under its Artt. 27 and 28, such review has been deleted by the Regulation.[5] 4

2. Need for rapidity

In connection with the previous remark, the Regulation stronger stresses the need for rapidity in declaring the foreign judgment enforceable. 5

2 Cf. the legislative statement in Art. 41 sentence 1.

3 The French terms are: «à bref délai» (Art. 34 (1)) of the Brussels Convention) and «aussitôt» (Art. 35 of the same), while the Regulation speaks of «dès l'achèvement des formalités» (Art. 41 sentence 1) and «aussitôt» (Art. 42 (1)). The larger differentiation of terms employed in the English, as opposed to the French version, may be a hint that the real elaboration was made this time in English rather than in French.

4 *Supra* Art. 41 notes 1-2 (*Kerameus*).

5 See, among others, *Kropholler* Art. 41 note 5.

3. No review of substance

6 The Brussels Convention (Art. 34 (3)) repeated the unchallenged principle that no review is allowed as to the substance of the foreign judgment (Art. 29 Brussels Convention). Without putting that principle in doubt, the Regulation transferred the prohibition of touching the substance from what is its Art. 41 to Art. 45 (2), i.e. to a place dealing with the decision of the court on the appeal concerning enforceability. Since legal review of the foreign judgment may now be exercised, if any, at the second stage of an enforceability check, i.e. on appeal of one of the parties, the new location seems more appropriate than the previous one (Art. 45 (2) instead of Art. 41). In any event, this issue is not significant, all the more so since a tautologous provision is to be found unchangeably in the Section on recognition, namely Artt. 34 (3) Brussels Convention, or 36 of the Regulation.

4. Enforceability on completion of formalities

7 Art. 41 has now no actual paragraphs but rather simply two sentences. The reason may be that the contents of the Article have now been reduced after the removal of the paragraph on the non-reviewability of substance.[6]

III. Particular issues

1. Surprise effect

8 As already explained,[7] the stress on rapidity in the first stage of enforcement proceedings is one of the differences between the Regulation and the Brussels Convention. However, even the Regulation does not provide for sanctions in case that the declaration of enforceability has been delayed against Art. 41 sentence 1.[8] Such rapidity has mainly the function of producing a surprise effect, running counter to a defendant's plan to hide away his assets or the very object of litigation.[9]

2. Full appeal

9 Preventing the defendant from making any submissions on the application towards enforceability does not amount to a violation or restriction of his constitutional right to be heard. This right is in substance complied with since the defendant, as well as the applicant, may under Art. 43 lodge a full appeal against the judgment on the declaration of enforceability.[10] However, it is not the function of the court of appeal "to put itself in the position of the party opposing enforcement by seeking out and considering a case for refusal of enforcement which had not been made in accordance with Art. 27 of the Convention"[11] [= Art. 34].

6 See Art. 41 para. 3 n. 3.

7 See Art. 41 para. 3 n. 2.

8 See Report *Jenard* p. 78; *Droz* para. 564: «un voeu pieux».

9 Report *Jenard* p. 78; Report *Schlosser* para. 219. A peripheral effect is sometimes also located in non awarding travel costs to the defendant coming to the court in spite of Art. 41 sentence 2. See Hof 's-Gravenhage [1998] I. L. Pr. 782 paras. 2, 3, 8.

3. Declaratory and constitutive elements

10 The very expression of declaration of enforceability may raise difficult questions about the true character of a judgment which assesses that a foreign judgment meets all conditions in order to open the way to enforcement. Such a domestic judgment bears elements of both a declaratory and a constitutive character. A domestic judgment confirms the existence of all required conditions and the non-existence of any negative conditions; insofar, this may be qualified as a declaratory judgment. On the other hand, only this judgment on enforceability may transform a foreign judgment, non-enforceable as such in the State of destination, to an enforceable instrument authorized to kick off a procedure of actual enforcement in the second State; insofar, the domestic judgment brings about such transformation of the foreign judgment, altering it from a mere foreign judgment to an enforceable instrument for domestic purposes. Herein we have an undeniable constitutive element which could make the domestic judgment to a constitutive judgment, a Gestaltungsurteil. In this regard, the Regulation regularly uses the expression of declaration of enforceability (e.g. Art. 43 (1)), while the Brussels Convention sticks to "applying for enforcement of a judgment" (e.g. Art. 46 pr.). Modern doctrine, to the extent that it deals with the question, discovers elements of both recognition or declaration, and constitution.[12] The discussion is not yet fully conclusive. It is, however, doubtful whether practical problems will hinge on that.

4. Formalities and more fundamental checks

11 Art. 41 (1) makes enforceability depend on the completion of the formalities provided in Art. 53[13] without any review under Artt. 34 and 35. However, the exclusion of review under these Articles does not prevent the court from making some more fundamental checks such as, in particular, whether the foreign judgment falls within the scope of application delineated in Art. 1 (1), (2).[14] Compliance with the procedural requirements of Artt. 39 and 40 can be checked by the court as well. Another allowed check would pertain to the enforceability of the foreign judgment in the Member State of origin;[15] however, such check should be considered as already included in Art. 41

10 See Report *Jenard* p. 78; OLG Saarbrücken in: Digest I-34 B-1. More extensively *Pipsou*, in: Liber Amicorum Konstantinos D. Kerameus (2000), p. 343-401.

11 In the elegant terms adopted by Cass. [1996] I. L. Pr. 504 para. 3.

12 See, in particular, *Gaudemet-Tallon* paras. 373, 374, 436, 451, 462-464.

13 *Supra* Art. 40 note 1 (*Kerameus*).

14 Cf. *Collins*, p. 107; *Kerameus/Kremlis/Tagaras* Art. 34 note 4 at n. 17.

15 See *Kerameus/Kremlis/Tagaras* Art. 34 note 4 fn. 16.

(1), and its reference to Art. 53 equally involving Art. 54 and its further reference to Annex V in fine: "The judgment is enforceable in the Member State of origin."[16]

Article 42

(1) The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.
(2) The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

I. General purpose

1. Objective and subjective coverage

1 The whole Article deals with the issue whether and to whom the decision on the application for a declaration of enforceability should be notified. As the Article stands now in the Regulation, no distinction is made in principle either on the result of the judgment to be notified or on the addressee of the notification. With regard to the first issue, both the affirmative and the negative judgment, i.e. regardless of whether the judgment granted enforceability, should be brought to the notice of the applicant. Indeed, he should receive notice of the judgment granting enforceability in order for him to proceed forthwith with actual enforcement in the Member State of destination. In addition, however, he should also receive notice of a negative judgment on enforceability in order for him to consider whether to lodge an appeal.

2. Notification to the debtor

2 On the other hand, the party against whom enforcement is sought has direct legal interest to be informed about granting the application for a declaration of enforceability: in such case, he should be able to consider lodging an appeal. The same party might well have an interest to be informed about the outcome of the application even in case of refusal: he might wish to accordingly rearrange his assets or the subject matter itself of the preceding litigation.

3. Distinction between potential addressees

3 However, Art. 42[1] seems here to treat less favorably the party against whom enforcement is sought. By focusing here (Art. 42 (2)) on the "declaration of enforceability" rather than on the "decision on the application for a declaration of enforceability", as

16 See supra Introductory remarks to Artt. 38-52 note 8 (*Kerameus*).

1 A provision «particulièrement ambiguë», following *Gaudemet-Tallon* para. 451.

in the first paragraph (Art. 42 (1)), the Regulation protects the enforcement defendant more narrowly, to wit only in case of threat of actual enforcement.[2]

II. Legislative history

Here again,[3] legislative history follows the lines indicated by the variation of purpose of the whole Article.[4] Under the Brussels Convention, the same matter was dealt with in at least two Articles (Artt. 35, 36 (1)). The Regulation, first, made the service of the decision on the party rather than the right to appeal itself the subject matter of the new Art. 42 and, second, unified the previous rules, with the possible exception of serving the declaration of enforceability only on the party against whom enforcement is sought.[5] 4

III. Particular issues

1. Methods of notification

Art. 42 (1) is again a confirmation of the applicability of local procedural law under the principle of lex fori governing all matters of procedure.[6] It might be, therefore, that Art. 42 (1) speaks about bringing the decision "to the notice of the applicant": By using such broad terms, the provision may try to cover all methods of notification probably provided by local procedural rules of the Member State in which enforcement is sought. Nevertheless, in most cases notification will be made by service of process. 5

2. Lex fori at the place of enforcement

In any event, the procedural lex fori will prevail even if the applicant is domiciled in a State other than the Member State in which enforcement is sought. Under such constellation, the lex fori of the Member State in which enforcement is sought will prevail under Art. 40 (2). The bottom line will be that the applicant shall appoint a representative ad litem.[7] 6

3. Repeated service of judgment

Under Art. 42 (2), ["t]he declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party". In most cases, the judgment under enforcement will have been already served on the defendant in the Member State of origin and for purposes of the 7

2 Next Art. 43 (1) on appealability returns then to equal treatment by concentrating, as in Art. 42 (1), on "[t]he decision on the application for a declaration of enforceability" rather than on "[t]he declaration of enforceability" as such (Art. 42 (2)).

3 Cf. *supra* Art. 41 notes 3 et seq. (*Kerameus*).

4 See *supra* Art. 42 notes 1 et seq. (*Kerameus*).

5 See *supra* Art. 42 notes 1 et seq. (*Kerameus*).

6 See *supra* Art. 40 notes 1, 9 (*Kerameus*).

7 See *supra* Art. 40 notes 1, 9 (*Kerameus*); Report *Jenard* p. 78.

law applicable in that State. In that case, a further service or notification of the same judgment will be redundant. However, the mere production of the judgment under Art. 53 (1) will probably not suffice. It seems that service on the enforcement defendant goes beyond a mere production which is designed to assist the court rather than the defendant.[8]

Article 43

(1) The decision on the application for a declaration of enforceability may be appealed against by either party.
(2) The appeal is to be lodged with the court indicated in the list in Annex III.
(3) The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
(4) If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26 (2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.
(5) An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

I. General purpose

1 Art. 43 is a kind of catch-all type of provision, mainly dealing with appeal and its procedural parameters. The Article contains no less than five paragraphs and consecutively establishes the right to appeal by either party (1), the organ for the appeal to be lodged with (2), the general reference to "the rules governing procedure in contradictory matters" (3), the check whether the enforcement defendant not appearing before the appellate court had been properly summoned (4), finally the time for appeal (5). In some respects, Art. 43 corresponds, on the appellate level, to Art. 40 on the first stage of proceedings on enforceability. In both instances, there is a general reference to national procedural rules (Artt. 40 (1) and 43 (3)), accompanied by some inroads by autonomous procedural rules contained in the Regulation itself (Artt. 40 (1), (2), and 43 (1), (2), (4), (5)). Such inroads are rather simple and almost self-understood, like the right to appeal as such (1), or the court appropriate to receive, and adjudicate on, the appeal (2), or else keep a vigilant eye on the contradictory character of appellate proceedings ((3), (4)), or on the appropriate computation of time for appealing (5).

8 See Cass. [1996] I. L. Pr. 303 paras. 3, 4.

II. Legislative history

1. Origin of the provisions

Art. 43 has drawn provisions, or parts of provisions, from Artt. 36 (1) and (2), 37 (1), and 40 (1) and (2) of the Brussels Convention. Such normative "loans" have been strongly rearranged by the Regulation, in an effort to make the sequence of provisions more logical and also in order to take account of the common treatment of the right of appeal, belonging to both parties (Art. 43 (1): "by either party"). 2

2. Specific comparison between the Regulation and the Brussels Convention

More particularly: The general rule on both parties' right of appeal is put down in Art. 43 (1), which supersedes Artt. 36 (1) and 40 (1) of the Brussels Convention. The list of appellate courts is removed from the text itself and included in Annex III, which insofar supersedes both Art. 37 (1) and 40 (1) of the Brussels Convention. Art. 43 (3) resurges what is included in Art. 37 (1) initio of the Brussels Convention on the lodging of an appeal "in accordance with the rules governing procedure in contentious matters";[1] in the Regulation, however, the meaning is wider than in the Brussels Convention: what is submitted to the rules governing procedure in contradictory matters is not only the lodging of appeals but their hearing as well.[2] Art. 43 (4) reproduces Art. 40 (2) of the Brussels Convention, also enlarging the reference to Art. 26 (2) to (4) (in the Brussels Convention: "second and third paragraphs of Art. 20") by including as provision of reference Art. 19 of the Service Regulation No 1348/2000 as well. Finally, the whole Art. 36 of the Brussels Convention on the time for lodging an appeal reappears here as Art. 43 (5). 3

III. Decisions taken by the Court of Justice

3. Contributions by the ECJ

This Article (previously Art. 36 Brussels Convention and now, in the Regulation, Art. 43) has been the centre around which a sequence of consistent judgments were elaborated by the ECJ and shed light in the years 1984-1995 on various issues, foremost on paras. 2 and 4. The interpretative advances by the ECJ may be broken down into six important propositions, as follows: 4

a) Appeals restricted to parties only

Interested third parties may not challenge an enforcement order, even where such a procedure is available to third parties under the domestic law of the State in which the enforcement order is granted.[3] Those parties cannot either take an appeal in cassation 5

1 The Regulation replaces the term "contentious matters" by "contradictory matters".
2 See the Report *Evrigenis/Kerameus* p. 22. And now Art. 43 (3): "The appeal shall be dealt with ...".
3 *Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur*, (Case 148/84) [1985] ECR 1981, 1992 para. 18; Cassaz. [2004] I. L. Pr. 536 paras. 34-42.

under Art. 44.[4] Accordingly, the enforcement of foreign judgments is a matter for the parties in the foreign court only. Even interested third parties have to stay away and watch.

b) Hearing granted to the defendant

6 On an application for enforcement on appeal, the court is required to hear the enforcement defendant even though the application was dismissed simply on formalities (non-production of documents at the appropriate time).[5] It is, thus, insisted that the enforcement defendant has to be heard at least once before the enforcement order has become final, no matter how limited or trivial the subject matter may be on which the issue of enforceability hinges.

c) Special *Konzentrationsmaxime*

7 While the ECJ insists on hearing the enforcement defendant at least once,[6] there is a kind of special *Konzentrationsmaxime* introduced, first, between the judgment of the national court expecting to be enforced and an application to stay the proceedings[7] and, second, between the appeal against enforcement and the actual enforcement measures to be taken in the State where enforcement is sought.[8] In both instances, the second step (application to stay the proceedings, or actual enforcement, as the case may be) may not be burdened or otherwise influenced by allegations or considerations which could have been availed of in the first step (judgment of the national court, or appeal against enforcement, respectively). Thus, the Court introduced a step-by-step approach in order to structure and speed up the whole procedure leading towards actual enforcement.

d) Appeal in cassation and application to stay

8 The appeal in cassation, provided in Art. 44, is a truly extraordinary and exceptional method of final appeal. Therefore, it should not be allowed beyond the areas strictly mentioned in the Regulation. Accordingly, judgments or parts of judgments dealing with the stay of proceedings (stay or non-stay or lifting the stay) may not become subject to an appeal in cassation.[9] Neither can the extraordinary French judicial remedy of "recours en revision"[10] bring about a stay of enforcement.

4 *Volker Sonntag v. Hans Waidmann*, (Case 172/91) [1993] ECR I-1963, I-1999 para. 35.

5 *Firma P v. Firma K*, (Case 178/83) [1984] ECR 3033, 3042 para 11.

6 *Firma P v. Firma K*, (Case 178/83) [1984] ECR 3033, 3042 para 11.

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

8 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1988] ECR 645, 669 et seq. paras. 27-31, and Operative part note 4.

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

10 Art. 593 French Code of civil procedure (reopening of contested judgments). See OLG Karlsruhe IPRax 1987, 171. This remedy is translated into "application for reconsideration" by *Dodd*, The French Code of Civil Procedure in English (2004) 112, Art. 593.

e) Protective measures under and within Art. 46

Finally, protective measures provided in Art. 46 may be taken by the so far successful 9
applicant all the time until the expiry of the period for appeal and, if such an appeal is lodged, until a decision thereon.[11] Specific authorization or confirmatory judgments required by national law are not needed under the Regulation.[12] Thus, the area of protective measures, until the first appeal is exhausted, is governed by the Regulation itself which prevails over national requirements.

f) Distinction with regard to the starting point of the period to appeal

In the present text of Art. 43 (1), "[t]he decision on the application for a declaration of 10
enforceability may be appealed against by either party". So far no distinction exists as between an appeal taken by the party who seeks enforcement and the party against whom enforcement is sought (para. 1). In both instances, "[t]he appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters" (para. 3), which also includes the determination of time to take an appeal. By contrast, only "[a]n appeal *against* the declaration of enforceability is to be lodged *within one month* of service thereof" (para. 5 [1]). In addition, there seems to be a distinction as far as the starting point of computation of time to take an appeal is concerned: While Article 42(1) focuses on bringing the decision on enforceability "to the *notice* of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought", Article 43 (5) is stricter since it requires service of the declaration of enforceability. This latter distinction recently led the Court of Justice of the European Communities[13] to hold that "the Brussels Convention, ..., makes transmission of the decision authorizing enforcement to the party against whom enforcement is sought subject to procedural requirements that are more stringent than those applicable to transmission of that same decision to the applicant". This opinion does not seem to be highly relevant since it was handed down under the Brussels Convention, while now under the Regulation the difference in the starting point of time for an appeal has been partly eliminated through the present Regulation.[14]

11 *Société d'Informatique Service Réalisation Organisation v. Ampersand Software BV*, (Case 432/93) [1995] ECR I-2269.

12 *P. Capelloni et F. Aquilini v. J. C. J. Pelkmans*, (Case 119/84) [1985] ECR 3147.

13 *Gaetano Verdoliva v. J. M. Van der Hoeven BV*, (Case 3/05) [2006] ECR I-1579, paras. 32, 35, 38.

14 See para. 35: "double function" or "dual function" (para. 34) of the service of the decision authorizing enforcement.

IV. Other issues

1. Full right of appeal by both parties

11 Paragraph 1 introduces an unencumbered right of appeal against a decision granting or refusing a declaration of enforceability.[15] Both possible outcomes of the decision on enforceability (affirmative or negative) are thus covered by a full appeal. All allegations, substantial or formal, by the parties may be brought, actually for the first time, to the appellate court. Further specifications, if any, of the right to appeal might be introduced by local procedural law (Art. 43 (3)), provided that they do not unduly restrain or frustrate the right of appeal, as expressly granted by the Regulation.

2. Lodging and hearing of an appeal

12 Paragraph 3, by referring to rules governing procedure in contradictory matters, considers the lodging and hearing of an appeal[16] itself as a contradictory matter. This qualification is justified on account of the deliberately unilateral character of granting or refusing a declaration of enforceability in the first stage. The contradictory character of appeal makes good what might have been missed in the first stage. The same contradictory character may also imply that the granting or refusing of a declaration of enforceability is a matter to be decided by the appellate court regardless of the procedural behaviour by the parties (no legal relevance of concession or avowal by any party).[17]

3. Service of the document instituting the proceedings

13 The whole Art. 43 (4) is concerned with a situation in which the applicant is present at every stage of the proceedings that move towards a declaration of enforceability, although the party against whom enforcement is sought fails to appear. Under such constellation, Art. 26 (2) to (4) tries to make sure, as far as possible, that the defendant has been able to receive the document instituting the proceedings or an equivalent document. To that end, the principal method of service is the one introduced by Art. 16 of the Service Regulation No. 1348/2000. Where that Regulation is not applicable, Art. 15 of the Hague Service Convention of 15 November 1965 shall apply. If this Convention is not applicable either, the general repository provision of Art. 26 (2) shall be called for application. These weighted guarantees of a fair hearing "shall apply even where the party against whom enforcement is sought is not domiciled in any of

15 Innominate type of appeal, according to Areios Pagos 1024/2001, HellDni 2002, 402; functionally, the appellate court becomes a first-instance court, according to Epheteio Athens 7701/2004, DEE 2005, 441, 442/443; Monomeles Protodikeio Thessaloniki 3066/2004, Harm. 2004, 578. Cf. also Monomeles Protodikeio Athens 1037/2002, Harm. 2002, 1831: no other recourse.

16 See *supra* Art. 43 note 3 (*Kerameus*).

17 Cf., on the function of both instances in producing enforceable instruments, *Mankowski*, Gläubigerinteressen und Grundsatz des kontradiktorischen Verfahrens im Zielkonflikt bei der Beschwerde im Vollstreckbarerklärungsverfahren, IPrax 2004, 220-223; too narrow OLG Düsseldorf, *ibid.*, 251.

the Member States" (Art. 43 (4)). Thus, by protecting parties domiciled outside the territory of the European Union, the Regulation heads towards the regular movement of judgments rather than the individual protection of the particular enforcement debtor.

4. Inertia of the defendant or the party fighting enforceability

14 Art. 43 (4) takes care of the failure to appear in regard to a party against whom enforcement is sought rather than with regard to a party applying for a declaration of enforceability. The probable reason for the latter failure may lie in the consideration that, in such case of the applicant's absence, the application is dismissed because of the applicant's failure to actively pursue the case. In any event, the issue would have to be resolved by local rules of procedure under Art. 43 (3).

5. Time for appeal

15 Art. 43 (5) deals with time of appealing: generally within one month of service of the declaration of enforceability; in the particular case of an appeal by a party domiciled in a Member State other than that in which the declaration of enforceability was given, the time limit is two months and runs from the date of service, either on him in person or at his residence. No extension of time is provided on account of distance. By contrast, if the party taking the appeal is domiciled outside the Community territory, it is submitted that the time limit will be one month which may be extended on account of distance in accordance with the law of the Member State authorizing enforcement of the foreign judgment.[18]

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

I. General purpose and legislative technique

1 As already indicated,[1] the Regulation avoids presenting in its text lists of either national provisions, or national courts, or national appeals. Preference is rather given to the technique of including such lists of national legal matters in annexes attached to the Regulation and referred to in certain provisions of the same. Thus, both the amendments to the lists (Artt. 74, 75 (2): Annexes I to IV) and the updating or

18 Report *Jenard* p. 51 under (c); Report *Evrigenis/Kerameus* para. 84 (b); *Kerameus/Kremlis/Tagaras* Art. 36 note 3. See also *Kropholler* Art. 43 notes 18-23; *Mankowski*, in: *Rauscher* Art. 43 notes 15-20. On the narrow limits of judicial discretion in this regard, even in the United Kingdom, see *Citibank v. Rafidian Bank* [2003] I. L. Pr. 49 paras. 44-58 (Q. B. D.).

1 *Supra* Introductory remarks to Artt. 38-52 notes 11-12 (*Kerameus*).

technical adjustment of the forms, specimens of which appear in Annexes V and VI, becomes easier and speedier. Indeed, the matters contained in Annexes and deliberately subject to amendments, updating, or technical adjustment are, to a certain degree, separated from the purely normative ingredients dealt with in the Regulation itself and, from a certain perspective, degraded to quasi administrative instructions.

II. Particular issues

1. Splitting of matters between the Regulation and its annexes

2 By contrast to the technique adopted by the Regulation via its annexes, the Brussels Convention itself, even in its most recent version,[2] continues to integrate the relevant lists in its text itself rather than annexes.

2. Denmark's exception

3 It may be noted that in Annex III, as well as in all other annexes attached to the Regulation, no mention at all is made of Denmark. The reason is that Denmark is still bound only by the Convention and not by the Regulation.[3]

3. Final appeal and considerations of law

4 In respect of contents, Annex IV enumerates the types and denominations of the final appeal ("appeal in cassation", as mentioned in the first indent to Annex IV) which is provided for in Art. 44 as the only procedural way to contest the judgment rendered on the appeal under Art. 43. The enumeration in Annex IV of such types of final appeal is often limited to a point of law only.[4] Accordingly, Art. 44 in conjunction with Annex IV is to be understood under a double limitative qualification: Not only is the appeal provided for in Art. 44 the only procedural way to contest the judgment in the Member State of destination; in addition, such final appeals are ope regulationis limited to points of law only.

2 OJ EC 1998 C 27/1.

3 See Art. 1 (3): "In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark". Cf. also Recital 22 to the Regulation: "Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation". Apparently, Denmark is again interested in being connected to the Brussels I Regulation; see COM (2005) 145 final.

4 Cf. Annex IV indents (1): "appeal in cassation", (2) "*Rechts*beschwerde", (3) "an appeal on a point of *law*", (4) "*Revisions*rekurs``, (5) "n appeal on a point of *law*", (8) "a single further appeal on a point of *law*".

4. Appeal in cassation against only a judgment on the previous appeal

The exceptional character of the final appeal provided for by Art. 44 has been clearly underlined by the Court of Justice. In *Brennero v. Wendel*[5] the Court found that the formal appeal under Art. 44 "cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made", or against a decision refusing a stay of execution under Art. 46.[6] 5

Article 45

(1) The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.
(2) Under no circumstances may the foreign judgment be reviewed as to its substance.

I. General purpose

The contents of Art. 45 mainly deal with the narrow limits within which the national court may refuse or revoke a declaration of enforceability. Indeed, such limits pertain to six distinctive viewpoints: 1

1. Restriction of the appeal to the grounds under Artt. 34 and 35

The first and most important constraint refers to the grounds on which a declaration of enforceability may be repelled. Such grounds are strictly limited to the ones specified in Artt. 34 and 35, i.e. any national court, including all national appellate courts, are bound by the exhaustive character of grounds for non-recognition, as they are listed in Artt. 34 and 35. In particular, no refusal of recognition is allowed "solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute".[1] 2

5 *Calzaturificio Brennero s.a.s. v. Wendel GmbH Schuhproduktion International*, (Case 258/83) [1984] ECR 3971, 3983 para. 15, and Operative part para. 2. See also *supra*, Art. 43 note 8 (*Kerameus*).

6 See *Delloye v. Lamberts* by the French Cour de cassation [1996] I.L. Pr. 504 para. 5, under reference to the opinion *B. J. van Dalfsen and others v. B. van Loon and T. Berendsen*, (Case C-183/90) [1991] ECR I-4743, by the Court of Justice of the European Communities.

1 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, (Case C-38/98) [2000] ECR I-2973, I-3021 para. 29, referred to also by *Maronier v. Larmer* [2002] I.L. Pr. 685, 693 para. 26 (C.A.).

2. Restriction of non-recognition to the grounds under Artt. 34 and 35

3 Accordingly, it may be stated as a principle that any enforceable judgment rendered in a Member State shall be recognized and enforced unless one of the grounds for non-recognition as listed in Artt. 34 or 35 is interposed.[2]

3. No review of substance with regard to both recognition and enforcement

4 As stated with regard to recognition (Art. 36), in respect of enforcement as well (Art. 45 (2)) "[u]nder no circumstances may the foreign judgment be reviewed as to its substance". Such prohibition is, substancewise, quite near to the *révision au fond* which is also excluded by Art. 36.

4. Decisions on enforcement to be given without delay

5 Timewise, the appellate court in the State where enforcement is sought either under Art. 43 or Art. 44 "shall give its decision without delay".

6. Non-enforceability as an exception with regard to both types of appeal

6 No distinction is allowed in this respect between appeals under Art. 43 or 44. Both appellate courts, regardless of whether they have been asked to deal with the first or the final appeal, should take the same approach vis-à-vis the foreign judgment seeking enforcement: Regardless of whether the applicant (or the final applicant) is the party seeking enforcement or its opponent, the appellate court should start off from the presumption that the foreign judgment deserves (and should be awarded) enforceability unless one of the grounds for non-recognition listed under Artt. 34 or 35 is interposed.

7. Refusing or revoking a declaration of enforceability

7 In Art. 45 (1) (2) the distinction between refusing or revoking a declaration of enforceability only pertains to the outcome at the previous level and does not have any material effect. Refusing a declaration of enforceability would imply the appeal under Art. 43 where, after the formal check under Art. 41, the first appellate court dismisses the application for a declaration of enforceability. Revoking a declaration of enforceability refers to the national court of final appeal, which is ready to confirm the existence of a ground for non-recognition and, accordingly, to accept the final appeal and vacate the judgment of the first appellate court.

2 The core of Art. 45, eliminating at this stage any substantial controls, is called "une réduction sensible de la portée de l'ordre public de fond": *Muir Watt*, Rec. des Cours 307 (2004), 9, 145 para. 97 fn. 327.

II. Legislative history

8 Art. 45 grew out of Art. 34 of the Brussels Convention. Both provisions are to be found in Section 2 ("Enforcement") of Chapter III ("Recognition and Enforcement"). What is added to Art. 45 in relation to Art. 34 of the Brussels Convention is a clear outline of the scope of application, covering both appeals (the first and the final one);[3] accordingly the limited disjunction between refusing and revoking a declaration of enforceability is also addressed.[4]

III. Particular issues

1. Burden and standard of proof

9 Art. 45 deals with some procedural issues pertaining to the first or final appeal with regard to refusing or revoking a declaration of enforceability. In both instances, the declaration of enforceability is the starting point for dealing with appeals. It is the common rule.[5] Therefore, refusing or revoking a declaration of enforceability is considered an exception, and requires a positive assessment by the appellate court that there exists one of the grounds specified in Artt. 34 or 35. Insofar, the commentators rely more or less on a presumption in favor of declaring the foreign judgment, as a matter of law, enforceable. A reason not to assess such enforceability, or to revoke the same, has to be specifically interjected and clearly to be adopted.[6] Insofar, we may speak of a reversal of the burden of proof or, indeed, of the necessity for the party against whom enforcement is sought to meet the standard of full proof. What has been said up to this point springs forth from the structure of the Regulation and relies thereon. What remains to be assessed under national procedural law are, of course, the issue of how a reversal of the burden of proof takes place and, also, what is understood under the notion of full proof and how it may be produced.

2. Applicability of local rules of procedure

10 It should be added that refusing or revoking a declaration of enforceability is a procedural step to be taken by the enforcement debtor. Time, ways and other technical parameters in putting forth the respective allegations are procedural issues which are governed under Art. 43 (3) by local rules of procedure in contradictory matters.[7]

3 *Supra* Art. 45 note 6 (*Kerameus*).

4 *Supra* Art. 45 note 7 (*Kerameus*).

5 Which could easily come to be included in Section 3 on "Common provisions".

6 Cf. Report *Jenard*, Art. 26 p. 43; OLG Düsseldorf [2005] I. L. Pr. 366 paras. 4-6; *Gaudemet-Tallon*, para. 453, in particular at fn. 61; *Kerameus/Kremlis/Tagaras* Art. 36 note 6; *Pipsou*, in: Liber Amicorum Konstantinos D. Kerameus (2000), p. 359 fn. 97.

7 Cf. Cass. [2005] RCDIP 322: enforceability only within the context applicable to similar national decisions.

Article 46

(1) The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.
(2) Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.
(3) The court may also make enforcement conditional on the provision of such security as it shall determine.

I. General considerations

1 Art. 46 corresponds, with minor variations, to Art. 38 of the Brussels Convention. Its object is also the same, namely, to protect the party against whom enforcement is sought against any loss which could result from the enforcement of a judgment which may yet be overturned on appeal in the State of origin.[1] The provision therefore serves as a counterbalance to the unilateral nature of the procedure for enforcement laid down by Arts. 31 *et seq.* of the Convention (equalling Art. 38 *et seq.* of the Regulation).[2] It deals only with judgments which, although still subject to appeal, are enforceable in the State of origin. The protection afforded to the judgment debtor is either by way of granting a stay of the enforcement proceedings in the State requested (II) or by making enforcement conditional on security being furnished by the judgment creditor (IV).

2 Art. 46 is largely similar to Art. 37 of the Regulation (Art. 30 of the Brussels Convention), which enables the court in which recognition of a judgment is sought to stay the proceedings if an ordinary appeal against the judgment has been lodged in the State of origin. Nevertheless, there are a number of differences between the two provisions. They will be adverted to in the course of the following comments.

3 Although Art. 46 is only concerned with enforcement proceedings, it applies – like other provisions contained in Sections 2 and 3 of Chapter III of the Regulation – also to proceedings brought under Art. 33 (2) for a decision that the foreign judgment be recognised.

1 Report *Jenard* p. 52.

2 *B. J. van Dalfsen and others v. B. van Loon and T. Berendsen*, (Case C-183/90) [1991] ECR I-4743, I-4774 para. 29.

II. Paragraph 1

1. Courts empowered to stay enforcement proceedings – Conditions for granting a stay

The power to stay the enforcement proceedings under Art. 46 can only be exercised by 4
the court with which an appeal has been lodged under Art. 43 or a further appeal under Art. 44, i.e. one of the appellate courts listed in Annex III and Annex IV, respectively.[3] By contrast, Art. 37 permits a stay to be granted even by the court of first instance in which recognition is sought. The reason for this difference is that the party against whom enforcement is sought is not entitled to make any submissions at the first stage of the enforcement proceedings (Art. 41).

Under Art. 46a stay of the enforcement proceedings may only be granted on the ap- 5
plication of the party against whom enforcement is sought. There is consequently no room for the possibility, which exists under Art. 37, of the court examining of its own motion the question whether to grant a stay.

The power to stay the enforcement proceedings exists not only where, as is normally 6
the case, the appeal is against a decision issuing a declaration of enforceability but also in the, admittedly rare, case where the contested decision involves a refusal to grant such a declaration.[4]

A stay of the enforcement proceedings under Art. 46 may be granted either if an 7
ordinary appeal against the judgment has been lodged in the State of origin or if the time allowed for such an appeal has not yet expired. On this point, again, the provision differs from Art. 37, under which a stay can only be granted if an ordinary appeal has actually been lodged.

If the party against whom enforcement is sought has not yet lodged an appeal in the 8
State of origin, the court of the State requested may require him to do so within a specified time as a condition for the grant or continuation of a stay. Such a time limit does not, of course, affect the question of the time within which the party concerned has the right to pursue his appeal in the State of origin.

3 On this point the provision differs from its predecessor, Art. 38 Brussels Convention, which does not permit a stay to be granted by the court seised of a further appeal. See *Société d'Informatique Service Réalisation Organisation (SISRO)* v. *Ampersand Software BV*, (Case C-432/93) [1995] ECR I-2269, I-2297 paras. 27-42. Cf. Report *Jenard* p. 52.

4 In this respect, too, the provision differs from Art. 38 Brussels Convention, which only envisages cases in which the debtor appeals against a decision declaring the foreign judgment enforceable.

2. "Ordinary appeal"

9 The question of the meaning of an "ordinary appeal" is answered differently and not always very clearly in the national legal systems of the Member States.[5] This problem has been dealt with in the commentary on Art. 37 and will, in principle, not be further pursued here. Suffice it to recall that the concept has been given an autonomous and uniform interpretation by the European Court in the *Industrial Diamond Supplies* case. In that case an ordinary appeal was defined as including "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 according to the Convention and the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment".[6] In view of this broad definition it may well happen that an appeal considered to be extraordinary in a national legal system must be held to be ordinary within the meaning of the Brussels Convention (Regulation), as interpreted by the European Court.[7]

3. Discretionary nature of the power to stay

10 The court before which enforcement is sought is in no case under a duty to stay the proceedings but merely has the power to do so. Although different factors may be taken into account by the court in the exercise of its discretion, the primary test appears to be whether the appeal lodged or to be lodged in the State of origin can reasonably be expected to be successful and lead to the judgment in question being reversed or amended.[8] Since Art. 46 constitutes a derogation from the overriding principle of free movement of judgments laid down by the Regulation, however, the court must follow a restrictive line in granting a stay. This emerges clearly from the interpretation of Art. 38 of the Brussels Convention given by the European Court in the *van Dalfsen*

5 See Report *Schlosser* paras. 195-204.

6 *Industrial Diamond Supplies* v. *Luigi Riva*, (Case 43/77) [1977] ECR 2175, 2189 para. 42. For a German case adopting an even wider interpretation see BGH IPRspr. 1986 Nr. 189 (affirming OLG Hamm IPRspr. 1985 Nr. 187). Among writers see *Kaye* p. 1645-1654; *Mankowski*, in: *Rauscher* Art. 37 notes 3 et seq. and Art. 46 notes 6-8.

7 In French law, for instance, the appeal in cassation is an extraordinary means of appeal, see *Gaudemet-Tallon* para. 458. But this has not prevented courts in other Member States, applying the test espoused by the European Court, from treating it as an ordinary means of appeal for the purposes of applying the Brussels Convention. See, e.g., Belgium: Trib. Bruxelles in: Digest I-38 B 3; Germany: OLG Hamburg in: Digest I-38 B 5. And see *Kropholler* Art. 37 note 3 and Art. 46 note 3.

8 See, e.g., for a French case so holding CA Versailles RCDIP 81 (1992), 117 with note *Gaudemet-Tallon*. In a German case it was even held that a stay can, in principle, only be granted if the foreign judgment is "ersichtlich fehlerhaft" (manifestly erroneous), see OLG Saarbrücken IPRspr. 1997 Nr. 186. Among writers see *Gaudemet-Tallon* para. 458; *Geimer/Schütze* Art. 46 note 3 and *Kropholler* Art. 46 note 5, with further references, respectively, to French and German case law.

case.[9] In particular, the European Court pointed to the principle that the foreign judgment may under no circumstances be reviewed as to its substance (Art. 34 (2) of the Convention, Art. 45 (2) of the Regulation), and inferred that Art. 38 of the Convention (Art. 46 of the Regulation) cannot be interpreted as meaning that the court concerned may take into consideration, in a decision concerning an application for a stay of enforcement proceedings, submissions already put before the adjudicating foreign court. Nor can it in such a decision take arguments into account which were unknown to the foreign court at the time of its judgment for the reason that the appellant had failed to put them before it.[10] In consequence, what the court of the State requested may take into consideration, in such a decision, is limited to such facts as have occurred subsequently to the judgment and which the appellant was therefore unable to submit to the court of the State of origin.[11]

11 The power conferred on the court of the requested State to stay the enforcement proceedings has been held to include a power to impose such a stay subject to terms. The court may therefore order a stay of those proceedings on condition that appropriate security is provided by the judgment debtor.[12]

12 It has occasionally been held that, in order to obtain a stay of the enforcement proceedings, the party against whom enforcement is sought must rely on one of the grounds for refusal of recognition of the foreign judgment which are exhaustively listed in Arts. 27 and 28 Brussels Convention (Arts. 34 and 35 of the Regulation) as a ground of his appeal.[13] This view, however, has no support in the text of the provision and does not seem to be consonant with its purpose.[14]

13 The restrictive policy towards granting a stay which was adopted by the European Court in the *van Dalfsen* case has generally been followed in national decisions bearing on the Brussels Convention (Regulation). There are very few reported cases in which

9 *B. J. van Dalfsen and others* v. *B. van Loon and T. Berendsen*, (Case C-183/90) [1991] ECR I-4743, I-4774 paras. 27-37.

10 On this point the European Court referred to its decision in *Horst Ludwig Martin Hoffmann* v. *Adelheid Krieg*, (Case 145/86) [1988] ECR 645, where the Court ruled, in connection with Art. 36 of the Convention – corresponding to Art. 43 (5) of the Regulation – that a party who has not appealed against an enforcement order is precluded, at the stage of the actual execution of the judgment, from relying on a ground which he could have pleaded in such an appeal.

11 For national decisions following the view expressed by the European Court in the present respect see, e.g., France: CA Paris D. 1994 IR 66; CA Paris RCDIP 91 (2002), 362 with note *Pataut*; Germany: BGH IPRax 1995, 243 with notes by *Grunsky* (at p. 218) and by *Stadler* (at p. 220).

12 Belgium: Trib. Bruxelles in: Digest I-38 B 3; England: *Petereit* v. *Babcock International Holdings Ltd.* [1990] 2 All E. R. 135 (Q. B. D.).

13 OLG Hamburg in: Digest I-38 B 5.

14 See particularly A-G *Léger*, opinion in Case C-432/93 [1995] ECR I-2269, I-2283 paras. 43-51. In accord: *Layton/Mercer* paras. 27.060 et seq.

an unconditional stay of the enforcement proceedings has actually been ordered.[15] By contrast, there are many cases in which a stay was denied.[16]

14 If the court does decide to grant a stay, it also has a discretion as to the length of the stay. Normally, however, a stay should not extend beyond the time limited for the appeal to be brought in the State of origin, or, if an appeal has actually been brought, beyond the date of disposal of it.[17]

4. Legal consequences of a decision as to the grant of a stay

15 When a stay has been imposed, it follows from Art. 47 (3) that no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought. On the other hand, once the time limited for appealing has expired or an appeal lodged has been dismissed, the creditor may go ahead with enforcement of his judgment in accordance with the national law concerned. The court may, however, require the creditor to put up security pursuant to Art. 46 (3).

16 A decision by which the court hearing the appeal proceedings under Art. 43 orders or refuses to order a stay of the enforcement proceedings does not constitute a "judgment given on the appeal" within the meaning of Art. 44. It can therefore not be contested by an appeal in cassation or a similar form of appeal (see now Annex IV to the Regulation).[18]

III. Paragraph 2

17 Like Art. 37 (2), the present provision subjects Irish and United Kingdom judgments to a special regime, the reason being in both cases that the distinction between ordinary and extraordinary appeals has no counterpart in the legal systems of Ireland and the United Kingdom. The solution adopted in Art. 46 differs, however, from that enshrined in Art. 37. Indeed, whereas under the latter provision a stay of the proceedings for recognition of an Irish or United Kingdom judgment can only be granted if enforcement is suspended in the State of origin by reason of an appeal, no such limitation exists under Art. 46. Instead, it is provided that any form of appeal available in the State of origin must be treated as an ordinary appeal for the purposes of paragraph 1. This difference is explicable on the footing that the solution provided for in Art. 37

15 For a French decision granting such an order see CA Versailles RCDIP 81 (1992), 117 with note *Gaudemet-Tallon*.

16 In several such cases the court, instead, ordered the judgment creditor to provide security in accordance with paragraph 3 of the present provision. For such decisions see *infra* fn. 23.

17 *Layton/Mercer* para. 27.062.

18 *Calzaturifico Brennero SAS* v. *Wendel GmbH Schuhproduktion International*, (Case 258/83) [1984] ECR 3971, 3983 paras. 14-16; *B. J. van Dalfsen and others* v. *B. van Loon and T. Berendsen*, (Case C-183/90) [1991] ECR I-4743, I-4770 paras. 17-26; *Société d'Informatique Service Réalisation Organisation (SISRO)* v. *Ampersand Software BV*, (Case C-432/93) [1995] ECR I-2269, I-2297 paras. 27-42.

would be less appropriate in the context of Art. 46, because under the latter provision a stay can be granted without an appeal having (yet) been lodged in the State of origin.[19] On the other hand, in view of the very broad definition of an ordinary appeal given in the present provision and in the interest of striking a reasonable balance between the Member States in their application of Art. 46, it seems appropriate for the court of the State requested to make very cautious use of its discretionary power to stay enforcement proceedings in cases where the judgment emanates from Ireland or the United Kingdom.[20]

IV. Paragraph 3

18 Unlike Art. 37, Art. 46 provides that the competent court of the State requested may, instead of granting a stay, allow the enforcement proceedings to progress subject to the condition that the creditor gives such security as is determined by the court. Like the grant of a stay this is a means of protecting the judgment debtor which is within the discretion of the court. The same holds true as regards the form and amount of security required.

19 The exercise of this discretion is a matter for the same courts and is in principle subject to the same restrictions as have been mentioned above in respect of the grant of a stay of the enforcement proceedings. Nevertheless, it would seem that Art. 46 (3) leaves a broader room for taking various factors into account than there is under Art. 46 (1).[21] In particular, more weight can and should be given to the risk that execution of the judgment would cause irreparable harm to the debtor, if the judgment is subsequently overturned on appeal.[22] In such circumstances it seems reasonable to require the creditor to furnish security, even if the likelihood that the appeal will be successful is less high than would be required for a decision to stay the enforcement proceedings. There are quite a few reported cases in which enforcement was made conditional on the provision of security by the creditor.[23]

19 *Layton/Mercer* para. 27.070.

20 Report *Schlosser* para. 204.

21 This view has especially been endorsed in German case law and literature. See, e.g., BGH IPRax 1995, 243; *Geimer/Schütze* Art. 46 note 10; *Kropholler* Art. 46 note 7; *Mankowski*, in: *Rauscher* Art. 46 note 17. See also *Layton/Mercer* para. 27.075.

22 In a French case it has even been held that the judgment creditor could not be required to furnish security since the judgment debtor had not provided sufficient evidence that the creditor would be unable, in case the foreign judgment was overturned on appeal, to pay back the amount seised if the execution was allowed to go on. See CA Paris RCDIP 91 (2002), 362.

23 For examples of such cases see Belgium: Rb. Antwerpen in: Digest I-38 B 4; Denmark: ØLD UfR 1989 A 877; Germany: BGH IPRax 1985, 156 note *Prütting* (at p. 137); BGH IPRspr. 1986 Nr. 189 (affirming OLG Hamm IPRspr. 1985 Nr. 187); OLG Köln in: Digest I-38 B 2; OLG Düsseldorf IPRspr. 1984 Nr. 190; OLG Hamm IPRspr. 1993 Nr. 182; OLG Stuttgart IPRspr. 1997 Nr. 182.

20 In so far as the court of the State requested has a choice between granting a stay and permitting enforcement subject to security being provided, it would normally seem appropriate to give preference to the latter solution.[24] The reason is that the provision of security, while less radically interfering with the creditor's position, is in most cases sufficient to satisfy the debtor's interests. In order to avoid any possible misunderstanding, however, it should be recalled that there is also a third solution, which must indeed be considered to be the normal alternative, namely, to permit enforcement to go ahead without any condition being imposed.

21 As a rule, it seems inappropriate to grant an order for provision of security under Art. 46 (3) if the foreign judgment itself makes enforcement subject to the condition that security is given. In this situation the debtor's interests will normally be sufficiently protected by the security furnished in the State of origin.[25] Only if security has not been provided in that State or if it is predictably insufficient to cover the debtor's claim for damages arising out of the enforcement should it come into question to require security on the strength of the present provision in the State requested.[26]

22 In the *Brennero* case[27] the European Court ruled that the power to make enforcement conditional on the provision of security can only be exercised when the court of the State requested gives judgment on the appeal against a decision authorising enforcement. Consequently, the court is not allowed to order security to be furnished as an interim measure pending its own decision. The reason is that a need for protecting the debtor's interests, in principle, does not arise unless and until the appeal is dismissed, because it is only at that moment that the creditor can proceed to enforcement means (other than protective measures), see Art. 47 (3).

24 This is the prevailing view especially in Germany. See, e.g., *Geimer/Schütze* Art. 46 note 3; *Kropholler* Art. 46 note 1; *Mankowski*, in: *Rauscher* Art. 46 note 3. *Contra*, apparently, the decision in the English case of *Petereit* v. *Babcock International Holdings Ltd.* [1990] 2 All E.R. 135 (Q.B.D.), where the judge said (at p. 143), *inter alia*, that "I do not think that the convention [i.e. the Brussels Convention] expresses any preference as to which method (i.e. by ordering a stay or by making enforcement conditional on the provision of security by the creditor) is to be employed by the enforcing court. Nor do I consider that the policy of the convention ... requires the enforcing court to prefer one method as opposed to the other."

25 See *Geimer/Schütze* Art. 46 note 13; *Kropholler* Art. 46 note 7. Cf. *Layton/Mercer* para. 27.075.

26 For an English case where the foreign court had ordered security to be lodged but where the amount of that security was held to be wholly inadequate and therefore did not prevent the English court from requiring adequate security to be provided, see *Petereit* v. *Babcock International Holdings Ltd.* [1990] 2 All E.R. 135 (Q.B.D.). See also the German case decided by OLG Stuttgart IPRspr. 1997 Nr. 182.

27 *Calzaturificio Brennero SAS* v. *Wendel GmbH*, (Case 258/83) [1984] ECR 3971, 3981 paras. 7-13; cf. also *Kaye* p. 1641-1642.

Article 47

(1) When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.
(2) The declaration of enforceability shall carry with it the power to proceed to any protective measures.
(3) During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

I. General

Art. 47 concerns provisional, in particular protective, measures allowed to be taken when a judgment must be recognised in accordance with this Regulation (paragraph 1) or has already been declared enforceable in the State requested (paragraphs 2 and 3). Paragraph 1 is new in the sense that it has no counterpart in the Brussels Convention. Paragraphs 2 and 3, on the other hand, substantially reproduce the contents of Art. 39 of the Convention. 1

The purpose of Art. 47 is to strike a balance between the rights and interests of the judgment creditor and the judgment debtor at the enforcement stage.[1] On the one hand, the judgment debtor, who has not been afforded an opportunity to be heard during the first stage of the enforcement proceedings, is protected inasmuch as no irrevocable steps in the execution process may be taken as long as the debtor has not been notified and heard on appeal, see paragraph 3. On the other hand, the creditor is protected against the risk that the debtor seeks to avoid the judgment by disposing of the assets on which execution is to be levied or by removing them beyond the creditor's reach. This is achieved by giving the creditor the right to take provisional, including protective, measures in accordance with paragraphs 1 and 2. 2

Art. 47 applies irrespective of whether the judgment sought to be enforced has already acquired the force of *res judicata* in the State of origin or whether it is still subject to an ordinary appeal or whether such an appeal has actually been lodged against the judgment in that State. 3

II. Paragraph 1

Where the foreign judgment concerned must be recognised in accordance with the Regulation, the judgment creditor can immediately, already before he has obtained or even applied for a declaration of enforceability, avail himself of provisional, including 4

1 Report *Jenard* p. 52.