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 *Calzaturifico 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.

protective, measures in accordance with the law of the requested State. It may not even be a relevant matter for investigation at this stage whether there exists any ground for withholding recognition under Arts. 34 and 35 of the Regulation.[2] The right conferred on the creditor under the present provision can be important for him during the time (which should normally be very short) that elapses until an automatic right to proceed to provisional measures arises by virtue of paragraph 2. Although the provision under review is new (as compared with the Brussels Convention), it is doubtful whether it actually involves any change of the law.

5 The regime laid down in Art. 47 has been characterised as an extension of that embodied in Art. 31.[3] Indeed, while Art. 31 is concerned with provisional measures available before judgment is given on the substance of the matter, Art. 47 (1) deals with such measures to be taken after that judgment has been given but before it has been declared enforceable. Under both provisions the questions as to what kinds of protective measures are available and to what prerequisites they are linked fall to be determined by the national law of the State in which the measures are sought. This includes the question as to the relevance of the foreign judgment as a ground for granting provisional relief.

6 One aspect of Art. 47 (1) is that it enables the creditor to proceed to protective measures in two or more Member States in which property belonging to the debtor is or may be situated. This may be advantageous for the creditor particularly in cases where it is uncertain whether or to what extent such property exists in one Member State or the other. The creditor can then await the results of the protective measures sought to be taken before he decides in which State or States to proceed with his application for a declaration of enforceability.[4]

III. Paragraph 2

1. The creditor's automatic right to take protective measures

7 Once the judgment creditor has obtained a declaration of enforceability, he becomes entitled to take any protective measures available under the law of the State requested. The purpose of this provision is to offer the creditor (who cannot yet proceed with other measures of enforcement, see paragraph 3) a means of preventing the party against whom enforcement is sought from disposing of his property in the meantime so as to render future enforcement fruitless or indeed impossible.[5]

8 The power conferred on the creditor under Art. 47 (2) flows directly from that provision (and, contrary to cases coming within Art. 47 (1), not from any national law). That power arises automatically and is unconditional. It is not dependent on service of

2 See *Geimer/Schütze* Art. 47 note 1. But see *Mankowski*, in: *Rauscher* Art. 47 note 7.

3 See Commission Proposal COM (1999) 348 final p. 23, comment on the proposed Art. 44.

4 See *Kropholler* Art. 47 note 6; *Mankowski*, in: *Rauscher* Art. 47 note 11.

5 *P. Capelloni and F. Aquilini* v. *J. C. J. Pelkmans*, (Case 119/84) [1985] ECR 3147, 3159 para. 19.

the declaration of enforceability on the judgment debtor having been effected.[6] Nor is there any need for the creditor to obtain a separate decision from the courts of the State requested authorising the protective measures or a judgment *a posteriori* confirming those measures.[7] It also follows that the creditor does not have to show probable cause for his claim or establish that there is a risk that the party against whom enforcement is sought will, by removing property or otherwise, evade payment of his debt.[8] Requirements of the kind mentioned which may exist in the national law of the State requested must be disregarded in cases coming within Art. 47 (2). The principles thus laid down by the European Court seem to have been fully accepted by the national courts of the Member States.[9] Nevertheless, some doubts still exist as to their detailed application.[10]

It should finally be noted that the relevant national law may allow the judgment debtor to avert protective measures by furnishing such security as satisfies the purpose of the measures in question.[11] Such a provision does not seem to be contrary to the Brussels Convention or Regulation. 9

2. Relevance of national law

As always, the question of *what* protective measures may be taken is a matter to be decided by reference to the national law of the State where the measures are sought. Thus, the Regulation does not guarantee the creditor any specific measures of enforcement.[12] The measures that come into question normally involve the seizure or freezing of the judgment debtor's assets. 10

Likewise, a number of other questions regarding measures, types and procedures for the execution of protective measures under Art. 47 (2) remain matters for the national law 11

6 For a German decision confirming this view (in regard to the Brussels Convention) see LG Stuttgart IPRax 1989, 41 with note *Pirrung* (at p. 18).

7 See *P. Capelloni and F. Aquilini* v. *J. C. J. Pelkmans*, (Case 119/84) [1985] ECR 3147, 3160 paras. 23-26 and 3162 paras. 31-37.

8 Cf. Report *Jenard* p. 52, emphasising that the applicant does not have to establish that the case calls for prompt action or that there is any risk in delay.

9 See, e.g., Ireland: *Elwin (Cottons) Ltd.* v. *Pearl Designs Ltd.* [1989] ILRM 162 (H.C.) noted by *Coester-Waltjen*, IPRax 1990, 65; see also *Hogan*, (1989) 14 E.L.Rev. 191, 202-203; Italy: Cassaz. RDIPP 1989, 129 (the decision of the court which had invited the European Court to give a preliminary ruling in the *Capelloni* case); App. Torino RDIPP 1989, 399.

10 See *Kaye* p. 1634-1638.

11 For examples of this type of provision see Germany: Section 20 of the Recognition and Enforcement Code (AVAG) of 19 February 2001 (BGBl. 2001 I 288); Sweden: Chapter 15, Section 8, of Rättegångsbalken (the Code of Judicial Procedure) of 18 July 1942. For a German judicial decision see OLG Hamm IPRspr. 1977 Nr. 168.

12 Report *Schlosser* para. 221.

of the State requested.[13] The European Court has stated that the Brussels Convention (now: the Regulation) leaves the matter of resolving any question not covered by specific provisions of the Convention to the procedural law of the court hearing the proceedings. Nevertheless, the European Court made it clear that the application of the requirements of the national procedural law of the court hearing the proceedings must not in any circumstances lead to frustration of the principles laid down in that regard, whether expressly or by implication, by the Convention itself and by Art. 39 thereof in particular. Accordingly, the question whether any given provision of the national procedural law of the court hearing the proceedings is applicable to protective measures taken pursuant to Art. 39 depends upon the scope of each provision of national law and upon the extent to which it is compatible with the principles laid down by Art. 39 (now: Art. 47 of the Regulation).[14]

IV. Paragraph 3

12 Art. 47 (3) restricts the right of the judgment creditor to take enforcement measures until the expiry of the period for lodging an appeal specified in Art. 43 (5) and, if such an appeal is lodged, until it has been determined. During that time the creditor is only allowed to take such protective measures as are available under the law of the requested State. As has already been mentioned, the *ratio* of this provision is that no irreversible measures of execution, such as the sale or disposal of the debtor's property, should be allowed to be taken as long as the judgment debtor has not had an opportunity to be heard in the enforcement proceedings.

13 The question has arisen whether the period during which the judgment creditor can proceed to take protective measures may be further restricted by national law. The European Court has answered that question in the negative: "the right to proceed with the measures in question cannot be restricted in time by the application of national measures prescribing a shorter period".[15]

14 Once the time specified for an appeal has expired or an appeal lodged has been disposed of, the restrictions provided for by Art. 47 (3) cease to be applicable. The creditor need not await the time within which the debtor is entitled to lodge a further appeal or the outcome of such appeal proceedings.[16] The only protection possibly enjoyed by the debtor in this situation is if the court hearing the appeal has used its power under Art. 46 (3) to make enforcement conditional on the the creditor providing security.

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13 One such question, specifically mentioned by the *Schlosser*report (para. 221), is under what conditions measures of enforcement are possible against persons other than the judgment debtor.

14 *P. Capelloni and F. Aquilini* v. *J.C.J. Pelkmans*, (Case 119/84) [1985] ECR 3147, 3159 paras. 20-21. The meaning of this statement is discussed by *Kaye* p. 1629-1634.

15 *P. Capelloni and F. Aquilini* v. *J.C.J. Pelkmans*, (Case 119/84) [1985] ECR 3147, 3161 para. 28. And see *Kaye* p. 1636.

16 *Calzaturifico Brennero SAS* v. *Wendel GmbH Schuhproduktion International*, (Case 258/83) [1984] ECR 3971, 3982 para. 12.

Article 48

(1) Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.
(2) An applicant may request a declaration of enforceability limited to parts of a judgment.

This provision in substance reproduces Art. 42 of the Brussels Convention. It deals with cases in which a declaration of enforceability may be given for part only of the judgment invoked. Two situations of this type are distinguished, each of which is treated in a separate paragraph.[1] 1

The first situation is where the judgment encompasses two or more separate and independent matters which do not both (all) meet the conditions for enforceability in the State requested. This is not an unusual case. It occurs, for instance, where some part or parts of the judgment fall outside the scope of the Regulation. A simple example is a decree of divorce which also contains orders for the payment of maintenance and provisions concerning rights in property arising out of the matrimonial relationship. Pursuant to Art. 1 (2) such a judgment is not within the scope of the Regulation, in so far as it relates to divorce and matrimonial property (although to that extent it may well be recognised or enforced on the strength of an applicable convention or under the autonomous law of the State requested[2]). This, however, does not prevent a declaration of enforceability being given in respect of the obligation to pay maintenance, which is within the Regulation. 2

Another type of example is where a severable part of the judgment has already been satisfied. To that extent the judgment is no longer enforceable in the State of origin, nor in consequence in the State requested, see Art. 38 (1). Again, this is no bar to a declaration of enforceability being given as regards the parts of the judgment which remain unsatisfied. 3

The second situation covered by Art. 48 is where the applicant himself seeks only partial enforceability of the foreign judgment. Such a request may be made and granted even if the judgment in question is in respect of a single claim such as the payment of a debt. A simple example is where the debtor has paid some part of the debt after the judgment was given and the creditor is now seeking to recover the balance of his claim. 4

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1 See Report *Jenard* p. 53.

2 Nevertheless, some problems may arise when the foreign judgment comes only partially within the Regulation and the other parts fall within a convention or the autonomous law of the State requested. See *Gaudemet-Tallon* para. 467.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

1 This provision is for all practical purposes identical to Art. 43 of the Brussels Convention. It is designed to deal with some problems arising due to the existence in the laws of Member States of various provisions whereby specific performance ordered by a judgment is enforced by a monetary penalty for default, in particular where the amount to be paid is determined by reference to the length of time during which the debtor's primary obligation remains unsatisfied.[1] In some Member States such a penalty is finally fixed in the judgment imposing it and can be directly enforced in case of non-compliance by the debtor with his primary obligation.[2] In others, however, *inter alia* in France, a contravention of the court order must be followed by a further judicial decision finally determining the amount to be paid (*liquidation*).[3] In fact, this second order usually fixes the amount due at a lower level than the full sum calculated on the basis of the length of time during which the debtor has been in breach of performance.

2 Art. 49 of the Regulation is largely influenced by the latter conception. The effect of this provision is that a judgment ordering a periodic payment by way of a penalty can only be enforced in the State addressed if the amount of payment due has been finally fixed by a court order in the State of origin. It will therefore not be sufficient if the amount payable can be calculated by reference to the daily rates imposed and the period of time the debtor has been in default. This is so even if the law of the State of origin does not, itself, require any *liquidation* of the periodic payments ordered.[4]

3 According to the English text, Art. 49 is limited to payments which have to be made on a *periodic* basis. Such a requirement however, does not figure in other authentic texts and cannot reasonably be a necessary condition for applying the provision. Rather, the relevant test appears to be whether the payments ordered are *calculated* on a periodic basis.[5]

4 In order for the present provision to apply it is clearly necessary that the payment order has been made by way of a penalty. The enforceability of judgments ordering other periodic payments (such as rent or maintenance) or payments calculated by reference

1 Such as the penalty known as *astreinte* in French law.

2 This appears to be the case in Belgium and the Netherlands.

3 Report *Schlosser* para. 213.

4 For a French decision so holding (on the basis of Art. 43 Brussels Convention) see CA Paris ERPL 1994, 399 with note *Remien*. Cf. the Dutch decision of Rb. Rotterdam in: Digest I-43 B 1.

5 See Report *Jenard* p. 54, referring to orders for the payment of a sum of money *for* each day of delay; *Layton/Mercer* para. 27.092.

to time (such as interests) is not dependent on the amount to be paid having been finally determined by the courts of the State of origin.

5 For the judgment to be enforceable in the State addressed the amount of the payment must have been *finally* determined by the courts of the State of origin. This does not mean that the judgment must have become *res judicata*. It suffices that the amount of the total sum payable has been determined by a court, even if the order for payment is still only provisionally enforceable and is still susceptible of amendment or discharge on appeal.[6]

6 A question which was left open when the Brussels Convention was drafted and adopted is whether a fine for disregarding a court order can be enforced even if it accrues, not to the judgment creditor but to the State.[7] The doubts surrounding this question have not yet been finally dispelled. The answer apparently depends on the interpretation of the words "civil and commercial matters" in Art. 1 (1). From a functional point of view the better arguments seem to militate in favour of including cases of the present type within the scope of the Regulation.[8]

7 Art. 49 does not prevent the judgment containing the original obligation (i.e. the obligation non-compliance with which is sanctioned by a penalty order) from being recognised and declared enforceable in the State addressed. Nor does it seem to exclude the possibility of obtaining a judgment in that State imposing a monetary penalty for default. In this way the creditor may have an alternative available to seeking a declaration of enforceability of the foreign judgment ordering the payment of a penalty. This may be of practical importance especially as regards judgments ordering the defendant not to commit a threatened wrong, such as an infringement of industrial property rights. It is even conceivable that the creditor seeks to proceed in both ways and thereby to obtain two enforceable penalty judgments in the State addressed. Such a situation would be bound to give rise to problems which are so far rather speculative and which will not be further considered here.[9]

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

6 *Layton/Mercer* para. 27.094.

7 Report *Schlosser* para. 213.

8 See *Kropholler* Art. 49 note 1 with references; *Geimer/Schütze* Art. 49 note 2; *Mankowski*, in: *Rauscher* Art. 49 notes 3 et seq.

9 See *Kropholler* Art. 49 note 3. Cf. *Geimer/Schütze* Art. 49 no. 3; *Mankowski*, in: *Rauscher* Art. 49 notes 8-10.

1 This provision substantially reproduces Art. 44 (1) of the Brussels Convention. Its scope of application is, however, considerably wider. For whereas its predecessor is limited to the initial stage of the proceedings for obtaining a declaration of enforceability, the present provision applies "in the procedure provided for in this Section", that is to say, throughout those proceedings, including the second and third stages. It does not, however, extend to the stage of the actual enforcement (execution).

2 The purpose of Art. 50 is to extend the benefit of legal aid enjoyed by the applicant in the State of origin to the enforcement proceedings in the State addressed. This is of particular importance in maintenance cases, where the provision has a social function to fulfil.[1] It should be noted in this connection that the provision corresponds with the terms of Art. 15 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.[2]

3 The extension of legal aid effected by the present provision takes place *ipso iure*. There will therefore not be any need for the applicant to go through the procedure for obtaining legal aid prescribed in the State addressed or for his entitlement to such aid to be further examined in that State.[3]

4 The provision may be characterised as generous towards the applicant, for even if he was only granted partial legal aid in the State of origin, full legal aid must be granted in the proceedings for a declaration of enforceability. It is, however, limited to such legal aid as is available under the law of the Member State addressed; it does not oblige that State to introduce a system of legal aid in civil matters if it does not already have one or to adapt its system to that obtaining in the State of origin.[4] Furthermore, the extent and other details of what constitutes "full legal aid" must be determined by reference to the *lex fori* of the State addressed.[5]

5 As regards the documents required to be produced by the applicant to show that he was in receipt of legal aid in the State of origin, see Artt. 54 and 55 in conjunction with Annex V.

6 Art. 50 does not exclude the possibility of legal aid being granted in accordance with the rules of the autonomous law of the State addressed or of relevant international conventions. Indeed, the provision is aimed at improving, and not at impairing, the situation of the indigent applicant.[6] Thus, for instance, if the applicant did not enjoy

1 Cf. Report *Jenard* p. 54.
2 Cf. Report *Schlosser* para. 223.
3 For judicial decisions see Germany: OLG Düsseldorf in: Digest I-44 B 1; Sweden: Högsta Domstolen NJA 2003, 666.
4 Report *Schlosser* para. 223.
5 Cf. the decision of the Högsta Domstolen NJA 2003, 666.
6 See *Kropholler* Art. 50 note 6.

legal aid in the State of origin but has become impoverished after the end of the proceedings in that State, he may be entitled to legal aid in the State addressed under the law of that State.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

This provision is virtually identical to Art. 45 of the Brussels Convention. It affords protection against an order for security being issued in proceedings for the enforcement of a judgment given in another Member State.[1] The authors of the Brussels Convention, rightly it is submitted, thought that the provision of security in relation to such proceedings was unnecessary.[2] 1

It must be noted, however, that the provision only prevents an order for security being made on the ground of the applicant's foreign nationality or his lack of domicile or residence in the State addressed. It does not exclude security being required on other grounds. Indeed, it follows from Art. 46 (3) that enforcement may in certain circumstances be made conditional on the provision of security. There are also other grounds on which the court may make an order for security pursuant to its own law.[3] 2

On the other hand, the provision is not limited to applicants who are nationals of or domiciled or resident in a Member State. It also applies to applicants having no connection whatsoever to a Member State. One consequence is that a judgment debtor who has successfully opposed an application for enforcement may in certain cases find it difficult to recover the costs incurred for his defence.[4] 3

1 But not, of course, against orders for security being made in the proceedings in the State of origin. As regards nationals of other Member States, however, such an order would be contrary to the principle of non-discrimination laid down in (what is now) Art. 12 of the EC Treaty, in so far as the action is concerned with the exercise of fundamental freedoms guaranteed by Community law. See, e.g., *Data Delecta Aktiebolag and Ronny Forsberg* v. *MSL Dynamics Ltd.*, (Case C-43/95) [1996] ECR I-4661; *David Charles Hayes and Jeannette Karen Hayes* v. *Kronenberger GmbH*, (Case C-323/95) [1997] ECR I-1711; *Stephen Austin Saldanha and MTS Securities Corporation* v. *Hiross Holding* AG, (Case C-122/96) [1997] ECR I-5325.
2 Report *Jenard* p. 54.
3 See *Layton/Mercer* para. 27.100; *Mankowski*, in: *Rauscher* Art. 51 note 2.
4 See critically *Droz* para. 592; *Geimer/Schütze* Art. 51 note 5.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter in issue may be levied in the Member State in which enforcement is sought.

1 This provision goes back to Art. III of the Protocol to the Brussels Convention, whose wording it reproduces practically unchanged. The background to the latter provision was that the fees payable in some Member States for the issue of an *exequatur* were fixed, whereas in others they were calculated by reference to the value of the judgment sought to be enforced. Art. III of the Protocol was included in order to remedy the distortion considered to result from this difference.[1]

2 The provision is only concerned with fees payable to the State addressed. It has no bearing on lawyers' fees.[2]

3 As is clear from its wording, the provision does not purport to eliminate the right of the Member States to require fees to be levied for the issue of a declaration of enforceability or even to harmonise the rules applicable in the Member States concerning such fees. Nevertheless, a prohibitive level of court fees for enforcement proceedings would clearly run counter to the purpose of the Regulation to facilitate the free movement of judgments between the Member States. This problem was already adverted to in the *de Wolf* case.[3] In that case the European Court, after observing that the Brussels Convention, in the words of its preamble, is intended "to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals", stated that the Convention ought to induce the Contracting States to ensure that the costs of the procedure described in the Convention are fixed so as to accord with that concern for simplification.[4] The same is now true of the Regulation and its Member States.

1 Report *Jenard* p. 63.
2 Report *Jenard* p. 63.
3 *Jozef de Wolf* v. *Harry Cox BV*, (Case 42/76) [1976] ECR 1759.
4 *Jozef de Wolf* v. *Harry Cox BV*, (Case 42/76) [1976] ECR 1759, 1767 para. 15.

Section 3
Common provisions

Preliminary remarks to Arts. 53 to 56

The provisions of Arts. 53 to 56 provide the general rules applicable to the whole of Chapter III – relating both to recognition (Arts. 33 to 37) and to enforcement (Arts. 38 to 52). Section 3 defines the formal preconditions to the recognition and enforcement of judgments defined in Art. 32. This means that the rules must be applicable to every judgment defined in Art. 32, to the exclusion of other types of judgments. Accordingly, a judgment of consent or judgments in short form (e.g. the judgments in §§ 313a (1), 313b (1) and 317 in the German ZPO) will also qualify as a judgment for these purposes; but documents made by a lawyer and settlements in process – according to a strongly contestable decision of the European Court of Justice[1] – will not. Nevertheless, the provisions of section 3 are applicable indirectly via the rules contained in Arts. 57 (4) and 58. 1

Article 53

(1) A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity. (2) A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

In order to recognise or enforce a judgment, Art. 53 (1) requires the creditor to produce a copy[1] of the judgment. This copy must satisfy the conditions necessary to establish its authenticity. The crucial criterion when determining the authenticity of the judgment is that the copy is proven to be authentic before the court in question. The authenticity of the copy must be judged according to the national law of the court giving judgment.[2] Under no circumstances is a judgment copied by hand, by typewriter or by Xerox adequate. The attached copy does not have to stay in the possession of the court giving recognition or declaring enforceability.[3] In practice the court usually gives a seal of approval and hands the documents back to the petitioner. 1

1 *Solo Kleinmotoren GmbH* v. *Emilio Boch*, (Case C-414/92) [1994] ECR I-2237, I-2256 para. 20.
1 French: "expédition"; German: "Ausfertigung"; Spanish: "copia auténtica"; Italian: "copia della decisione".
2 Report *Jenard* p. 55.
3 The BGH decided accordingly: BGHZ 75, 167, 179 = NJW 1980, 527.

2 Based on Art. 53 (2), the certificate defined in Art. 54 must also be attached to the declaration of enforceability. This rule does in fact make it easier for a creditor to have a judgment recognised or enforced than the procedure used in the Brussels Convention.[4] The court seised for the recognition and enforcement is able to find all the necessary information in the certificate, and therefore it is under no obligation to consider the authenticity of the data otherwise. Courts of first instance generally have limited powers of control in this respect. A court of first instance cannot examine the existence of reasons to refuse judgment according to Art. 34 (2) as this may only be done by another court during the appeal procedure defined in Art. 45 (1). The certificate itself must be issued by the Member State court seised in the standard form as defined in Annex V to the Regulation. If the creditor cannot submit such a certificate, the judgment shall only be recognised or enforced if the conditions listed in Art. 55 are met.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to the Regulation.

1 The certificate in Art. 54 and the standard form in Annex V which it is based on seeks to formalise the recognition and enforcement procedure and thus to further simplify the procedure in the various Member States.[1]

2 The certificate is not necessarily issued by the same court that has given the enforceable judgment. The law of the Member State where the certificate is issued determines which court has authority to issue the certificate. The precondition to issuing such a certificate is the express request of the interested party that wishes to seek enforcement in another Member State. The rules do not specify a time limit for the submission of the request. Appeal against the decision taken in connection with the certificate is governed by Arts. 43 to 44.

3 The standard form in Annex V to this Regulation is the equivalent of the conditions listed in Arts. 46 Nr. 2 and 47 Brussels Convention. The standard form specifies the compulsory substance and form of the certificate. The identical content of the standard form in every official language of the European Communities identified in Annex V makes translation of the documents unnecessary and greatly simplifies the procedure. The standard form contains all the necessary information (the names of the parties, the date, the number of the claim etc.) that the court issuing the certificate needs to take into account. If the judgment to be enforced was brought in a procedure where the dismissed party was not present (judgment in default), the certificate must contain the

4 Commission Proposal COM (1999) 348 final p. 26.

1 Commission Proposal COM (1999) 348 final p. 26.

date of the written request for starting the relevant proceedings (Nr. 4.4 Annex V). This is necessary to ascertain whether the documents were served on the defendant in due time. Since a court of first instance is not authorised to examine whether any grounds of refusal exist according to Art. 41, this can only be done in an appeal procedure. In the appeal procedure the certificate provides the basis for granting or suspending a request for enforcement (according to Art. 34 Nr. 2) for the appeal court in question. In certain circumstances the certificate must also contain the name of the party that has received a reduction in process costs (Nr. 5 Annex V).[2] The certificate, lastly, specifies the party against which the decision may be enforced in the original Member State. It does not, however, have to contain information as to whether the decision is enforceable or not, since the Brussels I Regulation includes the previously enforceable judgments as well.

Article 55

(1) If the certificate referred to in Article 54 is not produced, the court or competent authority 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.
(2) If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

The first paragraph of Art. 55 defines the way in which the certificate issued according to Art. 54 may be substituted. Producing a copy of a judgment according to Art. 53 (1) does not come under this section. The rule in Art. 55 (2), however, covers all documents defined in Arts. 53 and 54. According to the correct explanation of Art. 55, extreme formalism should be avoided.[1] This rule however, does not exclude the possibility of referring back to national law if necessary, provided that the national rules do not conflict with the spirit of secondary Community law.[2] 1

While the submission of the copy of the judgment is compulsory according to Art. 53 (1), the Art. 54 certificate is replaceable. The court or competent authority can exercise discretion whether to impose a time limit on the party seeking enforcement to submit a certificate, to accept other documents, or to dispense with submission of a certificate altogether. The latter is only possible if the party has already provided evidence to the court in another way. The Brussels Convention dismisses the requirement to provide a certificate if obtaining one would have imposed an unnecessary 2

2 See Directive 2002/8/EC of the Council of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 26/41.

1 Report *Jenard* p. 55, to Art. 48 Brussels Convention.

2 *Roger van der Linden* v. *Berufsgenossenschaft der Feinmechanik und Elektrotechnik*, (Case C-275/94) [1996] ECR I-1393, I-1413 para. 18.

burden on the party seeking enforcement.[3] The court or competent authority has the discretion to refuse a request for enforcement according to Arts. 3 and 14 if the required documents are missing. In such a case the applicant may bring appeal proceedings. The appeal proceedings have a contradictory nature, therefore the applicant must be compulsorily examined according to Art. 43 (3). Taking all of the above into consideration, it seems that the most convenient option for the court or competent authority to specify a time for the production of a certificate. If the creditor seeking enforcement does not comply with the set deadline, the request for enforcement must be refused. The possibility to submit a new certificate is governed by the law of the Member State where the enforcement is sought. From the spirit of Art. 55 we can suggest that there should be a way for the creditor to be able to present the certificate in the course of the appeal procedure as well.[4]

3 The documents to be attached according to Art. 53 may be submitted without translation. If the court or competent authority at first or second instance considers that translation would be necessary, the party seeking enforcement can submit the translation even afterwards. In order to make the applicant's position easier, it is enough if the translation is certified by a person qualified to do so in any of the Member States. The court has the discretion to accept a translation done also by a person not explicitly certified to do so.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55 (2), or in respect of a document appointing a representative ad item.

Art. 56 wishes to make the recognition and enforcement of judgments within the common judicial area, as well as the internal market, as simple as possible by removing all remaining obstacles. Thus the rule says that there is no need to have a foreign document certified for its authenticity by a consular authority of the Member State where the document is to be used. There is equally no need for similar formalities, such as the formal requirements specified in the Hague Convention of October 5, 1961. This means that all foreign documents are to be judged on equal footing with national documents in all Member States. In other words, the authenticity of a document must be judged by the rules of the Member State enforcing the judgment. All the above is true also in respect of a document appointing a representative ad item.

3 OLG Koblenz EuZW 1990, 486.

4 This is how the German courts have decided under the Brussels Convention; OLG Koblenz EuZW 1990, 486; OLG Köln RIW 1990, 229.

Chapter IV
Authentic Instruments and court settlements

Article 57

(1) A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.
(2) Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.
(3) The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.
(4) Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

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