Article 32

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

I. General Outline

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

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

II. Legislative history

#3# Art. 32 already appeared in the original Brussels Convention (Art. 25). The text has not been modified in the Brussels I Regulation, save for the substitution of the reference to the 'Contracting State' by 'Member State'. A similar provision appears in Art. 26 of the Lugano Convention.

III. Commentary

1. ". . . Any judgment"

#4# The question whether a judgment is capable of recognition or enforcement under the Regulation must be decided on the basis of an independent interpretation of the European regime. Reference to national law cannot be decisive.[1]

#5# The form or the name given to the judgment by the court of origin is not material to decide whether a particular decision is a "judgment" for the purposes of Art. 32.[2]

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

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

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

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

Judgments issued in shortened form, without a full description of the reasoning followed by the adjudicating court, should also be recognised and enforced.[3] The court addressed may have regard to other documents, such as pleadings submitted by the parties, to exercise its control over the grounds of refusal.

#6# Artt. 33 ff. of the Regulation may obviously only be applied if the decision falls within the scope of application of the Regulation.[4] This will be the case if the dispute brought before the court of origin was principally concerned with an issue which belongs *ratione materiae* to the Regulation.[5] The fact that the court of origin also decided, incidentally, an issue which falls outside the scope of application of the Regulation, does not exclude the application of the Regulation.[6] When deciding upon the recognition or enforcement of a judgment, the court addressed is not bound by the determination made by the court of origin as to the applicability of the Regulation.[7] The court addressed may in other words decide that the dispute falls outside the scope of the Regulation even if the court of origin applied the Regulation.[8] Decisions awarding costs to one party will likewise be recognised and enforced when the underlying dispute concerned related to a subject matter falling within the material scope of the Regulation.[9]

2. ". . . from a court or tribunal . . ."

#7# The Regulation applies only to decisions issued by courts or tribunals. Although the Regulation does not provide a definition of what constitutes a court or a tribunal, it is understood that this covers any judicial authority acting independently from other organs of the State and whose decisions are taken following a procedure having the characteristics of a judicial proceedings, i.e. based on the respect for the principle of due process.[10]

#8# According to the Court of Justice, ". . . in order to be a 'judgment' for the purposes

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

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

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

[6] Cass. RCDIP 73 (1984), 501.

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

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

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

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

of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between parties."[11] Hence, a default judgment issued by an English court cannot benefit from the Regulation's rules on recognition and enforcement since under English law, when the defendant does not appear, the plaintiff's claim will be accepted without any examination by the court.[12] A mere claim form issued by the plaintiff and registered by the court does not constitute a judgment.

#9# A decision taken by an administrative body could conceivably satisfy the requirements of Art. 32. This will be the case provided the administrative body performs a judicial function and satisfies the requirements of independence and due process that are at the heart of the adjudicatory process.[13]

#10# If the court or tribunal satisfies the requirements of independence and due process, it does not matter whether the court sits in civil, commercial, administrative or even criminal proceedings. The Regulation could be applied to a decision issued by a criminal court, awarding damages to a victim.[14] The Regulation also applies to the decisions of bar authorities when establishing the fees due to an attorney for the legal services rendered, provided the decision has been declared enforceable or otherwise been ratified by judicial authorities.[15] The determination of costs by an officer of the court (in Germany the '*Rechtspfleger*') following the adjudication of a dispute could also qualify as a judgment if under then relevant provisions of law, the officer must decide on the substance of the matter.[16]

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

#11# The Regulation only applies to judgments issued by courts of Member States.[17] This means that the court or tribunal must have been established by the sovereign decision of one Member State. For the recognition and enforcement of judgments issued by courts of third states, one must therefore have regard to the domestic rules of each Member State.

#12# This has been confirmed by the ECJ in *Owens v. Bracco* in which the Court held that the Regulation can only be applied to judgments issued by courts of Member State.[18]

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[11] *Solo Kleinmotoren GmbH v. Emilio Boch,* (Case C-414/92) [1994] ECR I-2237, I-2255 paras. 17 and 18.
[12] See *Cuniberti*, RCDIP 89 (2000), 786, 788-789.
[13] See *Bariatti,* RDIPP 2001, 6.
[14] See Art. 5 (4) of the Regulation.
[15] See LG Karlsruhe RIW 1991, 156 = IPRax, 1992, 92 and Trib. Bruxelles Gaz. Pal. 1981 somm. 78 (applying the Brussels Convention to the decision taken by the president of the Paris bar, which had been confirmed by a French court). Compare with OLG Koblenz RIW 1986, 469 = IPRax 1987, 24 (the decision of the President of a bar association does not, as such, constitute a judgment). See in general the distinctions made by *Kropholler* Art. 32 note 9.
[16] *Solo Kleinmotoren GmbH v. Emilio Boch,* (Case C-414/92) [1994] ECR I-2237, I-2255 para 16. See e.g. OLG Saarbrücken IPRax 1990, 207 = [1992] I.L.Pr 146 (allowed the enforcement in Germany of two French decisions awarding the plaintiff costs of the dispute). Compare with Pres. Rb. Maastricht NJ 1982, Nr. 466 (holding that a German *Kostenrechnung* is not to be considered a judgment as referred in Art. 32. The *Kostenrechnung* had been drawn up by the plaintiffs themselves, as notaries).
[17] See Art. 299 EC Treaty for the geographical scope of European law in general. For judgments issued by the courts of Gibraltar, see *Briggs/Rees* 429.
[18] *Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA,* (Case C-129/92) [1994] ECR I-

#13# The rules of Chapter III can not be applied to arbitral awards,[19] or to judgments given by ecclesiastical courts. Decisions rendered by international courts or tribunals, such as the European Court of Human Rights or the European Court of Justice are also excluded from the scope of Chapter III.[20] Whether the Regulation applies to a decision issued by a court established by a Member State but sitting outside the Community's borders, remains contested.[21]

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

#14# The Regulation can be applied without regard to the nature of the jurisdiction exercised by the court of origin. It is not required that the court of origin took jurisdiction based on the Regulation, nor that the defendant was domiciled or otherwise established in a Member State.[22] The fact that the court of origin took jurisdiction based on one of the grounds of jurisdiction excluded from the scope of the Regulation[23] does not disqualify the decision. This follows from the fact that the court addressed is in principle barred from reviewing the jurisdiction of the court of origin. The possibility to use the Regulation scheme to obtain the recognition or enforcement of a judgment obtained against a party who does not have a domicile in a Member State, has been heavily criticized, for it gives a 'European-wide' effect to a judgment which is based on the exorbitant and long arm jurisdictions of national laws.[24] One should, however, not forget that the eviction of long arm jurisdictions requires a reciprocity which is only guaranteed among EU Member States.

117, I-152 paras. 17 and 18. See also Trib. Paris Clunet 120 (1993), 599.

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

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

[21] See on this *Gaudemet-Tallon* para. 358.

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

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

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

#15# Similarly the Regulation can be applied even if the dispute which led to the decision was purely domestic.[25]

5. Specific situations

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

#17# Art. 62 of the Regulation extends the benefit of the recognition and enforcement mechanism to decisions issued by the special administrative service put in place in Sweden.[26]

6. No requirement of finality

#18# The Regulation does not require that a judgment be final or conclusive to enjoy the benefit of Chapter III. Accordingly, Art. 32 of the Regulation is not limited to decisions which definitively terminate a dispute in whole or in part, but also applies to decisions which are susceptible of appeal or of another challenge. The Jenard Reports learns found that the omission of any requirement that the judgment be final was deliberate.[27]

#19# It follows that a judgment which is only provisionally enforceable is in principle entitled to recognition and enforcement under the Regulation.[28]

7. Provisional and protective measures

#20# Art. 32 of the Regulation is drafted in very general terms. Accordingly, there is no reason to exclude provisional measures from the benefit of Chapter III.[29] This is important given that under Art. 31 of the Regulation a court may give (limited) extra-territorial effect to the provisional and protective measures it orders.

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

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

[27] Report *Jenard* p. 43.

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

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

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

> « Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by [Chapter III] ».[30]

#22# The Court stressed that the liberality of the regime set up under Chapter III of the Regulation was only possible because of the protection afforded to the defendant in the original proceedings. According to the Court, for recognition or enforcement to be possible, it is essential that before the judgment is delivered, an *inter partes* procedure takes place - or could have taken place if the defendant had chosen to appear.[31] It is unclear whether provisional decisions issued *ex parte*, which are excluded from the Regulation, could benefit from a bilateral recognition and enforcement scheme or could be recognized or enforced under a Member State's national law.[32] It is also unclear whether a provisional order issued *ex parte* becomes entitled to recognition and enforcement under the Regulation if the defendant has sought to have it set aside in the State of origin.[33]

#23# Following the *Denilauler* judgment, it was decided that an order granting an attachment could not be recognized if it has been given without an opportunity for the defendant to appear in court.[34] In *EMI Records*, the English High Court held that an injunction issued by a German court prohibiting an English company from reproducing and distributing the masters tapes of a music group, could not be registered for enforcement since the injunction had been delivered *ex parte* and it could be enforced without prior service upon the defendant.[35] In *Stolzenberg*, the French Court of Cassation held that a provisional Mareva injunction issued by an English court could be recognized in France.[36]

#24# A decision ordering provisional or protective measures is, however, entitled to recognition and enforcement under the Regulation if, after it has been granted *ex parte*,

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

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

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

[33] See OLG Karlsruhe ZZP Int. 1996, 89.

[34] CA Paris Clunet 123 (1996), 145 (refusal to allow the enforcement of an Italian decision allowing *ex parte* the attachment of the assets of the French defendant) . See also Cass. RCDIP 83 (1994), 688 (refusal to enforce an Italian decision ordering *ex parte* the defendants to pay a certain amount to a bank, without possibility for the defendants to appear in court or be heard), Trib. Luxembourg CDE 1985, 477 (holding that an Italian judgment appointing a sequestrator to hold the shares owned by an Italian company in a Luxemburg company, was not entitled to recognition as it had been issued *ex parte*) and BGH IPRax 1999, 371 ("als 'Entscheidungen' im Sinne des Artikels 25 EuGVÜ künnen auch einsweilige Verfügungen anerkannt werden, wenn sie aufgrund eines zweiseitig angelegten Verfahrens ergehen").

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

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

the defendant has the possibility to challenge the order before it is enforceable. In *Hengst Import*, an Italian company had obtained an order for payment (*decreto ingiutivo*) from a court in Italy, following summary proceedings brought *ex parte*. Once such an order is issued, it must be served on the defendant who may oppose the order. The Court held that since the order is not enforceable without the authorization of the court which can only be given after expiry of the period for opposing the order, the order at issue was a judgment capable of recognition and enforcement "since there could have been an *inter partes* hearing in the State where it was made before recognition and enforcement were sought in the Netherlands".[37]

#25# Since decisions ordering provisional measures *ex parte* do not fall within Chapter III of the Regulation, costs awarded to one party following such a decision cannot be recognized or enforced under the Regulation.[38] Since the ECJ referred in general terms to the need for the decision to be *inter partes*, one can wonder whether the *Denilauler* case law also applies to judgments on the merits.[39]

8. Judgments by default

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

#27# It may not always be easy to ascertain whether a particular decision was rendered by default or must be considered *ex parte*. This is in particular the case with the various types of orders for payment.[40] The distinction is important since judgments issued *ex parte* do not benefit from the Regulation's smooth mechanism of recognition and enforcement.

#28# The judgment issued by the ECJ in the case *Klomps* illustrate the difference in the framework of German summary proceedings for the recovery of debts ('*Mahnverfahren*').[41] In that case, a German creditor had issued an order for payment ('*Zahlungsbefehl*') against a Dutch debtor. After service of process of this order according to the rules prescribed by German law, the debtor failed to lodge an objection. The creditor then obtained an order for enforcement ('*Vollstreckungsbefehl*'), which was later challenged by the debtor. It is clear that while the order for payment does not constitute a decision, an enforcement order must be considered to be a decision in the

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

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

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

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

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

sense of Art. 32.[42] It will be a decision by default if the debtor has failed to lodge an objection. In order to characterize the decision, the court addressed must follow the rules of the State where the decision was rendered.

9. Procedural orders

#29# According to the Schlosser Report, "interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings", should be excluded from the benefit of Chapter III of the Regulation.[43]

#29# Orders made to set a hearing date or to establish the order in which parties will present their evidence or submit their written pleading or to establish that certain evidence is admissible, are therefore excluded from the scope of the Regulation.[44] In any case, the relevance of such orders for the legal order of the state addressed is minimal, if not non-existent, as they relate to matters of procedural law of the state of origin.[45]

#30# A court order appointing an expert and entrusting him to examine a building and report on its quality does, however, affect the parties' position and rights. Before issuing such an order, the court will indeed at the very least verify that the party requesting the appointment of an expert, has a credible case to make. As such, it should not be excluded from the scope of the Regulation.[46] Since the coming into force of the Evidence Regulation,[47] priority must be given to this instrument in order to obtain evidence located in another Member State. Hence, judgments ordering the audition of witnesses or the production of documents should be deemed to fall outside the Regulation.[48]

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

10. Judgments dismissing a claim

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

[43] Report *Schlosser* para. 187.

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

[45] *Donzallaz* p. 178, para. 2171.

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

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

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

#32# Whether Art. 32 applies to a foreign judgments dismissing a claim is unclear. In principle, nothing prevents a party from applying to have such a judgment recognized or enforced. The Regulation does not make any distinction in respect of the outcome of the foreign proceedings. There is no doubt that the Regulation applies to a judgment holding that the plaintiff's claim could not be sustained on the merits, as it is a determination of the parties' rights.[49] It could also be that the proceedings were dismissed for lack of jurisdiction. In both cases, the judgment is entitled to recognition.[50] One could, however, be more hesitant to hold that a judgment dismissing a claim for a mere procedural reason – *e.g.* a failure to comply with a time limit or to provide security for costs - is entitled to recognition.[51] In any case, it is difficult to see how a party could benefit from the recognition of such a judgment.

11. Judgments on judgments

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

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

#35# The same rule must apply when the foreign judgment whose recognition or enforcement is sought, has been subject to enforcement proceedings which lead to the issue of an new judgment incorporating the first decision (*actio judicati*).[52] The position may be different, however, when the judgment incorporating the foreign decision, also contains an independent decision, such as the granting of interests.[53]

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

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

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

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

[53] See e.g. OLG Hamm RIW 1992, 939 (the court granted a declaration of enforceability of an English

#36# However, it must be accepted that since the Regulation provides uniform rules on the recognition and enforcement of foreign judgments, the decision of the first court addressed cannot be ignored by other courts which are seized of a request for a declaration of enforceability. These courts must take into account the fact that the first court addressed did not find any cause under the Regulation to refuse to recognize or enforce the decision. This assessment is particularly concerned with whether a defendant has been served in due time with the document instituting the proceedings.[54]

#37# A plaintiff who has already obtained a judgment in a Member State, may not elect to sue on the original cause of action instead of seeking to have the judgment recognized or enforced.[55] The Court held that :

> "The provisions of the Convention . . . prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State".[56]

12. Settlements and transactions

#38# In *Solo Kleinmotoren*, the Court held that since settlements in courts are essentially contractual in that their terms depend first and foremost on the parties' intention, such settlements do not qualify as judgment in the sense of Art. 32.[57]

#39# However, consent judgments may probably be regarded as judgments for the purpose of Art. 32 since a court will operate a certain control before issuing such a judgment.[58]

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court decision enforcing a GAFTA arbitral award, since the judgment contained not only a declaration of enforcement of the award but also an independent order for payment, including interest after the award was issued).

[54] Art. 34 (2) Regulation.

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

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

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

[58] See the Opinion of A-G *Gulmann* in Case C-414/92 [1994] ECR I-2239, I-2244 et seq. paras 29 and 30. In *Landhurst Leasing plc v. Marcq*, [1997] E.W.J. n° 1490, the English Court of Appeal held that a Belgian judgment entered by consent was within Art. 32 of the Regulation. According to Beldam, L.J., "If a party agrees to a judgment being entered by conceding the issues, the judgment is no less an authoritative judgment than a judgment entered in default which is quite clearly within Article [32]". See Cass. RCDIP

13. Decision in contentious and non-contentious matters

#40# The Regulation applies whether the court of origin was seized of a dispute or acted in a non-contentious matter ('*freiwilligen Gerichtsbarkeit*' / '*juridiction gracieuse*').[59] The latter may be the case when the court appoints a liquidator for a company.[60]

#41# Following the distinction made by the Court in *Solo Kleinmotoren*, it must be accepted that such a decision can only be entitled to recognition if the court has decided on its own authority, without merely taking over what the petitioner submits.[61]

87 (1998), 326 and Clunet 124 (1997), 1026 (no application of the Regulation to the enforcement in France of a settlement concluded by parties in England without intervention of the English courts) and BGH IPRspr. 1992, Nr. 228, p. 555

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

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

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

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgement be recognised.

3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

I. General Outline

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

II. Legislative history

#2# Art. 33 already appeared in the original Brussels Convention (Art. 26). The text has not been modified in the Brussels I Regulation, save for the substitution of the reference to the 'Contracting State' by 'Member State'. A similar provision appears in Art. 26 of the Lugano Convention.

III. Commentary

1. The concept of 'recognition' of foreign judgments

a) The various effects of judgments

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

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

#4# Although every lawyer will be influenced by its national law when discussing the exact meaning of the recognition under the Regulation, it is possible to state that to

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

recognize a foreign judgment involves accepting to give it two effects.[2] The first one is a positive one. The State addressed accepts to consider that what the court of origin has decided constitutes a valid determination of the rights and obligations of parties.[3] If the court of origin has ordered a party to pay damages because the party has been found in breach of a contract, courts in other Member States should accept that the parties were bound by a contract and that this contract has been breached.

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

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

b) The law applicable to the effects of foreign judgments

#7# It also follows from the extract of the Jenard Report reproduced above that the national law of the adjudicating court is decisive to determine the effects of a judgment in the other Member States.[7] This means that the State addressed must also accept that a judgment issued in another state may have legal consequences unknown in the legal system of the State addressed.[8] The only limitation to the extension of those consequences lies in the public policy clause (Art. 34(1)).

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

#9# One will therefore make reference to the effects of the judgment in the State of origin

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

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

[4] *Infra* notes 7 et seq.

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

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

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

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

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

to determine whether the judgment qualifies for *res judicata*, estoppel or any other preclusive doctrine in the State addressed.

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

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

c) Effects of judgments falling outside the Regulation

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

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

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

2. The principle : automatic recognition

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

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[10] *Boss Group Ltd. v. Boss France SA*, [1997] 1 WLR 351, 359. Compare, however, with the decisions of the same Court of Appeal in *Berkeley Administration Inc. v. McClelland*, [1995] ILPr 201 (C.A.) and *Berkeley Administration Inc v. Mc Clelland (No 2),* [1996] ILPr 772 (C.A.) in which the Court of Appeal did not consider it necessary to refer to French law in order to determine the extent to which a French judgment was entitled to recognition.

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

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

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

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

awarded the same treatment as domestic judgments.

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

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

#18# It has been said that the automatic recognition amounts to "a presumption in favor of recognition, which can be rebutted if one of the grounds for refusal listed in Article [34] is present".[16] The automatic recognition can only be likened to a presumption of this type in so far as the Regulation removes all traditional procedures for recognition which were provided for in the laws of the Member States. In this respect, the recognition granted to judgments from other Member States still differs from that awarded to domestic judgments.

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

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

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

[16] Report *Jenard* p. 43.

[17] *Geimer*/*Schütze* Art. 33 note 16.

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

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

#21# Art. 33 (2) refers to the procedures provided in sections 2 and 3 of the Regulation. Procedure on the application is therefore *ex parte*.[20] The application for a declaration on the recognition may be made jointly with an application for a declaration of enforceability.[21] Certain rules of Sections 2 and 3 will not prove adapted to a request for a declaration on the recognition of a foreign judgment. This is the case with Art. 39 (2) of the Regulation, which deals with the domestic jurisdiction of the court. It is generally suggested to leave the petitioner the possibility to seize the court of his domicile or of his choice.[22] As is the case with enforcement proceedings, the court seized may only examine whether the formal requirements for recognition are met. The review of the various refusal grounds is only possible if an appeal is lodged against a decision granting a declaration.

a) 'Any interested party'

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

#23# Although the Court of Justice has yet to rule on this question, it is generally accepted that the circle of interested parties will not be limited to those parties who were

[19] Infra notes 31 et seq. on this possibility.
[20] See the criticism on the *ex parte* nature of the proceedings by *Geimer/Schütze* Art. 33 note 104. Compare with *Gothot*/*Holleaux* para. 394 (who argue that *ex parte* proceedings are well suited to the need for a party to obtain within a reasonable time period a decision on the status of the foreign judgment).
[21] *Kropholler* Art. 33 note 5.
[22] *Kropholler* Art. 33 note 8; *Gaudemet-Tallon* para. 439; *Gothot*/*Holleaux* para. 398.
[23] Report *Jenard* p. 49 (this statement concerned the possibility to request the enforcement of a foreign judgement. It is submitted that is applies likewise to requests for recognition).

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

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

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

b) A dispute

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

#27# The reference to a dispute rather indicates that parties must have disagreed on the issue of the recognition of the foreign judgment.[29] Existence of a dispute may be demonstrated by evidence of behavior of one of the parties concerned which is inconsistent with the foreign judgment, such as the fact that the judgment debtor refuses to give effect to a request made by the judgment creditor to obtain payment or to recognize that a contract has been avoided. For a dispute to exist, it must possess a certain

[24] *Geimer/Schütze* Art. 33 note 94; *Gaudemet-Tallon* para. 440.
[25] *Gaudemet-Tallon* para. 440; *Gothot/Holleaux* para. 395.
[26] See *Layton/Mercer* para. 26.005; *Gaudemet-Tallon* para. 440.
[27] It is unclear whether one should apply the law of the State addressed or look at whichever system of law is indicated by the choice of law rules of the court.
[28] See C.A. Paris RCDIP 70 (1981), 121.
[29] Compare with *Kropholler* Art. 33 note 4 (according to whom it is not required that "die Anerkennung ausdrücklich bestrittten wurde").

degree of reality. It does not appear to be sufficient that the party requesting the declaration merely entertains doubts as to the status of the judgment.[30] In any case the various procedural requirements existing in national laws – such as the requirement that the petitioner shows an "*intérêt*" or an "*Interesse*" – will prevent a purely hypothetical request.[31]

c) Positive declaration

#28# Art. 33 (2) only refers to the possibility to obtain a declaration to the effect that a judgment "be recognized". Does this mean that the Regulation does not permit a party to seek a declaration that a judgment not be recognized? This is what the Jenard Report seems to imply, justifying the imbalance by the fact that the simplified procedure put in place by the 1968 Convention « was evolved solely to promote the enforcement of judgments, and hence their recognition ».[32] The fact that the Brussels IIbis Regulation refers specifically to the possibility of obtaining a declaration of non-recognition suggests that the drafters of the Brussels I Regulation meant to exclude the possibility of obtaining a negative declaration.[33] However, this also suggests that issuing a declaration of non-recognition does not contradict the fundamental tenets of the European judicial area. Hence, it is suggested that the exclusion of requests for a declaration of non-enforcement should be reviewed.[34]

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

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

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

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

[30] Compare with the liberal interpretation suggested by *Gothot*/*Holleaux* para. 395.
[31] *Kropholler* argues that the special 'Feststellungsinteresse' required under German law for declaratory proceedings is not necessary to obtain a declaration under Art. 33 (2): *Kropholler* Art. 33 note 4.
[32] Report *Jenard* p. 43. See e.g. *Van den Broeck v. Ranieri*, Hof Hertogenbosch NIPR 1994, 157.
[33] See to that effect, *Geimer/Schütze* Art. 33 note 85; *Leible,* in: *Rauscher* Art. 33 note 13.
[34] TGI Paris Clunet 120 (1993), 599 granted the plaintiff's request for a negative declaration and decided that several Italian decisions were not entitled to recognition in France, in particular because they contradicted earlier judgments issued by the courts of Delaware. In doing so, the court followed the majority opinion in the French literature (see *Gothot*/*Holleaux* para. 402; *Lagarde*, RCDIP 78 [1989], 534-537; *Pluyette,* Etudes offertes à Pierre Bellet [1991] pp. 443 ff.).
[35] *Kropholler* Art. 33 note 7; *Kaye* p. 1397.

application for a judgment to be recognized under Art. 33 (2).

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

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

#34# While Art. 33 (2) specifically refers to the rules of 'Sections 2 and 3' of Chapter III, a similar reference does not appear in Art. 33 (3). Nonetheless it is accepted that the provisions of those sections will apply *mutatis mutandis* to the incidental recognition. This means that a party claiming incidental recognition will have to comply with the general provisions of Artt. 53-56 of the Regulation, in particular the requirement to produce the relevant documents.[37]

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

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

5. Partial recognition

#37# Art. 48 of the Regulation provides for the possibility to obtain a partial enforcement of a foreign judgment, provided the judgment is severable. Although the Regulation does not contain a similar provision for the recognition, it is accepted that such partial recognition is possible.[39] This follows necessarily from the fact that some judgments will

[36] *Gothot*/*Holleaux* para. 388.
[37] *Kropholler* Art. 33 note 10.
[38] See *Layton/Mercer* para. 26.011; *Kropholler* Art. 33 note 11.
[39] *Leible,* in: *Rauscher* Art. 33 note 11; *Geimer*/*Schütze* Art. 33 notes 66-67; *Layton/Mercer* para. 24.043; *Kropholler* Art. 33 note 10; *Gothot*/*Holleaux* para. 392.

contain issues which fall outside the scope of application of the Regulation, while other issues falls within this scope. It also follows from the fact that a judgment may be held to contradict a ground of refusal only for part of the ruling.

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