

## Article 37

**(1) A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.**

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

### I. General Outline

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

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

### II. Legislative history

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

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

### III. General rule: stay of recognition proceedings pending appeal, (1)

#### 1. Purpose

#5# Under the Brussels Regulation, unlike in some national legal systems, foreign judgments can be recognised even if they are not *res judicata* in the continental sense of the phrase, i.e. if they

are still susceptible of appeal.<sup>1</sup> If the judgment whose recognition is sought is still susceptible to be overturned or otherwise modified in appeal in its country of origin, it may be premature to give it effect in the country in which recognition is sought. Hence the possibility is given to the recognition court to stay the recognition proceedings once the judgment has effectively been challenged in the country of origin.

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

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

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

## 2. Ordinary appeal

**#9#** Art. 37 only envisages a stay in cases where the judgment has been subject to an ‘ordinary’ appeal in the country of origin. The concept of ‘ordinary appeal’ has never been defined in the European texts. There is no doubt, however, that this concept must receive an autonomous definition.<sup>8</sup> This has been confirmed by the Court of Justice which held in the *Riva* case that

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

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

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

<sup>4</sup> Report *Jenard* p. 46.

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

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

<sup>7</sup> In Germany, § 148 ZPO.

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

“[t]he expression ‘ordinary appeal’ within the meaning of Articles [37 and 46] must be defined solely within the framework of the system of the Convention itself and not according to the law either of the State in which the judgment was given or of the State in which recognition or enforcement for that judgment is sought”.<sup>9</sup>

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

**#11#** The Court indicated that the recognising court should be able to stay the proceedings “whenever reasonable doubts arise with regard to the fate of the decision in the State in which it was given”.<sup>10</sup> Drawing on this general observation, the Court held that an appeal is ordinary in the sense of Art. 37 if (i) it may result in the annulment or amendment of the original judgment and (ii) there is a specific time period for appealing which starts by virtue of the judgment.<sup>11</sup> With this second requirement, the Court selected only those appeals whose exercise parties can reasonably foresee because they constitute a normal procedural development.<sup>12</sup> Since Art. 37 only applies when the judgment has effectively been challenged in the country of origin, the second requirement loses much of its significance.<sup>13</sup>

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

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

**#14#** An appeal to the Court of cassation in France, Belgium or Luxemburg appears to be on the other hand an ordinary appeal even though as a matter of French or Belgian internal law, these

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

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

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

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

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

<sup>14</sup> *Leible*, in: *Rauscher* Art. 37 note 3; *Kropholler* Art. 39 note 3.

<sup>15</sup> Art. 1132 Belgian Code Judiciaire; Art. 617 Nouveau Code de Procédure Civile in Luxemburg.

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

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

appeals are considered to be ‘extraordinary’.<sup>18</sup> The same can, however, not be said of an appeal to the court of cassation ‘in the interests of the law’, i.e. an appeal introduced by the public prosecutor. The decision of the Court following such an appeal has indeed no effect on the position of the parties, it only serves to redress *in abstracto* what appears to be a legally wrong decision.<sup>19</sup>

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

**#16#** Finally, it has been said that in case of doubt, the concept of ‘ordinary appeal’ should be interpreted broadly.<sup>21</sup>

### **3. Discretion to stay**

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

**#18#** The Court of Justice indicated that the power to stay should be used “whenever reasonable doubts arise with regard to the fate of the decision in the State in which it was given”.<sup>22</sup>

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

**#20#** Under Art. 46, the Court has held that when deciding whether to grant a stay of proceedings, a court may take into account only such submissions as the party lodging the appeal against the decision authorising enforcement of a judgment was unable to make before the court of the state in which the judgment was given.<sup>26</sup> Since Art. 46 and 37 pursue the same goal, (i.e.

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

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

<sup>20</sup> OLG Hamm RIW 1994, 243.

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

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

<sup>23</sup> Recital (2).

<sup>24</sup> See *Layton/Mercer* para. 26.108.

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

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

preventing that the potential effects of the appeal in the country of origin from being pre-empted by the judgment being given immediate effect in the Member State in which recognition is sought) it may be that the Court's decision, which has been criticized, should also apply to the court deciding whether or not to stay proceedings on the basis of Art. 37.

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

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

#### **IV. Specific provision for the United Kingdom and Ireland, (2)**

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

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

**#25#** As noted in the Report *Schlosser*, “continental courts will have to use their discretion in such a way that an equal balance in the application of the Articles [37 and 46] in all Contracting States will be preserved. To this effect they will have to make only cautious use of their discretionary power to stay proceedings, if the appeal is one which is available in Ireland or the

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

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

<sup>29</sup> In this sense, Report *Jenard* p. 47.

<sup>30</sup> Which were reviewed in the Report *Schlosser* para. 204.

United Kingdom only against special defects in the judgment or which may still be lodged after a long period”.<sup>31</sup>

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<sup>31</sup> Report *Schlosser* para. 204.