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MODULE II

SUBJECT 5

REGULATION (EC) No. 44/2001 (II): RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

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Introduction

At the beginning, this sector of problems within the Community was regulated by means of Conventions (Brussels I and Brussels II); when the Treaty of Amsterdam came into force, and according to the terms of articles 61 and 65 of the Treaty of the European Community, Regulation is the legal instrument used today.

The purpose of the Community regulations we are going to be studying on this course is to facilitate the recognition and enforcement of foreign judicial decisions between the member states. Therefore they will only be applicable for the time being when the judgement comes from a Community country; in other cases the conventional legal system or internal law will apply.

There are six regulations containing rules on recognition or enforcement of decisions: Regulation No. 40/94, *on Community trademarks*; Regulation No. 2100/94, *on plant variety protection*; Regulation No. 1347/2000, *concerning the jurisdiction, recognition and enforcement of decisions in matrimonial affairs*; Regulation No. 1346/2000, *on insolvency proceedings*; Regulation (EC) No. 805/2004 of the European Parliament and the Council of 21 April 2004 *creating a European enforcement order for uncontested claims*, and Regulation No. 44/2001 *relating to judicial jurisdiction, the recognition and the enforcement of judicial judgements on civil and commercial matters*. It is this last one, the most important given its sphere of material application, that we shall be studying in depth throughout this subject.

I. The effects of foreign judgements: general issues.

Even though our example is the Spanish one[1], we can determine in almost general terms the effectiveness in a country of foreign judicial decisions; in other words, what effects the decisions that are the result of a proceeding opened, developed and concluded outside its borders have there. We are thus talking about the possibility that those judgements may have certain effects in that country: to be recognised or to be enforced.

1. Just as procedural guarantees are necessary in any proceeding, they are equally so when it comes to ratifying a foreign decision. That is why there are different mechanisms that can guarantee fulfilment of a series of conditions, without which the foreign judgement may be neither recognised nor enforced. The decision of the organs in charge of reviewing those conditions is limited to accepting or rejecting the effectiveness of the foreign judgement according to whether or not those conditions are met. Therefore, there is no chance of reviewing the foreign judgement in terms of substance: either in the appraisal of the facts or in the application of the law made by the original judge.

2. Without entering into the problem of the legal nature of the foreign decision, we can put forward some important issues. *First*, that without passing through the reviews or procedures provided for in the law which calls for the recognition or

[1] Spanish law will be taken as an example throughout this subject.

enforcement (in the state in which recognition is sought), any judgement laid down in another state (the state of origin) will, in principle, only produce the effects deriving from a public document (fundamentally for evidence) or one containing a legal datum or fact. *Second*, that, as a result, an action can generally (in accordance with Spanish autonomous law, certainly) be undertaken in a particular country on the same matter provided the decision has not been recognised. Nevertheless, those two premises change when we enter the field of the Community Regulation, since it provides for the recognition "as a matter of law" of the judgements (the same would be the case if provided for in an international convention), which means that in the new process an exception of res judicata can be filed if the decision meets the conditions of the Regulation (or the international convention, as the case may be) for recognition. *Third*, that if the judgement has been refused an exequatur, that does not prevent a new action in the country where it was refused on the same issue.

3. The intended effects of a foreign decision may be of quite different classes. Sometimes the intended effect is enforcement, i.e., the enforcement of the judgement in a particular country. At other times, the security granted by the declaration of material "res judicata" (by preventing a new trial in that country on the same object and by binding the judge in later proceedings with a different object). On other occasions, a judgement may have to be entered in the register and, similarly, it may be that the only aim is to have the judgement considered a means of proof, either in a proceeding before the courts or outside the procedural sphere.

However, not all the effects need the same instruments to be produced. Depending on the effect intended and the scope, a review of regularity may or may not be necessary and, if it is, the instruments for implementing it are different. In such a way that we can make an initial division of the effects of foreign decisions which distinguishes between the ones that need proof of regularity, either through a special procedure (exequatur) or through a review of certain conditions; and the other effects that are produced regardless of proof of regularity.

4. As far as the second effects are concerned, since in autonomous systems in general (the Spanish one among them) only the exequatur proceeding makes the foreign decision effective, and the effects of the decisions that have not passed that review are not regulated.

> However, for some time in Spain foreign decisions have been allowed to have effects, in the sphere of a proceeding carried out both inside and outside Spain, with no need for recognition. That position has been supported by jurisprudence. The foreign decision, like the public document it is, may be alleged as a means of proof in a proceeding in Spain or outside the procedural sphere. That means that it can be brought as proof not only of its own existence, date and authenticity (intrinsic value as evidence), but also as proof of the facts contained in it which have been verified by the judge in the proceeding itself. Likewise, the judge may take it into consideration, for example, to adopt provisional measures or an embargo. It may even be alleged as an operative legal fact which, like the fact it is, is subject to appraisal by the courts. At all events, for the foreign decision to produce the effects mentioned above, it must fulfil the requirements of Article 323 of the Civil Procedure Law 2000 for foreign documents to be considered public documents for procedural purposes. It may be understood that those requirements will be extended to their extraprocedural effectiveness (generally entry in the Civil Register).

Those effects, regardless of any review of the regularity of the decision, are not regulated in the Community Regulation, and so it will be necessary to turn to internal law to find out what value is attributed to them (probatory, titular, etc.).

5. Regarding the effects that may need a regularity review, that is done in the Regulation through two different review formulae, the first by verifying certain conditions and the second through a special procedure (exequatur). Depending on the effects desired and their scope, the system used, i.e. the review of the regularity of the decision, will have to be either the one or the other. And so it may be the effect of res judicata with general scope in the state in which recognition is sought, whether in its negative effect (the same matter cannot be judged twice) or in its positive effect (admission of the new situation created by the decision that binds the parties and the judges in later decisions). In such cases, the intended effect is only obtained when recognition has been invoked principally and, therefore, the regularity review has been carried out by a special procedure (exequatur).

If the intended effects are limited to the effectiveness of the foreign decision at a pending trial, we are looking at "incidental recognition" (since it constitutes an incident in a proceeding in progress). The foreign decision will only take effect in the proceeding where it is put forward, i.e. in relation to the specific case. On other occasions, what is of interest is the invocation of the foreign decision before a non-judicial authority (for example, to proceed to its entry in the register). In these two last cases, recognition may occur with no need for a procedure of any kind (automatic recognition), i.e., without exequatur procedure, and the effects are limited and provisional (they have no res judicata effect since, as we said before, if the general effect of res judicata is intended, a special procedure is required).

However, we must point out that the fact that there is no need for a procedure (i.e., the special procedure known as exequatur) does not mean that there cannot be a regularity review by the national authority to which the judgement is submitted. Foreign decisions can be submitted to that review to see if there are certain conditions a breach of which would bring about rejection of the decision and, therefore, non-recognition of it. Those conditions, and their form of review, will be studied in their context.

6. Regarding "enforcement", it represents one more step: *to have that decision implemented*. Therefore, it implies a coercive power which corresponds only to the state.

Obviously, some foreign decisions (sentence to payment of a sum of money, for example) need not only recognition but also enforcement. It is also obvious that state coercion cannot be exercised by foreign authorities and, therefore, it corresponds exclusively to the state where the enforcement has to be carried out. The importance of that act means that, whereas in recognition there may be different systems (automatic recognition or special procedure), enforcement will always require special procedure. However, since recognition invoked principally and the declaration of enforceability are closely linked (the enforcement derives from the obligatory force of the decision obtained for recognition), it is logical for the procedure to be subject to the same conditions to avoid contradictory solutions and, therefore, to be the same. Through it (exequatur) comes not only recognition but also a "declaration of enforceability" of the decision and, once that has been obtained, the "enforcement", as a procedural act distinct from the former, will be carried out as if it were a national decision. Therefore, the mechanisms of enforcement and their limits are the ones of the country where the enforcement is carried out.

II. Analysis of the recognition and the enforcement of judgements in (EC) Regulation No. 44/2001 of the Council of 22 December 2000, relating to judicial jurisdiction, the recognition and the enforcement of judicial judgements in civil and commercial matters.

One necessary condition for achieving the aim of facilitating the "free circulation of decisions" in the European judicial space is simplification of the formalities required for the recognition and enforcement of judgements. To that end, the Regulation does not restrict itself to regulating recognition and enforcement; it has also been conceived as an instrument of the so-called "doubles", i.e., it regulates both the jurisdiction and the recognition and enforcement of decisions, making any review of the jurisdiction of the judge of the state of origin by the judge of the state in which recognition is sought unnecessary, thus encouraging recognition.

That aim of the Regulation —to simplify the recognition and enforcement of judgements— appears in several points of Chapter III. On the one hand, the possibility of granting automatic recognition of judgements, i.e. with no need for a procedure of any kind. On the other, when there is recourse to the special procedure designed in the Regulation whose mechanism is simple and rapid. And, lastly, in the few causes provided for rejecting recognition of a judgement.

1. Regulated decisions.

1. "Judgement" for the purposes of the Regulation is understood to mean any decision adopted by a court of a member state (whatever it may be called) as well as the determination of the costs or expenses of the procedure by an officer of the court (Art. 32).

2. Concerning the *origin* of the decision, two conditions are required. First, that it should come from a jurisdictional organ.

> The Court of Justice of the European Community has stated that, in the exercise of its jurisdictional power, the court has to see that its decision is considered a judgement for the purposes of the Convention (Judgement of the Court of Justice of the European Community of 2 June 1994, Case C-414/92, Solo Kleinmotoren c. Boch).

And, second, that that jurisdictional organ should exercise its function on behalf of a member state (with the exception of judgements from Denmark, which will be recognised through the 1968 Brussels Convention). And so the presupposition of application of the system of recognition of the Regulation is that the judgement should come from the jurisdiction of a Member state. Any decision coming from the jurisdiction of a country of the European Union will be recognised —or enforced— through the mechanisms provided for in it. And that even when the jurisdiction of the original court has not been based on the grounds of jurisdiction provided for in the Regulation.

3. The *object* of the decision must come within the sphere of material application of the Regulation, which is confined to civil and commercial matters (with the exceptions provided for in Article 1), also including labour. It is the matter, and not the organ from which it has come (provided it is a jurisdictional organ), which marks out the sphere of recognisable decisions. As for provisional or precautionary measures, they can also be recognised through the Regulation. Lastly, we should point out that the exequatur judgements —the ones whose aim is to declare a decision given in another state enforceable— are not included in the notion of "judgement" for those purposes of recognition. Essentially, it is a matter of preventing recognition of a foreign decision which, in turn, declares a judicial judgement of a third state enforceable. That maxim of "exequatur on exequatur is not valid" is admitted in both Spanish autonomous law and in conventions and Community regulations.

However, we should make two clarifications in terms of the interpretation of the sphere of material application of the Regulation in relation to recognition.

The first is that, although it may initially be the responsibility of the judge of origin to interpret the civil or commercial notion of the concepts included, it is not clear that at the moment of recognition the judge applied to is bound to that interpretation. As a consequence, the case may arise that the judge of the state where the recognition is sought does not apply the Regulation system as he understands that the matter does not come within its sphere of application.

The second clarification refers to the possibility that, although the judgement to be recognised is on a matter excluded from the sphere of application of the Regulation, if among its pronouncements there is one included in that same sphere, it may be recognised —or enforced— under its authority. In other words, we are looking at the figure of "partial recognition or enforcement" (Art. 48 of the Regulation).

> And so, the Spanish Supreme Court, having cognisance in an appeal in casation brought against an application for partial recognition and enforcement (concerning the obligation for foodstuffs), under the authority of the 1968 Brussels Convention of a judgement given by the Rotterdam Court of First Instance (Supreme Court judgement of 21 July 2000, Room 1) laid down: "It is therefore clear that in the light of the jurisprudence of the Court of Justice (it quotes the judgements of the European Court of 6 March 1980, on Case C-120/79, case of Cavel v, Cavel; of 27 February 1997, on Case C-220/95, case of Van den Boogaard v. Laumen, and that of 20 March 1997, on Case C-225/95, case of Farrell v. Long), the pronouncement whose enforcement was carried out under the authority of the 1968 Brussels Convention could be included, as a civil matter, in paragraph 1 of Art. 1, and could not be considered excluded by Section 1 of Para. 2 of the same Article because, although the pronouncement had been made at a divorce proceeding and the divorce itself and the liquidation and division of the couple's jointly owned property had been declared in the same judgement, it enjoyed an autonomy of its own by virtue of its object, the monthly alimony set in favour of the plaintiff, who applied to the Spanish courts only for the enforcement of that pronouncement, and so that cause also has to be rejected".

4. Concerning the *nature* of the decisions of the Regulation, it should be pointed out that both the contentious and voluntary jurisdiction decisions are the object of it. And that it is not necessary for the decision to have the effect of res judicata for it to be recognised through the Regulation (we should bear in mind the provisional or voluntary jurisdiction judgements that can be recognised and do not always have the force of res judicata).

Lastly, we should point out that Articles 57 and 58 of the Regulation provide for special review of regularity in relation to the enforcement of authentic instruments and court settlements.

2. Conditions for recognition and enforcement or causes for refusal of recognition.

As we have seen, the Regulation introduces the principle of automatic recognition or recognition as a matter of law of the judicial judgements in any of the member states. However, we had already mentioned that automatic recognition (with no need for a procedure of any kind) does not mean the absence of review of regularity in some cases.

If the aim is the enforcement of the judgement, or principal recognition (definitive and with general scope throughout the state, through the exequatur), or incidental recognition (i.e., provisional and limited in character), there must —in some cases— be a declaration of the regularity of the foreign decision. In the first case, if what is invoked is *principal* recognition or enforcement (declaration of enforceability), in its exequatur procedure the Regulation envisages the possibility that the defendant may file an appeal against the recognition or the enforcement already granted if he or she considers that the conditions of Article 34 are not being observed. And, in the second case, i.e., if what is invoked is incidental recognition, no procedure of any kind is necessary because it is the authority before which it is invoked that will review those conditions. The conditions required by the Regulation for the foreign decision to be recognised (principally or incidentally) and enforced if appropriate, are the same; even though in this last case the decision must be enforceable in the state of origin. What is different, as we have just seen, is the form of review of those conditions.

The Regulation starts from the presumption that decisions have to be recognised and, if appropriate, enforced. On the basis of the *principle of mutual trust* between the jurisdictional organs of the member countries, the presumption is favourable to recognition. Therefore, there are few conditions or, to be more exact, causes envisaged for rejecting the recognition of a decision by a Community state. Whether by the judge who is taking cognisance of an incidental matter within a proceeding, or the judge who is taking cognisance in the proceeding of exequatur of the appeal lodged by the party injured by a positive decision. There are causes that are expressly rejected A), and among the ones the Regulation envisages, some them are kept as exceptions B) and others are admitted in all cases C).

A) Causes expressly rejected. In no case can the judge applied to revise the foreign decision in terms of substance.

> "Under no circumstances may a foreign judgement be reviewed as to its substance (Art. 36 and, in relation to enforcement, 45 of the Regulation). In Mr JENARD'S report on the 1968 Convention —and in relation to this point— it was stated that: "The judge before whom the recognition of a foreign judgement is invoked may not appraise whether or not the judgement is in accordance with the law...", "..may not substitute with his will the will of the foreign judge or refuse recognition if he or she considers that some point of fact or law has been wrongly judged". Nevertheless, the difficult distinction between what is "revision" and what is "review of the conditions" of the regularity of the decision (for example, public order or the rights of the defence) has meant that part of the doctrine declares in favour of a limited admission of the revision which can only be extended to the review of the conditions required for its regularity. Concerning jurisprudence, it may be considered that the judgement of the European Court of 25 July 1982, on Case C-228/81, case of Pendy Plastics v. Pluspunkt, confirms that opinion.

B) Causes of exceptional application. Among the causes for rejection of the recognition which are forbidden in principle but can be admitted on particular suppositions is the review of the jurisdiction of the judge of origin.

As we have seen, the trust between the Community jurisdictional organs and the "double" model —regulation of jurisdiction and regulation of recognition in the Regulation itself— make it possible to limit that review to the maximum, thus differentiating the Brussels rules from the rules of Spanish autonomous law in which such review is always required.

The basic principle, then, is the prohibition of a review of jurisdiction (Art. 35-3 of the Regulation) of the judgements coming from a member country (both the ones based on the grounds of jurisdiction of the Regulation and the ones based on the grounds provided for in internal legislation). The exceptions are:

1st. The judge applied to will review (Art. 35 of the Regulation): on the one hand, and *to recognise a decision*, that the grounds of insurance, consumers and exclusive jurisdictions have been taken into consideration. In the case of these matters, if those grounds of jurisdiction —protection and exclusivity— have not been used, the judge applied to will prevent recognition not only of the decisions issued by a Community country but also those of a non-Community country on the assumptions on which he would have had jurisdiction to have cognisance of a lawsuit in a Community country; and, furthermore, *to not recognise a decision*, that the jurisdiction of the judge of origin is not based on the grounds of the Convention in the event that a member state might have entered into an agreement with a non-member state (Art. 72 of the Regulation), by which it is obliged not to recognise judgements based on the grounds of Art. 3 of the Convention; to that end, the judge has to review such a case. Those agreements, not provided for in the Regulation, are the ones that were made under the Brussels Convention and are still in force.

In all these cases the court of the state applied to can review the judicial jurisdiction of the court of the member state of origin of the decision, but must abide by the findings of fact on which its jurisdiction is based (Art. 35-2 of the Regulation).

2nd. Regarding review of the law applied, the principle of prohibition of revision also holds. The judge applied to may not review the law applied by the judge of origin. That review has also disappeared from national laws —among them Spanish law— and there are no exceptions in the Regulation either.

C) Causes of general application. Rejection of recognition of a decision from a Community jurisdiction will always be made for the reasons set out in Article 34 of the Regulation.

— The first reason for rejection of recognition is that the decision would be manifestly contrary to public policy in the member state in which recognition is sought. As in autonomous law, the contradiction must come not from the decision in itself, but the specific result of such recognition in the state in which recognition is sought at the moment when it is requested. This exception to recognition has been invoked quite frequently by national courts.

Both the doctrine and Mr JENARD's report on the Convention and the jurisprudence of the Court of Justice (judgement of 4 February 1988, Case C-145/86, case of Hoffmann v. Krieg) agree in stating that that exception may only be used in exceptional cases. And that "use of the public policy clause is in any event precluded when the issue must be resolved on the basis of a specific provision..." (judgement of 10 October 1996, Case C-78/95, case of Hendrikman & Feyen v. Magenta Druck).

An interpretation of the *substance* of this article by the Court of Justice is needed. First, to clarify its relation to the rest of the Regulation. For although we can infer the content of the text (non-use of public policy regarding the rules relating to jurisdiction - Art. 35-3), of the official reports and the judgements mentioned (which refer specifically to the priority use of Art. 27.3 and 27.2 respectively) on occasions, there are outstanding questions, all contested by doctrine. Some of them have been clarified by

the judgement of the European Court of 28 March 2000 in Case C-7/98, D. Krombach v. A. Bamberski. From among the issues submitted to the court we will select the most interesting ones for study purposes.

In the first, the court reaffirms that the public policy exception cannot be alleged against the effectiveness of a decision because the court of origin based its jurisdiction, concerning a defendant domiciled in a party state, on the nationality of the victim (ground forbidden by Art. 3 of the Convention). In the second, it affirms that public policy refers not only to the substance, but also includes procedural public policy (violation of the rights of the defence not included in Art. 27-2 of the Convention, now 34-2 of the Regulation). In the third, it clarifies the relation of that clause with the prohibition of a review of the substance of the decision (this can only be used when the judgement manifestly violates "an essential legal regulation in the public policy of the state in which recognition is sought or a right recognised as fundamental in that policy") and, lastly, it makes it clear that it is up to the European Court, if not to set the substance of the public policy of a contracting state, to set the boundaries within which the court in which recognition is sought may have recourse to that concept so as not to recognise a judgement.

At all events, and for Spain, our constitutional principles would be safe since, as indicated by the Constitutional Court in several judgements (Case C-54/1989, of 23 February and Case C-43/1986 of 15 April) public policy in the exequatur procedure "has thus acquired a peculiar substance impregnated by the requirements of the Constitution and, in particular, for what is of interest here, the ones imposed by Art. 24".

Lastly, the European Court judgement of 11 May 2000 on Case C-38/98 case of Renault SA v. Maxicar extends the content of public policy to both national and Community rules. In the words of the Court, "it is up to the national jurisdictional organ to guarantee with the same efficiency the protection of the rights established by national law and the rights granted by Community law".

— The second cause for rejection of recognition is the one related to the rights of the defence (Art. 34. 2 of the Regulation) and is limited to the cases where the decision was given in default of appearance, with two conditions: first, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence. Since the term "regular" (in a regular way) was changed to "in such a way" when the Brussels Convention became a Regulation, the jurisprudence mentioned here, which all predates that conversion, may involve future modifications.

The prior condition for this article to come into play is for the decision to have been appealed in the country of origin if the defendant "*could have done so*". This article turns the rights of the defence into the ones most protected by the Regulation, since it does not restrict itself to supplementing Art. 26 —which protects the defendant in default of appearance in the state of the jurisdiction—, but duplicates the guarantees granted him or her, in such a way that it opens a (possibly excessive) channel for the refusal of recognition or enforcement of Community decisions.

The jurisprudence of the European Court in relation to this article is broad, since it has been the one most used to refuse recognition of a Community decision. The Court has considered the two conditions two different and cumulative guarantees. Since the judgement of 16 June 1981, in Case C-

166/80, case of Klomps v. Michel, jurisprudence has insisted that the regularity of the decision has to be appraised according to the law of the state of origin, whilst the necessary time element “involves appraisals of a factual nature” (Klomps v. Michel). Similarly, the Court has considered that the review of the regularity of the notification has been entrusted “to the judge of the state of origin and the judge of the state in which recognition is sought”, in other words, that the latter must proceed to examine its regularity and must also verify whether the defendant has had sufficient time to organise his or her defence (judgement of 15 June 1982, Case 228/81, case of Pendy Plastic v. Plunspunk and of 11 June 1985, Case 49/84, case of Debaecker v. Bouwman). Lastly, the European Court has considered that the defendant can have cognisance of the procedure filed against him or her or have cognisance of the judgement given and not have used the means of objection existing in his or her internal law and, nevertheless, reject the recognition because he or she has not been regularly notified (Judgement of 3 July 1990, Case C 305/88 case of Lancray v. Peters, and of 12 November 1992, Case C 123/91, case of Minalmet GmbH v. Brandeis Ltd). It has interpreted the terms “defendant in default” (judgement of 21 April 1993, Case C 172/91, case of Sonntag v. Waidmann and judgement of 10 October 1996, Case C 78/95, case of Hendrikman & Feyen v. Magenta Druck) and “summons” (judgement of 13 July 1995, Case C 474/93, case of Hengst v. Campese).

— The third and fourth causes of rejection of the recognition of a decision are contained in Articles 34-3 and 34-4 of the Regulation and both refer to the irreconcilability of decisions. The aim is to prevent claims in the state in which recognition is sought for the recognition or enforcement of contradictory decisions.

The European Court has interpreted the concepts of both “irreconcilability” and “judgement” to that end. In the judgement of 8 March 1988, Case 145/86, case of Hoffmann v. Krieg, it was a question of the enforcement in the Netherlands of a German judgement which sentenced the husband to pay alimony to his wife. In the Netherlands a divorce judgement had been given according to which, since the marriage had been dissolved, there could be no obligation of alimony since that presupposed the existence of the matrimonial bond. The Court laid down that such judgements were irreconcilable since they involved mutually exclusive legal consequences. Nor is it necessary according to this
judgement for the judgement given in the state in which recognition is sought to come into the sphere of application of the Convention (it was a divorce judgement). In the judgement of 2 June 1994, Case C-414/92 case of Solo Kleinmotoren v. Boch, the Court interprets “judgement” as the one coming from a jurisdictional organ in the exercise of its jurisdictional power and, therefore, it rules out that a “court settlement” held before a judge of the state in which recognition is sought may be considered irreconcilable.

Article 34.3 prohibits the recognition of a decision given by a member state between the same parties, when it is irreconcilable with another given in the state in which recognition is sought. And so the conditions are: identity of parties and the existence of two irreconcilable decisions (already given whether or not they involve the effectiveness of res judicata and regardless of the order in which they were given).

The complementarity between this article and Articles 27 and 28 (lis pendens and related actions) is evident. In the second ones, the aim is to avoid contradictory decisions between member states and in Article 34.3 to prevent, should there be any, their recognition having a negative effect on the legal homogeneity of a member state, when in it there is already a

judgement given by its own judicial organs which is irreconcilable with the one applying to be recognised. However, the identity is not perfect since the article relating to lis pendens requires identity of parties, object and cause. So that the supposition of Article 34.3 is broader and will be used in cases where the exception of lis pendens has not arisen (as occurred in the Case Hoffmann v. Krieg mentioned above). However, the broader the interpretation of the concept of lis pendens, the more difficult it will be for there to be irreconcilable judgements, hence the fact that European Court jurisprudence (judgement of 8 December 1987, Case C-144/86, case of Gubisch Machinenfabrik v. Palumbo and of 27 June 1991, Case C-351/89, case of Overseas Union v. New Hampshire) has interpreted the tenor of Article 21 of the Convention (now Art. 27 of the Regulation) broadly. Nevertheless, the requirement of identity of parties may allow the recognition of irreconcilable decisions since such identity is not necessary for the decisions "to be mutually exclusive".

Article 34.4 of the Regulation rejects the recognition of a decision given by a member state (we should remember that the ones given by a non member state are not the object of recognition through the Regulation) when it was irreconcilable with another given previously —either in a third state or a member state— with identity of parties, object and cause and able to be recognised in the state in which recognition is sought.

We are therefore looking at a supposition of two decisions, neither of them from the state in which recognition is sought. For that reason, rejection of recognition is subject to greater conditions since it is not a matter of a decision by the judicial organs of the state in which recognition is sought. As a result, in addition to the priority in time, the identity of cause, object and parties is also required in order not to recognise the decision of the court of the member state. Lastly, it should be pointed out that the Brussels Convention did not regulate the case of two irreconcilable decisions both given by countries which were parties to the Convention. The doctrine was unanimous in considering that the principle of priority in time comes into play. The decision given earlier in time would be the one recognised in the state in which recognition is sought and the concept of irreconcilability would be broad, with no need to demand the identity of cause or object. Now that the Regulation has come into force, that last interpretation can no longer be maintained, since the Regulation requires the fulfilment of the three conditions.

3. The review of regularity or the channels of verification of the conditions.

Article 33 of the Regulation enshrines the recognition of judgements as a matter of law. Consequently, recognition is automatic and does nor require a procedure of any kind. However, as we have seen, automatic recognition does not mean that —in some cases— a review of the regularity of the decision is not required.

In the event that recognition is requested *incidentally* (i.e., when the foreign judicial judgement is alleged so that the court that has cognisance of another question will take it into account for its own ruling or as an exception of res judicata in another proceeding) the organ responsible for the review of regularity (i.e., responsible for verifying that the conditions for recognition set out in the previous section are met) is the court that has cognisance of the principal question. As we have seen, the effects of that recognition are limited to the principal question debated before the court. In this type of recognition, the judicial authority that has cognisance of the principal question, and on the assumption that such a judgement would still not have the force of res

judicata in the state of origin, may stay the procedure until the judgement acquires the force of res judicata in that state.

On the supposition that recognition of the judgement is requested *principally* (regardless of any other proceeding, either because there has been opposition or because security of recognition has been preferred and that has had effects on the whole state), the party intending it must have recourse to the special procedure provided for in the Regulation for enforcement (declaration of enforceability). Therefore, the procedure is the same in both cases (principal recognition and declaration of enforceability).

All that gives rise to two consequence which need to be specified.

First, that only the party intending recognition or enforcement can have recourse to that procedure and never the party opposing recognition, since neither the Regulation nor autonomous law (at least Spanish law) envisages the possibility of applying for a general declaration of non-recognition of a foreign decision. Part of the doctrine considers it possible. Nevertheless, the fact that the Regulation in matrimonial matters provides for that possibility and this one, later in time, does not, speaks for the interpretation set out in the text. And so the party interested in obtaining a declaration of non-recognition can only wait for the exequatur procedure begun by the other party and oppose it.

Second, that the recognition and enforcement procedure provided for in the Regulation is obligatory, in two different senses. In a first sense, because, as a natural consequence of the recognition as a matter of law established by the Regulation, the party that has obtained a favourable judgement in a member state cannot initiate a new procedure in another member state, but has to apply for recognition of it.

> This was the sense of the judgement delivered by the European Court on 30 November 1976, Case C-42/76, case of Wolf v. Cox, declaring that the clauses of the Convention prevent the party that has obtained a judicial judgement in its favour in a contracting state, which may be enforced in another contracting state according to the terms of Article 31 of the Convention, from requesting a jurisdictional organ in it to sentence the other party to what it has already been sentenced in the first state.

And, in a second sense, that the party intending general recognition of a foreign decision which comes within the sphere of the Regulation must have recourse to the procedure of the Regulation and not to the common procedure of the state in which recognition is sought (regarding the relation with the procedures of other Conventions, Art. 71 declares them compatible; and the same is the case with other Community acts in particular matters (see Art. 67 of the Regulation).

Lastly, the *special exequatur procedure*, which we shall explain succinctly, is envisaged in Articles 39 to 56 of the Regulation.

— Any interested party may apply for the recognition or enforcement of a judgement made by a court of a member state. The competent courts or authorities before which the applications are made are determined in Annex II of the Regulation. Annex III determines the competent courts for lodging the appeals referred to in Art. 43 section 2 of the Regulation and Annex IV determines the appeals pursuant to Art. 44. In Spain jurisdiction is attributed to the court of the first instance of the domicile of the party against which the enforcement is requested, and there is a system of appeals against its decision, first before the provincial court, and against that judgement there can be an appeal in casation before the Supreme Court.

— This is a procedure in two phases.

In the *first phase*, the procedure is unilateral, with no hearing for the defending party, with the idea that the defendant cannot take measures that imply the impossibility of enforcement (for example, for lack of goods in that state). The judge has to grant enforcement immediately (if they were enforceable in the state of origin) or recognition, with the sole requisite of having fulfilled the formalities of Article 53 and without the judge being able to review fulfilment of the conditions of articles 34 and 35. The application, whose modalities of presentation are determined by the law of the state where it is presented, must be accompanied by the documents set out in Article **53**: an authentic copy of the judgement and a certificate in accordance with the standard form that appears in Annex V to the Regulation. The judge can ask for a certified translation of the documents indicated, and in no event will their legalisation or a power for lawsuits be required.

The *second phase* of the procedure is the one that refers to the appeals and is contradictory in character. The appeals are established both when the decision has granted the recognition or the enforcement and when the enforcement has been refused. The appeal (Art. 43) will be lodged in Spain with the provincial court. If the party against whom the enforcement is requested should not appear, the court is obliged to stay the procedure according to Article 26 sections 2 to 4. In both appeals the court can only refuse recognition or enforcement if the causes alleged are the ones provided for in Articles 34 and 35. The court may stay the procedure should the judgement have been the object of an ordinary appeal in the country of origin. If the enforcement is intended at the request of one party, it will be stayed, as well as for the reason mentioned, when the appeal could have been lodged because the time for doing so had not expired, and the enforcement can also be subordinated to the constitution of a guarantee. If the appeal is against a positive exequatur decision, the time limit is one month if the party against which the enforcement or recognition is claimed is domiciled in that state or in a non-member state (in this case it may be extended according to the law of the state in which recognition is sought), and two months if it is in another member state. If the decision has refused the exequatur, the Regulation does not indicate any time limit, and so it is the national legislations that can set it. The judgement that decides on the previous appeal can only be the object of the appeals provided for in Annex IV (Art. 44). The reasons for refusing or revoking the granting of the enforcement have to be, in this appeal as well, the ones provided for in Articles 34 and 35.

— The Regulation regulates another series of questions such as: a) the provisional and precautionary measures whose adoption may be requested by the applicant “when a judgement must be recognised in accordance with this Regulation”, according to the legislation of the member state where the recognition is being sought, without any need for the granting of the enforcement (Art. 47); b) the judgements that oblige periodic payment by way of a penalty, which may only be enforced when the amount is definitively determined by the court of origin (Art. 49); and, c) the benefit of free legal aid and the security or deposit (arts. 50 and 51).

4. Relations between the Regulation and other instruments.

Regarding relations between the conventions and between the Brussels Convention and other international conventions and the Community Regulations, Articles 55 to 57 of the Brussels and Lugano Conventions and Articles 67 to 72 of the Regulation

determine the suppositions on which their provisions are applicable or not in relation to other international conventions which also regulate matters which are the object of them. We should remember first of all that the Brussels Convention will apply to the recognition and enforcement of judgements coming only from Denmark and the Lugano Convention only to those from the member countries of the European Free Trade Association which are not members of the European Union (Norway, Iceland, Switzerland and Liechtenstein[2]). The two conventions mentioned and the Regulation are applicable in substitution for the international conventions agreed by two or more contracting states (parties in the case of the Regulation) and which are expressly indicated in the respective texts (Art. 55 of the first and 69 of the second). Always assuming that the object of the litigation is matters included in their sphere of application. In the matters not included in those conventions they will continue to be effective. Moreover, Art. 57 of the Brussels and Lugano Conventions and 71 of the Regulation allow the application by the contracting states (or parties in the case of the Regulation) of other international conventions which they have ratified and which "in particular matters regulate judicial jurisdiction, the recognition or the enforcement of judgements".

In the specific sector of recognition, Article 71.2 b) of the Regulation 44/2001 studied above states that its system of recognition and enforcement is applicable to those decisions handed down by a court of a member state based on the grounds of jurisdiction of a convention relating to a particular matter. And, on the assumption that a convention of this nature, ratified by the state of origin and the state in which recognition is sought, envisages the conditions for recognition or enforcement they can be used (Article 71 *in fine*). In any case, the Brussels Regulation can be used in anything concerned with the recognition or enforcement procedure.

[2] Until the entry of Poland into the Europe union this convention also applied to it. From the moment of accession, Regulation 44 will be applicable to all the new countries.