OPINION OF ADVOCATE GENERAL JACOBS
delivered on 4 July 1996 *

1. The issue raised by the Netherlands Hoge Raad (Supreme Court) in this case is essentially whether a judgment given by a German court in ostensibly *inter partes* proceedings must be enforced under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1] by a Netherlands court in circumstances where the defendants were not aware of the proceedings in Germany and were represented before the German court without their authority.

Relevant provisions of the Brussels Convention

2. The provisions at issue are contained in Title III of the Brussels Convention, which is headed 'Recognition and Enforcement'.

3. The general rule with regard to recognition is laid down in the first paragraph of Article 26, which provides: 'A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.'

4. Article 27 derogates from that general rule by setting out a number of situations in which a court of one Contracting State must refuse to recognize a judgment given by a court in another Contracting State, of which the first two are:

'(1) if such recognition is contrary to public policy in the State in which recognition is sought;

(2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'.

* Original language: English.

1 — Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, OJ 1978 L 304, p. 77, and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, OJ 1982 L 388, p. 1.

5. Article 28 provides further exceptions to the general requirement of recognition, relating to insurance and consumer contracts, to cases in respect of which the Convention provides for exclusive jurisdiction, and to certain judgments which a Contracting State may agree with a third State not to recognize.

6. Article 29 states: 'Under no circumstances may a foreign judgment be reviewed as to its substance.'

7. Article 34, which concerns applications in one Contracting State for the enforcement of a judgment given in another Contracting State, states in its second paragraph that an application for enforcement 'may be refused only for one of the reasons specified in Articles 27 and 28' and continues in its third paragraph: 'Under no circumstances may the foreign judgment be reviewed as to its substance'.

8. The grounds on which a court must refuse to recognize a judgment are accordingly identical to those on which it may refuse to order enforcement. The national court's questions are framed in terms of recognition; the parties in their observations and the Court in its judgments in various cases cited in this Opinion sometimes use one term, sometimes the other and sometimes both.

Background and questions referred

9. Very few facts figure in the order for reference. Most of the following account is, in the absence of any other information, drawn from the observations of the appellants in the main proceedings and hence cannot be regarded as corroborated.

10. At the time of the events giving rise to the judgment sought to be enforced, Mr and Mrs Hendrikman, the appellants in the main proceedings, both resident in the Netherlands, were sole shareholders in the Netherlands company Hendrikman BV (subsequently dissolved). The company was in the business of cosmetics wholesaling. In 1989, negotiations took place with Mr Conrad and Mr Ernst of the Düsseldorf firm Partnership Management with a view to Conrad and Ernst handling the company's marketing in Germany. Conrad and Ernst ordered stationery, business cards and a stamp, all printed with 'Dekor Display' and 'Markenvertrieb Hendrikman & Hendrikman, Ben & Ria Hendrikman (...) Düsseldorf (...)', from Magenta Druck & Verlag GmbH, a company incorporated in Germany. The invoice for that order, received by Conrad and Ernst in April 1989, was never paid. Magenta subsequently brought an action against Mr and Mrs Hendrikman before the Amtsgericht (local court), Düsseldorf, in June 1989. It appears that service of the writ, citing the defendants as 'Herr und Frau Ben & Ria Hendrikman, handelnd unter der Firma

Dekor Display, Markenvertrieb Hendrikman & Hendrikman (...) per adresse Werner Conrad (...) Düsseldorf', was effected at Conrad's address and that in October 1989 Conrad or Ernst, using the stationery, instructed local lawyers to arrange for a defence.

11. According to Mr and Mrs Hendrikman, they had no knowledge of either the writ or the response to it.

12. The action was dismissed for reasons which are apparently not known to Mr and Mrs Hendrikman, but that judgment was reversed on appeal by the Landgericht (Regional Court), Krefeld, in April 1991; the Amtsgericht, Nettetal (to which the proceedings had been referred by the Amtsgericht, Düsseldorf), made an order for costs against Mr and Mrs Hendrikman in July 1991.

13. The Landgericht's judgment and the order for costs were served on Mr and Mrs Hendrikman in the Netherlands in September 1991 with a notification that failure to pay would lead to an application for enforcement. In January 1992 the President of the Arrondissementsrechtbank (District Court), The Hague, gave leave to Magenta to enforce the judgment and order against Mr and Mrs Hendrikman in the Netherlands. The judgment and order together with the President's order granting leave were served on them on 11 February 1992 with an order to comply and notification of execution in the event of non-compliance. On 10 March 1992 they lodged an appeal against the President's order to the Arrondissementsrechtbank, The Hague, invoking Article 27(1) and (2) of the Brussels Convention.

14. According to the order for reference, Mr and Mrs Hendrikman contended on appeal that (i) they were represented in the German proceedings without their authority; (ii) they had never received the documents instituting the proceedings; (iii) Conrad and Ernst acted without their authority in their name to instruct local lawyers to represent them; (iv) consequently Conrad and Ernst were, substantively, parties to the proceedings and not Mr and Mrs Hendrikman; (v) the German courts wrongly assumed that Mr and Mrs Hendrikman were validly represented before them; (vi) as a result, decisions were delivered against them against which they could not defend themselves; (vii) to recognize and, in this case, enforce the decisions would be contrary to public policy since it would be an unacceptable breach of the fundamental principle of the autonomy of the human person and the fundamental principle *audi alteram partem*.

15. The appeal was dismissed in February 1994. According to the order for reference, the Arrondissementsrechtbank held that (i) Article 29 of the Brussels Convention precluded it from judging whether the German

courts were entitled to assume that the representation in question was valid; (ii) Article 27(1) of the Brussels Convention should be given a narrow interpretation, although public policy might be at issue if the law of the country in which judgment was given against a defendant who was not aware of proceedings instituted against him and not validly represented conferred no remedy or if a remedy was not available in the circumstances; (iii) however, even if Mr and Mrs Hendrikman were not aware of the proceedings and not validly represented, they could not invoke Article 27(1) since they could have sought annulment of the judgment and order on the ground of lack of representation within one month of the initial service in September 1991 pursuant to Article 586 of the German code of civil procedure; and (iv) Article 27(2) of the Brussels Convention did not apply since there was no question of a defendant's having been declared in default of appearance.

16. On an appeal in cassation, the Hoge Raad (Supreme Court) referred the following questions to the Court of Justice:

'(1) Must Article 29 of the Brussels Convention be interpreted as meaning that the court of the State in which recognition is sought must refrain from making any inquiry into the question whether the defendant to the proceedings conducted in the State in which judgment was given was validly represented, even if the court of the State in which judgment was given made no ruling in that regard?

(2) (a) Must Article 27(1) of the Brussels Convention be interpreted as precluding recognition of a judgment given in another Contracting State where the defendant in the relevant proceedings was not validly represented and had no knowledge of the proceedings, even if he later had cognizance of the judgment which was given and availed himself in that regard of none of the legal remedies afforded by the procedural law of the State in which judgment was given?

(2) (b) Is it relevant in that connection that the time within which the legal remedy must be applied is one month from the day on which the defendant has cognizance of the judgment which has been given?

(3) Must Article 27(2) of the Brussels Convention be interpreted as meaning that that provision is also applicable in a case in which, although the defendant was not declared to be in default of appearance, the document instituting the proceedings or an equivalent document was not duly served on or notified to him in sufficient time and the defendant was not validly represented in the proceedings?'

17. As the Commission points out, it does not appear from the order for reference

whether in fact Mr and Mrs Hendrikman knew of the proceedings in Germany or were validly represented: thus if the Court were to conclude that lack of knowledge or valid representation could in principle preclude automatic recognition and enforcement in the Netherlands of the German judgment, the Netherlands courts would have first to ascertain whether those circumstances had been proved before refusing to authorize enforcement.

18. Nor is it apparent why the German courts had jurisdiction in proceedings brought against persons domiciled in the Netherlands. I assume, although it is nowhere stated, that those courts exercised special jurisdiction in accordance with Article 5(1) of the Convention, on the basis that they were the courts for the place of performance of the contractual obligation in dispute.

19. I propose to address the various issues in a different order from that adopted in the questions referred. I will first consider the national court's final question, concerning Article 27(2) of the Convention (judgments delivered in default of appearance), since I think that my proposed answer to that question resolves its other questions.

The scope of Article 27(2): judgments delivered in default of appearance

20. The national court's final question essentially asks whether a judgment delivered in proceedings where, although the defendant was not declared to be in default of appearance, he was not validly represented and had no knowledge of the proceedings is a judgment 'given in default of appearance' for the purpose of Article 27(2).

21. If that question is answered in the affirmative, the national court will be required to examine whether the two conditions set out in that provision were met before it enforces the judgment. Those conditions are separate and cumulative: the first requirement, of due service, is to be determined by reference to the procedural law of the State in which the judgment was delivered together with any relevant international conventions; the second requirement, of service in sufficient time to enable a defence to be arranged, is a question of fact to be assessed by the court before which enforcement is sought taking into consideration the circumstances of the case before it. [2]

2 — Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, paragraph 15 of the judgment; Case 49/84 *Debaecker* v *Bouwman* [1985] ECR 1779, paragraph 13; Case C-305/88 *Lancray* [1990] ECR I-2725, paragraphs 18 and 29.

22. The wording of the question suggests that the national court is assuming that neither condition was met. It therefore needs to know whether the defendants were in default of appearance, in which case Article 27(2) applies and it may not recognize the judgment. Although the German Government has suggested in these proceedings that there was due service under German law, it would still be possible for the referring court to find that the second condition was not met. The issue in this case is therefore whether the judgment was given in default of appearance within the meaning of Article 27(2).

23. The only case in which the Court has specifically considered the question of what constitutes 'appearance' for the purposes of Article 27(2) is *Sonntag*. [3] That case concerned criminal proceedings brought in Italy against Mr Sonntag, a German schoolteacher, for causing the death by negligence of a pupil who had suffered a fatal accident on a school trip to Italy. The deceased pupil's parents and brother joined the criminal proceedings as civil parties seeking an order against Mr Sonntag for compensation for the loss caused by the accident. The civil parties' declaration of intention to make a civil claim against him was served on Mr Sonntag. He was legally represented at the trial before the criminal court at which he was found guilty on the criminal count and ordered to pay compensation to the civil parties. The relevant German court granted the civil parties' application to enforce the civil law part of the judgment. Mr Sonntag appealed to the Oberlandesgericht, which dismissed the appeal; he appealed against that dismissal to the Bundesgerichtshof, which referred a number of questions to the Court including the following:

'Has a defendant appeared for the purposes of Article 27(2) of the Convention where the case concerns a civil claim for damages in connection with charges brought before a criminal court ... and the person against whom enforcement is sought, through counsel of his own choice, answered to the criminal charges but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel?'

24. Advocate General Darmon favoured a restrictive interpretation of the exception, stating: 'In order to be applicable, Article 27(2) necessarily implies, in my view, that the defendant is in default of appearance, *and must have been found to be so by the court of the State where the proceedings were first brought* ...'. [4] That statement should, however, be seen in its context: it was not disputed in *Sonntag* that the defendant had been aware of the proceedings as a whole and had been represented at the hearing by counsel of his choice.

3 — Case C-172/91 [1993] ECR I-1963.

4 — Paragraph 82 of the Opinion; emphasis added.

25. The Court did not follow the Advocate General's approach. The Court stressed that Article 27(2) was intended to ensure that a judgment was not recognized or enforced under the Convention if the defendant had not had an opportunity of defending himself before the court first seised. Non-recognition under Article 27(2) is accordingly possible only where the defendant was in default of appearance at the original proceedings:

'Consequently, that provision may not be relied upon where the defendant appeared, at least if he was notified of the elements of the claim and had the opportunity to arrange for his defence. ...

A defendant is deemed to have appeared for the purposes of Article 27(2) of the Convention where, in connection with a claim for compensation joined to criminal proceedings, he answered at the trial, through counsel of his own choice, to the criminal charges but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel.' [5]

26. Although the factual context of *Sonntag* was entirely different, it is instructive to note the Court's readiness to develop an autonomous interpretation of the concept of a judgment 'given in default of appearance' without reference to the relevant national law of the court which delivered the judgment in question. That echoes the view of Advocate General VerLoren van Themaat, who stated in *Debaecker* v *Bouwman* [6] after reviewing the earlier cases that 'Article 27(2) should be interpreted independently, as an autonomous provision of the Convention'. [7]

27. I consider that the Court's dicta in *Sonntag* as to the scope of Article 27(2), and in particular as to the meaning of 'appeared' for that purpose, support the view that that provision applies where the defendant was not in fact notified of the elements of the claim and did not answer the claim through counsel of his own choice, even though the court which delivered the judgment did not formally declare it to be given in default of appearance.

28. Such a construction is to my mind consistent with the Court's readiness in earlier cases to give a broad interpretation to Article 27(2). Although, as I stated in my

5 — Paragraphs 39 and 44 of the judgment.

6 — *Debaecker* v *Bouwman*, cited in note 2.

7 — P. 1785.

Opinion in *Lancray*, [8] 'as an exception to the general rule laid down in Article 26 of the Brussels Convention, Article 27 is not to be interpreted extensively', that proposition is, as I made clear, subject to the important caveat that 'too restrictive an interpretation might undermine the defendant's right to a fair hearing [which is] not an acceptable way of achieving the objectives of the Brussels Convention'.

29. The clearest authority for a broad interpretation may be found in the Court's statements in *Klomps* v *Michel* [9] and *Minalmet* [10] that Article 27(2) is intended to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised.

30. Similarly in *Pendy Plastic* v *Pluspunkt* [11] Advocate General Reischl stated that Article 27(2):

'reflects the basic concern to ensure observance of the principle of the right to a proper hearing ... the principle is often regarded as a matter of public policy ... provisions having such a content are not to be interpreted restrictively'. [12]

31. The case-law concerning the proper balance to be struck between the Convention's aim of ensuring the free movement of judgments and the need to ensure observance of the principle of *audi alteram partem* contains numerous further statements by the Court stressing the fundamental nature of the guarantee in Article 27(2) that the rights of the defence have been observed, [13] supporting an interpretation of the provision which extends it beyond proceedings in default *stricto sensu* where that is necessary for the protection of the rights of the defence.

32. Such an interpretation accords with that advocated by the Commission and the Greek Government as well as by the appellants in the main proceedings.

33. The contrary view would have the perverse consequence that defendants to proceedings which, albeit nominally *inter partes*,

8 — *Lancray*, cited in note 2, paragraph 14 of the Opinion.

9 — *Klomps* v *Michel*, cited in note 2, paragraph 9 of the judgment.

10 — Case C-123/91 [1992] ECR I-5661, paragraph 18 of the judgment.

11 — Case C-228/81 [1982] ECR 2723.

12 — Paragraph 3(b) of the Opinion, on p. 2743.

13 — See for example Case 125/79 *Denilauler* v *Couchet Frères* [1980] ECR 1553, paragraph 13 of the judgment; *Pendy Plastic* v *Pluspunkt*, cited in note 11, paragraph 3 of the Opinion of Advocate General Reischl; and *Debaecker* v *Bouwman*, cited in note 2, paragraph 10 of the judgment and the Opinion of Advocate General VerLoren van Themaat, on p. 1784; see also my Opinions in *Minalmet*, cited in note 10, paragraph 11, and Case C-474/93 *Hengst Import* v *Campese* [1995] ECR I-2113, paragraph 7.

were in fact conducted without their knowledge and without their being validly represented would not benefit from the additional safeguards provided by Article 27(2), whereas a defendant to a judgment given in default of appearance who had in fact received the document instituting the proceedings although it was not served according to the relevant procedural requirements, as in *Lancray*, [14] would so benefit. As the Commission's representative pointed out at the hearing, if the rights of the defence are regarded as prejudiced in the latter situation, then *a fortiori* they should be so regarded in the former.

34. The contrary view would moreover entail the risk that a judgment delivered after proceedings which did not comply with the safeguards required by Article 6 of the European Convention on Human Rights, which guarantees the right to a fair hearing, would require recognition and enforcement throughout the Community.

35. Furthermore it would mean that a judgment delivered by a court in proceedings brought without their knowledge against defendants domiciled in another Contracting State in circumstances where there was no jurisdiction under the Convention might be treated as enforceable, which would be contrary to the fundamental principles underlying the Convention.

36. Although the construction which I advocate runs counter to the view of Advocate General Darmon in *Sonntag*, [15] mentioned above, the Advocate General was — understandably in the circumstances of the case before him, where neither improper representation nor the defendant's lack of awareness of the proceedings was at issue — clearly influenced by the fact that the essence of an *inter partes* hearing before a court is that 'The defendant, or his counsel, had the opportunity before that court to object that the document instituting the proceedings was defective and to submit defence arguments going both to admissibility and the merits.' [16] That is precisely the opportunity which the appellants in the main proceedings in this case deny having had.

37. It may be noted that Advocate General Mayras came to a similar view to that which I propose in *Denilauler* v *Couchet Frères*, [17] a case concerning the application of the Convention to an interim order obtained *ex parte*. The Advocate General, considering

14 — Cited in note 2.

15 — Cited in note 3.

16 — Paragraph 84 of the Opinion.

17 — Cited in note 13.

whether Article 27(2) applied to proceedings in which such an order was obtained, stated:

'It is however far from certain that the terms used in [Article 27(2)] can apply only to default proceedings as understood *stricto sensu* in certain national legal systems.

I do not think it right to construe Article 27(2) as referring only to specific proceedings known to certain national legal systems. In my view such a construction would be too narrow and would fail to recognize the independent nature of the Convention, which is an instrument of international law, in relation to the multiplicity of proceedings under the national legal systems of the Contracting States.

This is confirmed by the English text of Article 27(2) which, by using the expression "judgment ... given in default of appearance", is careful to avoid terminology calling to mind certain national proceedings and those alone. There can be no doubt that according to the ordinary meaning of the words any judgment given against a defendant without his having been heard is a judgment "in default of his appearance". The English term refers simply to the absence of the defendant from the course of the proceedings for whatever reason.' [18]

38. The Court did not adopt Advocate General Mayras' analysis of Article 27(2), ruling instead that *ex parte* orders were outside the scheme of the Convention as a whole.

39. The court before which enforcement is sought will of course require evidence of wholly exceptional circumstances to establish that an ostensibly *inter partes* judgment in fact falls within the scope of Article 27(2). However, where that provision applies that court is already required to satisfy itself not only that service was duly effected but also whether, in a particular case, there are exceptional circumstances which warrant the conclusion that service was none the less inadequate for the purposes of enabling the defendant to arrange for his defence. In considering whether it is confronted with such a case the court may take account of all the circumstances, including the means employed for effecting service and the relations between the plaintiff and the defendant. [19] It does not seem to be unduly

18 — P. 1574. In so far as concerns the English terminology the Advocate General's comments appear to be founded on a false premise, since the term 'judgment in default of appearance' has an impeccable history in English law, dating back to the last century and only falling out of use in 1979 when the terminology of the Rules of the Supreme Court was changed: see RSC, Ord. 13, and SI 1979 No. 1716.

19 — *Klomps* v *Michel*, cited in note 2, paragraphs 19 and 20 of the judgment. See also the list of exceptional circumstances suggested by the Commission in *Debaecker* v *Bouwman*, cited in note 2, set out in the Opinion of Advocate General VerLoren van Themaat in note 10 on p. 1787, which includes a residual category of 'persons who are prevented from entering a defence by extraneous circumstances for which they cannot be held responsible'.

burdensome, or to make too great an inroad into the system set in place by the Convention, to require the court to undertake a comparable preliminary appraisal in situations such as that at issue in this case in order to ascertain whether the provision applies.

40. Finally it should be mentioned that it is clearly irrelevant for the purposes of Article 27(2) that the appellants in the main proceedings became aware of the judgment once it had been served on them and failed to avail themselves of the possibility under German law of applying to have the judgment set aside on grounds of lack of representation. As the Court stated in *Minalmet*: [20]

'the proper time for the defendant to have an opportunity to defend himself is the time at which proceedings are commenced. The possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending the proceedings before judgment is delivered.'

41. I accordingly conclude that a judgment delivered in ostensibly *inter partes* proceedings of which the defendant was unaware and in which he was not validly represented is a judgment given in default of appearance within the meaning of Article 27(2).

20 — Cited in note 10; paragraph 19 of the judgment.

The limits of Article 29: prohibition of a review of the substance of a judgment

42. The national court's first question asks essentially whether Article 29 prohibits the court before which recognition is sought from making any inquiry into whether the defendant was validly represented.

43. Once it is accepted that a judgment delivered in proceedings in which the defendant was not validly represented may constitute a judgment in default of appearance for the purposes of Article 27(2), it is clear that Article 29 cannot have the effect posited in the national court's first question since if it had that effect Article 27(2) would be wholly undermined: the national court would be precluded by one provision from making inquiries relevant to determining whether another provision applied in a particular case.

44. Thus to my mind, to the extent that the invalidity of representation is being pleaded by the defendant with a view to establishing that the judgment sought to be enforced is a judgment in default and hence that the safeguards in Article 27(2) apply, the court before which enforcement is sought is clearly competent to investigate the issue (although

as stated above it will require evidence of wholly exceptional circumstances to justify a finding that a judgment expressed to have been delivered in *inter partes* proceedings falls within Article 27(2)).

45. None the less I consider that it is worth briefly reviewing the scope of Article 29, if only to avoid unwarranted generalization of the conclusion that in this case the court before which enforcement is sought may review a procedural aspect of the judgment sought to be enforced.

46. In my view it would be stretching normal usage to construe the concept of the substance of a judgment as encompassing such unequivocally procedural elements as service and representation. The question accordingly arises whether, merely because procedural irregularities do not go to the substance of a judgment and hence do not fall within the prohibition in Article 29, the court before which enforcement is sought is at liberty to investigate any alleged procedural irregularity.

47. I consider that the answer to that general question is clearly in the negative, notwithstanding the answer to be given to the question put in the specific circumstances of this case.

48. In my view, the grounds for refusing enforcement are set out exhaustively in Articles 27 and 28 and hence procedural irregularities cannot be investigated except to the extent that they fall within one of the grounds set out in those articles, notwithstanding the fact that such irregularities do not go to the substance of the judgment and hence are not covered by Article 29.

49. The cumulative effect of the relevant provisions strongly supports the view that the types of irregularity which must lead the court before which recognition or enforcement is sought to refuse the application are set out exhaustively in Articles 27 and 28.

50. Title III of the Convention is headed 'Recognition and Enforcement'. Section 1, 'Recognition', consists of Articles 26 to 30. Article 26 sets out the basic rule that a judgment given in a Contracting State is to be recognized without any special procedure being required. Article 27 states that a judgment 'shall not be recognized' in a number of specified circumstances; Article 28 states: 'Moreover, a judgment shall not be recognized' on further specified grounds. Article 29 states unequivocally that under no circumstances may a foreign judgment be reviewed as to its substance. (Article 30 provides for a stay of recognition proceedings in the event of an appeal against the judgment at issue.)

51. In that context, Article 29 serves as a full stop: it reminds the court before which recognition is sought of the cornerstone of the whole edifice of the free movement of judgments, the bedrock principle that *prima facie* it must recognize the judgment. In the words of Advocate General Mayras in *Denilauler* v *Couchet Frères*: [21] 'the whole essence of the Convention is not to allow the court addressed to have jurisdiction as to the substance of the case'. [22]

52. The pattern moreover is reflected in Section 2 of Title III, headed 'Enforcement': Article 31 provides that a judgment is to be enforced when on the application of any interested party it has been declared enforceable; Articles 32 and 33 prescribe the procedure for obtaining such a declaration; Article 34 provides that the application 'may be refused *only* for one of the reasons specified in Articles 27 and 28' [23] and immediately thereafter, in its third paragraph, reiterates that under no circumstances may the foreign judgment be reviewed as to its substance. (The remainder of Section 2 is taken up with further procedural matters, principally to do with appeals against enforcement.)

53. The wording of the relevant provisions of Section 2, which is clearly designed substantially to mirror the scheme of Section 1, is to my mind unequivocal and hence supports a parallel construction of Section 1, the drafting of which is unfortunately less unambiguous.

54. Thus the scheme and objectives of the Convention support the view that the grounds for refusing recognition and enforcement are set out exhaustively in Articles 27 and 28 and that procedural irregularities may constitute such a ground only if they fall within those articles.

The scope of Article 27(1): public policy

55. In its second question, the Hoge Raad asks whether Article 27(1) precludes recognition of a judgment where the defendant was not validly represented and had no knowledge of the proceedings, even if he later had cognizance of the judgment and availed himself of none of the legal remedies afforded by the procedural law of the State in which the judgment was given.

56. This question does not arise if my view that Article 27(2) applies is correct since the public policy exception does not apply to situations covered elsewhere in Article 27:

21 — Cited in note 13.
22 — P. 1582.
23 — Emphasis added.

see *Hoffmann* v *Krieg*. [24] One question in that case was whether recognition of a German maintenance order should be refused pursuant to Article 27(1) or 27(3) (which prohibits recognition of a judgment which is irreconcilable with a prior judgment in a dispute between the same parties in the State applied to). The Court stated unequivocally that:

'according to the scheme of the Convention, use of the public-policy clause ... is in any event precluded when, as here, the issue is whether a foreign judgment is compatible with a national judgment; the issue must be resolved on the basis of the specific provision under Article 27(3)'. [25]

57. I can see no reason not to apply the Court's ruling that use of the public policy exception is precluded when the issue is specifically covered by Article 27(3) to cases where the issue has been held to fall within Article 27(2).

58. That approach moreover finds support in Advocate General Capotorti's comment in *Rohr* v *Ossberger* [26] to the effect that, where circumstances fall within the scope of Article 27(2), 'a particular aspect of the protection of the rights of the defence has been ensured by the authors of the Brussels Convention by means of a provision other than that concerning public policy'.

59. Although it may appear to conflict with the words of Advocate General Reischl in *Pendy Plastic* v *Pluspunkt* [27] quoted in paragraph 30 above, to the effect that the principle of the right to a proper hearing is often regarded as a matter of public policy and as such is not to be interpreted restrictively, it is apparent from Advocate General Reischl's Opinion that he is referring to the submission of the United Kingdom that 'Article 27(2) is intended to ensure observance of a principle of natural justice whereby recognition of a judgment must be withheld if the defendant did not have an opportunity to acquaint himself with the content of the instrument served.' [28] He is accordingly using the concept of public policy in the specific sense of the principle *audi alteram partem*.

60. To my mind therefore that statement merely confirms that, as argued above, the principle of the right to a proper hearing

24 — Case 145/86 [1988] ECR 645.
25 — Paragraph 21 of the judgment.
26 — Case 27/81 [1981] ECR 2431, at p. 2444.
27 — Cited in note 11.
28 — See the judgment, at p. 2730.

embodied in Article 27(2) is so fundamental that that provision should be interpreted as encompassing the circumstances alleged in these proceedings. That makes it unnecessary to bring the matter within the scope of the public policy exception.

Conclusion

61. I consider therefore that, in the light of the proposed answer to the third question, there is no need to answer the first and second questions.

62. In view of the terms of the national court's questions, and hence of my proposed answer, it should be emphasized once more that the alleged circumstances which have prompted that court to seek a preliminary ruling from this Court cannot at this stage be regarded as more than hypothetical. Accordingly it is for the appropriate national court, before deciding the case before it in the light of this Court's answer to the questions referred, to satisfy itself of the facts.

63. I am of the opinion that the Court should rule as follows on the questions put by the Hoge Raad:

Article 27(2) of the Brussels Convention applies in a case in which, although the defendant was not declared to be in default of appearance, the document instituting the proceedings or an equivalent document was not duly served on or notified to him in sufficient time and the defendant was not validly represented in the proceedings.