OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 11 July 1991 *

Mr President,
Members of the Court,

1. This case concerns a reference from the Hoge Raad der Nederlanden (hereinafter referred to as 'the court of reference') for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Article 37(2) and the first paragraph of Article 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Brussels Convention').[1] The questions put to the Court arose in the context of an appeal in cassation brought before the court of reference by B. J. Van Dalfsen, J. Timmermann, H. Van Dalfsen, J. Harmke and G. Van Dalfsen (hereinafter referred to as 'Van Dalfsen') against a judgment of the Arrondissementsrechtbank te Zwolle (Netherlands). They concern the procedure laid down under the articles of the Brussels Convention already referred to with regard to an appeal against the order for the enforcement of judgments given in another Contracting State.

2. By the first two questions, which are of a general nature, the Hoge Raad actually wishes to know, so as to decide on the admissibility of the appeal in cassation, whether an appeal in cassation within the meaning of the second paragraph of Article 37 of the Brussels Convention may be lodged against the refusal of the Arrondissementsrechtbank to stay the proceedings on the appeal against the order for enforcement. In its third question the Hoge Raad asks, so as to decide on Van Dalfsen's ground of appeal in cassation, if it is admissible, what arguments the Arrondissementsrechtbank could have taken into account in the context of a decision under the first paragraph of Article 38 of the Brussels Convention on whether or not to stay the proceedings on the appeal.

Legal background

3. Article 37(2) and Article 38 of the Brussels Convention, which are under discussion in these proceedings, are part of Section 2 of Title III of the Brussels Convention (Articles 31 to 45) concerning the enforcement of judgments which are enforceable in the State in which they are given. Under Article 31 of the Brussels Convention, such judgments may be enforced in another Contracting State when, on the application of any interested party, the order for enforcement has been issued there by the court having jurisdiction in pursuance of Article 32 of the Convention and in accordance with the rules laid down in Articles 33 to 35 and 42 to 45 thereof. It is particularly important to note that at this stage of the proceedings before the aforementioned court the party against whom enforcement is sought is not entitled to make any submissions on the application, that an application for

* Original language: Dutch.
1 — OJ 1978 L 304, p. 36.

enforcement may be refused only for one of the reasons specified in Articles 27 and 28 of the Convention and that the foreign judgment may under no circumstances be reviewed as to its substance (Article 34).

4. If the order for enforcement is refused, the applicant may, under Article 40 of the Brussels Convention, appeal to the court mentioned in that article, whose judgment may, in turn, be contested in cassation or by a similar form of appeal.

If, however, enforcement is authorized, the party against whom enforcement is sought may, in accordance with Article 36 of the Brussels Convention, appeal against the judgment within one month of the service thereof to the court mentioned in Article 37(1). Since under Article 34 the application for enforcement could have been refused only for one of the reasons specified in Articles 27 and 28, the appeal against the enforcement order must also be based on one of those reasons. According to Article 39, during the time specified for an appeal and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought; the decision authorizing enforcement carries with it the power to proceed to any such protective measures.

If in the meantime an ordinary appeal has been lodged in the State of origin against the judgment whose enforcement is sought or if the time for such an appeal has not yet expired, the court with which the appeal is lodged may, under the first paragraph of Article 38 of the Brussels Convention, on the application of the appellant, stay the proceedings. However, under the last paragraph of that article, the court may also make enforcement conditional on the provision of such security as it may determine on behalf of the party against whom enforcement is sought.

Under the second paragraph of Article 37 of the Brussels Convention, the 'judgment given on the appeal' may be contested only by an appeal in cassation or by a similar form of appeal.

Facts and procedure

5. By judgment of 21 October 1986 given by the Vredegerecht van het Kanton Herentals (Belgium), Van Dalfsen were ordered to pay B. Van Loon and T. Berendsen (hereinafter referred to as 'Van Loon') arrears of rent amounting to BFR 2 700 000 plus interest. In the same judgment the Vredegerecht recognized in principle Van Dalfsen's right to repayment of the cost of capital expenditure they had incurred in respect of the premises rented and ordered that an expert's report be drawn up to determine the amount of these costs. The court declared the judgment 'provisionally enforceable notwithstanding any appeal and without security'.[2]

6. On 17 December 1986 Van Dalfsen appealed against this judgment to the Rechtbank van Eerste Aanleg te Turnhout (Belgium). Van Loon, for their part, applied to the presiding judge of the said Arrondissementsrechtbank, previously referred to, in

2 — For a more detailed report of the procedure before the Belgian Vredegerecht, I refer to the Report for the Hearing, pp. 2 and 3.

accordance with Article 31 of the Brussels Convention, for an order for enforcement in the Netherlands of the judgment which in Belgium had been declared provisionally enforceable. By judgment of 23 January 1987 the presiding judge of the Arrondissementsrechtbank authorized enforcement. Pursuant to Article 36 of the Convention, Van Dalfsen appealed to the Arrondissementsrechtbank against the order for enforcement. They also requested the court to stay the proceedings on the appeal in view of the fact that an appeal had meanwhile been lodged in Belgium against the Vredegerecht's judgment and the fact that the claim for compensation for capital expenditure, which the Vredegerecht had accepted in principle, had in the meantime been assessed in a provisional expert report at BFR 477 954.

7. By judgment of 13 April 1988, that is, 'the judgment given on the appeal', within the meaning of the second paragraph of Article 37, the Arrondissementsrechtbank found that Van Dalfsen's appeal was clearly not based on a challenge to the legality of the order for enforcement which had been issued, but solely on the application to stay the proceedings on the appeal. It therefore declared the appeal unfounded, dismissed the application for a stay of proceedings, but attached to the order for enforcement, of its own motion, the condition that Van Loon should provide a bank guarantee in the sum of BFR 478 000 until such time as the court from whose decision the appeal was made had given judgment on Van Dalfsen's alternative claim.

8. Van Dalfsen appealed in cassation to the court of reference. In that appeal they state that the Arrondissementsrechtbank proceeded on the basis of an erroneous interpretation of the scope of its powers pursuant to Article 38 of the Brussels Convention as the court with which the appeal is lodged. Van Dalfsen's view is that it was open to the Arrondissementsrechtbank, in its decisions on the stay of proceedings on the appeal and making enforcement conditional on the provision of security, to take account of circumstances which the foreign court could already have taken into account in its judgment and to base such decisions, *inter alia*, on its estimate of the chance of success of the ordinary appeal lodged, or which might still be lodged, in the State in which the judgment was given. [3]

9. The court of reference raises the following questions:

'(1) Can decisions of "the court with which the appeal under the first paragraph of Article 37 is lodged" as to whether or not use should be made, or whether use should be made in a particular way, of the powers conferred on it by Article 38 of the Brussels Convention be regarded as "the judgment given on the appeal" against which an appeal in cassation may be lodged in the Netherlands under the second paragraph of Article 37 of the Brussels Convention?

(2) Does it make any difference to the answer given to Question (1) whether or not the decisions based on Article 38 of the Brussels Convention which are referred to in that question are set out in the (final) judgment ruling on the appeal?

3 — On this question, see point 7 of the Opinion of the Procureur-Generaal at the Hoge Raad der Nederlanden, attached to the documents in the case.

(3) May "the court with which the appeal under the first paragraph of Article 37 is lodged" make use of the powers conferred on it by the first paragraph of Article 38 of the Brussels Convention:

(a) where the party lodging the appeal states no grounds for its application for the proceedings to be stayed or for enforcement to be made conditional on the provision of security other than grounds that the foreign court could have taken into account in its decision;

(b) only where the application in question is based partly or exclusively on submissions not put forward in the proceedings before the foreign court; or

(c) only where the application is based partly or exclusively on submissions which could not have been put forward in the proceedings before the foreign court because the party lodging the appeal was at that time unaware of the facts on which those submissions are based?'

The second paragraph of Article 37 of the Brussels Convention

10. To enable it to decide as to the admissibility of the appeal in cassation, the court of reference wishes to know whether under Article 37(2) of the Brussels Convention an appeal in cassation may be lodged against a judgment given under Article 38 by the court with which the appeal is lodged, in which the latter refused to stay the proceedings and required the provision of security.

Article 37(2) provides for the possibility of lodging an appeal in cassation (or a similar form of appeal) against 'the judgment given on the appeal'. In its judgment in Case 258/83 *Brennero* v *Wendel*[4] the Court stated that these words must be strictly interpreted and ruled that a preliminary or interlocutory decision requiring the creditor (wrongly in the Court's opinion[5]) to provide security did not constitute 'a judgment given on the appeal' and could not therefore be challenged by an appeal in cassation (in that case by a 'Rechtsbeschwerde'). In that connection the Court stated:

'Under the general scheme of the Convention, and in the light of one of its principal objectives which is to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made' (paragraph 15).

11. In my view, it follows from that judgment that a decision by the court with which the appeal is lodged to stay the proceedings likewise cannot be regarded as a 'judgment given on the appeal' in view of the fact that such a decision to stay the proceedings can naturally only be taken by an interlocutory judgment. However, the

4 — [1984] ECR 3971.

5 — In fact, the provision of security was required (and hence enforcement was ordered) without the court's having itself given judgment on the appeal (paragraphs 10 to 13).

position is different in the case of a judgment refusing to stay the proceedings or requiring the provision of security, since such decisions pre-suppose a judgment on the appeal and are thus (as in this case) normally laid down in the final judgment declaring the appeal unfounded and ordering enforcement.

The question therefore is whether, in the light of *Brennero* v *Wendel*, the conclusion must be drawn that these judgments, which are not interlocutory decisions but are a formal part of the final decision, may be regarded as judgments 'given on the appeal'. In other words, does it follow from *Brennero* v *Wendel* that an appeal in cassation may be brought against any final decision of the court with which the appeal is lodged (formal criterion) or can an appeal in cassation be brought against the final decision only in so far as it concerns the actual judgment on the appeal, that is, in so far as it concerns the justification for, in this case, the dismissal of the appeal, which pre-supposes a judgment on one of the reasons specified in Articles 27 and 28 (material criterion)?

12. The strict interpretation of the expression 'judgment given on the appeal' which the Court advocates is justified in *Brennero* v *Wendel* by a reference to one of the principal objectives of the Brussels Convention, namely to simplify enforcement procedures in the State in which enforcement is sought. This consideration is also an argument, as rightly observed by the Netherlands and German Governments, for using the expression 'judgment given on the appeal' to denote only judgments which concern the appeal itself and not the judgments referred to in Article 38 of the Convention.

In the Jenard Report,[6] too, the need for a strict interpretation of the second paragraph of Article 37 is emphasized and it is pointed out that:

'An excessive number of avenues of appeal might be used by the losing party purely as delaying tactics, and this would constitute an obstacle to the free movement of judgments which is the object of the Convention.'

13. In its observations to the Court, the Commission puts forward another point of view. It thinks that a decision by the court with which the appeal is lodged to stay the proceedings is clearly not a judgment given on the appeal. On the other hand, a decision refusing to stay the proceedings and a decision to make enforcement conditional on the provision of security are indeed judgments given on the appeal because they imply the possibility of proceeding to enforcement.

I do not agree with that. In my view, the Commission's idea fails to recognize that, although the last-mentioned decisions are normally taken at the same time as the judgment on the substance of the appeal and are accordingly combined in a single judgment, they nevertheless have a different aim. The procedure on appeal envisaged in Article 36 of the Brussels Convention concerns the substance of the appeal and has a clearly legal aim: the question is whether the order for enforcement must be annulled because it ought not to have been made in view of the reasons exhaustively set out in Articles 27 and 28, to which Article 34 refers. The possibility envisaged in

6 — OJ 1979 C 59, pp. 51 and 52.

Article 38 of staying the proceedings or requiring the provision of security is intended, on the other hand, to preserve a balance between the interests of creditor and debtor: by staying the proceedings the court with which the appeal is lodged prevents the creditor from taking other than protective measures. Making enforcement conditional on the provision of security means that the interests of the debtor in the event of enforcement are protected in view of the possibility of a modification of the foreign court's judgment on appeal. In other words, decisions taken in this respect by the court with which the appeal is lodged lay down the details of the enforcement. Consequently, if it refuses a postponement or requires provision of security it is taking a decision regarding the details of enforcement. Of course, such a judgment implies that a decision is taken at the same time as to the substance of the appeal, but should be distinguished from it.

14. In view of the need to keep the procedure in the State in which enforcement is sought as simple as possible and of the different object of the procedures referred to in Articles 36 and 38, I therefore think I can say, in answer to the first preliminary question, that the expression 'judgment given on the appeal' refers to judgments directly concerning the substance of the appeal. These seem to me, moreover, to be the only judgments which lend themselves wholly to an appeal in cassation since they concerns questions of law in the strict sense, whilst judgments in the context of the procedures referred to in Article 38 are intended basically to balance interests.

I therefore give preference to a criterion based on content rather than exclusively on the formal nature of the decision. The answer to the second preliminary question should therefore be that, even when a decision based on Article 38 is contained in the same (final) decision as the actual judgment on the appeal, an appeal in cassation against such a (final) decision will lie only in so far as it concerns the substance of the appeal.

An additional advantage of this solution is that in the appeal procedure it treats the parties to the dispute equally. If the possibility of an appeal in cassation were to be rejected when a decision taken under Article 38 was given in an interlocutory judgment (which is bound to be the case with a decision to stay the proceedings) but to be accepted when such a decision is included in a final decision (which is normally the case with a decision refusing to stay the proceedings and ordering enforcement, where appropriate with the provision of security) then the appellant is in a position to lodge an appeal in cassation against the said final decision, but the respondent is not entitled to appeal in cassation against the aforementioned interlocutory judgment.[7]

First paragraph of Article 38 of the Brussels Convention

15. The Arrondissementsrechtbank refused the application to stay the proceedings on the appeal on the ground that Van Dalfsen,

7 — The Procureur-Generaal at the Hoge Raad drew special attention to this question of equal treatment in point 11 of his Opinion, already referred to in footnote 3.

in support of their application, put forward no arguments other than those which the foreign court could already have taken into account in its judgment and that to consider such arguments would mean that the appeal court would essentially be reviewing the substance of the foreign judgment. The Arrondissementsrechtbank made the order for enforcement conditional on the provision of security, taking into consideration a new fact which had arisen since the foreign judgment, namely the production in the meantime of the legal expert's report in which Van Dalfsen's counterclaim was evaluated.[8]

As I have already said, Van Dalfsen raise the point with the court of reference that in this way the Arrondissementsrechtbank proceeded on the basis of an erroneous interpretation of the scope of the powers conferred on it by Article 38 of the Brussels Convention. According to Van Dalfsen, it is open to the court with which the appeal is lodged to take into account in its decisions under Article 38 circumstances which the foreign court could already have taken into account in its judgment and the court with which the appeal is lodged must in particular base those decisions on its estimate of the chances of success of the ordinary appeal which has been or may still be lodged against the judgment.

16. In the third preliminary question the court of reference asks the Court to give its views on this point, whilst restricting the question to a decision taken in connection with an application to stay the proceedings, as referred to in the *first paragraph* of Article 38.

In their observations to the Court the Netherlands and German Governments associate themselves on this point with Van Dalfsen's interpretation, whilst the Commission takes the opposite point of view. I agree with the Commission, for the following reasons.

17. The possibility, envisaged in the first paragraph of Article 38, of staying proceedings on the appeal, with the consequence that, under Article 39, only protective measures may still be taken by the creditor (just like the possibility, envisaged in the last paragraph of Article 38, of making the order for enforcement conditional on the provision of security) has as its object to:

'protect the judgment debtor against any loss which could result from the enforcement of a judgment which has not yet become *res judicata* and may be amended'.[9]

In its judgment in Case 43/77 *Industrial Diamond Supplies* v *Luigi Riva*[10] the Court stated, in clarification of Article 38 of the Brussels Convention, that the State in which enforcement is sought 'is not under a duty to stay the proceedings but merely has the power to do so' (paragraph 32) and that the court may 'stay the proceedings whenever reasonable doubt arises with regard to the fate of an appeal which may lead to the annulment or amendment of the judgment in question' (paragraph 33).

In assessing the damage which a party may suffer as a result of the enforcement of the

8 — The relevant extracts from the Arrondissementsrechtbank's judgment are to be found in point 3 of the Opinion referred to in the previous footnote.

9 — Jenard Report, OJ 1979 C 59, p. 52.

10 — [1977] ECR 2175, paragraphs 32 and 33.

judgment, the court with which the appeal is lodged must naturally take into account the chance which, in the abstract, always exists, that the judgment under appeal may be wholly or partially revised on further appeal. It must draw up a balance between this chance and the extent and possibly irreversible nature of the damage which enforcement may inflict on the debtor. So, in drawing up this balance, may the competent court also take account of facts and arguments which the foreign court has or might have already considered in its judgment so that it can assess specifically the chance of revision on appeal, or can it take into account only arguments and facts which were not and could not be known to the foreign court?

18. For an answer to this question it must be stressed in the first place that the first paragraph of Article 31 is based on the principle that judgments which are enforceable in the State in which the judgment was given, even though they have not the force of *res judicata*, are also enforceable in the State in which enforcement is sought. This means, as the Commission stated at the hearing, that the rules applicable between Contracting States must be as similar as possible to the rules applying within their national territory with regard to a judicial decision which has been declared enforceable.

A stay of proceedings on the appeal and the resulting prohibition of measures other than protective measures (like a requirement to provide security, though to a lesser extent) represent in some degree a derogation from this principle. It follows that the powers conferred for this purpose must be applied sparingly or with reservations.[11] This is itself an indication that only facts and arguments which the foreign court did not and could not know may be taken into account.

19. That this is indeed so follows above all, however, (as was also observed by the Arrondissementsrechtbank), from the rule laid down in the third paragraph of Article 34 according to which the foreign judgment may 'under no circumstances . . . be reviewed as to its substance' by the courts of the State in which enforcement is sought. If the court with which the appeal is lodged, in its decision regarding a stay of proceedings (or a requirement to provide security), could take into account arguments and facts already known to the foreign court, there would be a real risk of its proceeding to review the substance of the foreign judgment and in particular of the declaration of the provisional enforceability of that judgment, a declaration made *inter alia* on the strength of the conviction arrived at by the foreign court regarding the substance of the case.

I think that to avoid that risk the court with which the appeal is lodged, weighing up the chances of success of the appeal brought against the foreign judgment on the one hand against the damage to the debtor in the event of complete enforcement (perhaps not protected by security) on the other, can only be guided by considerations which the foreign court could not take into account.

11 — See points 14 and 15 of the Opinion of the Procureur-Generaal at the Hoge Raad der Nederlanden, referred to in footnote 3, and G. Müller in A. Bülow and K.-H. Böckstiegel, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, No 606 256.

These are, in the first place, the lodging of an appeal, the manifest inadmissibility of the appeal lodged abroad (but not the fact that it is manifestly unfounded [12]) or the length of time which the procedure in such an appeal might be expected to take and, in the second place, the nature, the extent and the reversibility or otherwise of the damage suffered by the other party in the event of complete enforcement or, on the other hand, the insufficiency of the protective measures for the party applying for enforcement if the proceedings are stayed. [13] The provisional estimate accepted by the Arrondissementsrechtbank of the compensation due to Van Dalfsen in respect of capital expenditure (see paragraph 7) may in my view be regarded as belonging to the category of considerations which the court with which the appeal is lodged may take into account, in view of the fact that this is a factor affecting the extent of the damage with which the court from whose judgment the appeal is lodged was not acquainted and which is of such a kind as to influence the balance to be drawn up of the interests involved in the enforcement of the judgment.

20. A special problem arises with regard to the facts and arguments of which the foreign court was unaware at the time of its judgment but which were known to the appellant, who did not, however, bring them before the foreign court. My view is that the court with which the appeal is lodged cannot take these facts and arguments into account either. As the Commission observes, rightly I think, only in this way is it possible to avoid the enforcement of a judgment given abroad and declared enforceable there from being obstructed by an omission by the appellant and the effectiveness of Article 31 of the Brussels Convention being thus diminished.

The Court has not yet ruled on this problem, but reference may be made, in support of the opinion expressed here, to the judgment in Case 145/86 *Hoffmann* v *Krieg* [14] in which the Court ruled:

'Article 36 of the Convention must be interpreted as meaning that a party who has not appealed against the enforcement order referred to in that provision is thereafter precluded, at the stage of the execution of the judgment, from relying on a valid ground which he could have pleaded in such an appeal against the enforcement order, [...].'

From this it appears that the omission by a party to lodge an appeal, whatever the cause may be, deprives that party of the opportunity to avail himself subsequently of a further ground which would have supported that appeal. By analogy it should in my view be stated in this case that a party who has neglected to put facts and arguments before the foreign court can no longer put them before the court deciding as to a stay of proceedings on the appeal (or as to the provision of security).

12 — In view of the fact that that would amount to a review of the substance of a foreign judgment.

13 — Cf. Kaye, P. *Civil Jurisdiction and Enforcement of Foreign Judgments* (1987), p. 1643; O'Malley, S. and Layton, A. *European Civil Practice* (1989), p. 770 f., and Huet, A. note on the judgment in Case 43/77, *Journal de Droit International*, 1978, p. 403.

14 — [1988] ECR 645, paragraph 4 of the operative part.

21. Having regard to the foregoing considerations, I propose that the questions submitted should be answered as follows:

'1. A judgment given under Article 38 of the Brussels Convention by the court with which the appeal is lodged cannot be regarded as a "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of that Convention and accordingly cannot be the subject of an appeal in cassation.

2. When a judgment given under Article 38 of the Brussels Convention and a "judgment given on the appeal" are contained in a single judgment, an appeal in cassation against that judgment will lie only in so far as the second judgment is concerned.

3. The first paragraph of Article 38 of the Brussels Convention must be interpreted as meaning that the court with which the appeal is lodged, in its judgment regarding a stay of the proceedings, may take account only of considerations other than those taken into account by the foreign court or those which it could have taken into account if the appellant had not failed to put them forward.'