OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 18 December 2008 [1]

I — Introduction

1. The present case concerns the interpretation of Article 27(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ('the Brussels Convention'). [2] The subject of the main proceedings is the recognition of an English judgment which was delivered after the defendant was excluded from the proceedings for failure to comply with a court order. This case gives the Court an opportunity to develop further the principles set out in particular in *Krombach* [3] relating to public policy in connection with procedural law.

II — Legal framework

2. Article 25 of the Brussels Convention states:

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

3. Article 27(1), of the Convention states that a judgment is not to be recognised 'if such recognition is contrary to public policy in the State in which recognition is sought'.

1 — Original language: German.

2 — Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), 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. 1, and — amended version — p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). See also the consolidated version of 26 January 1998 (OJ 1998 C 27, p. 1).

3 — Case C-7/98 *Krombach* [2000] ECR I-1935.

III — Facts, reference for a preliminary ruling and proceedings before the Court of Justice

4. The main proceedings concern the recognition and enforcement in Italy of an English judgment obtained by Daimler Chrysler Canada Inc. ('Daimler Chrysler') and CIBC Mellon Trust Company ('CIBC') against Mr Gambazzi.

5. The main action in the English proceedings related to a claim for compensation brought by Daimler Chrysler and CIBC against Marco Gambazzi, a Swiss citizen resident in Lugano.

6. On the basis of the information contained in the order for reference and the submissions of the parties, the main features of the English proceedings appear to be as follows.

7. Before the commencement of the main proceedings, in July 1996 the English court issued a freezing order (also known as a Mareva order [4]) against Mr Gambazzi, at the request of Daimler Chrysler and CIBC, as an interim measure. By that freezing order he was prohibited from dealing with his assets in order to safeguard the enforcement of a future judgment.

8. On 26 February 1997, at the request of Daimler Chrysler and CIBC, the English court issued an amended version of the freezing order, now with additional instructions under which Mr Gambazzi was required to disclose information regarding his assets and to submit certain documents also relating to the main proceedings (disclosure orders).

9. Mr Gambazzi did not comply with the obligations under the disclosure orders, or at least not in full. Thereupon, at the request of Daimler Chrysler and CIBC, the English court issued a further order ('unless order'). In that order Mr Gambazzi was notified that unless he complied with the terms of the orders and disclosed the requested information by a certain date his defence submissions in the main proceedings would not be taken into consideration and he would be prohibited from taking further part in the proceedings.

4 — An instrument of procedural law, developed by case-law, now laid down in Rule 25.1(1)(f) of the Civil Procedure Rules 1998: 'The court may grant the following interim remedies … (f) an order (referred to as a "freezing order") — (i) restraining a party from removing from the jurisdiction assets located there; or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not'.

10. Mr Gambazzi brought various appeals against the freezing order, the disclosure order and the unless order without any success.

11. Even after a repeated unless order he failed to comply in full with his obligations within the prescribed period. The English court considered this to be contempt of court and excluded him from the proceedings (debarment), as notified in the unless orders.

12. In the main action Mr Gambazzi was then treated as a defendant in default. By a default judgment of 10 December 1998, supplemented by an order of 17 March 1999, the High Court of Justice of England and Wales, Chancery Division, ordered him to pay Daimler Chrysler and CIBC damages of CAD 169 752 058 and CAD 71 595 530, and a further USD 129 974 770.

13. Daimler Chrysler and CIBC wish to have that judgment enforced in Italy. By order of 17 December 2004, the Corte d'Appello di Milano (Court of Appeal, Milan) declared enforceable the English judgment and the order by which Mr Gambazzi was ordered to pay damages. Mr Gambazzi appealed against that order.

14. By order of 27 June 2007, the Corte d'Appello di Milano, which is hearing the appeal, stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'On the basis of the public-policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party — which had entered an appearance — the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order],

Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order issued by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?'

15. In addition to the parties to the main proceedings, the Greek, Italian and the United Kingdom Governments and the Commission of the European Communities made written

and oral submissions in the proceedings before the Court.

IV — Assessment

16. The two questions can be examined together. They present different aspects of the question whether the court of the State in which recognition is sought may, on grounds of public policy, refuse to recognise a civil judgment which was delivered after the defendant was excluded for failure to comply with a court order. It will therefore be necessary below to consider the requirements laid down in Article 27(1) of the Brussels Convention.

17. The provisions of the Brussels Convention applicable in the present case have now been superseded by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [5] Nevertheless, the present arguments are also relevant to the legal situation which now applies, since Article 27(1) of the Brussels Convention has a successor provision with the same content in Article 34(1) of Regulation No 44/2001.

5 — OJ 2001 L 12, p. 1.

18. First of all, however, it is necessary to clarify the preliminary question whether the contested judgment delivered by the English court is actually a judgment for the purposes of the Brussels Convention. If that judgment were not a judgment within the meaning of Article 25 of the Convention, which is to be recognised in principle pursuant to Article 26 of the Convention, the question of the exceptional refusal of recognition under Article 27 would not arise at all.

19. Whilst the referring court has not expressly requested an interpretation of Article 25 of the Convention, in the preliminary ruling procedure under Article 234 EC, it is for the Court of Justice to provide the referring court with an answer which will be of use to it. [6] In the present case, an answer which will be of use includes clarification of this preliminary question.

A — *Judgment within the meaning of Article 25 of the Brussels Convention*

20. Under Article 25 of the Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State,

6 — See inter alia Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18; Case C-469/00 *Ravil* [2003] ECR I-5053, paragraph 27; Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17; Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, paragraph 27; and Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECR I-1561, paragraph 42.

whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

21. Mr Gambazzi takes the view that the judgment delivered by the English court is not a judgment in that sense, simply because it was not delivered in adversarial proceedings as a result of his enforced default.

22. However, this objection does not hold. The Court has stated, in connection with interim measures, that Article 25 of the Convention calls for an adversarial procedure. Nevertheless, it considers it sufficient that the procedure preceding the judgment is adversarially structured and provides for a contentious judgment in principle. [7] If the judgment is delivered in such an adversarially structured procedure, it thus comes under Article 25 of the Convention even if in the specific case the procedure remains unilateral, for example as a result of default by one party. The actual course of the procedure does not in any way affect the adversarial nature of the procedure.

23. Consequently, default judgments are undoubtedly judgments within the meaning of Article 25 of the Convention, since they are delivered in procedures which are adversarially structured in principle. The fact that the Brussels Convention regards default judgments as judgments within the meaning of Article 25 thereof also follows from the special rule laid down in Article 27(2), which provides for a specific ground for refusal to recognise default judgments.

24. The contested judgment of the English court was delivered as a default judgment in civil proceedings which were in principle adversarial in structure. It thus meets the requirements of Article 25 of the Convention. The fact that the present case is atypical, in that the default was imposed by the court, does not lead to any reclassification, as this does not in any way affect the fundamentally adversarially-structured nature of the procedure. The fact that the default was enforced in the present case can only be relevant in the context of Article 27(1).

25. Classification of the judgment in question as a judgment within the meaning of Article 25 of the Convention might also be doubtful for

7 — Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13.

another reason, however. Some writers in legal literature generally answer this question in the negative in the case of an English default judgment.[8] They claim that in the case of a default judgment the court does not examine the sufficiency of the pleadings at all before delivering the judgment. Judicial examination of the sufficiency of the pleadings is necessary, however, for the purposes of a judgment within the meaning of Article 25. The ground for this view is the ruling of the Court of Justice in *Solo Kleinmotoren*.[9]

26. In my opinion, however, the judgment in *Solo Kleinmotoren* does not necessarily lead to that conclusion. In that ruling, the Court finds that, to be a judgment for the purposes of the Convention, the decision must emanate from a judicial body of a Contracting State 'deciding on its own authority on the issues between the parties'.[10] That condition is not fulfilled in the case of a settlement merely recorded by the court, as it is essentially contractual and therefore depends on the intention of the parties and not of the court.

27. On the other hand, a default judgment in which, before delivering the judgment, the court does not undertake a substantive examination as to whether the applicant's claims are well founded certainly has the character of a judgment. The fact that the content of the judgment is determined by the applicant's claims as a legal consequence of the default does not suggest that the default judgment is the mere recording of the parties' intention. Rather, the content of the judgment depends on the court's intention since, where the requirements for a default judgment are satisfied, although the court does not examine the sufficiency of the pleadings, in examining those requirements it alone determines whether the applicant's claim should be upheld in that way.

28. Furthermore, a broad interpretation of the term 'judgment' is suggested by the wording of Article 25 of the Convention. Under that provision, it means 'any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called'. This makes it clear that Article 25 attaches less relevance to the formal aspect of the decision, such as what it is called and how it came into being, than to its substantive effects. The relevance of a failure to examine the sufficiency of the pleadings in relation to recognition and enforcement under the system of the Convention becomes more convincing only in the context of examining the case for exceptional refusal of recognition under Article 27.

8 — See Patrick Wautelet, in: Ulrich Magnus/Peter Mankowski, *Brussels I Regulation*, Munich 2007, Article 32 paragraph 8, with reference to Gilles Cuniberti, *Commentaire sur la décision de la Cour de Cassation du 17 novembre 1999*, Rev. crit. dr. internat. privé. 1989 (2000), pp. 786, 788 et seq.; for the opposite view see Alexander Layton / Hugh Mercer (General Editors), *European Civil Practice*, 2nd edition, London 2004, Vol. 1, paragraph 25.005.

9 — Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237.

10 — *Solo Kleinmotoren* (cited in footnote 9, paragraph 17).

29. Against that background, a default judgment which was not preceded by an examination of the sufficiency of the pleadings also constitutes a judgment within the meaning of Article 25 of the Convention, and it has the same substantive effects as a judgment in general. It is enforceable and capable of having legal force.

30. The contested judgment is therefore to be regarded as a judgment within the meaning of Article 25 of the Brussels Convention.

B — *Public policy, Article 27(1) of the Brussels Convention*

1. Interpretation of Article 27(1) of the Brussels Convention

31. Article 27(1) of the Convention provides that a judgment is not to be recognised if such recognition is contrary to public policy in the State in which recognition is sought.

32. In several rulings the Court has set out the main features of the interpretation of the public policy proviso under Article 27(1) of the Brussels Convention.

33. In interpreting the clause, the Court first proceeds on the basis of the spirit and purpose of the Convention. The Convention is intended to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure. [11] Article 27 must therefore be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention. [12] In particular recourse may be had to the public-policy clause in Article 27(1) of the Convention only in exceptional cases. [13]

34. The Court makes it clear in this connection that while the Contracting States in principle remain free, by virtue of the proviso in Article 27(1) of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. [14] Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State. [15]

11 — See, inter alia, *Solo Kleinmotoren* (cited in footnote 9, paragraph 20); Case C-267/97 *Coursier* [1999] ECR I-2543, paragraph 25; and *Krombach* (cited in footnote 3, paragraph 19).

12 — *Solo Kleinmotoren* (cited in footnote 9, paragraph 20); *Krombach* (cited in footnote 3, paragraph 21); and Case C-38/98 *Renault* [2000] ECR I-2973, paragraph 26.

13 — See Case 145/86 *Hoffmann* [1988] ECR 645, paragraph 21; Case C-78/95 *Hendrikman and Feyen* [1996] ECR 4943, paragraph 23; *Krombach* (cited in footnote 3, paragraph 21); and *Renault* (cited in footnote 12, paragraph 26).

14 — *Krombach* (cited in footnote 3, paragraph 22) and *Renault* (cited in footnote 12, paragraph 27).

15 — *Krombach* (cited in footnote 3, paragraph 23) and *Renault* (cited in footnote 12, paragraph 28).

35. A first limit is laid down by Article 29 and the third paragraph of Article 34 of the Convention, according to which recognition and enforcement of a foreign judgment may not be refused solely on the ground that the legal rule applied by the court of the State of origin is different from that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought may not review the accuracy of the findings of law or fact made by the court of the State of origin.

36. The Court has imposed limits on reliance on the public-policy proviso in that connection, to the effect that recourse to the proviso can be envisaged only where recognition or enforcement would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. [16]

37. Compliance with the prohibition of any review of the foreign judgment as to its substance entails that the infringement must also constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order. [17]

38. Lastly, it follows from the judgment of the Court of Justice in *Krombach* that the limits within which the court of the State in which enforcement is sought may rely on public policy are not exceeded in any case where there is a manifest breach of fundamental rights under Community law. [18]

39. According to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are

16 — *Krombach* (cited in footnote 3, paragraph 37) and *Renault* (cited in footnote 12, paragraph 30).

17 — *Krombach* (cited in footnote 3, paragraph 37) and *Renault* (cited in footnote 12, paragraph 30). The requirement that the breach be manifest found its way into the wording of Regulation No 44/2001 (cited in footnote 5), Article 34(1) of which provides that a judgment is not to be recognised if 'such recognition is manifestly contrary to public policy in the Member State in which recognition is sought'. See also, as regards the interpretation of Article 26 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 63.

18 — *Krombach* (cited in footnote 3, paragraph 40); see also *Eurofood IFSC* (cited in footnote 17, paragraph 65 et seq.).

signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in Rome on 4 November 1950 has special significance. [19]

40. Since fundamental rights are therefore among the principles of Community law, a court is entitled to refuse to recognise a judgment which came into being in manifest breach of fundamental rights.

41. The right to a fair trial, which derives inter alia from the first sentence of Article 6(1) of the ECHR and was reaffirmed by Article 47 of Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000, [20] is a fundamental right forming part of the general principles of Community law. [21]

42. With specific reference to public policy in connection with procedural law, the Court found in *Krombach* that recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. [22]

43. It has not yet been definitively clarified whether the courts are not only entitled but even required to refuse the enforcement of a foreign judgment which manifestly breaches fundamental rights. [23] An obligation to that effect is suggested by the fact that, according to consistent case-law, national courts are bound by fundamental rights if they are examining a factual situation which falls within the scope of Community law. [24]

44. Unlike under Regulation No 44/2001, however, in the case of the Brussels Convention the additional question could arise as to

19 — Case 29/69 *Stauder* [1969] ECR 419, paragraph 7; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-283/05 *ASML* [2006] ECR I-12041, paragraph 26; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29; and Case C-402/05 P *Kadi* v *Council and Commission* [2008] ECR I-6351, paragraph 283.

20 — OJ 2000 C 364, p. 1, as amended by the proclamation of 12 December 2007, OJ 2007 C 303, p. 1. Admittedly, it still does not produce binding legal effects comparable to primary law but it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order; see Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769 ('*Family reunification*'), paragraph 38, and point 108 of my Opinion in that case; see also Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37.

21 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 20 et seq.; Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 17; *Krombach* (cited in footnote 3, paragraph 26); *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 19, paragraph 29); and Case C-341/06 P *Chronopost* v *UFEX and Others* [2008] ECR I-4777, paragraph 44.

22 — *Krombach* (cited in footnote 3, paragraph 44); see also *Eurofood* (cited in footnote 17) in connection with the insolvency regulation.

23 — See also my Opinion of 18 December 2008 in Case C-420/07 *Apostolidis*, pending before the Court, point 108.

24 — Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraphs 8 to 10; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19; C-260/89 *ERT* [1991] ECR I-2925, paragraph 42 et seq.; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75; Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 56. See, to that effect, inter alia, E. Jayme/C. Kohler, 'Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht?', *Praxis des Internationalen Privat- und Verfahrensrechts — IPRax,* 2000, 454, 460.

whether Community law within the meaning of that case-law is involved. This is suggested in particular by the fact that the agreement was concluded on the basis of Article 220 of the EC Treaty (now Article 293 EC).

2. Interim conclusion

45. The following interim conclusion can therefore be reached: The referring court may in any event refuse recognition and enforcement, in reliance on public policy, if the proceedings before the court of State of origin are vitiated by a manifest breach of the fundamental right to a fair trial.

3. Application to the present case

46. In *Krombach* the Court itself could establish that the proceedings before the court of the State of origin constituted a manifest breach of the fundamental right to a fair trial. [25] That case concerned a civil claim in criminal proceedings. The court prevented the defendant from being defended by a lawyer because the defendant did not comply with the court's order to appear in person. If, however, the defendant had complied with the order to appear in person, he would have been threatened with arrest for a criminal offence. The situation in *Krombach* was clear and unambiguous in fact and in law. The defendant was not heard at any time, did not have any opportunity to defend himself and no means of appeal were available to him either.

47. In contrast, the proceedings before the court of the State of origin in the present case are highly complex. The defendant was repeatedly heard at various stages of the proceedings and apparently various legal remedies were open to him. In addition, the different strands of the interim legal protection (freezing order, disclosure orders, unless orders) appear to be closely interwoven with the proceedings in the main action and thus with the default judgment which was delivered. They essentially serve therefore to enable the judgment to be enforced in the event that the applicant is successful. It is not therefore sufficient to consider the default judgment in isolation without also including the prior procedural steps in the examination of public policy. Rather, the proceedings must be considered as a whole [26] and the matter must be assessed having regard to all the circumstances. [27]

25 — *Krombach* (cited in footnote 3, paragraph 40).

26 — The European Court of Human Rights also based the examination of Article 6(1) ECHR on the proceedings considered as a whole; see the judgment of the ECHR of 18 March 1997 in *Mantovanelli* v *France*, *Reports of Judgments and Decisions* 1997-II, § 34.

27 — *Eurofood* (cited in footnote 17, paragraph 68).

48. However, important details of the proceedings before the court of the State of origin are not described adequately in the order for reference. For example, the subject-matter and scope of the hearings which took place are not fully explained. In particular, it is not clear whether Mr Gambazzi was also heard on the claim in the main action. Nor is it stated whether the court examined the sufficiency of the pleadings in respect of the claim in the main action before the freezing order was issued or whether that examination was repeated in the subsequent procedural steps, in particular before the judgment in the main action was delivered. It will therefore be for the referring court to ascertain the facts and to give the final decision on whether there was a manifest breach of the fundamental right to a fair trial.

49. Nevertheless, the Court of Justice may offer the referring court some principles and criteria which will have to be taken into consideration in its examination. Before I look at this, however, a further objection raised by the parties to the main proceedings must first be considered.

(a) Relevance of the case-law on the Lugano Convention

50. In the proceedings before the Court of Justice, the parties to the main proceedings have made reference to a judgment of the Swiss Federal Supreme Court.[28] That judgment concerned the recognition and enforcement of the same English judgment in Switzerland.

51. In the written procedure Mr Gambazzi pointed out that the Court of Justice should take into account the fact that in that ruling the English judgment was considered to be contrary to public policy within the meaning of Article 27(1) of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed on 16 September 1988 at Lugano.[29]

52. Daimler Chrysler and CIBS referred to the same judgment and claimed that the Court of Justice and the referring court were bound by the finding of the Swiss Federal Supreme Court that the English judgment was not contrary to public policy because of the debarment.

53. The Lugano Convention establishes a system which is, with some exceptions, the same as that established by the Brussels Convention.[30] Article 27(1) of the Lugano

28 — Judgment of the Swiss Federal Supreme Court of 9 November 2004 in Case 4P.82/2004 X and Y v A, published in Italian on the website of the Swiss Federal Supreme Court at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm, as last consulted on 5 November 2008.

29 — OJ 1988 L 319, p. 9 ('the Lugano Convention').

30 — Opinion 1/03 [2006] ECR I-1145, paragraph 18.

Convention contains a public policy clause with the same wording as Article 27(1) of the Brussels Convention.

54. In the ruling cited, the Swiss Federal Supreme Court concluded that the recognition and enforcement of the English judgment was to be regarded as contrary to public policy. However, in doing so it relied on a ground different from that on the basis of which the referring court seised the Court of Justice. With regard to the exclusion of Mr Gambazzi from the English proceedings (debarment) the Swiss Federal Supreme Court explained that this was not a breach of Swiss public policy. However, the Swiss Federal Supreme Court saw a breach of public policy in another aspect of the proceedings which preceded the debarment. After changing lawyers Mr Gambazzi was refused access to the file by his former lawyers until he paid the lawyers' fee and the English court thereupon also refused to grant access to the papers in the case so as not to frustrate the lawyers' right of retention.

55. It is uncertain what the implications and relevance of the judgment of the Swiss Federal Supreme Court might be for the present reference for a preliminary ruling. The Court of Justice has no jurisdiction to interpret the Lugano Convention. [31] However, a mechanism for the exchange of information in respect of judgments delivered in application of that Convention was established by Protocol 2 on the uniform interpretation of the Convention and the Member and non-Member States of the European Union signed declarations to ensure as uniform an interpretation as possible of that Convention and of the equivalent provisions in the Brussels Convention. [32]

56. In one of those declarations, the representatives of the Governments of the Member States of the European Communities declared that 'they consider as appropriate that the Court of Justice of the European Communities, when interpreting the Brussels Convention, pay due account to the rulings [in German "Grundsätze" (principles)] contained in the case-law of the Lugano Convention'. [33]

57. However, it certainly cannot be inferred from that declaration that the Court of Justice is formally bound by individual rulings on the Lugano Convention. The wording of the declaration merely states that the Court must 'pay due account' to the rulings contained in the case-law. In the context of the public-policy proviso, this therefore means that it takes note of and gives due consideration to the principles of the provision and the limits of national public policy. Many of the criteria mentioned above which

31 — Opinion 1/03 (cited in footnote 30, paragraph 19).

32 — Opinion 1/03 (cited in footnote 30, paragraph 19).

33 — A further declaration is annexed to the Convention which lays down a mirror-image obligation for the courts of the Member States of the European Free Trade Association.

must be taken into consideration in establishing whether there is a breach of public policy can also be found in the judgment of the Swiss Federal Supreme Court.

58. The Court of Justice and the referring court nevertheless cannot be bound by a specific assessment of conflict with public policy by another court of a Contracting State of the Lugano Convention. This follows in particular from the fact that public policy in Article 27(1) of the Brussels Convention is, as the Court has stressed, the *national* public policy of the Member State in question. As the Italian Government rightly points out, this must be assessed independently by each national court. Account must therefore be taken only of the general principles developed by the courts of the Contracting States in interpreting public policy in connection with the Lugano Convention, but not of specific assessments made by those courts as to whether a certain case is consistent with or contrary to public policy.

(b) The fundamental right to a fair trial

59. The fundamental right to a fair trial requires that the party can effectively defend his legal position. [34] The right to be heard occupies an eminent position in the organisation and conduct of a fair legal process. [35] It implies the right to comment sufficiently on all relevant points of fact and law and to offer evidence.

60. However, not every restriction on the right to be heard is necessarily to be classified as a breach of the fundamental right to a fair trial. As the Court found in a different context, procedural rights may be restricted, provided the restrictions in fact correspond to objectives of public interest pursued by the measure in question and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. [36]

61. In its judgment in *Eurofood*, the Court stated, in connection with urgent measures, that the specific detailed rules concerning the right to be heard may, for example, vary according to the urgency for a ruling to be given. Any restriction on the exercise of that right must, however, be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency. [37]

34 — See *ASML* (cited in footnote 19, paragraph 26), and Case C-14/07 *Weiss und Partner* [2008] ECR I-3367, paragraph 47.

35 — *Eurofood* (cited in footnote17, paragraph 66).

36 — Case C-28/05 *Dokter and Others* [2006] ECR I-5431, paragraph 75.

37 — *Eurofood* (cited in footnote 17, paragraph 66).

62. In particular, the weighty interest in a functioning State system of administration of justice and in the guarantee of effective justice may restrict the fundamental right to a fair trial.

63. Thus, the legal orders of all Member States have sanctions for failure to comply with court orders in civil proceedings. This is rightly pointed out by all the Member States participating in the proceedings. For example, failure to comply with time-limits set by a court may result in the exclusion of the late submissions, failure to respond to the bringing of a legal action or non-appearance at a hearing may lead to a default judgment, and failure to submit requested documents may be regarded unfavourably in the evaluation of evidence.

64. Furthermore, it has already been pointed out that the fact that national procedural law does not provide for the sanction applied by the court of the State of origin in that form does not in itself mean that a breach of public policy may be taken to exist. [38]

65. Particular importance attaches, however, to whether the sanction in question of enforced default is proportional or whether its severity appears to be manifestly disproportionate, having full regard to all the features of the proceedings as a whole, in relation to the penalised failure to comply with the court orders. [39]

66. In examining the proportionality of the aim pursued by the sanction of ensuring the efficacy of proceedings and the sanctions applied, the subject-matter of the order, failure to comply with which was penalised, and the procedure for its issue, the severity of the sanction in relation to the significance of failure to comply with the order and the legal remedies possible will be relevant.

67. Complete debarment is probably the most serious sanction for failure to comply with a court order and thus the most serious restriction possible on the defendant's right to defend himself. Justification for such a restriction will accordingly be subject to very exacting requirements.

38 — See point 35 of this Opinion.

39 — The ECHR also examines proportionality when it is required to decide on restrictions on the right to be heard. It considers whether the very essence of the right is impaired and whether the restriction pursues a legitimate aim and is proportionate; see judgment of 28 October 1998 in *Pérez de Rada Cavanilles* v *Spain*, *Reports of Judgments and Decisions* 1998-VIII, § 44.

68. First of all, consideration must be given to the content and character of the court orders, failure to comply with which was penalised by debarment in the present case. What did the court orders require of the defendant? Were there precautions so as to take into consideration any obstacles in fact or in law to complying with the orders? Mr Gambazzi claims in this respect that he did not comply with the disclosure orders in particular because he would thereby have infringed his lawyer's duty of professional confidentiality and thus made himself criminally liable. He argues that the English court did not take into consideration that justification for his failure to disclose the documents. The United Kingdom Government, on the other hand, points out that the English court conducted a thorough examination of the justifications put forward by Mr Gambazzi and that documents by which the defendant would make himself criminally liable are exempted from the duty of disclosure.

69. Other relevant factors are whether the defendant was given a fair hearing before the court orders were issued and what means of defence and legal remedies were available against the orders.

70. Furthermore, particular attention must be paid to the content and character of the debarment and of the default judgment. Was consideration given in connection with the debarment as to whether the failure to comply with the court orders was culpable? Were all defence submissions regarding the claim in the main action disregarded or was the defendant able to make submissions on the main action at an earlier stage in the proceedings, and were those submissions taken into account? Was the defendant able at least to comment on the amount of the claim? Was there an examination of the sufficiency of the pleadings before the default judgment was delivered or at least at an earlier stage of the proceedings (before the freezing order was issued)? Was warning given of the sanction?

71. As the Commission rightly argues, it will also be particularly relevant what means of legal protection were available to Mr Gambazzi to challenge the infringement of his right to be heard in the State in which judgment was given. The Court has already stressed the importance of means of legal protection as regards justification of restrictions on the right to be heard in *Eurofood*.[40] The referring court will therefore have to take into consideration whether there were legal remedies against the debarment and against the subsequent judgment.

72. It is not necessary to determine whether a breach of public policy can be taken to exist only where, in the State in which the judgment is delivered, all the legal remedies available to the party in question by which the alleged

40 — *Eurofood* (cited in footnote 17, paragraph 66).

breach could have been rectified have been exhausted without success. In any case, failure to appeal will not rule out the possibility of a breach of public policy if an appeal offered no prospect of success. That is assumed to be the case in particular where the alleged breach of public policy is rooted in the specific procedural law of the State in which the judgment is delivered, which would also have remained the basis for the ruling in subsequent instances.

73. If, after a final examination, including in particular a review of the above points, the picture emerges for the referring court of a grossly disproportionate sanction, it will assume the existence of a manifest breach of the fundamental right to a fair trial and thus may refuse to recognise and enforce the judgment delivered in the State of origin.

74. In his observations in the context of the reference for a preliminary ruling, Mr Gambazzi also pointed out that the Italian court should also apply the public policy proviso for a second reason. In the proceedings before the English court, he had been refused access to the file. He had changed lawyer in the course of the proceedings. Thereupon his former lawyer refused him access to the documents before the court, relying on a right of retention for failure to discharge fee obligations. The court then also refused access to the file on the ground that the lawyer's right of retention would otherwise be circumvented. Mr Gambazzi also considers this to be a ground for refusing recognition and enforcement of the English judgment subsequently delivered in the main action as contrary to public policy.

75. It must be stated, first of all, that the referring court did not ask the Court of Justice any question on this subject. Mr Gambazzi takes the view that the Court should nevertheless also state its position in this regard. In principle, however, the Court is bound by the subject-matter of the reference for a preliminary ruling which the referring court has defined in its order for reference. The parties are normally not entitled to address additional questions to the Court. [41]

76. If, however, the Court wishes to consider this question, reference may be made to what was said regarding the question referred. In respect of this aspect too, the referring court may refuse recognition if it constitutes a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that

41 — Case 44/65 *Singer* [1965] ECR 965; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 46; and Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 37.

legal order. A refusal to recognise a foreign judgment is therefore consistent with Article 27(1) of the Brussels Convention in any event where there is a manifest breach of the right to a fair trial as a result of the refusal to grant access to the file.

V — Conclusion

77. In the light of the above considerations, I suggest that the Court give the following answer to the questions asked by the Italian Corte d'Appello di Milano:

Article 27(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Conventions of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, is to be interpreted as meaning that the court of the State in which enforcement is sought may refuse to recognise a judgment delivered in another Member State if the judgment was delivered in manifest breach of the fundamental right to a fair trial.