JUDGMENT OF THE COURT (First Chamber)

2 April 2009 *

In Case C-394/07,

REFERENCE for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, from the Corte d'appello di Milano (Italy), made by decision of 27 June 2007, received at the Court on 22 August 2007, in the proceedings

Marco Gambazzi

v

DaimlerChrysler Canada Inc.,

CIBC Mellon Trust Company,

* Language of the case: Italian.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet and J.-J. Kasel, Judges,

Advocate General: J. Kokott,
Registrar: M.-A. Gaudissart, head of unit,

having regard to the written procedure and further to the hearing on 9 October 2008,

after considering the observations submitted on behalf of:

— Mr Gambazzi, by B. Nascimbene and M. Condinanzi, avvocati,

— DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company, by F. Alvino, S. Pravettoni and A. Anglani, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

— the Greek Government, by T. Papadopoulou and O. Patsopoulou, acting as Agents,

— the United Kingdom Government, by Z. Bryanston-Cross and I. Rao, acting as Agents, and by M. Gray, Barrister,

— the Commission of the European Communities, by A.-M. Rouchaud-Joët, E. Montaguti and N. Bambara, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to 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 (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) ('the Brussels Convention').

2 The reference was made in proceedings between Mr Gambazzi, domiciled in Lugano (Switzerland), and the companies DaimlerChrysler Canada Inc. ('DaimlerChrysler') and CIBC Mellon Trust Company ('CIBC'), which have their registered offices in Canada, in relation to the enforcement in Italy of a judgment given and an order made in the United Kingdom.

Legal context

The Brussels Convention

3 The conditions under which judgments given in one Contracting State are recognised and enforced in another Contracting State are governed by Articles 25 to 49 of the Brussels Convention, which appear in Title III ('Recognition and Enforcement').

4 Article 25 of the Convention provides:

'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.'

5 Article 27(1) and (2) of the Convention provide:

'A judgment shall not be recognised:

(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'.

6 Article 29 of the Brussels Convention, which concerns the recognition of judgments, and the third paragraph of Article 34 of the Convention, which concerns their enforcement, provide that:

'Under no circumstances may a ['the'] foreign judgment be reviewed as to its substance.'

The Lugano Convention

7 The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9; 'the

Lugano Convention') derives from the creation of the European Free Trade Association (EFTA) and the establishment, between the contracting EFTA States and the Member States of the European Communities of a system similar to that of the Brussels Convention.

8 Article 27(1) of the Lugano Convention provides:

'A judgment shall not be recognised:

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

9 According to the declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities, it is 'appropriate that the Court of Justice of the European Communities, when interpreting the Brussels Convention, pay due account to the rulings contained in the case-law of the Lugano Convention'.

10 Also, Article 1 of Protocol 2 on the uniform interpretation of the Lugano Convention imposes on each contracting State the obligation to 'pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States'.

The main proceedings and the question referred for a preliminary ruling

11 According to the order for reference and the observations submitted to the Court, in the context of a claim for damages with interest brought by DaimlerChrysler and CIBC against Mr Gambazzi, the High Court of Justice (England and Wales), Chancery Division, on 26 February 1997, on application by DaimlerChrysler and CIBC, made an order which, on the one hand, restrained Mr Gambazzi on a temporary basis from dealing with some of his assets ('freezing order') and, on the other hand, instructed him to disclose details of his assets and certain documents in his possession concerning the principal claim ('disclosure order'). On 11 March 1997 that order was served by the Swiss authorities on Mr Gambazzi, who entered an appearance in the proceedings before the High Court.

12 Mr Gambazzi did not comply, or at least did not fully comply, with the disclosure order. The High Court then, on application by DaimlerChrysler and CIBC, made on 10 July 1998 an order which barred Mr Gambazzi from taking any further part in the proceedings unless he complied, within the prescribed time-limit, with the obligations regarding disclosure of the information and documents requested ('unless order').

13 Mr Gambazzi made several appeals against the freezing order, the disclosure order and the unless order. All those appeals were dismissed.

14 On 13 October 1998, the High Court made a new 'unless order'.

15 Since Mr Gambazzi did not, within the prescribed time-limit, completely fulfil the obligations laid down in the new order, he was held to be in contempt of court and was excluded from the proceedings ('debarment').

16 By judgment of 10 December 1998, supplemented by an order of 17 March 1999 ('the High Court judgments'), the High Court entered judgment as if Mr Gambazzi was in default and allowed the applications of DaimlerChrysler and CIBC, ordering Mr Gambazzi to pay them damages of CAD 169 752 058 and CAD 71 595 530 and USD 129 974 770, with interest and incidental expenses.

17 On application by DaimlerChrysler and CIBC, the Corte d'appello di Milano (Court of Appeal, Milan, Italy), by order of 17 December 2004, declared the High Court judgments to be enforceable in Italy.

18 Mr Gambazzi appealed against that order. He claims that the High Court judgments cannot be recognised in Italy, on the ground that they are contrary to public policy within the meaning of Article 27(1) of the Brussels Convention, because they were made in breach of the rights of the defence and of the adversarial principle.

19 It was in those circumstances that the Corte d'appello di Milano, before which the appeal was brought, decided to stay the proceedings and to refer to the Court of Justice the following question 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 made 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)?'

The question referred for a preliminary ruling

20 By this question, the national court asks essentially if, with regard to the public policy clause in Article 27(1) of the Brussels Convention, the court of the State in which enforcement is sought may take into account the fact that the court of the State of origin ruled on the plaintiff's claims without hearing the defendant, who entered appearance before it but was excluded from the proceedings by an order, on the ground that he had not complied with the obligations imposed by an order adopted at an earlier stage.

Categorisation of the High Court decisions with regard to Article 25 of the Brussels Convention

21 As a preliminary point, it must be examined whether the High Court's decisions are judgments within the meaning of Article 25 of the Brussels Convention or if, as Mr Gambazzi maintains, they do not fall within that definition because they were adopted in infringement of the adversarial principle and the right to a fair trial.

22 In that regard, it should be noted that Article 25 of the Brussels Convention refers, without distinction, to all judgments given by a court or tribunal of a Contracting State.

23 The Court has indeed made clear that all the provisions of the Brussels Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. However, it considered that, for such decisions to fall within the scope of the Convention, it is sufficient if they are judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of

being, the subject in that State of origin and under various procedures, of an inquiry in adversarial proceedings (Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13).

24 Thus, for example, judgments by default fall within the scope of the Brussels Convention, as follows from Article 27(2) of the Convention, which refers expressly to default of appearance by the defendant.

25 As the Advocate General noted in point 24 of her Opinion, the High Court decisions took the form of a judgment and an order given in default of appearance in civil proceedings which, as a rule, adhere to the adversarial principle. The fact that the court entered judgment as if the defendant, who had entered appearance, was in default, cannot suffice to call into question the categorisation of those decisions as judgments. That fact can be taken into consideration only with regard to the compatibility of those decisions with the public policy of the State in which enforcement is sought.

Consideration to be taken of the defendant's exclusion (debarment) from the proceedings with regard to Article 27(1) of the Brussels Convention

26 In Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 23, the Court of Justice held that, 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.

27 In that regard, the Court explained that recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State 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. The infringement would have to 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 (*Krombach*, paragraph 37).

28 With regard to the exercise of the rights of the defence, to which the question submitted for a preliminary ruling refers, the Court has pointed out that this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, among which the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is of particular importance (see, to that effect, *Krombach*, paragraphs 38 and 39).

29 It should, however, be borne in mind that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions. However, such restrictions must in fact correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a manifest or disproportionate breach of the rights thus guaranteed.

30 The Government of the United Kingdom explained that the aim of the 'freezing', 'disclosure' and 'unless' orders is to ensure the fair and efficient administration of justice.

31 It must be conceded that such an objective is capable of justifying a restriction on the rights of the defence. As observed by the Italian and Greek Governments, the legal systems of most of the Member States provide for the imposition of sanctions on persons who, in civil proceedings, adopt delaying tactics which would ultimately lead to a denial of justice.

32 Such sanctions may not, however, be manifestly disproportionate to the aim pursued, which is to ensure the efficient conduct of proceedings in the interests of the sound administration of justice.

33 With regard to the sanction adopted in the main proceedings, the exclusion of Mr Gambazzi from any participation in the proceedings, that is, as the Advocate General stated in point 67 of her Opinion, the most serious restriction possible on the rights of the defence. Consequently, such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights.

34 It is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case.

35 In that context, the parties to the main proceedings refer to a judgment of 9 November 2004 of the Tribunal fédéral (Federal Supreme Court) (Switzerland) (Case 4P082/2004). By that judgment, that court dismissed an appeal brought by CIBC and Daimler-Chrysler against a decision of the Tribunale d'appello del cantone Ticino (Court of Appeal of the Canton of Ticino, Switzerland) which refused to recognise and enforce in Switzerland the High Court judgments against Mr Gambazzi on the basis of Article 27(1) of the Lugano Convention. The Tribunal fédéral held that Mr Gambazzi's exclusion from the High Court proceedings was not contrary to Swiss public policy, but considered that other circumstances, to which the national court did not refer in the present proceedings, nevertheless justified the application of the public policy clause.

36 In accordance with the declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities, it is appropriate that the Court pay due account to the principles contained in that Tribunal fédéral judgment and, in application of Article 1 of Protocol 2 on the uniform interpretation of that convention, the national court is to pay due account to those principles.

37 In that regard, it must be pointed out that the Tribunal fédéral refers, to give substance to the public policy clause, to the right to a fair trial and the right to be heard, principles to which the Court itself referred in *Krombach*, and to which it has drawn attention in paragraphs 27 and 28 of this judgment.

38 With regard to the specific assessment of the conflict with Swiss public policy carried out in the present case by the Tribunal fédéral in its abovementioned judgment, it should be noted that that assessment cannot formally bind the national court. That is especially true in this case because the latter court must carry out its assessment with regard to Italian public policy.

39 In order to fulfil its task of interpretation described in paragraph 26 of the present judgment, it is however for the Court to explain the principles which it has defined by indicating the general criteria with regard to which the national court must carry out its assessment.

40 To that end, it must be stated that the question of the compatibility of the exclusion measure adopted by the court of the State of origin with public policy in the State in which enforcement is sought must be assessed having regard to the proceedings as a whole in the light of all the circumstances (see, in that regard, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 68).

41 That means taking into account, in the present case, not only the circumstances in which, at the conclusion of the High Court proceedings, the decisions of that court — the enforcement of which is sought — were taken, but also the circumstances in which, at an earlier stage, the disclosure order and the unless order were adopted.

42 With regard, first, to the disclosure order, it is for the national court to examine whether, and if so to what extent, Mr Gambazzi had the opportunity to be heard as to its subject-matter and scope, before it was made. It is also for it to examine what legal remedies were available to Mr. Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions.

43 With regard to Mr Gambazzi's failure to comply with the disclosure order, it is for the national court to ascertain whether the reasons advanced by Mr Gambazzi, in particular the fact that disclosure of the information requested would have led him to infringe the principle of protection of legal confidentiality by which he is bound as a lawyer and therefore to commit a criminal offence, could have been raised in adversarial court proceedings.

44 Concerning, second, the making of the unless order, the national court must examine whether Mr Gambazzi could avail himself of procedural guarantees which gave him a genuine possibility of challenging the adopted measure.

45 Finally, with regard to the High Court judgments in which the High Court ruled on the applicants' claims as if the defendant was in default, it is for the national court to investigate the question whether the well-foundedness of those claims was examined, at that stage or at an earlier stage, and whether Mr Gambazzi had, at that stage or at an earlier stage, the possibility of expressing his opinion on that subject and a right of appeal.

46 It must be underlined that verifying those points, to the extent that the sole purpose is to identify any manifest and disproportionate infringement of the right to be heard, does not mean reviewing the High Court's assessment of the merits, which would constitute

a review as to the substance of the judgment expressly prohibited by Article 29 and the third paragraph of Article 34 of the Brussels Convention. The referring court must confine itself to identifying the legal remedies which were available to Mr. Gambazzi and to verifying that they offered him the possibility of being heard, in compliance with the adversarial principle and the full exercise of the rights of defence.

47 Following completion of such verification, it is for the national court to carry out a balancing exercise with regard to those various factors in order to assess whether, in the light of the objective of the efficient administration of justice pursued by the High Court, the exclusion of Mr Gambazzi from the proceedings appears to be a manifest and disproportionate infringement of his right to be heard.

48 Consequently, the answer to the question referred is that Article 27(1) of the Brussels Convention is to be interpreted as meaning that the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in that article, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

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 Convention 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 follows:

the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in that article, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.

[Signatures]