Jurisdiction, Fair Trial and Public Policy: The *Krombach* and *Gambazzi* Cases

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1 The Death of Kalinka Bamberski and the Acquittal of Krombach in Germany

Two cases in which national and international courts have been recently involved deserve, in my view, to be illustrated and compared.

The first one relates to a long dispute between Mr Dieter Krombach (hereinafter "K"), a doctor of German nationality, and a French citizen, Mr André Bamberski (hereinafter "B").

B's daughter Kalinka, a 14-year-old girl of French nationality, died in Lindau, Germany, at K's house, where she was staying on holiday with her brother and her mother. The latter, after divorcing from B, had married K.

The complex circumstances surrounding the death of the very young Kalinka drew the attention of the German authorities which launched an investigation against K, whose liability was ultimately excluded.

However, B, the girl's father, was so convinced of K's liability that he repeatedly but unsuccessfully requested the German competent authorities to take further action. Before the German case was dropped, he also lodged a complaint with the French competent authorities with the result that, by virtue of the fact that the young victim was a French national, they opened a preliminary investigation against K.

These proceedings in which B also introduced a civil claim for moral damages had an opposite outcome compared to the German one: by a judgement of 9 March 1995, the Paris Assize Court, which had previously issued a warrant for his arrest,

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sentenced K *in absentia* to 15 years' imprisonment,[1] finding him "guilty of violence resulting in involuntary manslaughter".[2]

The same Assize Court, a few days later, on 13 March 1995, ordered K to pay B a sum of money to compensate his moral damages and to bear the cost of the proceedings. Also, this part of the proceedings was held *in absentia*. It has to be noted that K tried on different occasions to be represented by his lawyers in the proceedings, in order to make submissions concerning both criminal and civil allegations made against him. He was nonetheless denied the possibility to be represented, pursuant to the French applicable law at that point in time, which prohibited representation for absent defendants who had not surrendered to the authorities as a result of an arrest warrant. And K had explicitly expressed his intention not to go to France as this would have made him subject to an arrest.

It is not irrelevant to mention that—as it is made clear by the ruling of the European Court of Human Rights (ECtHR)—both German and French proceedings have experienced efficient judicial cooperation between the two States and that, in any case, the extradition of German citizens is clearly excluded by Article 16, second paragraph, of the *Grundgesetz* of 23 May 1949.[3] In this regard a lateral circumstance of this case can also be recalled, which is reported in the same Strasbourg judgement.

In January 2000, K was arrested in Austria pending the hearing of a request for his extradition submitted by France. Nonetheless, the Innsbruck Court of Appeal (*Oberlandesgericht Innsbruck*) shortly afterwards ordered his release, considering that, taking into account the decision issued by the German authorities not to proceed against him, K could not be detained for the purpose of extradition.

As reported by the Strasbourg judgement, the Innsbruck Court of Appeal also relied upon Article 54 of the Schengen Convention of 19 June 1990, implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French

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[1] The European Court of Human Rights (ECtHR) in its judgement in Krombach v. France recalled the following: "The Assize Court explained in its judgement that if the applicant had reported to the Authorities, it would have been able to discontinue the in absentia procedure and the applicant would have been able to make any requests that would assist in his defence when complying with that mandatory procedural requirement. It also reminded the applicant's lawyers, who were present at the hearing, that Article 630 of the Code of Criminal Procedure prohibited representation for absent defendants and laid down their submissions were inadmissible" (ECtHR: Krombach v. France, 29731/96, Judgment (13 February 2001), para 46). Article 630 of the French Code of Criminal Procedure has been repealed by Law no. 2004-204.

[2] This can be read at para 15 of the 28 March 2000 judgment issued by the European Court of Justice (ECJ: Dieter Krombach v. André Bamberski, C-7/98, Judgment (28 March 2000)); the judgement issued by the ECtHR reports that K. "was founded guilty of voluntary assault on his stepdaughter unintentionally causing her death" (ECtHR: Krombach, supra n. 1, para 45).

[3] The European Convention on Extradition (Paris, 13 December 1957), entered into force on 18 April 1960, at that time in force between France and Germany, conferred to the contracting parties the power to deny extradition of their own citizens (Article 6.1.a) and Article 16.II of the fundamental law of the Federal Republic of Germany drastically states: "It is not allowed to extradite a German citizen".

Republic on the gradual abolition of checks at their common borders[4]; this provision, which reflects the principle *ne bis in idem*, states the following:

> A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party.

2 Krombach's Conviction in France, the Ruling of the European Court of Justice and the Subsequent Decision of the Bundesgerichtshof

In the meantime, B had already triggered the procedure foreseen by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; hereinafter Brussels Convention of 1968),[5] filing an application before a German court in order to obtain the enforcement of the ruling issued by the Assize Court of Paris, ordering K to pay compensation. At the first and second instances, German judges admitted B's application, while the *Bundesgerichtshof*, resorted to by K pursuant to Article 41 of the Brussels Convention, considering that there were some uncertainties related to the interpretation and application of the Convention itself referred the matter to the European Court of Justice (ECJ) asking the following questions:

> (1) May the provisions on jurisdiction form part of public policy within the meaning of Article 27, point 1 of the Brussels Convention where the State of origin has based its jurisdiction as against a person domiciled in another Contracting State (first paragraph of Article 2 of the Brussels Convention) solely on the nationality of the injured party (as in the second paragraph of Article 3 of the Brussels Convention in relation to France)?
> (…)
> (2) May the Court of the State in which enforcement is sought (first paragraph of Article 31 of the Brussels Convention) take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an international offence and did not appear in person?
> (…)

[4] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (19 June 1990), entered into force on 1st September 1993.

[5] Entered into force on 1st January 1973.

> (3) May the Court of the State in which enforcement is sought take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the court of the State of origin based its jurisdiction solely on the nationality of the injured party (see Question 1 above) and additionally prevented the defendant from being legally represented (see Question 2 above)?

The judgement issued by the ECJ on 28 March 2000 (after hearing the opinion of Advocate General Saggio submitted on 23 September 1999) is a very relevant one as regards the free circulation of judgements within the Member States of the European Community and now of the European Union, namely as far as it relates to the power assigned to States to invoke the public policy exception and the power assigned to the Court, if requested, to assess the limits that States will have to respect.[6]

The first question raised by the *Bundesgerichtshof* was answered by the Court in a very negative way. The (alleged) conflict with public policy cannot allow the judge responsible for recognition and enforcement to dispute the jurisdiction of the judge *a quo* (apart from some particular cases foreseen by Article 28 with regard to insurance, contracts with the consumers and with regard to exclusive jurisdiction set by Article 16).

In addressing the second question, the Court maintained that the fact that the ruling to be acknowledged or enforced came from a criminal court had been clearly considered by the Convention negotiators: they did not only foresee in this regard a particular provision related to optional jurisdiction (Article 5.4) but also considered it namely with regard to recognition in Article II of the Protocol annexed to the Convention,[7] which is the provision on which major doubts on interpretation were raised by the *Bundesgerichtshof*.

In this regard, relying not only on its precedents but also on some decisions issued by the ECtHR—that the same Court would recall a few months later in the ruling Krombach v. France—the Court concluded

> 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 [Brussels] Convention [of 1968] 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

[6] The reasoning of the Court is remarkable when stressing that fundamental rights form an integrated part of the general principles of law whose observance the Court ensures and that, for such a purpose, the Court drew inspiration from the constitutional traditions common to Member States and from the guidelines supplied by international treaties for the protection of human rights. Nonetheless, it has to be noted that the issue of the impact of individual fundamental rights has faced a progressive simplification further to the adoption of the Charter of Nice and now with the "constitutionalisation" that has affected it pursuant to Article 6.1 of the Treaty establishing the European Union (as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009).

[7] Brussels Convention of 1968, Protocol Annexed.

> the EC[t]HR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred in Article 27, point 1, of the Convention, of the fact that, an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that the person was not present at the hearing.[8]

Actually, Article II of the Protocol states that "without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person" and that "however, the court seized of the matter may order appearance in person; in the case of failure to appear, a judgement given in the civil action without the person concerned having had the opportunity to arrange for his defence need not to be recognised or enforced in the other Contracting States".[9]

Almost twenty years later, the Court recalled its precedent[10] where the restriction to offences unintentionally committed, as addressed in the above paragraph, was construed as meaning that the Convention clearly seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this. Nonetheless, the Court—as already noted—held that the literal interpretation of Article II of the Protocol cannot be shared as the effectiveness of the right of defence and the relevance of its infringement in the proceeding *a quo* have to be duly considered in order to check the compliance of the enforcement of the foreign decision with the public policy of the *forum*.[11]

Issuing its ruling in positive terms, the Court of Justice therefore stated the following:

> [T]he court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the [Brussels] Convention [of 1968], of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.[12]

In this way, then, the Court held that the provision of the Protocol, even if explicitly related only to unintentional infringements, is also applicable with

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[8] ECJ: Krombach, supra n. 2, para 44.

[9] The Jenard Report explains that this provision, that certainly "includes road accidents", is based on the Benelux Treaty and it "is relevant as in some legal orders, namely France, Belgium and Luxembourg, criminal decisions have to be deemed as *res judicata* as far as they concern subsequent claims for damage and therefore it is essential that the alleged liable person "can exercise his right of defence since the criminal proceeding has started".

[10] ECJ: Siegfried Ewald Rinkau, C-157/80, Judgment (26 May 1981), para 12.

[11] Along the same lines, Advocate General Saggio had advised this in his opinion (paras 29–32, in particular para 31).

[12] ECJ: Krombach, supra n. 2, para 45.

regard to intentional infringements, as otherwise the recognition of the judgement would have to be refused as it is contrary to public policy.[13]

Along the same lines, the Court of Justice was immediately followed by the referring court. Actually, the *Bundesgerichtshof*, in its ruling of 29 June 2000,[14] accepted the claim submitted by K and invoked the *ordre public clause* to exclude the enforcement of the French judgement which had ordered K to pay compensation to B.

3 Article 61 of Regulation (EC) No. 44/2001

Nonetheless, it is the Community legislator itself which seems to depart from the reasoning of the Court of Justice. Article 61 of Regulation No. 44/2001, Brussels I,[15] finally adopted on 22 December 2000, which replaces the Brussels Convention of 1968, actually mirrors Article II of the Protocol to the Convention. One may be surprised by this correspondence with the wording of 1968 when it is considered that in the past more than one ruling of the Luxembourg judges had led to the introduction of specific amendments to the Convention at the time of Accession Conventions which followed the progressive enlargement of the European Community.

It must nonetheless be noted that the time that had elapsed between the judgement of the Court of Justice in the case of Krombach v. Bamberski and the adoption of Regulation No. 44/2001 is very short and, moreover, the wording of the Regulation is the outcome of a long and complex drafting exercise which also led to the revision of the Lugano Convention between the Member States of the European Community and those belonging to the EFTA.

As a matter of fact, Article 61 of Regulation No. 44/2001 is literally mirrored in Article 61 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Lugano, 30 October 2007),[16] just as, on the other hand, Article II of Protocol No. 1 to the first Lugano Convention of

[13] This is the reasoning of Pocar in the Explanatory Report on the Lugano Convention of 2007 (in Official Journal of European Union, C 319, 23 December 2009; the Italian version is also published in Rivista di diritto internazionale privato e processuale (2010), p. 244 ss.). In the opinion delivered by Advocate General Kokott in the Gambazzi case one can read the following: "In Krombach the Court itself could establish that the proceedings before the court of the State constituted a manifest breach of the fundamental right to a fair trial" (ECJ: Marco Gambazzi v. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company, C-394/07, Judgment (2 April 2009), para 46).

[14] 53 Neue Juristische Wochenschrift, 2000, p. 3289.

[15] European Union, Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[16] Entered into force on 1st January 2010.

16 September 1988[17] literally reproduced Article II of the Protocol to the Brussels Convention of 1968. This is due to the fact that the experts group of representatives from the EC and EFTA Member States assigned with the task of updating the Brussels and Lugano Conventions in 1997 had already reached an agreement on the revised text in April 1999, which remained "frozen" for many years.[18]

4 The Judgement of the European Court of Human Rights in *Krombach v. France*

Immediately after being sentenced by the Assize Court of Paris, K. filed a complaint with the European Commission of Human Rights alleging that France had breached his right to a fair trial (Article 6 of the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950))[19] and his right to have his conviction or sentence reviewed by a higher tribunal (Article 2 of Protocol n. 7).[20] Further to the amendment to the control mechanism assigned to the Commission, as introduced by Protocol no. 11, the matter had been referred to the (third Section of the) ECtHR. The judgement, dated 13 February 2001,[21] offers a detailed reconstruction of all the facts related to the death of Kalinka Bamberski, supported by a careful reference to the rules which were then applicable to the proceedings in France.

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[17] Protocol no. 1 on Certain Questions of Jurisdiction, Procedure and Enforcement to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988).

[18] A reference to this circumstance can be found at point 5 of the preamble to Regulation No. 44/2001, whilst an extensive and detailed reconstruction of what occurred is offered by the Explanatory Report of the Lugano Convention, written by Fausto Pocar. The Report mentions that the group of experts discussed the provision of Article II of the Protocol, opting eventually for its maintenance also "in order to avoid forceful interference in the criminal law of the States in a Convention dealing with civil and commercial matters" (para 65). Nonetheless—as the Report noted—what has now become Article 61 of Regulation No. 44/2001 and of the Lugano Convention of 2007, has to be read in the light of the Court of Justice's ruling in the Krombach case.

[19] Entered into force on 3 September 1953.

[20] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984), entered into force on 1 November 1988.

[21] ECtHR: Krombach, supra n. 1. In their ruling the Strasbourg judges acknowledged the preliminary ruling proceedings held in Luxembourg, quoting the ECJ in the part reproduced above (para 53), and admitted that, further to the judgement of the Court of Justice, the *Bundesgerichtshof* had dismissed Bamberski's application for an order to enforce the civil judgement delivered by the French Assize Court.

After recalling its case law with regard to proceedings *in absentia*, starting from the case Colozza v. Italy,[22] the Court highlighted that in the case at stake it was not disputed that

> the applicant had clearly manifested an intention not to attend the hearing before the Assize Court and, therefore, not to represent himself. On the other hand – it is noted in the ruling – the case file shows that he wished to be defended by his lawyers, who had been given authorities to that end and were present at the hearing.[23]

The following, in my view, is the crucial paragraph:

> Although not absolute, the right for everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance.[24]

Moreover:

> Lastly, the Court observes that the applicant's lawyers were not given the permission to represent their client at the hearing before the Assize Court on the civil claims. To penalise the applicant's failure to appear by such an absolute bar on any defence appears manifestly disproportionate.[25]

Even with regard to the right to obtain a review, the ruling maintains that there had been a breach:

> The Court attaches weight to the fact that the applicant was unable to obtain a review, at least by the Court of Cassation, of the lawfulness of the Assize Court's refusal to allow the defence lawyers to plead.

In the end—according to the judgement's conclusion—

> by virtue of Articles 630 and 639 of the Code of Criminal Procedure taken together the applicant, on the one hand, could not be and was not represented in the Assize Court by a lawyer, and, on the other, was unable to appeal to the Court of Cassation as he was a defendant in absentia. He therefore had no real possibility of being defended at first instance or of having his conviction reviewed by a higher court.[26]

Nonetheless, it is worth mentioning, at least incidentally, that despite the clear wording of these sentences that seem to address direct criticism towards the provisions themselves, the Court, obviously fully aware that this fell outside of its remit, immediately drew attention to the case at stake to dispute the circumstance that those same provisions had not been applied by the French judges, who might have interpreted them in a way that would allow K to be defended.

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[22] ECtHR: Colozza v. Italy, 9024/80, Judgment (12 February 1985).

[23] ECtHR: Krombach, supra n. 1, para 88.

[24] Ibidem, para 89.

[25] Ibidem, para 90.

[26] Ibidem, para 100.

5 Krombach's Kidnapping and the Current Criminal Proceedings in France

It was actually reported by the media that in October 2009 B arranged for K to be kidnapped and released in France, in order for him to be arrested. The French judges confirmed his imprisonment and, based on the rules governing proceedings *in absentia*, on 29 March 2011 the proceedings against him started before the Assize Court of Paris, the same judicial authority which had previously sentenced him *in absentia* in 1995. As for B, he will have to be prosecuted as the instigator of the kidnapping which nonetheless, according to the Court, does not undermine the legitimacy of the proceedings against K.[27] After an adjournment when K needed hospital treatment, on 22 October 2011 the Assize Court of Paris sentenced him to 15 years imprisonment, the same punishment as in 1995.

6 Gambazzi and Daimler Chrysler Before the European Court of Justice

The Court of Justice relied on its judgement of 2000 in the case of Krombach to deliver its ruling in the case of Gambazzi v. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company.[28] On this occasion, it was the Court of Appeal of Milan which had referred a preliminary ruling to the Court of Justice concerning the interpretation of Article 27.1 of the Brussels Convention of 1968, that is to say on the exception of public policy with regard to the recognition of a foreign judgement. The Court of Justice also made interesting remarks about two other issues: the proper notion of a decision and the relevance for both the Court of Justice and the national courts of member States of Swiss rulings pursuant to the Lugano Convention of 1988. Nonetheless, it is not possible to further elaborate on these issues in this context.

The main issue addressed by the Court in the judgement delivered in the case of Gambazzi is related to the possibility to invoke the public policy exception to refuse the recognition and enforcement in Italy of two related judicial decisions, issued in the United Kingdom, which ordered Mr Gambazzi (hereinafter "G"),

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[27] The issue, which reads in Latin *male captus bene detentus* and seems to answer in the affirmative, has been frequently addressed both by literature and the case law. It must nonetheless be noted that, differently from the circumstances of the case at hand, in most of the cases the responsibility to arrest the person prosecuted or convicted can be directly or indirectly assigned to the State which has an interest in triggering a judicial procedure against the person or to enforce a criminal sanction which has already been imposed. Recently the expression *extraordinary rendition* has also been frequently used whenever the person concerned is arrested by foreign officers and this happens with the agreement or support of the local State. On this point, Carella 2009, pp. 111–123; Pedrazzi 2009, pp. 681–694.

[28] Gambazzi, supra n. 13.

domiciled in Switzerland, to pay damages to two legal entities registered in Canada. The judgement does not clarify on which grounds the compensation was due nor when the concerned proceedings started in the United Kingdom and not even on which grounds the High Court of Justice (of England and Wales), Chancery Division, had acknowledged its own jurisdiction.[29] These issues are clearly irrelevant for the purpose of recognition as is clearly mentioned in Articles 28.3 and 29 of the Convention. It then emerges from the ruling of the Court of Justice that in March 1997 the Swiss national competent authorities jointly served on G the application filed before the High Court, Chancery Division, together with the order issued by the High Court itself which, on the one hand, restrained G 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').[30]

It was also ascertained that G regularly appeared before the High Court but he

> did not comply, or at least did not fully comply, with the disclosure order. The High Court then, on application by Daimler Chrysler 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"). Mr Gambazzi made several appeals against the freezing order, the disclosure order and the unless order. All those appeals were dismissed. On 13 October 1998, the High Court made a new "unless order". 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"). By judgement of 10 December 1998, supplemented by an order of 19 March 1999 ("the High Court judgements"), the High Court entered judgement as if Mr Gambazzi was in default and allowed the applications of Daimler Chrysler and CIBC, ordering Mr Gambazzi to pay them damages (…) with interest and incidental expenses. On application by Daimler Chrysler and CIBC, the Corte d'appello di Milano (…), by order of 17 December 2004, declared the High Court judgements to be enforceable in Italy. Mr Gambazzi appealed against that order. He claims that the High Court judgements 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 right of the defence and of the adversarial principle.[31]

At this stage the Milan Court stayed the proceedings and referred the case to the Court of Justice for a preliminary ruling.

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[29] On this point see the in-depth essay by Cuniberti 2009, pp. 685–714. Particularly relevant is the reconstruction of the discussions over many months between the applicants and the English judge—which G and the other defendants were unaware of—before obtaining the authorisation to serve the application together with the decisive *interim* measures. The enforcement of the British judgements concerned was applied for not only in Italy but also in the United States, in France, in Switzerland and in Monaco, and Cuniberti's contribution, which analyses these proceedings and the ruling of the Court of Justice, also informs us that the case had also been referred to the ECtHR, "mais elle ne daigna pas s'y intéresser" (p. 686).

[30] Gambazzi, supra n. 13, para 11.

[31] Ibidem, paras 12–18.

In essence, the question referred to the Court relates to the possibility of relying on the public policy clause to refuse the recognition and enforcement of a judicial decision delivered at the end of a proceeding in which

> the court of the State which handed down that judgement denied the unsuccessful party which had entered an appearance the opportunity to present any form of defence following the issue of a debarring order.[32]

7 The Judgement of the European Court of Justice

The ruling of the Court of Justice contains many references to the former Krombach case, to which it is related in the part where it reaffirms that the exercise of the rights of the defence occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights which deserve to be duly protected. It is true, as acknowledged by the Court, that those rights appear to have been oppressed in order to ensure the accurate and effective use of the judicial power and that with regard to civil proceedings many States impose sanctions on parties who rely on inappropriate delaying tactics. Nonetheless, sanctions of this kind, as clarified by the Court, "may not (…) 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]

Whereas the Court acknowledged that G was prevented from any participation in the proceedings *a quo* and that this kind of exclusion represented "the most serious restriction possible on the right of defence",[34] the Court held that "such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights".[35]

At this point, it might be relevant to recall that in the past the Court of Justice was quite sceptical towards legal tools which are peculiar to the British civil procedure system, stating that the framework defined by the Brussels Convention of 1968 (and by Regulation No. 44/2001) prevents British judges from considering themselves as *forum non conveniens*[36] and, moreover, from issuing anti-suit injunctions.[37]

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[32] Ibidem, para 19.

[33] Ibidem, para 32.

[34] Ibidem, para 33.

[35] Ibidem.

[36] ECJ: Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, C-281/02, Judgment (1 March 2005).

[37] ECJ: Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, C-159/02, Judgment (27 April 2004); ECJ: Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc., C-185/07, Judgment (10 February 2009).

In the pertinent Gambazzi ruling, the Court held, on the contrary, that it is the responsibility of the judge of the requested State—that is to say of the Italian judge—to verify that in the proceedings *a quo* a disproportionate infringement of defensive rights has effectively occurred, but it also provides valuable guidance on how this verification should be performed, which implies a thorough assessment of the English proceedings *a quo*.

Actually the Court maintained that the following had to be taken into account:

> in the present case, not only the circumstance 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.[38]

And then it followed:

> With regard, first, to the disclosure order, it is for the national court to examine whether, and if so to what extent, G had the opportunity to be heard as to its subject-matter and scope, before it was made.

The referring judge also had 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. 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.
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> 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.
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> Finally, with regard to the High Court judgements 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.[39]

Based on all these verifications, the Court of Justice stated that

> 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.[40]

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[38] ECJ: Gambazzi, supra n. 13, para 41.

[39] Ibidem, paras 41–45.

[40] Ibidem, para 47.

8 The Decision of the Court of Appeal of Milan Not to Invoke Public Policy

The Court of Appeal of Milan had to deal with the case once again in the light of the guidance provided by the Court of Justice. The ruling of 24 November–14 December 2010[41] confirms the declaration of enforcement relating the English decisions which was issued at first instance. Actually, the Court of Appeal considered that G could have complied with the provisions of the judge *a quo* and that in any case he was really granted the possibility to challenge each of the decisions which had subsequently led to his exclusion from the proceedings.

Nonetheless, I think that it can be argued whether the referring judge had followed, both in the wording and in the rationale, the guidance provided by the Court of Justice.

I am not convinced that, with regard to the judgements whose enforcement was requested, the ruling from Milan has thoroughly verified that the grounds of the claim against G had been duly considered by the judge *a quo* and that G had had "the possibility of expressing his opinion on that subject and a right of appeal".[42]

For the Milan judges the exclusion of G from the proceedings *a quo* has to be considered as a very severe sanction but not unreasonable or disproportionate—and then not of such a nature to justify the application of the public policy clause—with regard to the procedural choice made by G to focus his defence on the matter of the lack of jurisdiction of the British court rather than on the orders that were issued in sequence. Taking for granted the presumption of enforceability resulting from the Convention (and Regulation No. 44/2001), it also cannot be disputed that the recognition judge cannot challenge the assessment of his jurisdiction by the judge *a quo*, but that is not the issue in my view. The Court of Milan stated the following: "Gambazzi non ha *completamente* adempiuto, entro il termine fissato, agli obblighi di cui all'ultima ordinanza ed è stato così ritenuto colpevole di contempt of Court (oltraggio alla Corte) ed escluso dal procedimento, proseguito in assenza dello stesso sino alla sentenza di condanna in data 10.12.1998; la questione relativa alla giurisdizione è stata ancora una volta riproposta innanzi alla House of Lords che, con sentenza in data 12 ottobre 2000, l'ha definitivamente rigettata".[43]

To my mind, the judges in Milan should have asked themselves if the fact that G had been extruded by the proceedings and subsequently found guilty *in absentia* by British judges well before their jurisdiction was ascertained, was really needed for the sound administration of justice and therefore did not generate an unreasonable and disproportionate infringement of the right of defence.

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[41] Rivista di Diritto Internazionale Privato e Processuale (2011), 47:1057.

[42] ECJ: Gambazzi, supra n. 13, para 45 and the Advocate General's opinion, paras 25–27, 48.

[43] Emphasis added.

9 Some Final Remarks

G can still challenge the judgement of the Court of Appeal of Milan by filing an application before the *Corte di Cassazione* (Article 41 of the Convention and Article 44 of Regulation No. 44/2001). So far, the impression is that the Milan judges and the *Bundesgerichtshof* followed a different approach. Can this be justified by the fact that whilst Gambazzi is a Swiss national with no domicile in Italy but in Lugano, Krombach—as highlighted by the Court in its ruling, although with a reasoning that might sound misleading—is a German citizen with his domicile (at that time) in Germany?

I would be inclined to say no and it should certainly not be the case. As far as the identification of the jurisdiction responsible for receiving the application for enforcement is concerned, the Convention makes a clear difference based on the circumstance that the defendant has a domicile or not in the requested State (Article 32.2 of the Brussels Convention of 1968; less explicitly in Article 39.2 of Regulation No. 44/2001), but from this distinction we cannot maintain that the requested State can or even shall better protect the parties who are domiciled in its territory.

What one can probably say—or, better, repeat—is that in the Krombach case the infringement of defence rights was directly related to the features of the French legal system, whilst in the Gambazzi case we are faced with many *interim* measures imposed by the judicial authorities.

It is also worth mentioning what Article 111 of the Italian Constitution, with a relatively recent provision, states: "La giurisdizione si attua mediante il giusto processo regolato dalla legge. Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo ed imparziale".

In a different and more general perspective it must also be noted that the elimination of the public policy exception has been included for some time now amongst the measures to facilitate the implementation of the principle of the mutual recognition of judgements between the member States of the Union, although both European institutions and member States are significantly reticent in their moving towards this direction.

It is true that the recent proposal submitted by the European Commission in order to review Regulation No. 44/2001[44] foresees that a decision issued in a member State and thereby enforceable can also be enforced in the other member States "without the need for a declaration of enforceability" (Article 38.2). Nonetheless, the defendant has "the right to apply for a refusal of recognition or enforcement of a judgement where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial" (Article 46.1).

[44] European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 def./2, 14 December 2010–3 January 2011.

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