Reflexions on the Role of the "Ordre Public" in the EU Regulations on Civil Procedure

1. Introduction

It is generally acknowledged that the system introduced by the 1968 Brussels Convention on the jurisdiction and the enforcement of judgements in civil and commercial matters (1968 Brussels Convention) and the EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters[1] (Regulation 44/2001) has been working well over the past forty years.[2] In spite of that, in the last years the discussion arose about the public policy exception in the recognition and enforcement of foreign decisions. Particularly, it has been suggested that this provision should not be any longer necessary and that it should consequently be cancelled from all regulations, in order to make the recognition and enforcement faster and easier.

The recognition and enforcement of foreign decisions, or, as we now say, the free circulation of the decisions within the EU Member States has been a goal of the European Communities (now: European Union) from its very beginning.

Art. 220 of the Treaty of Rome, in its original 1957 version, stated that Member States had to start negotiations in order to ease recognition and enforcement of foreign judgements. In its often recalled the Commission's note of 1959[3], where it stated that "a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States,

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[1] OJ L 12, 16. 1. 2001, p. 1–23.

[2] The doctrine on the 1968 Brussels Convention and on the Regulation 44/2001 unanimously share this view. As it is not possible to quote all studies, in this discussion I will mostly refer to Gaudemet – Tallon, Compétence et execution des judgements en Europe, 4e éd. Paris, 2010; Magnus – Mankowski, Brussels I Regulation, Sellier, 2007; Briggs and Rees, Civil jurisdiction and judgments, London, 2009. I take the liberty to add Mansi, Il Giudice italiano e le controversie europee – I principali regolamenti comunitari di diritto processuale civile, Milano 2010.

[3] The note had been sent to the Member States – six at that time – on the 22 October 1959, inviting them to commence negotiations – according to the Jenard Report.

and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments".

The Member States started negotiating a suitable text that had been signed in Brussels on 27 September 1968 and entered into force on 1 February 1973. Recognition and enforcement of foreign decisions were in fact greatly consented, but some exceptional reasons for refusal were maintained. Art. 27 of the 1986 Brussels Convention provided five reasons for the refusal of recognition and enforcement. Art. 27.1 stated that a judgment shall not be recognized "if such recognition is contrary to public policy in the State in which recognition is sought".[4]

This was a common provision in many conventions signed and operating at that time, such as the 1970 Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (Hague Convention).[5]

In the words of the Jenard Report,[6] it is made clear that "there are grounds for refusal, not of the foreign judgment itself, but if recognition of it is contrary to public policy in the State in which the recognition is sought. It is no part of the duty of the court seized of the matter to give an opinion as to

[4] According to the Jenard Report, "recognition may be refused if it is contrary to public policy in the State in which the recognition is sought. In the opinion of the Committee this clause ought to operate only in exceptional cases. (…) public policy is not to be invoked as a ground for refusing to recognize a judgment given by a court of a Contracting State which has based its jurisdiction over a defendant domiciled outside the Community on a provision of its internal law, such as the provisions listed in the second paragraph of Article 3 (Article 14 of the French Civil Code, etc.). Furthermore, it follows from the last paragraph of Article 27 of the 1968 Brussels Convention that public policy is not to be used as a means of justifying refusal of recognition on the grounds that the foreign court applied a law other than that laid down by the rules of private international law of the court in which the recognition is sought". In the same direction is Art. 7 of the Hague Convention on the recognition and enforcement of foreign judgements in civil and commercial matters: "recognition or enforcement may not be refused for the sole reason that the court of the State of origin has applied a law other than that which would have been applicable according to the rules of private international law of the State addressed".

[5] Article 5 of the Hague Convention read as follows: "recognition or enforcement of a decision may nevertheless be refused in any of the following cases: (1) if recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case". Further international convention with similar provisions were those between Germany and Belgium, and Italy and Belgium.

[6] Jenard Report, OJ C 59, 5. 3. 1979, p. 1.

whether the foreign judgment is, or is not, compatible with the public policy of its country. Indeed, this might be taken as criticism of the judgment. Its duty is rather to verify whether recognition of the judgment would be contrary to public policy".

2. The road to the Regulation 44/2001

2.1. The reform of the 1968 Brussels Convention: from the 1997 Commission proposal

The debate on the need for the public policy clause started along with the discussions for the reform of the 1968 Brussels Convention. In its proposal for a Council act establishing the "new" Convention on jurisdiction and the recognition and enforcement of judgments of 26 November 1997, the Commission dealt with the problem of simplified recognition and enforcement procedure. It recognised that "the most radical solution, and the most compatible with the concept of a frontier-free law-enforcement area, would be to abolish the registration (exequatur) procedure purely and simply".[7] In such "radical solution", there were no room for any public policy clause as there were not any proceedings where to raise such exception.

The radical option was probably excessive, and in fact the Commission considered still unrealistic such aim and preferred to suggest faster and easier proceedings for the recognition and enforcement of foreign decisions.

In spite of the amendments in the procedures, according to the Commission's views, it would have been necessary a "…revision of the grounds on which recognition of a foreign judgment may currently be opposed… and in particularly public policy ground, which does not sit well with the European integration process on the civil and commercial matters concerned here".[8] As a consequence, Art. 37a of the proposed draft of the Convention did not list public policy among the grounds for opposing to recognition and enforcement of foreign decisions.

As anyone knows, the 1997 Commission proposal for a new international Convention has not been adopted, as the EC Treaty was deeply modified by the 1999 Amsterdam Treaty.

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[7] Commission of the European Communities, Commission communication to the Council and the European Parliament, Towards greater efficiency in obtaining and enforcing judgments in the European Union, Brussels, 26. 11. 1997, COM (97) 609 final, point I. 6 (p. 11).
[8] Commission…cit., point 20 (p. 12).

2.2. To the new proposal - the adoption of Regulation 44/2001

After the entry into force of the Amsterdam Treaty the EC Institutions were attributed the new competences of Title V in the area of freedom, security and justice (Art. 61 et seq.) and it then became clear that the 1968 Brussels Convention would have been replaced by an EC legal instrument.

The Commission then prepared a new proposal[9] – this time with a view to issuing an EC Regulation – where the public policy clause still appeared in the text,[10] though the recognition and enforcement of foreign decisions were much simplified in comparison with the formalities required under the 1968 Brussels Convention.

According to Professor Pocar's report to the Regulation 44/2001, "the declaration of enforceability involves a procedure further simplified from that under the 1968 Brussels Convention, so as to become virtually automatic, with purely formal scrutiny of the documents produced by the party applying for it. Having ascertained that the documents are in order, the court declares the judgment enforceable, upon application by any interested party, without considering recognition requirements under the regulation, in the absence of the party against whom enforcement is sought, who is not allowed to make any submissions at this stage of proceedings. Only once the declaration of enforceability has been served on the other party may he, within one month, appeal against it on the grounds for non-recognition under the regulation. The court must give its decision without delay on that appeal, which is dealt with under the rules governing adversarial procedure. The regulation thus follows the pattern of the summary procedure previously laid down in the 1968 Brussels Convention, with the further simplification that scrutiny as to recognition requirements, performable by the court twice under the convention, first for a declaration of enforceability and then for an appeal against it, is confined to the second stage, if the party against whom enforcement is sought so requests by appealing. Where he does not, the foreign judgment is thus enforced without any scrutiny as to recognition requirements. The elimination of scrutiny at the first stage therefore has

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[9] Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - (1999/C 376 E/01) - COM(1999) 348 final - 1999/0154(CNS) (Submitted by the Commission on 7 September 1999), OJ, 12. 12. 1999, C 376 E/1.

[10] Art. 41 of the Regulation 44/2001 reads as follows: "The court with which an appeal is lodged under Article 39 or Article 40 shall give its decision without delay. It shall refuse or revoke a declaration of enforceability only on one of the following grounds:
1. if the declaration of enforceability is manifestly contrary to public policy in the Member State addressed".

significant implications and makes for automatic giving of effect to foreign judgments".

This new procedure reflects the new principles – arising out of the new Treaty rules – of mutual trust between Member States,[11] and the cooperation within the area of civil procedure, together with the needs for faster, easier and less expensive proceedings,[12] and limits the possibilities for the debtor to challenge the validity of the foreign decision.

In spite of the revised proceedings, the public policy clause still plays a role, albeit a softer one. Art. 34 of the Regulation 44/2001 provides that "a judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought". According to the Commission's words in its explanatory notes to its 1999 proposal[13] "this Article determines the sole grounds on which a court seized of an appeal may refuse or revoke a declaration of enforceability. These grounds have been reframed in a restrictive manner to improve the free movement of judgments". Particularly the Commission observes: "… adding

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[11] Today this principle is fully confirmed by the case-law of the Court: "…in the case of the recognition and enforcement of judgments, the relevant principles are those, specified in recital 6 and recitals 16 and 17 in the preamble to Regulation 44/2001, of free movement of judgments and mutual trust in the administration of justice (favor executionis)". See the case C-533/08, TNT Express Nederland BV v AXA Versicherung AG, [2010] ECR I-4107, par. 45. As for the appreciation of the said principle in the area of EC Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003, p. 1–29; Regulation 2201/2003), see the case C-256/09, Bianca Purrucker v Guillermo Vallés Pérez [2010], paras 70 and 71: "Ainsi qu'il ressort du deuxième considérant du règlement n° 2201/2003, le principe de la reconnaissance mutuelle des décisions judiciaires est la pierre angulaire de la création d'un véritable espace judiciaire.Selon le vingt et unième considérant dudit règlement, cette reconnaissance devrait reposer sur le principe de la confiance mutuelle".

[12] The relevant recitals of the Regulation 44/2001 are the following: "(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute; (17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation; (18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected".

[13] Commission of the European Communities, Brussels, 14. 7. 1999 (COM(1999) 348 final).

the adverb "manifestly" in point 1 underscores the exceptional nature of the public policy ground".[14]

3. The interpretation of the public policy clause by the Court of Justice of the EU

In spite of the debate on the legislative options, the Court of Justice of the EU (Court) has been called upon to interpret the public policy clause quite scarcely. So far, the only few judgments are on Art. 27.1 of the 1968 Brussels Convention.

The *Krombach* case[15] is probably well known to a large audience. Mr Krombach was the subject of a preliminary investigation in Germany following the death in Germany of a 14-year-old girl of French nationality. That preliminary investigation was subsequently discontinued. In response to a complaint by Mr Bamberski, the father of the young girl, a preliminary investigation was opened in France, the French courts declaring that they had jurisdiction by virtue of the fact that the victim was a French national. At the conclusion of that investigation, Mr Krombach was, by judgment of the Chambre d'Accusation (Chamber of Indictments) of the Cour d'Appel de Paris (Paris Court of Appeal), committed for trial before the Cour d'Assises de Paris.

That judgment and notice of the introduction of a civil claim by the victim's father were served on Mr Krombach. Although Mr Krombach was ordered to appear in person, he did not attend the hearing. The Cour d'Assises de Paris thereupon applied the contempt procedure governed by Article 627 et seq. of the French Code of Criminal Procedure. Pursuant to Article 630 of that Code, under which no defence counsel may appear on behalf of the person in contempt, the Cour d'Assises reached its decision without hearing the defence counsel instructed by Mr Krombach.

By judgment of 9 March 1995 the Cour d'Assises imposed on Mr Krombach a custodial sentence of 15 years after finding him guilty of violence resulting in involuntary manslaughter. By judgment of 13 March 1995, the Cour d'Assises, ruling on the civil claim, ordered Mr Krombach, again as being in

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[14] The new rules on recognition and enforcement of foreign decisions and the new public policy clause apply also to the authentic instruments (Art. 57 of the Regulation 44/2001) and to the Court settlements (Art. 58 of the Regulation 44/2001).

[15] Case C-7/98, Dieter Krombach v André Bamberski [2000] ECR I-1935.

contempt, to pay compensation to Mr Bamberski in the amount of FRF 350 000.

On application by Mr Bamberski, the President of a civil chamber of the Landgericht (Regional Court) Kempten (Germany), which had jurisdiction *ratione loci*, declared the judgment of 13 March 1995 to be enforceable in Germany. Following dismissal by the Oberlandesgericht (Higher Regional Court) of the appeal which he had lodged against that decision, Mr Krombach brought an appeal on a point of law (Rechtsbeschwerde) before the Bundesgerichtshof in which he submitted that he had been unable effectively to defend himself against the judgment given against him by the French court.[16]

The Bundesgerichtshof decided to stay proceedings and to refer to the Court for a preliminary ruling[17] focused on how the term public policy in the State in which recognition is sought in Art. 27.1 of the 1968 Brussels Convention should be interpreted. The Court started its reasoning by recalling its case law on some preliminary aspects:
(i) the need for a strict interpretation of the public policy clause, as it constitutes an obstacle to the attainment of the EC goals (free movement of judgements);[18]
(ii) the recourse to the public policy clause is limited to exceptional cases only;[19]

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[16] Krombach judgement, paras 12 to 16.
[17] The questions were the following:
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)? If Question 1 is answered in the negative: 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 intentional offence and did not appear in person? If Question 2 is also answered in the negative: 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)?
[18] Case C-414/92, Solo Kleinmotoren v Boch [1994] ECR I-2237, par. 20; Krombach, par. 21.
[19] Case 145/86, Hoffmann v Krieg [1988] ECR 645, par. 21, and case C-78/95, Hendrikman and Feyen v Magenta Druck & Verlag [1996] ECR I-4943, par. 23; Krombach, par. 21.

(iii) as the 1968 Brussels Convention is an autonomous and complete system independent of the legal systems of the Contracting States, the principle of legal certainty in the Community legal system and the objectives of the Convention in accordance with Art. 220 of the EC Treaty (now Art. 293 EC), on which it is founded, require a uniform application in all Contracting States of the Convention rules and the relevant case-law of the Court.[20]

As a consequence, "the Contracting States in principle remain free, by virtue of the proviso in Art. 27.1 of the 1968 Brussels Convention, to determine, according to their own conceptions, what public policy requires", while "the limits of that concept are a matter for interpretation of the Convention".[21]

What are such limits? The Court found two limits in the Krombach case. The first one relates to the test of public policy referred to in Art. 27.1 of the 1968 Brussels Convention and may not be applied to the rules relating to jurisdiction (par. 1): it follows that the public policy of the State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction.[22] The second limit refers to the recourse to the public-policy clause in Article 27.1 of the 1968 Brussels Convention, which 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. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, 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.[23]

In the Krombach case, then, "a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right".

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[20] Case C-432/93, SISRO v Ampersand [1995] ECR I-2269, par. 39.

[21] Krombach, par. 22; par. 23 reads as follows: "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".

[22] Krombach judgement, par. 32.

[23] Krombach judgement, par. 37.

"It follows from the foregoing developments in the case-law 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 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR)".

Many of the principles outlined in *Krombach* have been reviewed in a restricted way in the *Gambazzi* case.[24]

In the context of a claim for damages brought by DaimlerChrysler and CIBC against Mr Gambazzi, the High Court of Justice (England & Wales), 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'). Althoug Mr. Gambazzi was served with that order, he 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 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, but all those appeals were dismissed. The High Court then made a new 'unless order', but as 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 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 with interest and incidental expenses. On application by DaimlerChrysler and CIBC, the Corte d'appello di Milano (Court of Appeal, Milan, Italy), declared the High Court judgments to be enforceable in Italy. Mr Gambazzi appealed against that order. He claimed that the High Court judgments cannot be recognised in Italy, on the ground that they are contrary to public policy within the meaning of Art. 27.1 of the 1968 Brussels Convention, because they were made in

[24] Case C-394/07, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBS Mellon Trust Company [2009] ECR I-2563.

breach of the rights of the defence and of the adversarial principle. The Corte d'appello di Milano, before which the appeal was brought, decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:
"On the basis of the public policy clause in Art. 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 Art. 26 et seq. of the 1968 Brussels 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 Art. 27.1?"

The case is dealing with a particular kind of public policy principles, as it is based on one of the fundamental rights envisaged and protected by all Member States: the right to a fair trial. As in the *Krombach* case the Court stated that the control over the limits of the public policy exemption is a matter of EC law (now: EU law), in the *Gambazzi* case the Court had to face the following key questions:
(i) can a fundamental right be limited by reasons of public policy?
(ii) if the answer is "yes", to what extent such limitation is admissible?

The reasoning of the Court is stated in the following paragraphs.

"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 ECHR, is of particular importance (see, to that effect, Krombach, paras 38 and 39).

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".[25]

It is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case. In other words, if the exclusion of Mr. Gambazzi from the trial is a reasonable restriction to his right of defence or it is an excessive measure having regard to the proceedings as a whole in the light of all the circumstances.[26, 27]

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[25] The Court observed that 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 Kokott 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.

[26] See, in that regard, Case C-341/04, Eurofood IFSC [2006] ECR I-3813, par. 68.

[27] Here are some more excerpts from the judgment: "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-foundness 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."

"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."

A very hard task is therefore asked to national courts as they are called upon to examine not only the effects of the foreign decisions, but also if any breaches of fundamental rights in the country of origin can be tolerated, as being based on the public principles of correct functioning of the judicial system. Is it a reasonable task for our national courts?

4. The other Regulations on civil procedure

After the 1997 Commission remarks on the possible abolishment of the public policy clause, not only the Regulation 44/2001 has been issued in the field of civil procedure, but also many other EU instruments have come into being. Some regulations provide the public policy exception, some do not. The regulations containing the provision are, not surprisingly, those dealing with matters where each State's core values still play a central role.

Council Regulation 2201/2003 provides in Art. 22(a) that a foreign judgment relating to a divorce, legal separation or marriage annulment "shall not be recognised if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought". And also, Art. 23(a) provides that a "judgment relating to parental responsibility shall not be recognised if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child".

Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[28] contains a specific provision on public policy. Art. 26 provides that "any Member State may refuse to recognize insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual".

[28] OJ L 160, 30. 6. 2000, p. 1–18.

The draft of Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession provides in Art. 30(a): "a decision shall not be recognised in the following cases where it was given in default of appearance, such recognition is manifestly contrary to public policy in the Member State in which recognition is sought, it being understood that the public policy criterion may not be applied to the rules of jurisdiction".

On the contrary, three minor regulations in the civil procedure area do not provide any public policy clauses. Their scope of application focus on to the civil and commercial areas, similarly – though not identically – to that of Regulation 44/2001. Such are: the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,[29] the Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure,[30] and the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.[31]

5. The Commission's studies and the 2009 Green Paper on the review of the Regulation 44/2001

The most accurate and recent reflections on the public policy clause are to be found in the debate arisen out of the possible revision of Regulation 44/2001. According to Art. 73 of Regulation 44/2001, the Commission had to investigate on its application after five years from its entry into force. The Commission then asked the cooperation of a group of experts coordinated by Professors *Heiss*, *Pfeiffer* and *Schlosser* who delivered a very interesting study,[32] which is highly recommended for anyone interested in the functioning of the Regulation's mechanism.

On the result of this study, the Commission prepared a "Report" to the European Parliament, the Council and the European Economic and Social Committee "on the application of Council Regulation (EC) No 44/2001"[33]). The most interesting excerpts of the Report need to be fully quoted:

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[29] OJ L 143, 30. 4. 2004, p. 15–39.
[30] OJ L 399, 30. 12. 2006, p. 1–32.
[31] OJ L 199, 31. 7. 2007, p. 1–22.
[32] Hess, Pfeiffer, Schlosse, The Heidelberg Report on the application of Regulation Brussels I in 25 member States (study JLS/C4/2005/03), Munchen, 2008.
[33] COM/2009/0174 final; not yet published in the OJ.

"2.2. General evaluation of the Regulation
In general, the Regulation is considered to be a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings, and circulation of judgments. The system of judicial cooperation laid down in the Regulation has successfully adapted to the changing institutional environment (from intergovernmental cooperation to an instrument of European integration) and to new challenges of modern commercial life. As such, it is highly appreciated among practitioners. This general satisfaction with the operation of the Regulation does not exclude that the functioning of the Regulation may be improved".

"3.1. The abolition of exequatur
Following the political mandate by the European Council in the Tampere (1999) and The Hague (2004) programs, the main objective of the revision of the Regulation should be the abolition of the exequatur procedure in all matters covered by the Regulation.

As regards the existing exequatur procedure, the general study shows that, when the application is complete, first instance proceedings before the courts in the Member States tend to last, on average, from 7 days to 4 months. When, however, the application is incomplete, proceedings last longer. Applications are often incomplete and judicial authorities ask for additional information, in particular translations. Most applications for a declaration of enforceability are successful (between 90% and 100%). Only between 1 and 5% of the decisions are appealed. Appeal proceedings may last between one month and three years, depending on the different procedural cultures in the Member States and the workload of the courts.

In cases where the declaration of enforceability is challenged, the ground of refusal of recognition and enforcement most frequently invoked is the lack of appropriate service pursuant to Article 34(2). However, the general study shows that such challenges are rarely successful today. As to public policy, the study shows that this ground is frequently invoked but rarely accepted. If it is accepted, this mostly occurs in exceptional cases with the aim of safeguarding the procedural rights of the defendant. It seems extremely rare, in civil and commercial matters, that courts would apply the public policy exception with respect to the substantive ruling by the foreign court. The other grounds for refusal are rarely invoked".

The Commission issued also the "Green paper on the review of Council Regulation EC No 44/2001 on jurisdiction and the recognition and

enforcement of judgments in civil and commercial matters",[34] addressed to all interested parties, where the following reflexions are made: "The existing exequatur procedure in the Regulation simplified the procedure for recognition and enforcement of judgments compared to the previous system under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad. If applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused, aiming for the objective of abolishing the exequatur procedure in all civil and commercial matters should be realistic. In practice, this would apply principally to contested claims. The abolition of exequatur should, however, be accompanied by the necessary safeguards."

In the area of uncontested claims, intermediate measures have been abolished on the basis of a control, in the Member State of origin, of minimum standards relating to the service of the document instituting proceedings and to the provision of information about the claim and the procedure to the defendant. In addition, an exceptional review should remedy situations where the defendant was not served personally in a way to enable him/her to arrange for his/her defence or where he/she could not object to the claim by reason of force majeure or extraordinary circumstances ('special review'). Under this system, the claimant must still go through a certification procedure, be it that this procedure takes place in the Member State of origin rather than in the Member State of enforcement.[35]

In light of this analysis, the Commission asked the following question: "Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings

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[34] COM/2009/0175 final; not yet published in the OJ.

[35] According to the Commission, "In the area of contested and uncontested claims, on the other hand, Regulation EC No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10. 1. 2009, p. 1–79, Regulation 4/2009) abolishes exequatur on the basis of harmonized rules on applicable law and the protection of the rights of the defense is ensured through the special review procedure which applies once the judgment has been issued. Regulation 4/2009 thus takes the view that, in the light of the low number of "problematic" judgments presented for recognition and enforcement, a free circulation is possible as long as the defendant has an effective redress a posteriori (special review). If a similar approach were followed in civil and commercial matters generally, the lack of harmonization of such a special review procedure might introduce a certain degree of uncertainty in the few situations where the defendant was not able to defend him/herself in the foreign court. It should therefore be reflected whether a more harmonized review procedure might not be desirable".

(abolition of exequatur)? If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?" Answers were to be addressed to the Commission within 30 June 2009 and we are awaiting to know what are the outcome of such inquiries.

6. Is the public policy clause responsible for lengthy and costly enforcement proceedings?

In the previous paragraphs we have been examining the public policy clause in the light of the debates regarding the Regulation 44/2001 and its predecessor (the 1968 Brussels Convention).

We have noted that the most part of the discussion focuses on the need for faster and easier recognition of foreign judgment, as it has been from the very beginning of the EU history. The key question is then "is the public policy clause responsible for today's lengthy and costly proceedings for the enforcement of foreign decisions before national Courts". My answer is "no". There is a sort of wrong focusing on the public policy clause as it seems that it is responsible for lengthening the enforcement proceedings. In fact, no one doubts that we can seek further improvements in the mechanisms of the proceedings. We all would desire better and faster proceedings, but with regard to the public policy clause the real questions should be: "is it useless and shall we abolish it? Or: is it necessary to preserve our fundamental rights? How much do we care about our fundamental rights and the ways to preserve them?"

I share the opinions of the recent legal literature where the clause is considered to be still necessary in the Regulation 44/2001. As for the other Regulations, I would say that the EU has chosen a "case by case" approach: in some less sensitive areas the public policy provision (and the whole *exequatur*) is absent, while elsewhere the Member States and their fundamental principles still are still requested to play a pivotal role.

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