

# The Impact of Article 6 of the European Convention of Human Rights on the Enforcement of Foreign Judgments rendered in a non Contracting State

*Elena D'Alessandro, University of Rome "Tor Vergata", Italy*

## 1. Introduction

### (a) Article 6 of the European Convention of Human Rights

The European Convention of Human Rights (hereinafter "ECHR") was created in 1950 by ten European States as part of the process of reconstructing western Europe after the Second World War. At the present time, 47 Member States of the Council of Europe are parties to the ECHR. All of the Member States of the EU are "contracting States"<sup>1</sup>.

The ECHR contains a number of safeguards which contribute to a fair administration of justice in national legal systems. The most popular is the right to a fair trial.

Pursuant to Article 6 (1) of the ECHR (hereinafter "Article 6"), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law<sup>2</sup>.

Article 6 (1) imposes an obligation on contracting States to ensure the right to a fair trial in proceedings before their national courts.

### (b) *The Leading Case Pellegrini v. Italy and the Duty to Deny Enforcement to Foreign Judgments Obtained in Proceedings which Do Not Comply with Article 6*

Although Article 6 (1) applies only to a contracting State's own judicial system, the European Court of Human Rights (hereinafter: ECtHR) went to consider the relationship between the guarantees of "fair trial" and the enforcement of foreign judgments rendered in a non contracting State.

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<sup>1</sup> In addition, article 6 of the Treaty on European Union, as amended by the Treaty of Lisbon, establishes the legal basis for EU accession to the ECHR: see, e.g., D. Chalmers, G. Davies & G. Monti, *European Union Law: Cases and Materials*, Second Edition, Cambridge, 2010, 259.

<sup>2</sup> For general background concerning the ECHR, see e.g.: D. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights*, Second Edition, New York, 2009, 1 ff.; J. Coppel, *The Human Rights Act 1988*, Chichester, 1999, 237 ff.; C. Focarelli, *Equo processo e convenzione europea dei diritti dell'Uomo*, Padova, 2001, 4 ff.; J. Frowein & W. Peukert, *EMRK-Kommentar*, 3. Auflage, Kehl am Rhein, 2009, 140 ff.; S. Greer, *The European Convention on Human Rights*, Cambridge, 2006, 251 ff.; W. Peukert, "Verfahrensgarantien und Zivilprozess (Art. 6 EMRK)" (1999) *RabelsZ* 600 ff.

In the leading case *Pellegrini v. Italy*<sup>3</sup>, the ECtHR had to ascertain if a court of a contracting State has a duty to deny enforcement to judgments obtained in a non contracting State, in proceedings which do not comply with the guarantees mentioned in Article 6 (1).

The applicant, Mrs. Pellegrini, complained of a violation of Article 6 of the ECHR on the ground that the Italian court declared enforceable the judgment of the ecclesiastical court of the Vatican City<sup>4</sup> annulling her marriage, even if such decision was rendered in breach of her right to a fair trial.

In order to understand the case, it may be helpful to outline that, in proceedings under canon law, the respondent (*i.e.*, Mrs. Pellegrini) was not informed before being questioned by the court either of the identity of the petitioner or of the grounds on which they allege that the marriage should be annulled. Furthermore, she was not informed of the possibility of securing the assistance of a defence lawyer or of requesting copies of the case file. Consequently, Mrs. Pellegrini's guarantees of fair hearing were greatly reduced.

Despite the mentioned infringement, the proceeding to have the judgment declared enforced in Italy was successful: The Italian court of appeal had dismissed the claim presented by Mrs. Pellegrini on the ground of contrariety to procedural public policy and had enforced the ecclesiastical court's judgment.

The ECtHR found that such enforcement was, in itself, in breach of the right to a fair trial as stated in Article 6, even if The Vatican has not ratified the ECHR. The infraction was committed by the Italian court:

“The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties”<sup>5</sup>.

It has been noted that *Pellegrini v. Italy* may be seen as a purpose, by the ECtHR, to extend the field of application of the ECHR<sup>6</sup>.

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<sup>3</sup> ECtHR, July 20, 2001, case *Pellegrini v. Italy*, 35 EHRR 44 = (2001) *Rivista di diritto internazionale* 1117 with annotation by C. Focarelli, 955 ff. = (2002) *Gazette du Palais*, July 23, 2 with annotation by L. Sinopoli.

<sup>4</sup> The Vatican is not a party to the ECHR.

<sup>5</sup> At para. 40.

<sup>6</sup> Cf. D. Harris, M. O'Boyle & C. Warbrick, *supra* note 2, 203.

From the point of view of the ECtHR<sup>7</sup>, each court of a contracting State is entitled to deny enforcement to foreign judgments obtained in proceedings which do not comply with Article 6 (1), leaving out of consideration the fact that the State in which the decision was rendered was not a contracting party of the ECHR<sup>8</sup> and, consequently, was not obliged to respect the guarantees of the ECHR.

The enforcement of such type of judgments must be treated as involving a breach of the right to a fair trial. Subsequently and according to Article 34 of the ECHR, the ECtHR shall, if necessary, afford just satisfaction to the injured party.

This essay focuses on the consequences of the leading case *Pellegrini v. Italy* on the enforcement of civil judgments delivered in a non contracting State.

## 2. *Breach of Article 6 (1) as Reason for Refusing Enforcement on the Ground of Procedural Public Policy*

In *Pellegrini v. Italy*, the ECtHR has not expressly shown the ground by virtue of which the enforcement of a judgment rendered in a non contracting State should be refused.

Within the European judicial area<sup>9</sup> the right to a fair trial, as stated in Article 6 (1), is unanimously considered as a part of the European procedural public policy. This view has received a substantial support from:

### A) The ECJ's case-law.

Firstly in *Krombach v. Bambersky*<sup>10</sup> and subsequently in *Gambazzi v. Daimler Chrysler Canada Inc and another*<sup>11</sup>, the ECJ, having regard to the ground for non

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<sup>7</sup> It is beyond the scope of this essay to determine if the decisions of the ECtHR are binding only for the State involved in the claim or, on the contrary, if the authority of the Court's case-law goes beyond the judgment's mandatory effect on the parties. For a detailed examination of this question, see, e.g., N. Fricéro, "L'autorité de chose jugée des décisions de la CEDH" (2007) *Procédures*, étude 21; J. M. Schilling, *Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und menschenrechtlicher Europäisierung*, Tübingen, 2010, 131 ff.

<sup>8</sup> Cf. R. Fentiman, *International Commercial Litigation*, New York, 2010, 704; M. Weber, *Europäisches Zivilprozessrecht und Demokratieprinzip*, Tübingen, 2009, 51; C. Focarelli, "Equo processo e riconoscimento di sentenze straniere: il caso Pellegrini" (2001) *Rivista di diritto internazionale* 968 ff.

<sup>9</sup> I.e., between the Member States of the EU, which are all parties to the ECHR.

<sup>10</sup> Judgment of March 28, 2000, Case C-7/98, [2000] E.C.R. I-1935, para 28 = (2000) IPRax 406, 364, with annotation by A. Piekenbrock = (2000) JZ 725 with annotation by C. von Bar = (2002) *Rivista di diritto internazionale privato e processuale* 803 with annotation by B. Nascimbene. See also A. Layton & H. Mercer, *European Civil Practice*, Second Edition, Vol. 1, 883 ff.; H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 4<sup>e</sup> édition, Paris, 2010, 418 ff.

<sup>11</sup> Judgment of April 2, 2009, Case C-394/07, [2009] E.C.R. I 0000 = (2009) *Foro italiano*, IV, 384 with annotation by E. D'Alessandro = (2009) *Europe*, n. 261, 41 with annotation by L. Idot = (2009) *Europäische Zeitschrift für Wirtschaftsrecht* 424 with annotation by B. Sujecki. See also H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, *supra* note 10, 420 ff.; R. Fentiman, *International Commercial Litigation*, *supra* note 8, 716 ff.; B. Hess, *Europäisches Zivilprozessrecht*, Heidelberg, 2010, 98.

recognition indicated in Article 27 (1) of the 1968 Brussels Convention (now Article 34 (1) of the Brussels I Regulation) has made clear that:

“the exercise of the rights of the defence, to which the question submitted for a preliminary ruling refers ... 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, signed in Rome on 4 November 1950, is of particular importance”<sup>12</sup>.

B) The text of Article 6 (3) of the Treaty of the European Union, which states that fundamental rights, as guaranteed by the European Convention of Human Rights and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. Again, the right to a fair trial is now reaffirmed in Article 47 of the Charter of the Fundamental Right of the European Union<sup>13</sup>.

Anyway, in this paper we give all the attention to foreign judgments rendered in a non contracting State and, unfortunately, due to the fact that the Member States are all parties to the ECHR, an application for a declaration of enforceability of such decisions does not fall within the scope of the Brussels I Regulation.

Particularly, the test of European public policy referred to in Art. 34 (1) of the Brussels I Regulation cannot take place.

Conversely, enforcement is governed by the domestic law of the court where recognition is sought.

National courts, however, have normally the power to deny enforcement on the ground of procedural public policy. In this regard, it must be borne in mind that the so called “European procedural public policy“, which includes the guarantees of fair trial, is a portion of the “national public policy” of the Member States<sup>14</sup>.

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<sup>12</sup> Case C-394/07, at para. 28.

<sup>13</sup> According to Article 47 of the Charter of Fundamental Rights of the European Union, “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”.

<sup>14</sup> A. Mills, “The dimension of public policy in private international law” (2008), 4 *Journal of Private International Law*, 194-198; B. Hess, *Europäisches Zivilprozessrecht*, *supra* note 11, 345; R. Stürner, “Anerkennungsrechtlicher und europäischer Ordre Public als Schranke der Vollstreckbarerklärung – der Bundesgerichtshof und die Staatlichkeit in der Europäischen Union”, in *50 Jahre Bundesgerichtshof. Festgabe aus der Wissenschaft*, Band III, München, 2000, 677 ff., especially at 687 ff.; F. Sudre, “Existe-t-il un ordre

Consequently, it can be said that, in order to avoid the risk to be condemned by the ECtHR as provided in Article 41 of the ECHR, a court is entitled to deny enforcement to foreign judgments obtained in a non contracting States, in proceedings which do not comply with the guarantee of fair trial, on the ground of procedural public policy<sup>15</sup>.

For instance, a court shall deny enforcement to a foreign judgment rendered in a written procedure without an oral hearing<sup>16</sup>.

### *General Duty v. Duty to Deny Enforcement under Particular Circumstances*

For the purpose of Article 6, it is also important to ascertain whether a national court has a general duty or a broad discretion to deny enforcement to foreign decisions rendered in non contracting States in proceedings which do not comply with the guarantees of fair trial, on the grounds of procedural public policy.

If such a refusal is mandatory, enforcement of foreign judgments might be denied by the court on his own motion, even if the public policy defence is not raised by the interested party during the course of the *exequatur* proceedings.

On that aspect, there are two possible readings of the leading case *Pellegrini v. Italy*.

The first plausible approach is to consider the courts as always obliged to deny the *exequatur* of judgments obtained in foreign proceedings which do not comply with Article 6, on the ground of procedural public policy, even on their own motion.

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public européen?”, in P. Tavernier (ed.), *Quelle Europe pour les droits de l’homme?*, Bruxelles, 1996, 39 ff.; I. Thoma, *Die Europäisierung und die Vergemeinschaftung des nationalen ordre public*, Tübingen, 2007, 22 ff.

<sup>15</sup> As suggested by F. Matscher, “Die indirekte Wirkung des Art. 6 EMRK bei der Anerkennung und Vollstreckung ausländischer Entscheidungen”, in: *Festschrift für Helmut Kollhosser*, Karlsruhe, 2004, 427 ff., 432 ff. and W. H. Rechberger & U. Frauenberger-Pfeiler, “Anerkennung und Vollstreckung ausländischer Titel ausserhalb des Anwendungsbereiches des Brüsseler und Luganer Übereinkommens: Österreich”, in G. Walter & P. Baumgarten (eds.), *Reconnaissance et exécution des jugements étrangers*, The Hague, 2000, 60.

In the same direction: Fentiman, *International Commercial Litigation*, *supra* note 8, 715 ff.; H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, *supra* note 10, 419; J. Kropholler & J. von Hein, *Europäisches Zivilprozessrecht*, 9. Auflage, Frankfurt am Main, 2011, 564; P. Stone, *EU Private International Law*, Second Edition, Cheltenham Gloss, 2010, 241.

See to like effect: Cour de cassation, Première chambre civile, March 16, 1999, No 97-17598 = (1999) *Journal du droit international*, 773 with annotation by A. Huet = (1999) *Revue trim. droit civil*, 469 with annotation by R. Perrot. The French Cour de cassation has referred to Article 6 of the ECHR in order to deny enforcement to two English decisions, under Article 27(1) of the 1968 Brussels Convention.

<sup>16</sup> As noted by some German authors (see, e.g., J. Kropholler & J. von Hein, *Europäisches Zivilprozessrecht*, *supra* note 15, 1117), with regard to the Member States, problems of compatibility with Article 6 (1) may arise from the European Regulation No. 861/2007 establishing a European Small Claims Procedure which is applicable among the Member States since January 1, 2009. According to Article 5 (1) of the Regulation, the European Small Claims Procedure shall be a written procedure. The court shall hold an oral hearing only if it considers this to be necessary or if a party so requests, but the tribunal may refuse such a request if it considers that, “[w]ith regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings”.

If the national court denies enforcement, both parties of the foreign proceedings shall spend, for the first time, their right to a fair trial in the contracting State<sup>17</sup>: The judgment rendered abroad has not been recognized, so parties are not precluded from relitigating the claim in the Member State.

The scope served by this first solution consists in ensuring the respect of the guarantees of fair trial in the contracting State to which the judgment is taken for enforcement, even if the interested party voluntarily renounces to spend for the first time in that country his own right to due process. To this extent, in my view, it is to presume that the interested party who does not invoke the dismissal of the application for enforcing a judgment on the ground of public policy, voluntarily renounces to spend his right to a fair trial in the State of enforcement.

As alternative approach, it can be said that the enforcement of a foreign judgment may be refused by the national court only if the described ground of denial is invoked by the defendant.

This second suggestion takes into account the personal responsibility of the interested party.

Under such a proposal, each court of a contracting State would have the duty to respect the right to a fair trial, even when the *Pellegrini v. Italy* conditions are satisfied, only if the interested party (*i.e.*, the defendant of the enforcement proceedings) really wants to have a due process in the State of enforcement and, therefore, he invokes the public policy objection to preclude the recognition of the foreign decision.

The choice among the two described solutions depends on the value preferred. Personally, I consider the best interpretation the second one.

In this regard, I would just add a point to the debate noting that the second proposed approach seems not to be disturbed by the leading case *Pellegrini v. Italy*. As mentioned above, this case involved a decision of the ecclesiastical tribunal which was declared enforceable by the Italian court, notwithstanding the public policy objection proposed by Mrs. Pellegrini.

Therefore, in *Pellegrini v. Italy*, the interested party (*i.e.*, Mrs. Pellegrini) had invoked the protection of her right to a fair trial. It is in such a situation that the ECtHR has affirmed the existence of a duty to deny enforcement for each tribunal of a contracting State.

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<sup>17</sup> If the contracting State has jurisdiction over them.

To put the same point differently: The ECtHR has not taken into consideration the situation in which the interested party has omitted to invoke the procedural public policy exception in a contracting State.

### 3. *Impact of Pellegrini v. Italy in Specific Contexts*

#### (a) *Defendant that Did Not Exhaust Remedies to the Judgment in the State of Origin*

In the leading case *Pellegrini v. Italy* the ECtHR has considered contrary to Article 6 the situation in which a court of a contracting State had not denied enforcement to a foreign judgment obtained in an unfair process.

It seems now of interest to examine whether the situation in which the interested party was in a position to appeal the decision before the court of the non contracting State on grounds of procedural irregularities<sup>18</sup> and he failed to do so, constitutes a breach of Article 6.

As previously said, regarding judgments given in a European Union country and consequently under the field of application of the Brussels I Regulation, the negative solution seems to prevail in virtue of its Article 34 (2)<sup>19</sup>.

The text of Article 34 (2) of the Brussels I Regulation makes clear that the enforcement of a foreign judgment cannot be refused under the ground of procedural public policy if the defendant has failed to use the means of objection given by the State of origin to try to remediate of the infringement of fair trial. This concept was also illustrated by the ECJ, for the first time in *ASML Netherlands BV v. Semiconductor Industry Services GmbH*<sup>20</sup> where the Court pointed out that:

“Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that it is ‘possible’ for a defendant to bring proceedings to challenge a default judgment

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<sup>18</sup> *Id est*: even when he has had the concrete possibility to remediate to the breach of the right to a fair trial.

<sup>19</sup> See, e.g., A. Layton & H. Mercer, *European Civil Practice*, Second Edition, London, 2004, Vol. II, paras. 26.053 and 26.054; M. De Cristofaro, “La crisi del monopolio statale dell’*imperium* all’esordio del titolo esecutivo europeo” (2004), Int’l Lis 141 ff.; M. De Cristofaro, “L’onere di impugnazione della sentenza quale limite al rilievo dei vizi nella fase introduttiva del giudizio chiuso da sentenza contumaciale: tra diritto di difesa e *full faith and credit*” (2007), Int’l Lis 7 ff.; P. Gottwald, *Münchener Kommentar zur Zivilprozessordnung*, III. Band, München, 2008, sub art. 34 EuGVO, Rn. 15-17; J. Kropholler & J. von Hein, *Europäisches Zivilprozessrecht*, supra note 15, sub art. 34, 567; E. Merlin, “Riconoscimento ed esecutività della decisione straniera nel Reg. ‘Bruxelles I’” (2001), Rivista di diritto processuale 433 ff.; A. Staudinger, “Der ordre public-Einwand im Europäischen Zivilverfahrensrecht” (2004) The European Legal Forum, 275; P. Schlosser, *EU-Zivilprozessrecht*, 3. Auflage, München, 2009, 189 ff.; E. D’Alessandro, *Il riconoscimento delle sentenze straniere*, Torino, 2007, 180 ff.

<sup>20</sup> ECJ, Judgment of December 14, 2006, case C-283/05, *ASML Netherlands BV c. Semiconductor Industry Services GmbH (SEMIS)* [2006] E.C.R. I-12041, also available at [http://curia.europa.eu/jcms/jcms/\\_6/](http://curia.europa.eu/jcms/jcms/_6/) = (2008) IPRax, 498 with annotation by R. Geimer = (2007) Revue critique de droit international privé, 642 with annotation by E. Pataut = (2007) Rivista di diritto processuale 1354 with annotation by D. D’Adamo.

against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given”<sup>21</sup>.

Subsequently, in *Apostolides*<sup>22</sup> the ECJ has reaffirmed that:

“the recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No. 44/2001 (hereinafter ‘Brussels I Regulation’) where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence”.

In order to refer the described approach to the case in which the enforcing judgment was rendered in a non contracting State, we have to test its compatibility with *Pellegrini v. Italy*.

Maybe the stronger rationale for justifying such compatibility consists in emphasizing the behaviour of the interested party in the State of origin<sup>23</sup>.

In our view, it is reasonable to presume that the defendant has voluntarily dismissed his right to a fair hearing in the situation above described: *i.e.* when he did not appeal the decision in the State of rendition and it was possible for him to do so (so called “criterion of reasonableness”).

The enforcement of such kind of judgments in a contracting State seems not to be considered as a breach of Article 6 (1) ECHR because, as I have already pointed out, the party against whom the recognition is required has *sua sponte* renounced to the protection afforded by the ECHR.

*(b) Default Judgment Obtained against a Party Barred from Appearance by Reason of Contempt*

It is doubtful whether the enforcement, in a court of a contracting State, of a default judgment obtained in a non contracting State against a party barred from appearance by reason of contempt – which is frequent in the common law tradition – shall be considered as a breach

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<sup>21</sup> At para. 49.

<sup>22</sup> ECJ, Judgment of April 28, 2009, case C-420/07, *Apostolides v Orams*, [2009] E.C.R. I-3571, para. 80 = (2010) Common Market Law Review 1122 with annotation by G. De Baere = (2009) Europe, n. 213, 9 with annotation by L. Idot = (2009) Bulletin of International Legal Developments 85 with annotation by T. Christou.

<sup>23</sup> Along the same line: BGH, Judgment of March 21, 1990 = (1990) NJW 2201 = (1992) IPRax 33; OLG Köln, Judgment of March, 8 1999 = (2000) IPRax 328. *Contra* BGH, Judgment of May 6, 1994 = (2005) Int'l Lis 72.



of article 6, and particularly, as a breach of the right of access to court, according to the leading case *Pellegrini v. Italy*.

The ECtHR, firstly in *Ashingdane v. United Kingdom*<sup>24</sup> and subsequently in *De Geouffre de la Pradelle v. France*<sup>25</sup> held that the right to a court is not an absolute one and each contracting State, in imposing restrictions, is allowed a certain margin of appreciation but any restriction must not be such that the very essence of the right is impaired.

That approach has been approved by the ECJ, in *Gambazzi v. Daimler Chrysler Canada Inc.*<sup>26</sup>.

Mr. Gambazzi failed to comply with a freezing order – previously referred to in the literature as *Mareva injunction* – pronounced by the High Court of Justice, England & Wales, Chancery Division pursuant to Article 25.1 of the Civil Procedure Rules. As a consequence, an order of debarment was pronounced and the judgment on the claim was given in default.

The question referred to the ECJ was involved with Article 34 (2) of the Brussels I Regulation and the enforceability of the default judgment.

The ECJ has held 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”<sup>27</sup>.

In view of the reasons set forth above, it can be said that a court, in Europe, cannot refuse to recognize a default judgment obtained in another Member State against a party barred from appearance, by reason of contempt by itself. Conversely, the court has to deny

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<sup>24</sup> ECtHR, May 28, 1985, case *Ashingdane v. United Kingdom* 7 EHRR 528, para. 57.

<sup>25</sup> ECtHR, December 12, 1992, A-253 B, para. 34.

<sup>26</sup> ECJ, Judgment of April 2, 2009, case C-394/07, *Gambazzi v. Daimler Chrysler Canada Inc.* [2009] ECR I-000, *supra* note 11. On this judgment, see B. Hess, *Europäisches Zivilprozessrecht*, *supra* note 11, 99 ff. The preliminary question was referred to the ECJ by the Court of appeal of Milan: *infra* note 28.

<sup>27</sup> Case C-394/07, at para. 48.

enforcement, as stated in *Pellegrini v. Italy*, only if such a decision was entered with a manifest infringement of the defendant's right to be heard<sup>28</sup>.

The situation seems similar at common law.

For instance, in the United States, the fact that a foreign judgment has been pronounced in default is not by itself a sufficient reason to deny enforcement. Such kinds of decisions are not enforced only if both parties have not had the opportunity to defend their rights in the State of rendition<sup>29</sup>.

It may be concluded from these examples that, generally speaking, the court in which is sought the enforcement of a non contracting State default judgment obtained against a party barred from appearance by reason of debarment, must evaluate if, on the basis of concrete facts of the particular case, such exclusion measure constituted a manifest and disproportionate breach of the defendant's right to be heard and, consequently, a manifest breach of Article 6 (1).

In doing so, the tribunal does not have the duty to apply the evaluation criteria indicated by the ECJ in *Gambazzi*<sup>30</sup> because the case in question is outside the scope of the Brussels I regime.

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<sup>28</sup> The Court of Appeal of Milan, judgment of December 14, 2010 = (2011) Int'l Lis 26 held that, in the light of all the circumstances of the case, the debarment did not constitute a manifest and disproportionate infringement of Mr. Gambazzi's right to be heard, although such kind of orders are unknown in Italian civil litigation. Accordingly, the Court has enforced the English default judgment. An opposite position was taken by the Court of Appeal of Coimbra, judgment of January 20, 2009, RC 545/7, 1TBOBT.C.1, available at [www.dgsi.pt](http://www.dgsi.pt). The Portuguese court has affirmed that "the civil procedural system of Portugal rejects decisions rendered in the absence of one of the parties" because such kind of judgments violate the principle of equality between parties. A similar approach can be found in: N. Andrews, opinion delivered on November 23, 2007 on the reference made to the European Court of Justice in proceedings pending before the Italian court between Mr. Gambazzi and Daimler Chrysler = (2011) Int'l Lis 43: "the European Court of Justice should instruct the Italian court not to recognize or enforce the English judgment because that judgment was obtained in violation of a fundamental procedural principle, and this falls within the scope of the 'public policy' exception to mutual recognition and enforcement under the Brussels Convention"; A. Briggs, opinion delivered on November 19, 2007 on the reference made to the European Court of Justice in proceedings pending before the Italian court between Mr. Gambazzi and Daimler Chrysler = (2011) Int'l Lis 38: "I would not find shocking if a court in another Member State were to take the view that the recognition obtained in such circumstances was contrary to its public policy in the sense in which that term had been defined by the European Court in its decisions in *Krombach v Bambersky* and *Régie Nationale des Usines Renault v Maxicar*".

<sup>29</sup> See, e.g., *Bank of Montreal v. Kough*, 612 F.2d 467 (9th Cir. 1980); *John Sanderson & Co. (Wool) v. Ludlow Jute Co.*, 569 F.2d 696 (1st Cir. 1978).

<sup>30</sup> Case C-394/07 at paras. 39-44: "In order to fulfill 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. 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 (...). 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. 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

(c) *American Orders of Anti Suit-Injunction*

As well known, the ECJ – in *Turner v. Grovit*<sup>31</sup> – has stated that a British anti-suit injunction addressed to enjoin the party or parties from beginning or prosecuting an action in another Member State, cannot be recognized or enforced under the Brussels I regime because in contrast to the general principle which emerges from the case-law on the 1968 Brussels Convention that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it<sup>32</sup>.

Furthermore, it is still uncertain whether an American or, more generally, an order of anti-suit injunction granted by an extra-European Court – *mutatis mutandis*, a non contractual party of the ECHR – shall be enforced in a European contracting State or if, vice versa, such a recognition would infringe the guarantees of fair trial.

It has been said that an enforcement would be contrary to (procedural) public policy<sup>33</sup>. However, it seems important to point out that the described approach does not consider orders of anti-suit injunction as contrary to the right to a fair trial itself.

Even if anti-suit injunctions are addressed to private persons<sup>34</sup> and not to the foreign court, they are considered in contrast with the general (procedural) principle that every court

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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. 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. 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".

<sup>31</sup> ECJ, Judgment of April 27, 2004, case C-159/02, *Turner v. Grovit*, available at [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) = (2004) Diario La Ley n. 6051, 1 ff. with annotation by M. Requeio Isidro = (2004) European Law Reporter 353 with annotation by M. Scheiber = (2004) Lloyd's Maritime and Commercial Law Quarterly 273 with annotation by A. Dickinson = (2004) IPRax 405 with annotation by T. Rauscher = (2004) International and Comparative Law Quarterly 1030 with annotation by T. Kruger = (2005) Recueil Dalloz 2712. See also P. Stone, *EU Private International Law*, *supra* note 15, 207.

<sup>32</sup> This trend has been criticized by many British commentators: see, e.g., G. Biehler, *Procedures in International Law*, Dublin, 2008, 74 ff.

<sup>33</sup> See, e.g., C. Consolo, "L'arbitrato con sede estera, la natura della relativa eccezione e l'essenziale compito che rimane affidato al regolamento transnazionale della giurisdizione italiana", (2009), Rivista trimestrale di diritto e procedura civile 603 ff.; E. Merlin, "Le *anti suit injunctions* e la loro incompatibilità con il sistema processuale comunitario", (2005) Int'l Lis 14 ff.; J. Kropholler, *Europäisches Zivilprozessrecht*, 5. Auflage, Frankfurt am Main, 2005, 88 ff.

seized determines itself, under the rules applicable to it, whether it has jurisdiction over the parties of the dispute before it<sup>35</sup>.

Accordingly, the barrier that might preclude the enforcement of an order of anti-suit injunction is not the right to a fair trial protected in Article 6 (1).

A different position was taken by the French *Court de cassation* in *Beverage international SA v Zone Brands International Inc.*<sup>36</sup>

In that case, the firm Zone Brands International Inc. sought a declaration of enforceability of an American anti-suit injunction. The French parties argued that such enforcement should be refused as contrary to French sovereignty and to their right of access to court as recognized by Article 6 (1).

The *Cour de cassation* confirmed the enforceability of the American judgment declaring that anti-suit injunctions are not contrary to French procedural public policy as long as they only aim at enforcing a pre-existing contractual obligation, and no Treaty or European regulation applies<sup>37</sup>. In other words: The enforcement of such orders is not in contradiction with the leading case *Pellegrini v. Italy*.

The problem of the effect of an anti-suit injunction outside the State of rendition is also debated in most common law countries, for instance in the United States, where it was defined as “the most troublesome of the open issues in the area of full faith and credit to judgments”<sup>38</sup>.

Most American courts have considered themselves not bound to stay or dismiss the action pending before them, even if the anti-suit order was rendered in a Sister State, because

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<sup>34</sup> “Within the enjoying court (operating against them in personam)”: G. Bermann, “The Use of Anti-Suit Injunctions in International Litigation” (1990), 28 Colum. J. Transnation. L. 589.

<sup>35</sup> B. Hess, *Europäisches Zivilprozessrecht*, *supra* note 11, 102; P. Schlosser, *EU-Zivilprozessrecht*, *supra*, note 19, 179-180.

<sup>36</sup> Cour de cassation, I Section, October 14, 2009 No. 1017, available at <http://www.legifrance.gouv.fr>. = (2010) Rivista di diritto processuale 1148.

<sup>37</sup> The solution adopted by the Cour de cassation was criticized by G. Cuniberti, “French Court agrees with *Anti-suit Injunctions*”, available at <http://conflictoflaws.net/2009/french-court-agrees-with-u-s-anti-suit-injunction> and E. Merlin, “‘Anti suit injunctions’ e ordine pubblico internazionale: un sorprendente arrêt della Corte di cassazione francese” (2010) Rivista di diritto processuale 1149 ff.

<sup>38</sup> R. B. Ginsburg, “Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments”, (1968-1969) Harvard Law Review 808. On the same problem see, *ex multis*, L. Eddleman Hein, “Protecting Their Own? Pro-American Bias and the Issuance of Anti-Suit Injunctions”, (2008) 69 Ohio State Law Journal 701; D. Tan, “Anti-Suit Injunctions and the Vexing Problem of Comity” (2004-2005) Virginia Journal of International Law 285 ff.; C. H. Helein, “Extraterritorial Recognition of Foreign Antisuit Injunctions”, (1960-1961) St. Louis University Law Journal 552 ff.

the duty to grant full faith and credit to sister State's judgments is limited to decisions on the merits and anti-suit injunctions are not orders on the merits<sup>39</sup>.

Even at common law<sup>40</sup>, the failure of anti-suit injunctions' enforcement does not seem to be a direct consequence of an infringement of the right to a fair trial committed in the State of rendition. The civil and common law approaches on this issue appear to converge.

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<sup>39</sup> See the authors at note 38 and: i) *Baker v. General Motors Corp.*, 522 US 222; 118 S.Ct. 657; 139 L Ed 2d 580 (1998), para. 236 n. 9; ii) *Abney v. Abney*, 176 Ind. App. 22, 26; 374 N.E.2d 264 (1978).

Another reason given to deny enforcement is that because "anti-suit injunctions act upon the parties rather than the court, the forum has the power to proceed notwithstanding the Sister-State injunction": *Kleinschmidt v. Kleinschmidt*, 343 Ill.App. 539, 546; 99 N.E.2d 623 (1951).

Most recently, the Court of Appeal of Michigan, judgment of January 4, 2011, No. 291476 *Calhoun Circuit Court, Charon Hare v. Starr Commonwealth Corporation and Frontier Insurance Company* held that a New York anti-suit injunction is not entitled to full faith and credit because "it appears well settled that the Full Faith and Credit Clause does not compel a forum state court to recognize and enforce a sister-state anti-suit injunction".

<sup>40</sup> *Rectius*, in the USA.