AG Opinion in Gambazzi

Advocate General Kokott has delivered her opinion today in *Gambazzi v. Daimler Chrysler* (Case C 394/07). For the time being, it is not available in English, but is in a few other languages.

I reported earlier on this judicial odyssey which has already been litigated in (at least) nine jurisdictions. The case was referred to the European Court of Justice by the Court of Appeal of Milan, which asked:

> *1. On the basis of the public-policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]?*
>
> *2. Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order issued by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?*

The fairly long opinion of AG Kokott can be summarized as follows.

First, AG Kokott addressed the issue of whether an English default judgment can be considered a judgment in the meaning of article 25 of the Brussels Convention and thus benefit from the European law of judgments. The first argument against such characterization was that it was held in *Denilauler* that judgments made ex parte are outside the scope of the Brussels Convention. AG Kokott writes that default judgments are not made ex parte, as they are the product of procedures which are typically not ex parte. The second argument against the inclusion of English default judgments within the scope of article 25 is that they are no actual decisions of the English court, but rather the automatic consequence of the failure of the defendant to appear before the court. And in *Solo Kleinmotoren*, the

ECJ held that decisions in the meaning of article 25 are those made of the own intiative of the court. This seemed to imply that automatic judgments would not qualify. AG Kokott, however, was not convinced by this interpretation of *Solo Kleinmotoren,* as she thinks that the content of an English default judgment is not merely the consequence of the action of a party, but an actual decision of the court, which must find that the requirements for making an English default judgment are met.

Then, AG Kokott moves to the public policy exception of article 27 of the Brussels Convention (she notes in passing that the new language of the Brussels Regulation is similar – not an obvious statement). However, she believes that it is difficult to reach a conclusion, for two reasons. First, she is of the opinion that the compatibility of proceedings to public policy should be envisaged globally, in the light of all circumstances, and that this is delicate in such a complex case. Certainly, the single act of debarring the defendants from defending cannot be taken in isolation and decide the case. Second, there is not enough evidence in the procedure to know what really happened. It should thus be for the Italian court to decide, in the light of all the evidence.

At the same time, AG Kokott underlines that while member states ought to have sanctions for parties refusing to comply with injunctions, full debarment is probably the most severe sanction one could imagine. As a consequence, she believes that the threshold for the compatibility of such sanction with the right to a fair trial ought to be very high. And she insists on the importance of a proportionality test.

Finally, despite the content of the reference of the Italian referring court, she briefly mentions a second potential infringment to public policy, that Gambazzi's lawyers put forward. Not only was he debarred from defending, but he was also prevented from accessing to his evidence and documents, because his English lawyers withheld them, arguing that he had not paid their fees. AG Kokott finds that the ECJ should only answer questions of the referring court, but that, should the ECJ decide to address the issue, it could rule along the same lines.

At the end of the day, this will probably not be such an unpleasant read for English lawyers. There are some peculiarities of English civil procedure which do not appear wholly unacceptable to a continental advocate general.