

## **Enforcement under the Brussels Convention: Procedural public policy and the influence of Article 6 ECHR**

**COURT OF APPEAL, 29 maggio 2002.** Unanimous Opinion by Lord Philips MR – Maronier (avv.ti Ralls, Pryce) v. Larmer (avv.ti Foy, Elfield)

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### **Recognition and enforcement – Brussels Convention – Ground for non recognition – Violation of Article 6 ECHR – Procedural public policy**

*Abstract: Although it must be held that it is contrary to the scheme of the recognition and enforcement provisions of the Brussels Convention for one Member State to review or “second guess” compliance with Article 6 ECHR by the courts of another Member State, we cannot accept that English Courts must apply an irrebuttable presumption that a judgment given in another Member State cannot have resulted from a violation of Article 6 in exceptional circumstances. In the circumstances of the present case, where the procedure of the Rotterdam Court permitted the plaintiff to reactivate an action that had been stayed for 12 years without requiring fresh service of an appropriate process to be effected on the defendant, it would be contrary to the public policy of this country to enforce the Dutch judgment, since the defendant has manifestly not received the fair trial that Article 6 ECHR required\*.*

### **1. Introduction**

This case concerns the enforcement of a Dutch judgment in the United Kingdom. It focuses on the application of the public policy exception as a ground of refusal under Article 27 Brussels Convention, in case fundamental principles of procedure are violated. Reference is, amongst others, made to the *Krombach v. Bamberski* case of the European Court of Justice (ECJ).<sup>1</sup> From this ruling it is clear that Article 27(1) can only be invoked in exceptional cases, for example when a defendant was prevented from putting his case to the court. In the present case the English Court of Appeal refuses the enforcement order because the defendant was denied a fair trial in the Netherlands. This is mainly based on the fact that there was a stay of proceedings of twelve years, after which the defendant, who meanwhile moved from

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<sup>1</sup> *Krombach v. Bamberski*, Case C-7/98 [2000] ECR I-1395.

the Netherlands to England, was not informed that proceedings had been re-activated and that a judgment was rendered.

On 1 March 2002 the Brussels Convention was replaced by the “Brussels I” Regulation, except when Denmark is involved.<sup>2</sup> This does, however, not affect the relevancy of this English judgment, since the applicable rules did not undergo any substantial changes. Article 34(1) “Brussels I” Regulation, which is the ‘successor’ of Article 27(1), explicitly states that a judgment shall not be recognised if it is *manifestly* contrary to public policy. The Brussels Convention did not contain the phrase ‘manifestly’, but it has always been clear from the explanatory Jenard-report, the case law of the Court of Justice and literature, that the public policy exception has to be applied restrictively.

Below the facts and proceedings will be set out in section 2. Section 3 focuses on the decision of the English Courts, and especially that of the Court of Appeal. In section 4 an attempt will be made to reconstruct, on the facts available, what happened in the Dutch procedure. In section 5 the public policy exception relating to procedural issues under the scope of Article 27(1) (Article 34(1) Regulation) will be further examined. Section 6 contains some concluding remarks on the English judgment and the application of the procedural public policy exception.

## 2. Facts and Procedure

Before going into the facts of the case, the Court of Appeal emphasises that the facts are quite extraordinary and that the evidence leaves unclear a number of matters that are or might be important. Since the judgment was not published in the Netherlands, in first instance this case probably did not raise any serious questions of law.

Mr. Larmer, the respondent in this appeal case, practiced as a dentist in Rotterdam between 1978 and 1991. One of his patients was the appellant in this case, Mr Maronier. In 1984 Mr Maronier commenced proceedings in the District Court of Rotterdam, claiming damages in respect of the treatment he had received from Mr Larmer of approximately 26,800 EUR. The proceedings were duly served on Mr Larmer in the Netherlands, and he was represented at law. There was an exchange of pleadings and statements, ending with a statement filed by Mr Maronier in 1986. After that the proceedings were stayed for a period of twelve years in total. In 1991, when the proceedings had already been stayed for five years, Mr Larmer (defendant) moved to England, leaving his address in England with the City Hall in Rotterdam and the Dutch Association of Dentists.

In July 1998 Mr Maronier instructed his lawyers to pursue his claim. His lawyers wrote a letter – which was not put in evidence in the English procedure – to the lawyer that filed a defence on behalf of Mr Larmer back in 1984 (which was by the way not the lawyer that is mentioned as his attorney in the Dutch judgment). This lawyer replied that the matter was not a current matter and that the case did not show in his records. This is probably caused by the fact that his partnership with the other lawyer (the one that is mentioned as Mr Larmer’s at-

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<sup>2</sup> See Article 68 and Article 1(2) Brussels Regulation. Hereafter when mentioning a provision of the Brussels Convention, the corresponding articles of the Brussels Regulation will be added between brackets when relevant.

torney in the Dutch proceedings) was meanwhile dissolved. Furthermore, he wrote that he did not have contact with Mr Larmer for a number of years, adding that according to his information Mr Larmer was presently living in England. The lawyer of Mr Maronier later on states that when the proceedings were recommenced, the official attorney of Mr Larmer declared himself to be 'incapable'. This means that a solicitor withdraws from a case due to problems encountered with his client. *These facts are, however, not cleared up and evidenced.*

The District Court of Rotterdam finally delivers its judgment on December 31, 1999, and Mr Maronier is awarded a total amount of the value of about 33,000 EUR. Noteworthy is that the judgment explicitly states that Mr Larmer is 'presently not represented anymore in law', and that it records Mr Larmer as residing in Rotterdam. Mr Larmer only finds out about the reactivation of the proceedings and the fact that a judgment is rendered when enforcement is sought in England. By that time the period of appeal, which is three months, has already expired.

The Court of Appeal mentions 11 matters that could not be deduced from the evidence, but that might nevertheless be relevant for the outcome. On the matters which involve Dutch procedural law (what grounds were required for reactivating the action after such a long delay; on what basis the Court permitted Mr Maronier to obtain a judgment in the absence of Mr Larmer; what the nature of the time limit placed on the exercise of the right of appeal is and whether the Court had any discretion to extend the period), I will give some comments from a Dutch perspective (see section 4).

### **3. The Judgments of the English Judge in First Instance and the Court of Appeal**

The English Judge in first instance expresses that the right to an effective opportunity to defend oneself is an important public policy in England as throughout the EU, and that in this case Mr Larmer was denied that right. The lawyer of Mr Maronier suggested that Mr Larmer should have kept the District Court of Rotterdam notified of his address or kept in touch with his lawyers. The English judge marks this as fanciful since no steps had been taken in the procedure for five years before Mr Larmer left the Netherlands, and he did notify the City Hall in Rotterdam and the Dutch Association of Dentists. The Judge concludes that recognition of the Dutch judgment is contrary to public policy because the action was revived without notifying the defendant.

On behalf of Mr Maronier, two submissions are made to the Court of Appeal. In the first place that the Judge in first instance had erred in carrying out a review of whether Mr Larmer had received a fair trial in the Netherlands. In the second place that though Mr Larmer might not personally be at fault, his lawyers were at fault for withdrawing from the case without informing Mr Larmer that the action was being revived. On behalf of Mr Larmer it is contended that Article 6 of the European Convention on Human Rights (ECHR) is violated because Mr Larmer was not informed on the re-activation of proceedings. Furthermore, a delay in pursuing the claim for twelve years should be regarded as an independent violation of Article 6 ECHR. Mr Maronier's lawyer responds that the Netherlands, as party to the ECHR, is committed to ensure that Article 6 is observed, and that it is contrary to the scheme of the

Brussels Convention for one member state to review or ‘second guess’ compliance with Article 6 by the courts of another member state.

The Court of Appeal sympathises with this last argument, referring to the *Solo Kleinmotoren v. Boch* ruling of the ECJ.<sup>3</sup> In this case the ECJ emphasises that one of the fundamental objectives of the Brussels Convention is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure. The Court of Appeal states that this objective would be frustrated if courts of an enforcing state carried out a detailed review of whether procedures in the state of origin comply with Article 6 ECHR. Procedures differ from state to state and there should be a strong presumption that procedures of other countries that ratified the ECHR are in compliance with Article 6. However, this is not an irrefutable presumption, as the Court of Appeal adds.

The Court of Appeal furthermore refers to *Renault v. Maxicar* in which the ECJ states that «it is for the national courts to ensure with equal diligence the protection of rights established in national law and rights conferred by Community law».<sup>4</sup> The Court of Appeal, however, reasons there is a distinction between a decision that resolves an issue of substantive law and a decision reached by a procedure that violates the fundamental human right to a fair trial. To this extend the Court of Appeal refers to Article 27(2) and the *Hendrikman v. Magenta Druck* case that recognise the importance of the defendant having a fair chance to defend himself.<sup>5</sup> The Court of Appeal continues to quote the *Krombach v. Bamberski* case extensively.<sup>6</sup> In this ruling the ECJ held that recourse to the public policy clause is possible «in exceptional cases, where the guarantees laid down in the legislation of the state of origin and in the Brussels Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself, as recognised by the ECHR». The remainder of the judgment focuses on the question whether such an exceptional case is at hand.

On the submission, made in appeal on behalf of Mr Maronier, that the lawyers of Mr Larmer were at fault because they did not inform him that the Rotterdam proceedings had been reactivated, the Court of Appeal decides that the lawyers were not under a duty to retain their client’s address over the twelve years that elapsed since the action was stayed, nor to seek out his address in order to inform him that proceedings had been reactivated.

The Court of Appeal expresses its surprise on the fact that the Rotterdam Court permitted Mr Maronier to reactivate an action that had been stayed for twelve years without requiring fresh service, that full interest was awarded (which vastly exceeded the capital sum awarded) for the whole period of the delay whereas this delay was entirely of Mr Maronier’s own making, and that the Court apparently does not have discretion to reopen the matter after the three months limit for appeal had exceeded whereas Mr Larmer was unaware that the action had been reactivated. The Court of Appeal – courteously – adds that there are many matters which are unclear on the evidence and that nothing they have said should be taken as criticism of the Rotterdam District Court or the procedure it was applying. The Court of Appeal rules: «We feel sure that a stay lasting 12 years of a simple claim for medical negligence

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<sup>3</sup> *Solo Kleinmotoren GmbH v. Boch*, Case C-414/92, [1994] ECR I-2237.

<sup>4</sup> *Régie Nationale des Usines Renault SA v. Maxicar SPA*, Case C-38/98 [2000] ECR I-2973.

<sup>5</sup> *Hendrikman and Feyen v. Magenta Druck & Verlag*, Case C-78/95 [1996] ECR I-4943.

<sup>6</sup> *Krombach v. Bamberski* (note 1).

must be quite extraordinary. On the basis of the facts before us, we are driven to the conclusion that Mr Larmer was denied a fair trial in Rotterdam because he was unaware that proceedings had been reactivated until even the time for an appeal had passed». The Court of Appeal concludes that the Judge in first instance was correct to decide that it would be contrary to the public policy of England to enforce the Dutch judgment.

#### 4. What happened in the Dutch proceedings?

The facts of this case, that are indeed quite extraordinary and surprising, makes one wonder what happened in the Dutch proceedings. Below an attempt will be made to answer some of the questions raised by the Court of Appeal concerning the proceedings in the Netherlands.<sup>7</sup> But because the facts are not clear on important points, this can only be done on a more abstract level.<sup>8</sup>

In advance it is noteworthy that on January 1, 2002 the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*; hereafter abbreviated as: CCP) was revised. This revision was mainly aimed at reducing the duration of proceedings and more in general to make proceedings more efficient. The relation between the parties and the court is altered; the judge has to participate more actively and parties have the duty to co-operate.<sup>9</sup> Maybe, hopefully, under the new procedural rules a case like this would not have slipped through.

##### 4.1 *The delay and reactivation of the proceedings*

The English Court of Appeal wonders what the requirements are for reactivating the action after such a long delay. The simple answer is: there are no formal requirements for reactivating an action. Technically there was one continuous procedure, which was delayed for a long period of time. The question therefore is not why or under which conditions the action was reactivated, but which grounds there were for staying the procedure for such a long time. Under the old Code of Civil Procedure there were no strict and uniform rules on this. Apparently the local regulations (*'plaatselijk rolreglement'*) of the District Court Rotterdam at that time allowed the judge to grant Mr Maronier several or one long stays. According to Article 143 old CCP the judge sets the deadlines for filing parties' statements. Paragraph 2 states that if parties agree on the deadlines and the postponements the judge will allow them, unless it would cause an unreasonable delay. In practice, however, if a party requested for a postponement for whatever reason, the court would grant it, unless the other party filed a protest. Furthermore it is important that Mr Maronier was declared bankrupt in 1986, which is a ground to postpone proceedings.<sup>10</sup> This bankruptcy, however, only lasted less than a year.

In 2000 a national court regulation (*'landelijk rolreglement'*) was established, which contains uniform rules concerning the terms for filing statements and requesting delays. This

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<sup>7</sup> See above section 2.

<sup>8</sup> Many thanks to mr. Marc Harreman, Assistant Professor Department of Civil Procedural Law of Erasmus University Rotterdam and former lawyer, for his information and assistance in trying to figure out what might have happened in the Dutch procedure. Unfortunately I did not succeed in obtaining the judgment from the District Court of Rotterdam, which maybe would have shed light on some of the events.

<sup>9</sup> See for a concise overview of the most important changes H.W. Wiersma, *Inhaalmanoeuvres van het burgerlijk procesrecht*, NJB 2002, 6-20.

<sup>10</sup> Article 27 of the Dutch Bankruptcy Law (*Faillissementswet*).

regulation was introduced with the aim to speed up proceedings. In January 2002 this court regulation was replaced by a new national regulation based on the revised CCP. Article 133 revised CCP contains a similar rule as article 143 old CCP. The idea behind the revision of CCP as a whole is, however, that the judge has to participate actively and that parties have to cooperate, which means the interpretation in practice should be stricter to avoid such long delays.

What the defendant could have done is request for what is in Dutch procedural law called '*verval van instantie*'. This is the right of the defendant to have the case removed from the court on the basis of undue delay.<sup>11</sup> Under the old Code this was possible in case a procedure was stayed for more than three years. In practice this was seldom done. Under the new Code such a request can be made after one year, and the rules are stricter in order to ensure that undue stays will be avoided as much as possible.

#### 4.2 *The absence of the defendant*

The English Court of Appeal also wondered on what basis the Rotterdam District Court permitted Mr Maronier to obtain a judgment in the absence of Mr Larmer. Under Dutch law it is possible to proceed without the defendant being present (this is called '*verstek*') when the terms and formalities concerning the service of the document instituting the proceedings have been fulfilled.<sup>12</sup> I will not go into these requirements, since this was not a case of '*verstek*'.<sup>13</sup> Mr Larmer was initially represented by a lawyer, and between 1984 and 1986 an exchange of pleadings and statements took place. So, technically the defendant took part in the proceedings. This goes for the whole duration of the proceedings, so also after the twelve-years delay. In other words: the Rotterdam District Court did not, and did not have to permit Mr Maronier to obtain a judgment in the absence of Mr Larmer, since it was not regarded as a default judgment.

#### 4.3 *The time limit on the right of appeal*

Another question of the Court of Appeal on Dutch procedural law was: what is the nature of the time limit placed on the exercise of the right of appeal, and did the Court had any discretion to extend that period? From the fact that the Court of Appeal mentions a time limit of three months, it is clear that this is in an ordinary appeal. If it had been a default judgment, then the time limit to set the judgment aside ('*verzet*') would have been fourteen days from the day the judgment was served on the defendant, or from the day he was otherwise informed that a judgment against him was rendered.<sup>14</sup> For an appeal against an *inter partes* judgment the fixed time limit is three months from the day the decision was delivered. The court does not have discretion to extend this period.<sup>15</sup>

## 5. The Public Policy Exception and Fair Trial

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<sup>11</sup> Articles 279-284 old CCP (Articles 251-253 revised CCP), which roots back in Article 399 of the *Code Napoleon*; see now Article 388 of the *nouveau c.p.c.*, under which the *péremption d'instance* operates *de droit* (although the judge can not take it into account *ex officio*) and no more upon request of the defendant.

<sup>12</sup> Article 76 old CCP (Article 139 revised CCP).

<sup>13</sup> Also in the light of the fact that there was a time limit of three months on the right of appeal, and if it was to be regarded as a case of '*verzet*' (default) other time limits would have been applicable. See also section 4.3.

<sup>14</sup> See Article 81 old CCP (Article 143 revised CCP).

<sup>15</sup> See Article 339 CCP.

### 5.1 Article 27(1) Brussels Convention (Article 34(1) “Brussels I” Regulation)

The grounds of refusal, laid down in Article 27 Brussels Convention (Article 34 Brussels Regulation), have to be interpreted strictly.<sup>16</sup> As the ECJ stated, these grounds constitute an obstacle to the fundamental objectives of the Convention, which is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure. As for Article 27(1) the Court held in the *Krombach* case that recourse to the public policy exception is only to be had in exceptional cases.<sup>17</sup> Article 34(1) Brussels Regulation explicitly states that it may only be invoked in case the decision is ‘manifestly’ against public policy. Under the Brussels Convention and Regulation, and more in general in private international law, public policy has a limited role. It mainly functions as a ‘safety net’ that enables a state not to recognise and enforce a foreign decision (or to apply a foreign law) that goes against fundamental principles upheld by its legal system.<sup>18</sup>

In deciding whether a foreign decision is against public policy, the rules of the state seized are decisive.<sup>19</sup> So, in this case English public policy was relevant. Although Dutch procedural rules at that time apparently made it possible to stay the proceedings for twelve years and re-activate it without summoning the defendant again and without him being represented by a lawyer, the English judge was allowed to review whether recognition of this decision was in conformity with English public policy.<sup>20</sup> Besides violation of the public policy envisaged by national rules of the state seized, also violation of fundamental rights or human rights – such as the right to a fair trial encompassed in Article 6 ECHR – or Community law is covered by the public policy exception.<sup>21</sup> The most relevant ruling in respect to the present case is the *Krombach v. Bamberski* case, since this concerned violation of fundamental procedural rights.<sup>22</sup>

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<sup>16</sup> See *Solo Kleinmotoren v. Boch* (note 3); *Coursier v. Fortis Bank*, Case C-267/97 [1999] ECR I-2543 and *Krombach v. Bamberski* (note 1).

<sup>17</sup> See Case 145/86, *Hoffmann v. Krieg* [1988] ECR 645, Case C-78/95, *Hendrikman and Feyen v. Magenta Druck & Verlag* (note 5), *Krombach v. Bamberski* (note 1) and *Renault v. Maxicar* (note 4). See also the Explanatory Jenard report, comments to Article 27(1) Brussels Convention. Also in literature this view is promoted, see *inter alia*, Dicey M., 551; A. Briggs, *The Conflict of Laws*, Oxford, 2000, 123; J. Kropholler<sup>7</sup>, 392; Gaudemet-T., 244-245.

<sup>18</sup> See the literature mentioned in the previous footnote and A.A.H. van Hoek, annotation to Case C-7/98, D. *Krombach v. A. Bamberski*, *CMLR* 2001, 1018.

<sup>19</sup> See on *inter alia*, Kropholler<sup>7</sup>, 391-392.

<sup>20</sup> See also the Explanatory Jenard report, comments to Article 27(1) Brussels Convention, which states that the court where recognition is sought is not allowed to review whether the decision itself is in conformity with the public order of its country, but whether *recognition* of the decision is in conformity with public order.

<sup>21</sup> See the ECJ in *Krombach v. Bamberski* (note 1); Kropholler<sup>7</sup>, 392-293; Van Hoek (note 18), who argues that the ECJ rules on the maximum content of “public policy” and the ECHR on the minimum content by obliging a State party to refuse recognition in case this violates fundamental rights.

<sup>22</sup> *Krombach v. Bamberski* (note 1). The ECJ concluded that Art. 27(1) does cover the right to be represented in one’s absence. The ECJ ruled that: «The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. [...] In this regard the ECHR has particular significance. [...] The Court has thus expressly recognised the general principle of Community law that everyone is entitled to a fair legal process, which is inspired by those fundamental rights». The BGH in its follow-up judgment in this case refused recognition and enforcement on the basis of violation of this right, guaranteed by German law, see BGH 29 June 2000, *IPRax* 2001, 50.

For the application of Article 27(1) it is furthermore important whether the defendant had the possibility to oppose the judgment in the country of origin by lodging an appeal or another procedural means to set the judgment aside.<sup>23</sup> In this case the defendant factually did not have this opportunity since the fixed three months limit for appeal had already expired before Mr Larmer was even aware, or could have been aware, of the fact that the action had been reactivated.

In literature the view is promoted that if a foreign judgment violated human rights, the enforcement of this judgment can constitute an independent violation.<sup>24</sup> In this case the English Court of Appeal concludes that because Article 6 ECHR is violated, it would be contrary to the public policy of *England* to enforce the Dutch judgment, but it can be concluded from its reasoning that the Court indeed promotes the view that granting enforcement would imply an independent violation of Art. 6 ECHR, since England is a party to that Convention.

#### 5.2 *The public policy exception and the fair trial requirements of Article 6 ECHR*

The case law and literature on Article 6 ECHR are overwhelming. The European Court of Human Rights (ECtHR), just like the Court of Justice as regards Article 27(1), uses an inductive method when applying Article 6. It cannot in general be determined what concrete requirements it implies; on a case-by-case basis it is decided whether the abstract requirements are met.<sup>25</sup> In this paragraph I will only shortly focus on some procedural matters that are most important in this case. This is in the first place the long duration of the proceedings (from 1984-1999). In the second place the right to defend one self, which was according to the English Court of Appeal violated since Mr Larmer was not informed on the occasion of the reactivation of proceedings. And in the third place the fact that in a case like this the defendant factually did not have the opportunity to oppose the decision in the Netherlands.

As concerns the ‘reasonable time’ period it is clear from the case law of the ECtHR that this is not a fixed, absolute period. It depends on several criteria whether the (long) duration of a civil procedure is reasonable or not.<sup>26</sup> In this case, I think it is indeed clear that the reasonable period requirement is not met. As the English Court of Appeal observed, this is a simple negligence case and the delays were the plaintiff’s making, and not the defendant’s fault.

The right to be heard implies that each party in a civil procedure must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial

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<sup>23</sup> See e.g. the Dutch decision: Hoge Raad 5 April 2002, *RvdW* 2002, no 65, see also X.E. Kramer, *Dutch Private International Law – Overview 1998-August 2002*, *IPRax* 2002, 542. See for a German decision on this: BGH, 21 March 1990, *IPRax* 1992, 33. See also Kropholler<sup>7</sup>, 395; F. Matscher, *Der verfahrensrechtliche ordre public im Spannungsfeld von EMRK und Gemeinschaftsrecht*, *IPRax* 2001, 436.

<sup>24</sup> P. Mayer, *La Convention européenne des droits de l’homme et l’applications des normes étrangères*, *RCDIP* 1991, 655; Van Hoek (note 18), 1019; A.P.M.J. Vonken, *De reflexwerking van de mensenrechten op het IPR*, in: P.B. Cliteur and A.P.M.J. Vonken (eds.), *Doorwerking van mensenrechten*, Groningen, 1993, 171-172.

<sup>25</sup> Also see Matscher (note 22), 432.

<sup>26</sup> F.G. Jacobs and R.C.A. White, *The European Convention on Human Rights*, Oxford, 1996, 143-145; D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London/Dublin/Edinburgh, 1995, 222-230; J. Frowein and W. Peukert, *Europäische MenschenrechtsKonvention, EMRK-Kommentar*, Kehl/Strassburg/Arlington, 1996, 267-279; P. Smits, *Artikel 6 EVRM en de civiele procedure*, Zwolle, 1996, 204-211.

disadvantage in relation to his opponent.<sup>27</sup> Besides a proper service of the document instituting the proceedings – which is under the Brussels Convention covered by Article 27 (2) (Article 34(2) Regulation) –, the right to adversarial proceedings can also be important in a later stage of the proceedings, as is covered by Article 27(1) Brussels Convention (Article 34(1) Regulation).<sup>28</sup> Although Mr Larmer was properly served with the document instituting the proceedings, it is in my opinion clear that he was put at a disadvantage because he was not informed on the re-activation of the proceedings. The right to be heard does not cover the right to, or obligation of, legal representation in civil cases. In literature this is sometimes more generally headed under the right of access to a court, but at the same time it is admitted that this is not an absolute right.<sup>29</sup> In civil cases legal aid is required only in situations in which a person cannot plead his case effectively himself or where the law makes legal representation compulsory, and even under these circumstances this is not an absolute right. In my opinion in the present case the right of access to a court is not violated because Mr Larmer's lawyer withdrew from the case. It could, however, in my view contribute to the conclusion that on the whole the trial was not fair, since the lawyer's withdrawal was the main cause of Mr Larmer not being informed, and the Dutch court should have been aware of this consequence.

The right of access to a court does not oblige states to create the possibility to lodge an appeal.<sup>30</sup> This also means that states are free to limit the possibilities for appeal, for example by imposing a time limit. However, if in a certain case the right to oppose a decision by means of an appeal exists, this procedure and the access to this procedure should comply with Article 6 ECHR. So, it can be argued that since according to Dutch law there was a right of appeal, this right was not effected in conformity with Article 6, because Mr Larmer was not aware, and could not possibly have been aware, of the fact that he had the right to appeal, until the time limit already expired.<sup>31</sup>

## 6. Further comments on the decision by the English Court of Appeal

In the initial proposal of the European Commission for the revision of the Brussels Convention the public policy exception was abandoned, since because of its limited interpretation this exception would no longer have a meaning within the European jurisdiction. In subsequent drafts, which finally led to the current Brussels Regulation, this exception was nevertheless adopted, with the addition that the judgment should 'manifestly' be contrary to public policy. I think that indeed the public policy exception only has little relevancy as far as substantive law is concerned. But for procedural aspects this provision will remain to be important, and in the light of the growing importance of Article 6 and the state of civil justice in many European countries, its relevancy could even increase.

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<sup>27</sup> *Borgers v. Belgium*, ECtHR [1993], Series A, no 214; Smits (note 26), 89-107.

<sup>28</sup> See *Debaecker v. Bouman*, Case 49/84 [1985] ECR I-1779, to which the English Court of Appeal also refers. See also a German judgment: BGH 21 March 1990, *IPRax* 1992, 33; Kropholler<sup>7</sup>, 396.

<sup>29</sup> Frowein&Peukert (note 26), 197; Harris, O'Boyle&Warbrick (note 26), 197-198, 216.

<sup>30</sup> Frowein&Peukert (note 26), 209-212; Smits (note 26), 42-45.

<sup>31</sup> See also *De Geouffre de la Pradelle v. France*, EctHR [1992], Series A. no 253.

What makes this case interesting is that it is one of the first cases in which the *Krombach* case of the ECJ is applied and that the area of the so-called procedural public policy is not yet fully crystallized. Article 6 ECHR, the ‘legal conscience’ of European criminal and civil proceedings, now clearly entered the arena of private international law, and more in particular international procedural law. It should be regarded as an independent source for the interpretation of the public policy exception under the Brussels Convention and Regulation. In *Krombach* the ECJ stated that only in exceptional circumstances this procedural public policy may be invoked, and in my opinion in the present case such exceptional circumstances were certainly at hand.

Although not all the facts are clear and evidenced, they leave in my opinion no doubt that the Dutch procedure was not in conformity with Article 6 ECHR and – more importantly – that the English Courts were right in refusing recognition and enforcement on the basis of the public policy exception of Article 27(1) Brussels Convention (Article 34(1) Regulation). I think the arguments that are presented by the English Court of Appeal are quite clear, its reasoning is convincing and the outcome in conformity with the case law of the ECJ and in particular the *Krombach* ruling. Maybe the Court of Appeal could have dug a little deeper into what happened in the Dutch procedure to be able to fully assess to which extent fundamental fair trial principles were violated, although I do not think that in this particular case a better understanding would have led to a different outcome. In my view especially two facts legitimise the refusal of the enforcement order on the basis of the procedural public policy exception. These are the excessive long duration of the proceedings, which are due to the claimant, and the factual impossibility for the defendant to lodge an appeal in the Netherlands.

What I found quite remarkable, or even charming, about the judgment of the English Court of Appeal, is that after the Court pronounces its deep surprise about what happened in the Dutch procedure, it takes efforts to emphasize that this should not be taken as criticism of the Rotterdam District Court or the Dutch procedure. Also from the questions and remarks of the English Court on Dutch procedure it is clear that civil procedure in the Netherlands and England are still quite different, and that a lot of work needs to be done to really come to common principles of civil procedure.<sup>32</sup>

It remains to be seen how the procedural public policy exception will develop. There are still several questions to be answered and difficulties to be solved concerning its relation to Article 6 ECHR. On the one hand it is desirable that the public policy exception is interpreted as limited as possible, since this is an obstacle to the free movement of judgments. So, as the ECJ ruled and as follows from the wording of Article 34(1) Brussels Regulation, the public policy exception has an exceptional character, for example when it is necessary to protect the defendant from a ‘manifest breach’ of his right to defend himself, as recognised by the ECHR. Article 6 ECHR is recognised as source of the general principles of Community law, and Member States are supposed to comply with those. But is it then in compliance with

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<sup>32</sup> As E. Jayme and C. Kohler (*Europäisches Kollisionsrecht 2002: Zur Wiederkehr des Internationalen Privatrechts*, IPRax 2002, 468) under reference to this *Maronier v Larmer* case state: «Hier zeigen sich die Grenzen des “einheitlichen europäischen Justizraums”. Brüche werden sichtbar, die nicht auf Anlaufschwierigkeiten, sondern auf Strukturunterschiede zurückgehen, und die schon deshalb nicht durch bloße Rhetorik überwunden werden können, weil sich die Gewährung von Rechtsschutz im gesamten Binnenmarkt an Art. 6 EMRK messen lassen muss».

Community law to only allow the public policy exception in case the rights recognised by the ECHR were *manifestly* violated? In literature the question was raised whether the state of recognition does not become an ‘accessory’ to the violation of Article 6 if it allows enforcement when the state of origin did not ‘manifestly’ violated them.<sup>33</sup> In national procedural law Article 6 plays an important role and increases the requirements of fair trial, whereas in international procedural law its function is marginalized. Of course it is one of the fundamentals of private international law that foreign laws and proceedings that differ from one’s own rules are to a large extent respected. Furthermore, the integration of the European Union requires that the barriers of mutual enforcement of judgment are lowered – under the Regulation the grounds of refusal are no longer reviewed in first instance – and finally completely removed.<sup>34</sup> But when fundamental principles of fair trial, as recognised by the Article 6 ECHR, are violated, we reach an impasse. This brings me back to the present case. As I concluded, one of the crucial points is that factually there was no possibility of appeal in the Netherlands. If only Mr. Larmer was informed that a judgment was rendered, the Dutch Court of Appeal would maybe have reversed whole or part of the judgment of the District Court on application by Mr Larmer and the case would not have reached the international level.

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<sup>33</sup> Van Hoek (note 18), 1021-1023 (1022). See also specifically on the relationship between Brussels Convention and ECHR: J. Gundel, *Der einheitliche Grundrechtsraum Europa und seine Grenzen: Zur EMRK-konformen Interpretation des Ordre-public-Vorbehalts des EuGVÜ durch den EuGH*, *Europäisches Wirtschafts und Steuerrecht* 2000, 442-448.

<sup>34</sup> See Article 41 Brussels Regulation. See furthermore the Proposal for a Council Regulation creating a European Enforcement order for uncontested claims, COM (2002) 159 final 2002/0090 (CNS), OJEC C 203 E, 27 August 2002 (see *Int’l Lis* 2002, *Cronache*, 58).