An Italian View on the Living Dead Convention

I am grateful to Pietro Franzina, a researcher in International law at the University of Ferrara, Italy, for sharing his thoughts on the recent case of the Cassazione on the Brussels Convention. Pietro dealt with this topic in 'Interpretazione e destino del richiamo compiuto dalla legge di riforma del diritto internazionale privato ai criteri di giurisdizione della Convenzione di Bruxelles', Rivista di diritto internazionale, *2010, 817* et seq.

I agree with Gilles Cuniberti: the conclusion reached by the *Corte di Cassazione* in its order of 21 October 2009 regarding Article 3(2) of the Italian Statute on Private International Law (*see* his post here) is an unfortunate one.

Before I attempt to explain why, in my view, the Court erred in saying that the reference made by that provision to the 1968 Brussels Convention should still be interpreted as a reference to the Convention, and not to the Brussels I regulation, let me put forward a few preliminary remarks.

(a) Article 3(2) of the Italian Statute on Private International Law of 31 May 1995 (hereinafter, the Statute) determines whether Italian courts have jurisdiction in civil and commercial matters in respect of proceedings *falling outside the scope of application* of the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, *i.e.* proceedings instituted against defendants domiciled outside the territory of a contracting State (or a contracting State of the Lugano Conventions). In respect of such proceedings the Italian legislator of 1995 was virtually free to lay out any rule on jurisdiction, and still is.

(b) The drafters of the Statute decided to make use of this freedom in an almost unprecedented way. They incorporated the heads of jurisdiction set out in section 2, 3 and 4 of chapter II of the Brussels Convention within the Statute. To do so, they made an express reference to such heads of jurisdiction, as provided for by the 1968 Convention and by its subsequent modifications in force for Italy ("*e successive modificazioni in vigore per l'Italia*"). This way, the Italian legislator introduced *national* rules providing heads of jurisdiction corresponding to those employed in Articles 5-15 of the Convention.

(c) After the entry into force of the Brussels I regulation, the doubt arose as to whether the reference made in Article 3(2) of the Statute should still be construed as aiming at the Convention, and not at the regulation. While the legislator took no action to amend (or confirm) the wording of Article 3(2), opposing views were expressed by scholars as to how the provision should be interpreted within the new legal landscape.

(d) The interest of the question was not only theoretical. It is well known that while the regulation retained the structure of the Convention and left almost unchanged many of its provisions, some rules have been significantly modified. One of these is Article 5(1), on jurisdiction in contractual matters. Suppose that an Italian company seeks to recover the price of the goods it sold to a non-European buyer. If the relevant heads of jurisdiction were to be found – via the Statute – in Article 5(1) of the Brussels Convention, the chances of bringing the case before an Italian court would presumably be rather high: the relevant obligation for jurisdictional purpose would be the obligation to pay the price (*De Bloos*), and its place of performance should be determined (under *Tessili* and *Custom Made*) pursuant to the substantial rules governing the contract, be they national rules (such as Article 1498(3) of the Italian Civil Code: at

the seller's domicile) or uniform rules (such as Article 57(1)(a) of the CISG: at the seller's place of business). On the contrary, should Article 3(2) of the Statute be construed as implying a reference to Article 5(1)(b), first indent, of the Brussels I regulation, the obligation to be taken into account would be the obligation to deliver the goods (*Color Drack*), and – failing an agreement of the parties – its place of performance should be the place where the purchaser obtained, or should have obtained, actual power of disposal over the goods, at the final destination of the sales transaction (*Car Trim*). The Italian seller would thus presumably be unable to sue the buyer in Italy.

In its order of 21 October 2009, the Italian Court of Cassation held that the Brussels Convention, although superseded by the regulation as between Member States, except as regards the territories of such States which fall within the scope of that Convention but lie outside the reach of EU law, must be considered as still in force and applicable. According to the Court, the fact that the Convention remains in force, no matter how narrow its residual scope of application, implies that the reference made in Article 3(2) is still capable of working as it was originally drafted, *i.e.* as a reference to the Convention, leaving no room for a different reading of the provision.

One would be tempted to say that the rationale behind the decision is, at least partly, a 'political' one. The rule regarding jurisdiction in contractual matters is frequently relied on, in Italy, by small and medium enterprises exporting the goods they manufacture. The latest developments in the ECJ's case law regarding the operation of this rule within the Brussels I regulation (*Car Trim*) make it more and more difficult for these businesses to sue their contractual counterparts before an Italian court (it is worth noting that the *Corte di Cassazione*, up until one year ago, interpreted the expression 'place of delivery' under Article 5(1) of the

Brussels I regulation as meaning – according to Article 31(a) of the CISG, and contrary to what is now the view of the ECJ – the place in which the goods are handed over to the first carrier for transmission to the buyer, *i.e.* a place generally 'close' to the seller's place of business). This conclusion may be inevitable for cases regulated by the Brussels I Regulation, but not for cases which are subject to a national provision, such as Article 3(2) of the Statute, provided the 'old' rule of the Convention and its pro-seller bias (as compared with the Regulation) may still be allowed to play a role.

I will leave 'political' considerations aside and try to examine the solution reached by the *Cassazione* from a purely legal standpoint. In this perspective, the Court's order calls for at least two critical remarks.

(1) The Brussels Convention may still be applicable in respect of proceedings against defendants domiciled in Wallis and Futuna, Saint-Pierre and Miquelon and a few other areas around the world, but this does not imply that the Brussels I regulation is to be given no weight in the interpretation of Article 3(2) of the Statute. On the contrary, the correct view – in my opinion – is that the regulation did bring about a "modification" of the Convention for the purpose of Article 3(2) of the Statute. The fact that the two instruments bear a different legal nature is not necessarily at odds with this assumption. According to the law of treaties (as codified in the Vienna Convention of 23 May 1969), a treaty may in general be amended by an agreement between the parties (Articles 39 *et seq.*): the Brussels regulation (and the EU-Denmark Agreement of 19 October 2005, on the application of the regulation between the parties) may be seen as the 'vehicle' by which the contracting States agreed to alter the scope of application of the Convention, limiting it to the cases which were not concurrently regulated by the regulation (and/or the EU-Denmark Agreement). One would hardly imagine, otherwise, how

the EU Member States (those who are parties, at the same time, to the Brussels Convention) might ignore in their mutual relationship, without violating it, a convention to which they are still bound.

(2) If the preceding assumption is correct, one should conclude that Article 3(2) of the Statute, according to its terms, implies – after the entry into force of the Brussels I regulation – a 'double' reference: a reference to the Brussels Convention (as long as it is an international treaty in force) *and* a reference to the regulation. Such double reference – a situation which the Italian legislator could not reasonable expect (until then, the modifications of the Brussels Convention were effected through conventions superseding the previously applicable texts *in their entirety*) – is clearly unworkable in practice. Under the Italian rules on statutory interpretation, issues like this, concerning a national rule ambiguously worded, should be solved through the use of non-textual (*i.e.* systematic and teleological) canons of interpretations. As a matter of fact, the *Corte di Cassazione* paid little or no importance, in its order, to the goals underlying Article 3(2). Through this provisions, the Statute attempted to permanently bring the Italian system of private international law in line with the most developed experiences of international cooperation in this field. Furthermore, by enacting national rules on jurisdiction corresponding to the heads of jurisdiction set out in a frequently applicable legal instrument, such as the Brussels Convention, the drafters of Article 3(2) pursued the objective of simplifying the work of interpreters, placing almost *all* jurisdictional issues susceptible of arising before Italian judges in civil and commercial matters within *one* normative framework. Both goals suggest that the better reading of Article 3(2) is the one implying a reference to the Brussels I regulation, and not to the Convention. The opposite view, followed by the *Cassazione*, prevents the Italian system from taking advantage of the developments of the regime set up by the Convention and

‘continued’ by the regulation, and runs counter the need of simplification.

Should the ‘new’ Brussels I regulation contain *erga omnes* rules on jurisdiction, as suggested by many (including the drafters of the Green Paper on the revision of the regulation, COM (2009) 175 def.), the *raison d’être* of Article 3(2) of the Statute will disappear altogether. Till then, the Italian interpreters will need to cope with a highly complex regime arising out of a questionable case law.