Requejo on Povse

Introduction

The accession of the European Union (EU) to the European Convention on Human Rights is proving difficult. PIL has not been spared.

In the field of recognition the biggest concern was not long ago represented by the conflict between the ECtHR decision in *Pellegrini*, and the European will to eliminate the intermediate procedure to declare the enforceability of foreign judgments – replacing the conditions usually required at the State where enforcement is sought by some controls operated in the Member State of origin. If *Pellegrin*i was to be followed, the unconditional system of recognition set in Art. 42 of the Brussels II bis Regulation would be incompatible with the ECHR. That the ECtHR decision in *Pellegrini* has been put forward as an argument against the abolition of the exequatur in the Commission proposal to recast Council Regulation (EC) no 44/2001 does therefore not come as a surprise; nor do the efforts by Member States designed to limit the effects of *Pellegrini* case (for instance by way of considering the decision of the ECtHR limited to cases where the State of origin is not a contracting State of the ECHR).

At first sight, the ECtHR decision to the application nº 3890/11, *Povse v. Austria*, based on the *Bosphorus test*, is the bridge to reconcile the positions.

Bosphorus test as applied to Povse

The so called *Bosphorus* test is based on the following premise: contracting States transferring sovereign powers to an international organization retain responsibility for the acts of their organs, "regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international obligations". However, in as far as the international organization "is considered to protect fundamental rights (…) in a manner which can be considered at least equivalent to that for which the Convention provides", a presumption that the contracting State has complied with the ECHR enters into play, if he lacked discretion in relation to the obligations derived from his membership to the international organization. Therefore, a three-step exam in needed in order to determine whether there is equivalence between the protection offered by the Convention and the international organization at stake

(step 1), and the degree of freedom of the concerned State (step 2); finally, the arguments against the presumption of equivalence in the specific case must be discarded (step 3).

Step1 in Povse: *Whether the relevant organization is considered to protect fundamental rights*. In the *Povse* decision this point is dealt with exclusively in par. 77, in such a manner that it is not only superficial, but inexistent (see the *Bosphorus* decision, num. 159-165, remitting to 73-81). This is not only striking, but disappointing. First, because as of today, i.e. at the relevant time of the analysis, the existence of truly "substantive guarantees" offered by the EU as a unit (instead of as a bunch of diverse systems striving for coherence), is not self-evident. Second, because the real issue at stake is precisely that of the compatibility between the ECHR and the guarantee's system provided by the EU in Regulation Brussels II bis: a system where the protection of the fundamental rights rests exclusively on the Member State of origin. By considering the ECJ as single key element of the control mechanism, the ECtHR avoids the issue; at the same time, it narrows the reach of its pronouncement. The ECtHR's approach may be explained in different ways, starting with the actual submission of the applicants: they contested the "equivalent protection" only by reference to the role of the ECJ in the present case. It should be added that the *Bosphorus* test has been used by the ECtHR on several occasions, in a way that may be considered consistent but not necessarily uniform, precisely because the different degrees of depth of the ECtHR's exam in order to affirm or to deny the equivalence of the protection offered by the international organization under review.

Step2 in Povse: Discretion. There was no discussion as regards Austria's lack of discretion under Art. 42 of the Brussles II bis Regulation.

Step3: Whether the presumption has been rebutted in the present case. In contrasts to step 1, the analysis here was performed extensively. Two elements seem to be essential: the role of the ECJ defining the applicability and interpretation of the relevant legal provisions (par. 85); and the *status quo* before the court of origin (the opportunity open to the applicants to still rely on their Conventions rights there: par. 86). The importance given to those issues legitimates further questions. To start with, what would happen in the absence of consultation of the ECJ? On the one hand, the stress put by the ECtHR in the ECJ's role suggests that the answer would have been different in the absence of a preliminary ruling (or at least, of a referral by the national court, even if rejected

by the ECJ).On the other hand, the ECJ's ruling in the aff. C-211/10, stating that any change in the situation of the abducted child with consequences on the return order must be pleaded before the competent court in the Member State of origin, creates a legal precedent for all member States, therefore exempting them from referring new queries on the same subject.

As for the second element retained by the ECtHR (the *status quo* in Italy), would its decision have been the same had the applicants exhausted their resources before the Italian courts without success? In the light of par. 86, the likely answer is yes. Presumably, this would also be the answer in the case of a complaint addressed, either simultaneously or consecutively, against two respondent States –the State of origin, and the Stated where enforcement is sought-, even if the ECtHR declares the first one in breach of the Convention when applying Art. 11 (8) the Brussels II bis Regulation (which is not a hypothetical situation: see *Sneersone and Kampanella v. Italy*).

Consequences

An interpretation of *Povse* in the sense that it sanctifies the Regulation mechanism of fundamental rights protection would result in the immunity of the State where enforcement is sought. In return, it places the ECtHR applicants in an uncomfortable situation when formulating their complaints: they must be very be cautious and select the correct respondent State. Special care and legal knowledge, improbable in the average individual applicant (representation before the ECtHR is not compulsory), will be required.

Bosphorus+Povse applied to Regulation 44/01 (and Regulation 1215/2012)

What would be the likely outcome of the *Bosphorus* test if applied to other UE PIL instruments, such as the Regulation 44/01 or the Brussels I recast Regulation? According to both instruments (albeit following different ways) the requested State is allowed to refuse the declaration of enforceability if specific, restricted grounds provided by the Regulations themselves are present; in particular, if such declaration is manifestly contrary to public policy. Thus at first glance, the answer is that these cases are not eligible for the *Bosphorus* presumption (However, it is so to the extent that the States have discretion when implementing the legal obligations steaming from their membership; whether this is the case as regards

public policy may be discussed in the light of *Krombach* and *Gambazzi*).

UE accession to ECHR

EU accession to the ECHR means the end of the *Bosphorus* test. Admittedly, the equivalence presumption in favor of the EU itself is no longer justified. However, it is worth considering whether it should not survive in the context of the analysis of a Member State compliance with the Convention, if he had to blindly obey a mandate of the EU; indeed, the presumption of equivalence makes more sense because the UE accession to the ECHR. In this context, provided that no ECtHR's decision has yet been pronounced against the EU, maintaining a rebuttable presumption of equivalence would simplify the applicant's choice of the correct respondent (see 3).