

Enforceability of a Judgment and State Immunity: a Recent Decision of the Italian Court of Cassation

Following the post by Marta Requejo Isidro on jurisdiction over civil claims against States for violation of basic human rights, and the related comments, we would like to report an interesting decision recently handed down by the United Divisions (“Sezioni Unite”) of the Italian *Corte di Cassazione*, on the declaration of enforceability against a foreign State of a foreign judgment condemning that State in respect of war crimes. Even if the declaration of enforceability was limited to the part of the decision related to the costs of the proceedings (this being the claim brought before Italian courts by the plaintiff), the court’s reasoning dealt with the issue in more general terms.

The ruling of the Italian Supreme Court (29 May 2008, no. 14199, available on the Court’s website) has been kindly pointed out to us by *Pietro Franzina* (University of Ferrara), who has commented it in an article forthcoming on the Italian review “Diritti umani e diritto internazionale” (n. 3/2008). The article is also available for download on the website of the Italian Society for International Law (SIDI).

The facts of the case, that is part of a “legal saga” involving a number of judicial actions brought before Italian and Greek tribunals for atrocities committed by the Nazi troops in the final years of World War II (1943-1945), are as follows.

In 2000, the Federal Republic of Germany had been condemned by the Greek Court of Cassation (Areios Pagos) to pay damages to the victims of the massacre made by the German army in the Greek village of Distomo in 1944, and to bear the costs of the judicial proceedings (see a partial translation of the ruling, and a comment by *B.H. Oxman, M. Gavouneli* and *I. Banterkas*, in *Am. J. Int’l L.*, 2001, p. 198 ff.). The enforcement of a judgment against a foreign State is, under Greek law (Art. 923 of the Greek Code of Civil Procedure), subject to an authorization by the Ministry of Justice, which in the present case refused to grant it.

Thus, the Administration of the Greek Region of Vojotia (the plaintiff) sought a declaration of enforceability of the Greek judgment, limited to the decision on costs, before the Italian courts. The exequatur was granted by the Court of Appeal

(Corte d'Appello) of Firenze, and confirmed by the same court on a subsequent opposition by the German State. The case was then brought before the Italian Supreme Court (Corte di Cassazione).

Germany's challenge to the declaration of enforceability of the Greek judgment rested on three main grounds:

1) the decision cannot be declared enforceable, as the Court of Appeal of Firenze did, on the basis of Reg. 44/2001, since its subject matter is outside the scope of application (either *ratione materiae* and *ratione temporis*) of the EC uniform rules;

2) even taking into account the Italian ordinary regime on recognition and enforcement of foreign judgments (Articles 64 ff. of the Italian Act on Private International Law, no. 218/1995) the Greek judgment does not fulfil all the conditions set out by the Italian provision, since it cannot be considered an enforceable "res iudicata", as requested by Art. 64, lit. d), of the Italian PIL Act, because in the Greek legal system it lacks the authorization of the Greek Ministry of Justice in order to be enforced; and

3) its effects are contrary to the Italian public policy (Art. 64, lit. g)), since it was rendered in violation of the jurisdictional immunity enjoyed by the German State in respect of *acta iure imperii*, such as the ones committed by the German army during WWII.

The Corte di Cassazione, while agreeing on the first argument (quoting the ECJ judgment in the *Lechouritou* case, on the scope of application *ratione materiae* of Reg. 44/2001: see our posts here), rejected the second and the third, and held the Greek decision enforceable under the Italian ordinary rules.

On the second ground, the Court made a distinction between the enforceability "in abstracto" of a foreign judgment and the actual enforcement of it (i.e., the concrete taking of executive measures), which is a different and subsequent step. The simple fact that the execution of a decision against a foreign State is made dependent, in the legal system of origin, upon a governmental authorization does not imply that the judgment is not "per se" enforceable, in a different context of time and space, provided that it is final and binding upon the parties.

On the third ground, the Court held that denying foreign State immunity, when

the defendant State is accused of serious violations of fundamental human rights, is not only non-incompatible with Italian public policy, but moreover perfectly in line with the reasoning already upheld by the Corte di Cassazione itself in a previous ruling (the well-known decision in the “Ferrini” case - judgment no. 5044 of 11 March 2004 - in which the United Divisions of the Corte di Cassazione had denied foreign State immunity to Germany in respect of an action brought by an Italian victim of deportation and forced labour).

The judgment of the Corte di Cassazione in the Ferrini case is published in an English translation in International Law Reports (vol. 128, p. 658 ff.): see also the article by Prof. Carlo Focarelli (University of Perugia), “Denying Foreign State Immunity for Commission of International Crimes: the Ferrini Decision”, in International and Comparative Law Quarterly, 2005, p. 951 ff. Other comments in English to the decision can be found in Prof. Focarelli’s article.

On the practice of national courts in Europe with regard to enforcement immunity, see the detailed analysis carried on by A. Reinisch in his article “European Court Practice Concerning State Immunity from Enforcement Measures”, in Eur. J. Int’l Law, 2006, p. 803 ff. (abstract available on SSRN).

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