

Enforcement in France of a U.S. Financial Penalty

Earlier this year, the French *Cour de cassation* (Supreme court for private and criminal matters) confirmed a declaration of enforceability of a U.S. financial penalty of 13 million dollars in a judgment of 28 January 2009.

The *Cour de cassation* characterized the foreign penalty as an *astreinte*. Its enforceability was challenged on the grounds that it was criminal in nature, as it sanctioned a contempt of court, and that it was not proportionate to the offence. By contrast, and although the introductory report prepared by one of the members of the court did discuss the issue, the judgment did not address whether *astreinte* was an exercise of state power which as such ought to remain strictly territorial.

The case was about another Ponzi scheme perpetrated in the U.S.. The accused was an American citizen, Richard Blech, who lived in France (he was eventually extradited to and jailed in New York and in California). He was the manager of an American corporation, Credit Bancorp, that he had used to commit the fraud. In January 2000, the District Court for the Southern District of New York appointed a receiver for Credit Bancorp, who was meant to trace the proceeds of the fraud committed by Blech. Some times later, the receiver sought an injunction from the US Court ordering Blech to cooperate with him. As he would not, he applied for a renewal of the injunction, together with a sanction of US\$ 100 per day of non-compliance, which was to double each day. At that point in time, I understand that Blech was found to be in contempt of court for not complying with the injunction. Four months later, the same receiver applied for the penalty to be calculated, which was done by the court in an order of 25 July 2000 which ordered Blech to pay a bit more than 13 million dollars.

The receiver then sought to enforce the order of July 25, 2000, in a ski resort  in France, where Blech owned a property. In 2003, the competent first instance court of Thonon-les-Bains (French Alps) declared the American judgment enforceable. The judgment was confirmed by the Chambéry Court of Appeal in 2006. Blech appealed to the Cour de cassation.

Blech first challenged the lower courts' decisions on the ground that they had recognised a foreign criminal order. Here, much of the argument revolved around the fact that Blech was found to be in contempt of court. The reason why was that, in the *Stolzenberg* case, the *Cour de cassation* had said *obiter* that contempt of court was criminal in nature. Then, the point was to declare enforceable in France a *Mareva* injunction, and the court had ruled that a freezing order is civil in nature irrespective of the sanction of "contempt of court" (cited as such in the judgment) which backs it, and which is criminal. In *Blech*, the issue was not anymore to recognize the foreign injunction, but its sanction. A mechanical application of *Stolzenberg* would have led to rule that it was thus a US penal judgment which could not be enforced in France. But this is not what the *Cour de cassation* did. It held that the financial penalty which was the sanction for non complying with a foreign injunction was civil in nature, and could thus be declared enforceable.

As mentioned earlier, the judgment does not discuss whether, though not criminal, the foreign sanction could have been regarded as an exercise of American state authority, and should thus have produced effect on American soil only. The likely reason is that, as the foreign penalty had been calculated, it was perceived as not raising such an issue. French scholars all agree that as soon as a threat of financial sanction ceases to be a mere threat and is turned into an actual order to pay, the problem is not anymore one of exercising state authority. Support for this position is thought to be in article 49 of the Brussels I Regulation, although it obviously did not apply in this case.

Blech further challenged the recognition of the U.S. order on the ground that it was a disproportionate penalty: 13 million for not cooperating with the receiver. The Court answered that trial judges could not be criticized for finding that it was a perfectly proportionate sanction given that the fraud was for US\$ 200 million. Implicitely, however, the Court accepted that foreign civil penalties could only be recognized if proportionate. The Court referred to the proportionality principle which lies both in the French Constitution (1789 *Declaration des droits de l'homme et du citoyen*, article 8) and in European Human Rights Law (Article 1 of the First Protocol to the European Convention on Human Rights). In another context, this is what the European Court of Justice recently held in *Gambazzi*.

M. Blech has served his sentence in California and is now back to France.