Krombach: an Update on the Efficacy of Private Enforcement in Criminal Law

As I promised readers to keep them updated on the recent developments in the Bamberski – Krombach case, and as it seems that there is not as much media coverage of the case outside of France as there is in France, here are the latest news.

First and most importantly, the French media has reported that Krombach will be tried again in France in a bit less than a year. My recollection of French criminal law is that it is standard procedure when a person sentenced in abstentia is eventually caught. What this means, of course, is that the startegy elaborated by Bamberski has worked. In a report broadcasted yesterday night on France main TV channel, he said that he organized the abduction because he did not want to see Krombach die without serving his time in prison.

It seems, therefore, that private enforcement can work pretty well in criminal law. I do not know whether Germany intends to do anything about it.

In the same TV show, Bambersky also explained how he had Krombach followed in Germany for 10 years so that he would always know where he was. It was reported that the people he hired for that job could inform him that Krombach had changed addresses in Germany seven times over a decade. It was reported that Bambersky would have taken the decision to initiate the process which led to the abduction when he learnt that Krombach was on the verge of changing addresses again.

Finally, Bambersky was charged with kidnapping, but he was not kept in preventive custody. When asked whether he feared to go to prison, he said that given that he had been deported in Poland during the war as a kid, it would be ok.

Bertoli: Party Autonomy and the Rome II Regulation

Paolo Bertoli (University of Insubria) has published two interesting articles (in English) on the role of party autonomy in the Rome II regulation. Here are the references:

Choice of Law by the Parties in the Rome II Regulation, in Rivista di diritto internazionale, 2009, pp. 697-716.

Party Autonomy and Choice-Of-Law Methods in the "Rome II" Regulation on the Law Applicable to Non-Contractual Obligations, in Il Diritto dell'Unione europea, 2009, pp. 229-264.

An abstract has been kindly provided by the author:

> *The articles discuss, also in comparison with American private international law theories and methods, the innovative provisions relating to party autonomy set forth in the EC "Rome II" regulation on the law applicable to non-contractual obligations, the choice-of-law methods that such provisions follow, and their role and significance in the framework of the European "federalized" private international law system. In particular, the articles demonstrate that a distinction can, and should, be made between cases in which party autonomy operates in the context, and demonstrates the existence in Rome II, of: (i) a traditional (or, in American terminology, "jurisdiction-selecting") choice-of-law method, (ii) a "content-oriented" choice-of-law method, and (iii) a European lex fori approach.*

With reference to the development of EC private international law, see also the author's thorough analysis of the role of the European Court of Justice, in his volume "Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale" (Giuffrè, 2005) and "The Court of Justice, European Integration and Private International Law" (in *Yearbook of Private International law*, vol. VIII-2006, pp. 375-412: the article can be browsed through the Libreka! website).

New Title of De Conflictu Legum Collection

Prof. Laura Carballo Piñeiro (University of Santiago de Compostela) has just published her monograph entitled *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa* (Collective actions and their extraterritorial effectiveness. Issues on the reception and adaptation of class actions in Europe).

The book, the last one of the Collection De Conflictu Legum directed by Prof. Santiago Álvarez, deals with PIL problems of collective actions. Most of the proceedings implying collective actions take place in the United States, whilst in Europe there is still an ongoing debate concerning whether to introduce or to improve collective litigation in each single national legislation, and whether to develop some specific Community instrument on the subject (as suggested by the White Paper on damages actions for breach of the EC antitrust rules, and by the Green Paper on Consumer Collective Redress). Nevertheless, PIL problems are also of importance for European countries: an American class action may need to be served or enforced in Europe. From now on, as a result of the increasing number of States dealing with collective actions, international jurisdiction and conflict of laws issues are also at stake .

The book starts with a thorough identification of the procedural problems arising from collective actions. Prof. Carballo makes clear how the many misunderstandings on the topic -mostly due to mistrust of US-American class actions- are a hurdle in itself, not only for the introduction of collective justice in many States, but also for its practical application. Spain provides a good exemple: although collective-friendly, Spanish rules on collective actions on consumer matters lack clarity and basic guarantees are not laid down.

PIL issues follow this procedural introduction. Prof. Carballo studies if and how the international jurisdiction criteria laid down by Regulation *Brussels I* may apply when the action is collective; the application of international and

community instruments in order to identify and notify absent class members; if it is necessary to create special conflict rules for collective actions in the European area of justice; and recognition and enforceability issues.

Surprise? Yes and No

I am grateful to Horatia Muir Watt, a professor of private international and comparative law at the Paris Institute of Political Science, to have accepted to comment on the recent In Zone Brands *decision of the* Cour de cassation *ruling that an American anti-suit injunction could be declared enforceable in France*.

To my mind, this case was well decided. But did it really come as such a surprise, as Gilles' and Raphael's comments seem to imply? Well, yes and no. But before explaining why, I want to start with two parentheses about legal comparison.

1. Firstly, it is wise before drawing conclusions from a decision of the Cour de cassation to consulting the accompanying preparatory documents (the "Rapport" of the juge-rapporteur, whose name figures at the bottom of the decision and from whom the Report can be obtained directly, when it is not published spontaneously on the Cour de cassation's website, and/or the "avis" of the Advocate general). The attention of the common law world has often been drawn to the importance of these documents, particularly since Mitch Lasser's magnificent "Judicial Self-Portraits" [1], in which he explains that behind the concise one-sentenced syllogism which constitutes an "arrêt", the various rapports and avis which accompany the decision are functional equivalents to the longer motivation of judgments in the common law tradition – and may indeed reveal dissenting opinions within the court ¨[2]. In this particular case, the thoughtful Report of Madame Pascal makes it easier to understand, for instance, how the procedure developed before the lower courts and, perhaps more importantly, the position of the Cour de cassation in respect of the implications of West Tankers.
2. Secondly, countries belonging to the civilian legal tradition do not

> constitute a homogeneous block with a single legal perspective on such institutions as anti-suit injunctions. Of course, the coexistence of the civilian and common law cultures within the European common judicial area has now revealed profound divergences on jurisdictional issues – unsurprisingly, since such issues are linked to conceptions about the very function of adjudication – , and it may well have been that before the antisuit/forum non conveniens crisis, such differences were underestimated on the civilian side, either through the inadequacy of comparative legal studies, or in a misguided quest for legal uniformity. However, while the epistemological and methodological divide between these two legal traditions is undisputable, it does not mean that within the civilian "camp", there are not equally significant differences in legal reasoning or indeed in judicial policy. In the particular case of anti-suit injunctions (and much could also be said in the same vein about forum non conveniens), the French courts cannot be said to have been hostile to anti-suit injunctions (beyond the dictum in the Stolzenberg decision, to which I shall come back) and their position on this point certainly cannot be inferred from the often cited German or Belgian cases which have explicitly refused to recognize or enforce anti-suit injunctions. Moreover, legal scholarship on this point, to which the Rapport is extremely attentive, has been far from antagonistic.

This having been said, the content of the arrêt of 14th October 2009 appears to me to conform to the general orientation of the Cour de cassation's case-law. Firstly, as the report itself emphasises, the Cour has itself, in a pre-Regulation insolvency case, awarded something that looks very like an anti-suit injunction, in the form of an order to desist from judicial proceedings abroad sanctioned by an "astreinte" (a sum of money by way of a private penalty to be paid to the claimant per day of non-performance/obedience to the order): see Banque Worms (Cass civ 1re, 19 nov. 2002). In that case, the Advocate general's Conclusions and the Report, which cite Gilles Cuniberti's own work on this point, show that the Court was paying particular attention to the risks attendant to the use of such injunctions insofar as they might be perceived to intrude on the jurisdiction of foreign courts, and is careful to emphasize that the French courts were themselves asserting jurisdiction in this case on grounds which justified their attempt to retain the proceedings before them. Secondly, the Cour de cassation was recently willing to allow effect to be given to an American judgment awarding

a large penalty against a company director for contempt of court (Cass civ 28 janvier 2009, n° 07-11.729 Bull civ. I, n°15), sweeping aside the argument according to which contempt of court is quasi-penal in nature and therefore contrary to French public policy. This was already the Cour de cassation's position in Stolzenberg (Cass civ 1re, 30 juin 2004, which the French challenger invokes here). The latter case, however, contained an obiter dictum (interestingly characterized as such in Mme Pascal's Report) according to which anti-suit injunctions (as opposed to freezing orders) "affect the jurisdiction of foreign courts". This dictum must however be interpreted in the light of Banque Worms, also cited by the Report , and, beyond the fact that the Stolzenberg case actually gave effect to a Mareva injunction, seems mainly to have been designed to draw the attention of the lower courts once again to the potential risks involved in enjoining foreign proceedings – but does not necessarily exclude the use of such measures when protecting choice of forum agreements, or at least, when protecting the jurisdiction of the chosen court to decide on the validity of the clause.

This latter consideration seems to have been decisive in the present case. The Report underlines, citing various scholarly opinions on this point, that in circumstances such as this, the injunction is merely designed to ensure the performance of the parties' contract (which of course includes the choice of forum clause). And, as Adrian Briggs has already pointed out, this is excellent judicial policy. The recognition of the American judgment here means that the French courts seized in apparent violation of the clause have refrained from ruling on its validity, in favour of the decision of the chosen court on this point. True, one might wonder why the detour via the enforcement of the American injunction was necessary: did it not suffice that the French court, whose jurisdiction was challenged on the basis of the choice of forum agreement, decline to exercise such jurisdiction, at least pending the decision of the American court? The explanation appears to be that the American judgment was presented very quickly with a view to obtain an exequatur, and, on appeal, the Court of Versailles had not yet had the opportunity to hear the appeal on the jurisdictional issue. If one takes the sole issue of jurisdiction, it might of course have made more practical sense for the Court to stay the exequatur proceedings until it had decided on the (lack of) jurisdiction of the French courts under the choice of forum clause (or at least, ruled on the basis of Kompetenz-Kompetenz). But since the American judgment appears to have contained both the injunction and a decision on the merits,

allowing enforcement meant that the jurisdictional issue and the issue of the French distributor's debt were on fact resolved in one fell swoop. Of course, as Raphael points out, enforcing the injunction may mean that the Cour de cassation is ready to go further than English courts, which stop short of enforcing foreign judicial orders which are not purely monetary. However, this point needs to be clarified in future cases, since the injunction came as a package with the judgment on the merits.

Perhaps the most interesting aspect of the Cour de cassation's decision, here again enlightened by the report, concerns its reading of the implications of West Tankers. The report clearly opines that while the Cour de cassation is now bound not to allow recognition of, say, an English anti-suit injunction when the enjoined proceedings are in France (or indeed before an arbitrator in France) , it remains free to recognize injunctions issued by the courts of third states. This of course is where things become sticky. Of course, the choice of forum agreement concerns the court of a third state and is as such apparently outside the bounds of the Brussels Regulation. But then, of course, so were the arbitration proceedings in West Tankers. In that case, the fact that the party in apparent breach of the arbitration clause had seized the court of a Member State (with jurisdiction under the Regulation? this requirement is no doubt superfluous) was enough to prohibit the use of the injunction by the English courts, under the "effet utile" and mutual trust doctrines. Do the latter apply here? Could such principles prevent the court of a Member State from declining its own jurisdiction in favour of the courts of a third state? Surely not? But this very question shows that the problem may well not lie in the anti-suit aspect of things at all, but in Owusu and its (unclear) implications as to the scope of the Regulation as far as choice of law agreements in favour of the courts of third states are concerned, when the defendant is domiciled in a Member State. Does it really make any difference here where the French court declines jurisdiction on the basis of a choice of forum agreement (either because it says it is valid under principles of common French private international law or because it decides to apply the Kompentez-Kompetenz principle in favour of the chosen court's jurisdiction to rule on its own jurisdiction under the agreement) or because it decides to recognise an American anti-suit injunction? For the moment, as the Cour de cassation's decision shows (cf Konkola Mines), national courts are resisting the expansion of the Regulation into the relationship between a Member state and a third state, as far as choice of law agreements are concerned. But current work in progress within the European

institutions and study groups is now envisaging this relationship, which may make a case for the ratification of the 2005 Hague Convention. In the meantime, if priority was recognised to the (presumptively) chosen forum to rule on its own jurisdiction, whether it be a court or an arbitrator, or in a Member State or not, life would no doubt be a little simpler.

[1] "Judicial (Self-)Portraits: Judicial Discourse in the French Legal System," 104 *Yale Law Journal* 1325-410 (1995).

[2] It is also important, of course, not to underestimate the procedural constraints which weigh on the Cour de cassation (and which are high-lighted by the report when it discusses the legal arguments raised by the parties), which is bound by the way in which the legal issue is framed before it (by virtue of what is known here as the "linguistic police" of the judiciary), and whose decisions may not have the same significance according to whether the Court quashes the decision of the lower court or merely dismisses the "pourvoi".

Dr Krombach's Final (?) Contribution to the European Judicial Area

Last week-end, Dr. Dieter Krombach was found in the street, tied up, in front of a court in Mulhouse, France, in the middle of the night.

What was he doing there, you may wonder?

Well, André Bamberski has now revealed that he had the 74 year old German doctor kidnapped in Germany and brought to France. The French police had been alerted that Dr. Krombach could be found in Mulhouse by an anonymous phone call from someone speaking French with a strong Russian accent.

Of course, many readers will know what Bamberski has against Krombach from

the famous *Krombach* cases of the European Court of Justice and the European Court of Human Rights. Krombach allegedly raped and killed Bamberski's 14 year old daughter in 1982. He was sentenced by a French court in abstentia in 1995 to 15 years of prison. But he never served them, as German authorities did not prosecute him, nor extradited him. So Bamberski, it might be argued, was thinking that he would soon die without serving his sentence. One logical theory is that he did not really trust the German legal system, so he decided to take the necessary steps to ensure that justice would done. It has been suggested that he thus involved a couple of Russian associates he had met in Munich earlier this month.

If that is true (and we offer no formal opinion either way here), he may or may not have been aware that what he was doing was illegal. Possibly, he had not heard about *West Tankers* and mutual trust. At the same time, one doubts that Dr Krombach was a stronger believer in mutual trust, since the European Court of Human Rigths recognized that he had not been afforded a fair trial by French criminal courts.

In any case, Bambersky has now been arrested in France and charged on Tuesday with kidnapping, among other criminal offences.

Professor Hess informed me that the Bavarian ministry of justice has issued earlier today a press declaration insisting that States have the monopoly of violence, that private individuals may substitute neither judges nor enforcement authorities, and that this abduction was wholly unacceptable.

Krombach was first brought to a hospital in Mulhouse, then transferred to Paris so that he could be heard by a French judge on Wednesday night. Bamberski's lawyer is calling for a new criminal trial in France.

US Court Refuses to Enforce

Nicaraguan Judgment

On October 20, 2009, the United States District Court for the Southern District of Florida issued an order in the case of *Osorio v. Dole Food Company* denying recognition of a $97 million Nicaraguan judgment under the Florida Uniform Out-of-country Foreign Money-Judgments Recognition Act (Florida Recognition Act). Fla. Stat. §§ 55.601-55.607 (2009). The Nicaraguan judgment involved 150 Nicaraguan citizens alleged to have worked on banana plantations in Nicaragua between 1970 and 1982, during which time they were exposed to the chemical compound dibromochloropropane (DBCP). DBCP is an agricultural pesticide that was banned in the United States after it was linked to sterility in factory workers in 1977. Nicaragua banned DBCP in 1993.

Plaintiffs sued Dole Food Company and The Dow Chemical Company, both Delaware corporations, on account of personal injuries allegedly resulting from the use of DBCP. The judgment in this case was rendered by a trial court in Chinandega, Nicaragua. The court awarded plaintiffs $97 million under "Special Law 364," enacted by the Nicaraguan legislature in 2000 specifically to handle DBCP claims. The average award was approximately $647,000 per plaintiff. According to the Nicaraguan trial court, these sums were awarded to compensate plaintiffs for DBCP-induced infertility and its accompanying adverse psychological effects.

Plaintiffs sought enforcement of the judgment in Florida state court, and defendants removed the case to federal court. Defendants then raised several objections to domesticating the judgment. They contended that under the Florida Recognition Act the federal court could not enforce the judgment because (1) the Nicaraguan trial court lacked personal and/or subject matter jurisdiction under Special Law 364, (2) the judgment was rendered under a system which does not provide procedures compatible with due process of law, (3) enforcing the judgment would violate Florida public policy, and (4) the judgment was rendered under a judicial system that lacks impartial tribunals.

In a lengthy opinion, Judge Paul C. Huck concluded that "the evidence before the Court is that the judgment in this case did not arise out of proceedings that comported with the international concept of due process. It arose out of proceedings that the Nicaraguan trial court did not have jurisdiction to conduct.

During those proceedings, the court applied a law that unfairly discriminates against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law. Both the substantive law under which this case was tried, Special Law 364, and the Judgment itself, purport to establish facts that do not, and cannot, exist in reality. As a result, the law under which this case was tried stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims. Finally, the judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a 'system of jurisprudence likely to secure an impartial administration of justice.'" (citation omitted)

In light of these findings, the Court held that "Defendants have established multiple, independent grounds under the Florida Recognition Act that compel non-recognition of the $97 million Nicaraguan judgment. Because the judgment was 'rendered under a system which does not provide impartial tribunal or procedures compatible with the requirements of due process of law,' and the rendering court did not have jurisdiction over Defendants, the judgment is not considered conclusive, and cannot be enforced under the Florida Recognition Act. Fla. Stat. § 55.605(1)(a)-(c). Additionally, the judgment will not be enforced because 'the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.' Fla. Stat. § 55.605(2)(c). The Court, therefore, orders that Plaintiffs' judgment shall be neither recognized nor enforced."

This case is interesting on multiple levels. *First*, the district court applied an "international concept of due process." Slip. op. at 23. This standard was seen to be in concert with, but different than, US notions of due process. *Id*. at 35-36. *Second*, the court found that Nicaragua does not have impartial tribunals. *Id*. at 54-58. In so doing, the court relied not only on US State Department pronouncements but also on expert testimony regarding what law is like on the ground in Nicaragua "on paper and in practice." *Id*. at 57. *Finally*, this case is perhaps most interesting because the general understanding is that it is hard to resist enforcement. This case shows that US courts, if presented with appropriate evidence, are willing to ascertain the validity of foreign judgments, especially in countries facing political and social turmoil that may negatively impact the administration of justice in those countries.

Arbitration of reinsurance disputes in Australia

In Australia, arbitration clauses in most contracts of insurance (other than marine insurance) are rendered void by s 43 of the federal *Insurance Contracts Act 1984*. However, that Act expressly excludes reinsurance contracts. Accordingly, for many years, practitioners assumed that arbitration clauses in reinsurance contracts were enforceable in Australia.

This changed with the decision of the New South Wales Supreme Court in *HIH Casualty & General Insurance Ltd (in liq) v Wallace* [2006] NSWSC 1150; (2006) 68 NSWLR 603. The Court held that s 19 of the New South Wales *Insurance Act 1902*, which provides that arbitration clauses in insurance contracts do not bind the insured, applied to reinsurance contracts, as there was no express exclusion of reinsurance contracts. (There is a good summary of this and other remedial provisions in the NSW Act, and further matters arising from the decision in *Wallace,* in this paper presented by Allens Arthur Robinson partner Michael Quinlan in 2007.)

In light of concerns expressed by practitioners and reinsurers, by the Insurance Regulation 2009, the NSW government has now excluded reinsurance contracts from the remedial provisions of the NSW Act, including s 19.

However, some uncertainty remains. Section 28 of the Victorian *Instruments Act 1958* is an equivalent provision to s 19 of the NSW Act: it allows an insured to institute court proceedings notwithstanding an arbitration clause and reinsurance contracts are not excluded from the provision. There does not appear to be any case law on this provision. However, following *Wallace*, it would apply to reinsurance contracts. Arbitration clauses in reinsurance contracts governed by Victorian law could therefore still be ignored by reinsureds. Moreover, it was stated in *obiter* in *Wallace* that s 19 of the NSW Act is a mandatory law of the forum. If this view is correct and applicable to s 28 of the Victorian Act, whatever the law of the reinsurance contract, a reinsured could institute court proceedings

in Victoria in the face of an otherwise binding arbitration clause.

Conference on Human Rights and Tort Law

The Institute for European Tort Law (Vienna) organises a **Conference on Human Rights and Tort Law** which will take place on **1 December 2009** in **Vienna**.

The conference programme and detailed information on booking etc. as well as a registration form can be found here.

The Execution of the Anti-Suit Injunction

I am grateful to Thomas Raphael, a barrister at 20 Essex Street and the author of a major work on The Anti-Suit Injunction*, to have accepted to comment on the recent* In Zone Brands *decision of the* Cour de cassation.

> **King Duncan:**
> Is execution done on Cawdor? Are not
> Those in commission yet return'd?
>
> **Malcolm:**
> My liege,
> They are not yet come back. But I have spoke
> With one that saw him die; who did report
> That very frankly he confessed his treasons,

> Implor'd your Highness' pardon, and set forth
> A deep repentance. Nothing in his life
> Became him like the leaving it.
>
> *Macbeth Act 1, scene 4, 1–8*

In a judgment of 14 October 2009 (Decision no 1017 of 14 October 2009) the Première Chambre Civile of the Cour de Cassation refused to set aside a decision of the Versailles Court of Appeal which gave "exequatur" to an anti-suit injunction granted by the Superior Court of Georgia to enforce an exclusive jurisdiction clause in favour of the Courts of the State of Georgia (USA). The Georgian anti-suit injunction had restrained litigation before the Tribunal de Commerce of Nanterre, which was apparently civil and commercial litigation.

In loose translation the Première Chambre Civile concluded:

> *But given that the decision [of the Versailles Court of Appeal] records precisely, in the first place, that in the light of the jurisdiction clause freely agreed by the parties, no fraud could result from the invocation by the American company of the jurisdiction expressly designated as the competent jurisdiction;*
>
> *and given that there could not be any deprivation of the right of access to a court, since the aim of the decision taken by the Georgian judge was specifically to rule on his own competence and, for the purposes of finality, to cause the jurisdiction clause undertaken by the parties to be respected;*
>
> *and given there is no inconsistency between public international law and an anti-suit injunction whose aim, as in the present case, is solely, outside the field of application of the operation of the conventions and community law, to punish the violation of a pre-existing contractual obligation; and given that therefore the decision is legally justified; for these reasons, [the Première Chambre Civile] rejects the appeal."*

To understand private international law a strong sense of irony is often helpful, and here there are three ironies I would like to highlight.

First, one of the paradoxical results of the *West Tankers* imbroglio is that the

bright light it shone on the anti-suit injunction may have led to a greater degree of understanding, and in some cases sympathy, for this particular English vice among our continental colleagues – just as the European Court of Justice was limbering up to deliver what it may have hoped was a final blow to the remedy. So while "civilian" academic opinion was once (it seems) overwhelmingly hostile, the mood has changed. Recently a number of distinguished civilian voices have supported the use of anti-suit injunction in certain circumstances (see e.g. Kessedjian on West Tankers). And while previous decisions from continental courts, including the Cour de Cassation itself (*Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24; see also in Belgium Civ Bruxelles, 18 December 1989, RW 1990-1991), had been opposed to the anti-suit injunction, the Cour de Cassation now seems to find the enforcement of a contractual anti-suit injunction entirely unproblematic. So we can say that, like the Thane of Cawdor, nothing in the anti-suit injunction's life "*became him like the leaving it.*"

Second, execution may have been done in (and on) Cawdor, but reports of the anti-suit injunction's death are greatly exaggerated; and now execution of it is done in France. There was a degree of crowing in certain quarters after *West Tankers*. But the anti-suit injunction is alive and kicking in respect of litigation outside Europe. Even within Europe the anti-suit injunction is not entirely dead – it is difficult to see how the European Court could prohibit an anti-suit injunction to restrain proceedings in another state where the "targeted" proceedings are themselves outside the scope of the regulation.

And now, rather surprisingly, the Cour de Cassation apparently shows us that *Turner* and *West Tankers* can be circumvented by executing a non-Brussels Lugano state's anti-suit injunction, at least in some states. If right, and if other European national courts take a similar course, this opens up contrasting possibilities. On the one hand, Lord Hoffmann's warnings in *West Tankers* prohibiting the English courts from granting anti-suit injunctions would drive business off-shore may now be given renewed vigour, if you can rely on your American anti-suit injunction by enforcing it in France. On the other hand, the possibility of obtaining anti-suit injunctions from a *third party court* to enforce an *English* arbitration clause (as the Bermuda and Eastern Caribbean Courts have done, although the Singapore High Court thinks that this is a bad idea as you become an "*international busybody*"), suddenly takes on far greater practical

utility.

Third, perhaps most ironically of all, the Cour de Cassation has apparently gone further than the English courts ever would – which may explain why English lawyers had not thought of this particular dodge before. It is a basic principle of common law enforcement that only money judgments are enforceable at common law; and therefore anti-suit injunctions, like other injunctions, are not enforceable at common law.

A good example of this is the *Airbus v Patel* litigation, which concerned the crash of an airliner made by Airbus at Bangalore airport. An action had initially been commenced against Airbus in India, but the victim's families later started duplicative claims in Texas. The dispute had no connection with Texas, but Texas at that time had no doctrine of *forum non conveniens*. The Indian courts granted an anti-suit injunction to restrain litigation in Texas, on the grounds that the Texas litigation was vexatious and oppressive. But the Indian anti-suit injunction had insufficient teeth in practice, and so an attempt was made to replicate it in England. Colman J held that the Indian injunction could not be enforced in England either under the common law or the English enforcement legislation, and that it did not create a right to an English anti-suit injunction either: *Airbus v Patel* [1996] ILPr 465. The only question was whether he could and should independently grant an anti-suit injunction to protect the Indian proceedings. He said no. The Court of Appeal disagreed: *Airbus v Patel* [1997] 2 Lloyds Rep 8; but then the House of Lords agreed with Colman J, holding in effect that the English courts should not act as the world's policemen where a non-contractual anti-suit injunction was sought, as this would be contrary to the principle of comity: *Airbus v Patel* [1999] 1 AC 119. (Lord Goff took care to make clear that he was not necessarily prohibiting a contractual injunction to protect the contractual jurisdiction of another state, a loophole the Bermuda and Caribbean case law mentioned above has exploited.)

So the Georgian injunction would not have been enforceable as a judgment in England, yet it is enforceable in France. A prophet is not without honour save in his own country (Matthew, 13:57).

But will the Cour de Cassation's new decision stand? I can't comment on what it means as a matter of French law, so it will be for others to say whether the Cour de Cassation has, in Shakespeare's words, "*set forth a deep repentance*" of its

earlier comment in *Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24 that a Mareva injunction is acceptable because it "*does not prejudice any of the debtor's fundamental rights or (even indirectly) foreign sovereignty*" because it "*unlike the so-called "anti-suit" injunctions, does not affect the jurisdiction of the State in which enforcement is sought*."

I do suspect, however, that there will be some, at least in Luxembourg, who will consider the Cour de Cassation's new decision a form of "*treason*" for which pardon should be asked.

As a matter of formality there is probably nothing directly inconsistent between it and *West Tankers*. It is a matter for the French legal system to decide what third state judgments it will enforce and its exequatur decision will not directly render the Georgian judgment enforceable in other member states under the Brussels-Lugano regime.

But there is no doubt that as a matter of principle the two decisions are very uncomfortable bedfellows. The Cour de Cassation is telling us that there is nothing wrong with a foreign court ordering someone not to litigate before the French courts, at least where this is done to enforce an exclusive jurisdiction clause in favour of the foreign court. Apparently, this does not interfere with the French court's judicial sovereignty. What matters is "*to punish the violation of a pre-existing contractual obligation.*" So the French court is content for the Georgian court to assess, and directly interfere with, the French court's jurisdiction. And this is so even though the jurisdiction of the Tribunal de Commerce of Nanterre over the substantive proceedings in France which the Georgian injunction restrained would have been a jurisdiction under the Brussels-Lugano regime. All this is completely alien to the mode of thought in Luxembourg, under which it is wholly unacceptable for the English courts, even when acting *outside* the scope of the regulation, to assess, and indirectly interfere with, the Brussels-Lugano jurisdiction of other member or contracting state courts; and the importance of enforcing contractual obligations binding the parties to litigate in a particular forum is simply irrelevant.

Indeed, it might even be argued that the Cour de Cassation's decision is inconsistent with implied principles of the Brussels-Lugano regime, as it "*necessarily amounts to stripping [the Nanterre Tribunal de Commerce] of the power to rule on its own jurisdiction under Regulation 44/2001*" (contrary to *West*

Tankers, §28). The Cour de Cassation did not make a reference, and there is no obvious reason why the Courts of other member states would be interested, so it is difficult to see how the point would get to Luxembourg. But perhaps one final irony awaits.

French Court Agrees with U.S. Anti-suit Injunction

After the *West Tankers* decision, common lawyers might have thought that continental lawyers had found the final support they needed to conclude that anti-suit injunctions are evil remedies and that they now have a license to chase them.

Well, that would not be true, as this judgment delivered by the French Supreme court for private and commercial matters (*Cour de cassation*) on 14 October 2009 demonstrates.

The dispute had arisen out of a distribution contract whereby a French company, In Zone Brands Europe, distributed children interactive beverage (see picture above) in Europe for an American corporation, In Zone Brands Inc. The contract included a choice of law clause which provided for the application of the laws of Georgia, and a choice of court agreement providing for the jurisdiction of Georgian courts.

When the American party terminated the contract, the French company and its director sued before a French commercial court (*Tribunal de commerce*) in Nanterre. The American challenged the jurisdiction of the French court, and initiated judicial proceedings in Georgia. In March 2006, the Superior Court of the Cobb county issued an anti-suit injunction enjoining the French parties to dismiss the French proceedings, and recognized the liability of the French party (the judgment of the *Cour de cassation* is unclear as to what this second part of the judgment really is, but it might have been a summary judgment).

The American party then sought a declaration of enforceability of the American judgment, that is, I understand, of both the anti-suit injunction and the summary judgment. As could be expected, the French parties argued that the anti-suit injunction infringed French sovereignty and their right of access to court as recognized by Article 6 ECHR and should thus be denied recognition. They could rely on a dicta of the *Cour de cassation* in the *Stoltzenberg* case, where the Court had ruled that, while Mareva orders could be declared enforceable in France, anti-suit injunctions could not, as they infringe the sovereignty of the jurisdiction the courts of which are indirectly targeted by the injunction.

Last week, the *Cour de cassation* most surprisingly confirmed the declaration of enforceability of the American judgment. It held:

1. as the parties had agreed to the jurisdiction of the American court, the decision of the American party to sue before that court could not be considered strategic behavior (*fraude*).
2. there was no issue of being denied access to court, as the American court was ruling on its own jurisdiction and only enforcing a choice of court which had been agreed by the parties.
3. anti-suit injunctions are not contrary to public policy as long as they only aim at enforcing a preexisting contractual obligation, and no treaty or European regulation applies.

The case is not available online as of yet. Here is the most relevant part of the decision:

> *Mais attendu que l'arrêt retient exactement, en premier lieu, par motif propre, qu'eu égard à la clause attributive de compétence librement acceptée par les parties, aucune fraude ne pouvait résulter de la saisine par la société américaine de la juridiction expressément désignée comme compétente et, en second lieu, par motif propre et adopté, qu'il ne peut y avoir privation de l'accès au juge, dès lors que la décision prise par le juge georgien a précisément pour objet de statuer sur sa propre compétence et pour finalité de faire respecter la convention attributive de compétence souscrite par les parties ; que n'est pas contraire à l'ordre public international l'"anti suit injunction" dont, hors champ d'application de conventions ou du droit communautaire, l'objet consiste seulement, comme en l'espèce, à sanctionner la violation d'une obligation contractuelle préexistante ; que l'arrêt est légalement justifié ;*

UPDATE: see loose translation of Thomas Raphael here.