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).

(Many thanks to Marta Requejo Isidro and Gilles Cuniberti)

Sovereign Immunity of Germany for WWII Actions: France

After the recent case of the Italian *Corte di Cassazione*, we thought that some of the readers might be interested by the decision of the French *Cour de cassation* of 2 June 2004.

In this case, proceedings had also been initiated against Germany for actions which had taken place during World War II. The plaintiff, M. Gimenez-Exposito, had been arrested in France during the war for actions of resistance against the

Germans. He had then been sent to Dachau where he had been forced to work for BMW from June 1944 to May 1945.

In 2000, he (eventually) decided to sue the German state and BMW before a French labour court for payment of his wages and for damages.

The *Cour de cassation* dismissed the action in respect of Germany on the ground of state immunity. It applied the traditional French rule on the scope of sovereign jurisdictional immunity. Since 1969, the court has ruled that the immunity covers actions where foreign states acted in a public capacity (*de jure imperii*). In that case, the court held that when Germany forced prisonners to contribute to its war effort, it was acting in a public capacity.

The argument was made before the court that Nazi Germany ought not to benefit from any immunity, as it violated international conventions, and was not a democratic state. The court answered that the defendant was the Federal Republic of Germany, and not Nazi Germany.

In respect of BMW, the court held that it lacked jurisdiction under article 5 of the Brussels Convention. Applying the Brussels Convention in this context was quite surprising, as the court had just held that the activity of the plaintiff in Germany could not possibly fall within the realm of private law.

Weighing Disputed Facts in Forum Non Conveniens Motions

The Court of Appeal for Ontario has released its decision in *Young v. Tyco International of Canada Ltd.* (available here). Those interested in the common law doctrine of *forum non conveniens* might find aspects of the decision of interest.

First, Justice Laskin states at para. 28 that "on a *forum non conveniens* motion, the standard to displace the plaintiff's chosen jurisdiction is high". For this notion

he relies on the language of the Supreme Court of Canada's leading decision on the doctrine, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, where that court notes that the existance of the more appropriate forum must be "clearly" established.

There is room for concern about Justice Laskin's statement. Many commentators have taken the language in *Amchem* to only indicate that in the very close cases, the benefit of the doubt goes to the party that does not bear the onus of establishing the more convenient forum. But in most cases, the court should be able to establish the more convenient forum on a balancing exercise. Justice Laskin's statement seems to suggest there could be cases in which another forum was shown to be more appropriate, but not more appropriate enough, than the plaintiff's chosen forum. For the most part Canadian courts have avoided deciding cases on such a basis. There is also room to debate whether the plaintiff should be entitled to the support contained in Justice Laskin's statement. In an era of tactical proceedings and multiple available jurisdictions, why should the plaintiff's choice be given particular protection under the doctrine?

Second, there is disagreement between the judges on how to handle facts in dispute on the stay motion. Justice Laskin holds that if, to resolve the motion, the court needs to get into the underlying facts of the case, the court should adopt the plaintiff's version of those facts as long as there is a reasonable basis for those facts in the record (paras. 32-34). In separate concurring reasons Justice Simmons disagrees with this approach. In her view (see paras. 67-70), if the motions judge cannot either resolve the motion against the plaintiff on the plantiff's view of the facts or resolve the motion against the defendant on the defendant's view of the facts, he or she should conduct the *forum non conveniens* analysis on the basis that both views of the facts have a reasonable prospect of being adopted at trial. To some extent this will neutralize the role that facts in dispute will play in the analysis, since they will cut both ways depending on the plaintiff's or the defendant's view of the facts. Justice Simmons' approach aims to be fair, on the stay motion, to both parties, and so rejects Justice Laskin's quite pro-plaintiff analysis.

Neither approach addresses those situations in which the court, in order to resolve a motion for a stay, needs to actually reach a conclusion on a factual question on the balance of probabilities. I have argued that one of those situations arises when the parties dispute the existance of a jurisdiction clause:

see Stephen Pitel and Jonathan de Vries, “The Standard of Proof for Jurisdiction Clauses” (2008) 46 Canadian Business Law Journal 66.

Third, the court discusses what will qualify as a legitimate juridical advantage which the plaintiff would lose if a stay were ordered (at paras. 56-61).

In the end, all of the judges agree that the defendant has not shown that Indiana was the more appropriate forum, and so the stay motion fails.

Spanish homosexual couple and surrogate pregnancy

While some countries, like the U.S.A., accept surrogate pregnancy among permitted techniques of assisted reproduction, Spanish law considers it illegal. That is why a certificate issued in the U.S.A. establishing the parenthood of a baby born in this country to a surrogate mother would not be registered in Spain; accordingly the baby would not have Spanish nationality; and consequently, he would need a visa to come to Spain.

This apparently neutral facts may not describe a theoretical situation but correspond whit a quite real one. A Spanish homosexual married couple from Valencia decided to try surrogate pregnancy after several failed attempts of international adoption; as for a national adoption, they feared they would not be awarded the “certificado de idoneidad” due to their homosexual condition. They therefore moved to the USA looking for better chances. Today, the intended parents and (their?) two twin babies born in the USA to a surrogate mother are the major figures of a complicated situation. The couple is in the U.S. since the Spanish embassy has denied the babies the visa to enter Spain. So far, the twins bear American nationality to prevent them from being stateless.

According to press reports, the couple has ruled out the option of returning to Spain by registering the babies as born to a Spanish female mother; they want them to be acknowledged as their children, and them to be granted the Spanish

nationality. Faced with the Spanish refusal they might decide to remain (to exile?) in the U.S.A., where they have been offered a residence permit. They have warned the Spanish government that they will start a legal battle both in the U.S.A. and before the European Court of Human Rights, claiming violation of the Declaration of the Rights of the Child. Considering the importance of their aim, how much it is worth; but also knowing how exhausting such processes will be, we can only wish them courage and luck.

Cross-Border Consumer Disputes in Victoria

In light of Martin's post about Jonathan Hill's new book on Cross-Border Consumer Contracts, it's worth noting a recent decision of the Victorian Civil and Administrative Tribunal (the main forum for small claims and consumer disputes in Victoria) that VCAT does not have jurisdiction over foreign persons or companies because the *VCAT Act* does not permit service outside the jurisdiction: *Apollo Marble and Granite Imports Pty Ltd v Industry + Commerce* (Civil Claims) [2008] VCAT 2298 (14 November 2008).

Article on choice of law for intra-Australian torts after the civil liability legislation

Professor Martin Davies, co-author of the leading text on Australian private international law (Nygh and Davies, *Conflict of Laws in Australia*, now in its 7th edition (2002)), has an article in the most recent *Torts Law Journal*. It concerns

the choice of law issues which have been created by the various Acts passed by the Australian states and territories to reform aspects of Australian tort law. As the abstract explains:

> *The civil liability legislation passed by the states and territories in the early part of this decade was not uniform in form or effect. As a result, choice of law in intra-Australian torts cases has been given a new lease of life. The lex loci delicti (law of the place of the wrong) choice of law test adopted by the High Court in John Pfeiffer Pty Ltd v Rogerson applies only to questions of substance. Thus, it is now necessary to ask whether the statutory reforms made by the civil liability legislation are substantive or procedural. This article suggests some tentative characterisations. No generalisations are possible because each statutory rule must be characterised individually. Because some of the statutory reforms seem clearly to be procedural, they create a new incentive for plaintiffs to go forum-shopping for a jurisdiction that provides a more favourable environment for their claims. Defendants can only protect themselves against that forum-shopping by applying for a venue transfer under the cross-vesting legislation. There is uncertainty about the operation of that legislation, too. Thus, a new set of unsettled questions has been melded to an existing area of uncertainty. The result is a fertile source of disagreement and future litigation.*

The article is both interesting and of use to practitioners. The citation is Martin Davies, "Choice of Law after the Civil Liability legislation" (2008) 16 *Torts Law Journal* 10.

UK Regulations Implementing Rome II Regulation Adopted

As pointed out by Andrew Dickinson on the BIICL-PRIVATEINTLAW list (the mailing list promoted by the British Institute of International and Comparative Law, devoted to conflict matters), on 18 November 2008 were laid before the UK Parliament the Regulations implementing the EC Rome II Regulation in England,

Wales and Northern Ireland (the Scottish Parliament is expected to legislate separately for Scotland).

The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (S.I., 2008, No. 2986), dated 12 November 2008, were made by the Secretary of State, as designated by the European Communities (Designation) (No.2) Order 2008 no. 1792 to exercise the powers conferred by section 2(2) of the European Communities Act 1972 (c. 68) in relation to private international law (readers who are unfamiliar – as I am – with the implementation of EC Law in the UK by means of statutory instruments may find useful this Wikipedia page and the Explanatory Memorandum to the European Community (Designation) (No. 2) Order 2008).

Here's an excerpt of the Explanatory Note to the implementing Regulations; most notably, **the application of the conflict rules provided by the EC instrument is extended to intra-UK conflicts**:

> *The purpose of these regulations is two-fold. The first is to modify the relevant current inconsistent national law in England and Wales and Northern Ireland. Regulations 2 and 3 restrict the application of the general statutory choice of law rules in this area. These are contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Regulation 4 restricts the application of certain provisions in the Foreign Limitation Periods Act 1984 and regulation 5 restricts the application of analogous provisions in the Foreign Limitation Periods (Northern Ireland) Order 1985.*
>
> *The second purpose involves extending the application of the Regulation to certain cases that would otherwise not be regulated by it. These are cases where in principle the choice of applicable law is confined to the law of one of the United Kingdom's three jurisdictions, that is England and Wales, Scotland and Northern Ireland, and to the law of Gibraltar. These cases therefore lack the international dimension which is otherwise characteristic of cases falling under the Regulation. Under Article 25(2) of the Regulation Member States are not obliged to apply the Regulation to such cases. To maximise consistency between the rules that apply to determine the law applicable to non-contractual obligations, regulation 6 of these regulations extends, in relation to England and Wales and Northern Ireland, the scope of the Regulation to conflicts solely between the laws of England and Wales, Scotland, Northern Ireland and*

Gibraltar.

The Regulations, subject in the Parliament to the negative resolution procedure, will enter into force on 11 January 2009 (the same date as the Rome II Reg.: see its Art. 32, and the comments to our previous post here). The text is available on the Office of Public Sector Information (OPSI) website.

Propositions of EGPIL on the Extension of Brussels I to Relations with Third States

The report of the 18th meeting of the European Group for Private International Law, which was held in Bergen in September 2008, is now available in French on the site of the EGPIL.

The Group makes several propositions regarding a possible extension of the Brussels I Regulation to relations with third states.

The Group also discussed other topics, including the law applicable to maritime torts.

Enforcement of Foreign Judgments in Australia

A recent judgment of the Supreme Court of Victoria provides a useful short summary of the operation of the *Foreign Judgments Act 1991* (Cth) and the

circumstances in which registration of a foreign judgment can be set aside on public policy grounds: *Jenton Overseas Investment Pte Ltd v v Townsing* [2008] VSC 470 (11 November 2008).

Whelan J refused an application to set aside the registration of a judgment of the Singapore Court of Appeal, and observed that:

> *"the courts are slow to invoke public policy as a ground for refusing recognition or enforcement of a foreign judgment. There are few instances in which a foreign judgment has not been recognised or enforced on this ground. There are good reasons for this. There are … the "interests of comity" to maintain. The respect and recognition of other sovereign states' institutions is important. This is especially so when acting under the Foreign Judgments Act where the registration and enforcement procedures apply on the basis that there is "substantial reciprocity of treatment" for Australian judgments in the foreign forum. There is also a need for caution because of the inherent volatility of the notion of "public policy"." At [20]*

> *"[S]ubstantial injustice, either because of the existence of a repugnant law or because of a repugnant application of the law in a particular case, may invoke the public policy ground. But it will only do so where the offence to public policy is fundamental and of a high order. For the public policy ground to be invoked in this context enforcement must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs." At [22]*

Forum Non Conveniens and Foreign Law in Australia

The High Court of Australia has handed down judgment in Puttick v Tenon Limited (formerly called Fletcher Challenge Forests Limited) [2008] HCA 54 (12 November 2008), the most recent High Court case to consider stay of proceedings

and choice of law in an international tort case. The High Court unanimously reversed the Victorian Court of Appeal and held in two joint judgments (French CJ, Gummow, Hayne and Kiefel JJ; and Heydon and Crennan JJ) that the Supreme Court of Victoria was not a clearly inappropriate forum, the test in Australia for forum non conveniens.

The suit was brought by a man who was exposed to asbestos while visiting factories in Belgium and Malaysia in the course of his employment by a New Zealand-based company. At the time, the man was resident in New Zealand. The man subsequently moved to Victoria, and he sued in the Supreme Court of Victoria after contracting mesothelioma. After his death, his wife was substituted as plaintiff. The Supreme Court and the Court of Appeal (by majority) concluded that Victoria was a clearly inappropriate forum and stayed the proceedings (see Perry Herzfeld's earlier post here). The Court of Appeal majority had concluded that the applicable law was that of New Zealand and that this, combined with other factors such as the location of witnesses and defendants, rendered Victoria a clearly inappropriate forum. This conclusion was then reversed by the High Court on the plaintiff's appeal.

French CJ, Gummow, Hayne and Kiefel JJ held that, in light of the state of the pleadings and the evidence,

> *"the Court of Appeal (and the primary judge) erred in deciding that the material available in this matter was sufficient to decide what law (or laws) govern the rights and duties of the parties. Rather, each should have held only that it was arguable that the law of New Zealand was the law that governed the determination of those rights and duties. Each should have further held, that assuming, without deciding, that the respondent was right to say that the parties' rights and duties are governed by the law of New Zealand, the respondent did not establish that Victoria is a clearly inappropriate forum." At [2]*

Their Honours added that:

> *"The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction. Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the*

> *legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the lex causae as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute." At [31]*

By contrast, Heydon and Crennan JJ appear to have taken a less absolute approach to the relevance of a foreign lex causae:

> *"The question of the lex causae can be relevant to the question whether Victoria is a clearly inappropriate forum. If the lex causae were New Zealand law, that would make a stay more likely, though not inevitable. But the question of what the lex causae is ceases to be relevant if it is impossible to say what it is. And the question remains irrelevant even if New Zealand law "might be" a candidate, or is "a very strong candidate", for ex hypothesi it is impossible to say whether New Zealand law is in truth the lex causae." At [49]*

Their Honours concluded that, even though "New Zealand is an appropriate forum, … other factors indicate that Victoria is not clearly inappropriate." At [51]

Although the course of argument in Puttick may not have been quite what the parties and some commentators were expecting — the decisive issues were not raised by the Court until after the conclusion of oral argument — on one level the result is unsurprising considering the High Court's previous decisions in the area of tort and private international law: as cases like Oceanic Sun, Zhang, Neilson and Puttick demonstrate, it is almost impossible for a defendant to succeed in a forum non conveniens application against an Australian-resident plaintiff in a torts case, regardless of how slight the case's connection to Australia, and regardless of how compelling the apparent factual connection to an overseas jurisdiction may be. After all, the plurality in Puttick concluded that "even if the lex causae was later shown to be the law of New Zealand, that circumstance, coupled with the fact that most evidence relating to the issues in the case would be found in New Zealand, did not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum." At [32].

The more troubling aspect of the decision in Puttick is the practical interrelationship between the test for forum non conveniens and the rules about pleading and proving foreign law. Because plaintiffs in Australia have no

obligations to allege, plead or prove foreign law — and because Australian choice of law rules are not mandatory — they have no incentive to draft a pleading that clearly discloses a foreign lex causae (whether expressly or by factual implication). To the contrary, they have every incentive to draft bland and incomplete pleadings that avoid clear references to a foreign lex causae.

Defendants are thereby placed in an invidious position: if they do nothing in response to such an unclear pleading, a successful forum non conveniens application will be precluded because of the plaintiff's lack of clarity; but if they elucidate the foreign lex causae by putting on a defence, they will have submitted to the jurisdiction, thereby rendering any jurisdictional challenge nugatory.

Heydon and Crennan JJ seem to have been alive to this difficulty and, citing *Buttigeig v Universal Terminal & Stevedoring Corporation* [1972] VR 626, observed that it will sometimes be possible to look through an artificial pleading to see the underlying substance:

> *"A conclusion reached on a stay application about what the proper law of a tort is will normally only be a provisional conclusion: it will be a conclusion open to alteration in the light of further evidence called at the trial. A judge considering a stay application may be able to determine the location of the alleged tort despite somewhat unreal or artificial contentions in the pleadings." At [36].*

By contrast, no such statement appears in the plurality judgment, which appears very much to focus on the literal words of a plaintiff's pleading.

Puttick therefore represents one more step in the slow death of forum non conveniens in Australia. The references in both judgments to vexation and oppression suggest the likely direction of future cases: under the general law of civil procedure, a vexatious or oppressive pleading can be struck out independently of any jurisdictional complaint; but unless a pleading is so manifestly defective as to fall foul of the general tests of vexation and oppression it is now unlikely that a court will ever issue a stay on jurisdictional grounds.

Whether this state of affairs is desirable — and whether it is consistent with the decision in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 — is a topic on which minds may disagree. French CJ, Gummow, Hayne and Kiefel JJ flatly rejected the respondent's invitation to restate the test in Voth, but Heydon and

Crennan JJ appeared to be more receptive to an invitation to reconsider Voth were it to arise in an appropriate case.

Likewise, unlike the plurality, Heydon and Crennan JJ seem to have recognised the apparent inconsistency between the Voth test and its subsequent treatment in *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, particularly the difference between a balancing exercise and a bright-line rule about vexation. Their Honours implicitly favoured the test as expressed in Voth (and not its reinterpretation in Zhang) by engaging in the very sort of contextual balancing exercise that had been disapproved of so strongly by the majority in Zhang.

If the High Court is presented with a case that squarely raises the issue of the correctness or desirability of the Voth test, it may be that these apparent differences of opinion will be highlighted more clearly.