The Concept of Enforceability

Notionally, what is enforceability? When the forum declares a foreign judgement enforceable, what does it mean? Does it mean that the foreign judgement actually enters in the legal system of the forum as such, and remains a foreign judgement? Or does it mean that a judgement of the forum carrying the substance of the foreign judgement is produced, and will be the only one existing in the legal system of the forum?

The distinction can be important for some of the effects of judgements, which could differ in the foreign legal system and in the forum. For instance, judgements could become time barred more quickly in some legal orders. Also, there could be special rules about the interests of judgement debts. The issue can thus arise of whether the foreign rule or the rule of the forum applies.

One example of such rule is article 1153-1 of the French Civil Code, which provides that judgement debts automatically attract a higher interest rate. Is this provision applicable to foreign judgements? If so, when does the interest start?

On March 6, 2007, the French supreme court for private matters (*Cour de cassation*) held in *Delsey* that the provision applies to foreign judgements declared enforceable in France, and that the interest begins to accrue from the date of the declaration of enforceability (*exequatur*). In an earlier 2004 case on the enforcement of arbitral awards in France, the *Cour de cassation* had already held that the provision applies to the arbitral awards declared enforceable in France "as the law of the enforcement proceedings".

The *Cour de cassation* did not provide much information on the facts of the *Delsey* case, but it seems that a Saudi agent of the French company *Delsey* had sued its principal in Saudi Arabia and obtained a judgement awarding Euros 807,121 as compensation for the termination of the contract. The agent then sought to enforce the Saudi judgement in France and obtained a declaration of enforceability providing that interests had accrued pursuant to article 1153-1 since when the Saudi judgement was made. Delsey appealed before the Cour de cassation arguing that the starting point of the interest was the date of the French declaration of enforceability and not the date of the making of the Saudi judgement. The appeal was allowed.

Delsey lays down the above mentioned rules, but does not explain them, in accordance with the French judicial practice. The case could be considered as an indication that the *Cour de cassation* subscribes to the theory that it is the declaration of enforceability of the forum which is enforced locally, and that this is the reason why the rules of the forum govern.

The Results of the JHA Council Session on Rome III, Maintenance and Rome I

Following swiftly on from our post on the JHA Council Session taking place today and tomorrow (19 – 20 April 2007), the Council have issued a **Press Release** with the main results of the council after today's deliberations. Here are their conclusions:

On **Rome III** (**Jurisdiction and applicable law in matrimonial matters**: see the related section of our site), they stated:

> *The Council discussed certain important issues of this proposal, in particular the rules regarding the choice of court by the parties, the choice of applicable law, the rules applicable in the absence of choice of law, the respect for the laws and traditions in the area of family law and the question of multiple nationality.*
>
> *A very large majority of delegations agreed on the guidelines proposed by the Presidency according to which the Regulation should contain a rule on a limited choice of court for divorce and legal separation by the spouses and on conflict-of-law rules. On this regard, the Regulation should contain, firstly, a rule giving spouses a limited possibility of choice of law for divorce and legal separation and, secondly, a rule applicable in the absence of choice. The Council took note of the position of two delegations that recalled that, in the absence of choice of law by the parties, the court seized should apply lex fori. However, such*

> *delegations underlined that they are prepared to continue the negotiations on this instrument. The Council recognised that the draft Regulation should not imply modifications of the substantive family law of the Member States with respect to divorce or legal separation. One delegation underlined however that the respect of the national legal order should not jeopardise the coherent application of Community law.*

They "gave mandate" to continue work on Rome III subject to guidelines on the *"choice of court by the parties (Article 3a)", the "choice of the applicable law by the parties (Article 20a)", the "rules applicable in the absence of choice of law (Article 20b)", the "respect for the laws and traditions of the Member State in the area of family law" and "multiple nationality".* See pages 10 – 15 of the Press Release for the full discussion of those points.

On **Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (see our related posts here and here),

The Member States confirmed their "shared will" to successfully complete the project. The Council also endorsed

> *abolition of the exequatur procedure for all maintenanceobligation decisions covered by the Regulation, on the basis of the introduction of certain common procedural rules, accompanied by harmonisation of conflict-of-laws rules.*

as well as agreeing to,

> *…the principle of introducing a system for effective practical cooperation between central authorities in maintenance obligation matters, the details of which will still have to be worked out.*

For bilateral agreements by Member States with non-Member States, the

> *…Presidency suggests that Member State s may retain such agreements in line with the system set out in Article 307 of the Treaty and following the precedent in this area of Regulation (EC) No 44/2001 (Brussels I). It is therefore clear that such agreements should not compromise the system established by the*

proposed Regulation.

Rome I on the Law Applicable to Contractual Obligations (see the related section of our site). The Council discussed several key provisions:

(a) Principle of choice of law by the parties to the contract (Article 3)

As in the Rome Convention, the basic rule for the law applicable to a contract is the choice of the law of a country by the parties. This rule respects party autonomy and is particularly appropriate in the area of contractual obligations which are created and governed by the parties to the contract (Article 3). However, where all other elements relevant to the situation are located in a country otherthan the country whose law has been chosen, the choice of law does not allow parties to avoid the application of provisions of the law of that country which cannot be derogated from by agreement (Article 3(4)). Concerning rules of Community law which cannot be derogated from by agreement, the Commission proposed that those rules should prevail wherever they would be applicable to the case. However, since the majority of delegations took the view that it would be appropriate to treat rules of national law and of Community law which cannot be derogated from by agreement on an equal footing, as in the Council Common position on the Rome II-Regulation, the Council agreed to follow this approach.

(b) Law applicable in the absence of choice (Article 4)

In the absence of a choice of law by the parties, Article 4 provides essentially for two connecting factors: the habitual residence of the party who is required to effect the characteristic performance, if such performance can be determined (Article 4(1) and (2)), or otherwise the closest connection of the contract with a specific country (Article 4(4)). Delegations agreed that in order to achieve more legal certainty, some of the most typical contracts should be explicitly mentioned in Article 4(1). Where the contract does not fall under Article 4(1), in particular if it does not fall within the scope of one of the typical contracts listed in that paragraph, the court has to apply Article 4(2). Member States also recognised the need for an "escape clause" allowing for flexibility where the connecting factors in Article 4(1) or (2) would exceptionally lead to an unsatisfactory result because it is clear from all the circumstances of the

case that the contract is manifestly more closely connected with another country (see Article 4(3)). The Council confirmed the structure and the content of Article 4 as set out in the Addendum, with the exception Article 4(1)(j1) which still needs to be further discussed by the Committee on Civil Law Matters (Rome I).

(c) Individual employment contracts (Article 6)

Delegations agreed that, as in the Rome Convention, a special rule should provide for the appropriate connecting factors concerning individual contracts of employment in the absence of a choice of law. However, where a choice of law is made by the parties, the employee should not lose the protection given to him by the rules of the law of the country whose law would have been applicable in the absence of the choice and which cannot be derogated from by agreement.

The Council also agreed on the text of a number of other provisions (Articles 1 and 2, deletion of Article 7, Articles 9, 10, 14, 15, 16, 17, 19, 20 and 21).

See pages 25 – 26 of the Press Release for some general remarks on a **future common frame of reference for European contract law**. View the full Press Release **here**.

Justice and Home Affairs Council Session in Luxembourg (19-20 April 2007)

On 19 and 20 April the JHA Council will hold its 2794th session in Luxembourg, under the German Presidency. On the agenda for the "Justice" issues, scheduled for Thursday 19th, there are a number of points dealing with cooperation in civil law matters, both under the "A" items (on which the Council decides without

discussion, since an agreement has previously been found in the Committee of Permanent Representatives – COREPER) and under the "B" items (that are actively debated in the Council: see the agenda for the meeting).

As regards the "A" points, two important deliberations will take place on private international law issues (see the list of public deliberations released by the Press Office of the Council):

- Amended proposal for a Regulation of the European Parliament and of the Council on the **service** in the Member States **of judicial and extrajudicial documents** in civil or commercial matters, amending Council Regulation (EC) No 1348/2000: the amended proposal adapts the original Commission proposal to the general agreement of the Council and to the opinion of the European Parliament in a codified version;
- Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (**Rome II**): **Non-approval of the European Parliament's amendment** (see the related section of our site).

As regards the "B" items, the first three points deal with cooperation in civil matters (Rome I, Rome III and the Regulation on maintenance obligations); in addition, as a last point the Council will discuss further proceedings of the works on a Common Frame of Reference for European contract law.

Here's an excerpt of the Background Note prepared by the Press Service of the Council: for each draft instrument we have added the latest available Council public document.

Rome III (Jurisdiction and applicable law in matrimonial matters: see the related section of our site)

> *At the informal meeting in January 2007 in Dresden, ministers underlined the importance of family law issues for the creation of a true area of justice, as there are more and more families where the spouses come from different countries.*
>
> *Some progress has been achieved since then on this proposal in the sense that a common understanding on a number of important questions is emerging among a majority of Member States. Some delegations have doubts about the*

added value of this proposal, but the Presidency believes that it is important to continue the discussions in order to find a solution acceptable to all delegations.

The Council will discuss a number of issues with a view to clarifying certain elements of this file and to finding a solution acceptable to all delegations. In particular, the Council will discuss the question of the choice of court by the parties and the choice of applicable law.

Latest available document of the Council: doc. n. 5274/07 of 12 January 2007 (text of the Regulation as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome III) and the comments made by Member States delegations).

Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (see our related posts here and here)

The Council is expected to agree on some political guidelines on issues of particular importance for the continuation of the work on this draft regulation. […]

[T]he shared will to move forward in such an important area as maintenance obligations was highlighted at the informal meeting of Justice and Home Affairs Ministers in Dresden on 15 and 16 January 2007.

The Council should focus its discussion on:

- *the abolition of the exequatur procedure for all maintenance obligation decisions covered by the Regulation, which would reduce the costs involved in enforcement of maintenance decisions and improve the position of creditors by speeding up enforcement of decisions and making them more easily portable within the European Union;*
- *the introduction of a system of cooperation between central authorities in order to facilitate application of the Regulation;*
- *making it clear in a recital that the Regulation applies only in situations having cross-border implications and hence an international aspect, and*
- *the conditions on which Member State may retain or conclude*

agreements with third countries in this particular area.

Latest available document of the Council: doc. n. 16830/06 of 20 December 2006 (available in German: text of the Regulation as drafted by the Finnish and German Presidency on the basis of the meetings of the Committee on Civil Law Matters (Maintenance Obligations) and the comments made by Member States delegations).

Rome I (see the related section of our site)

> *[…] Although most of the text is agreed by all delegations, there are some elements on which there is still not yet unanimity. With this aim, the Council is expected to examine a compromise package submitted by the Presidency.*
>
> *The following questions will be particularly examined: the principle of choice of law by the parties to the contact, the law applicable in the absence of choice and individual employment contracts.*

Latest available document of the Council: doc. n. 6935/07 of 2 March 2007 (French or German text of the Regulation as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome I) and the comments made by Member States delegations).

European Contract Law

The Council is invited to decide that a Council position on a common frame of reference for European contract law, in particular as regards its purpose, content and scope, is developed and defined. […]

In 2006 the European Parliament expressed its views in two Resolutions. The Commission has announced that it will submit a second Progress Report on European Contract Law and the Acquis Review. The Research Network will produce a draft by the end of 2007. In view of the importance of the project the Presidency considers that it would be appropriate for the Council to develop and define its own position. In this context, the Presidency suggests that the Council identifies the issues that require careful examination and proposes a method of work within the Council preparatory bodies.

(Many thanks to Martin George, for his collaboration in hunting down some of the documents referred to above)

German Casenote on ECJ Lechouritou Judgment

A very interesting article commenting the recent ECJ *Lechouritou* case (C-292/05, judgment of 15 February 2007) has been published in the latest issue of the German Law Journal, an online review in English devoted to developments in German, European and international jurisprudence.

The casenote has been written by *Veronika Gaertner* (University of Heidelberg), editor of conflictoflaws.net for Germany, who has extensively reported on the case for our site (see her posts on the opinion of AG Ruiz-Jarabo Colomer and on the judgment of the Court).

An abstract of the article (**"The Brussels Convention and Reparations – Remarks on the Judgment of the European Court of Justice in Lechouritou and others v. the State of the Federal Republic of Germany"**) has been kindly provided by the author:

> *The article analyses the judgment of the European Court of Justice in the case Lechouritou and others v. the State of the Federal Republic of Germany. In this judgment the Court had held that an action aimed at the payment of compensation for acts perpetrated by armed forces in the course of warfare does not constitute a civil matter in terms of the Brussels Convention.*
>
> *The case note first classifies the judgment in the previous case law of the Court on the concept of civil matters in terms of the Brussels Regime. Hereby, the relevant rulings are examined in view of the criteria developed by the Court for defining the term of "civil and commercial matters" – in particular in distinction to public matters. In this regard, it is argued that the Court followed its previous rulings by basing its argumentation on the question whether the acts*

> *constituting the origin of the action for damages result from the exercise of public powers.*
>
> *In the second part the case note addresses – in reference to objections raised by the plaintiffs – the question whether the qualification of the acts perpetrated by German armed forces as acta iure imperii excluded from the scope of the Brussels Convention can be agreed with. Here, the focus is on the question whether the term of act iure imperii could be regarded as limited to lawful acts, as partly argued with regard to the law of State immunity. This restriction of acta iure imperii to lawful acts is, however, rejected and consequently the assessment of the Court to regard the action of the plaintiffs as excluded from the scope of the Convention is agreed with.*

In addition to a thorough analysis of previous ECJ rulings on the matter, the article contains numerous references to national and international Courts' case law regarding the classification of military acts as the emanation of State authority and the restriction of State immunity in relation to wrongful acts, even if the author points out the different rationales underlying these restrictions in the field of State immunity (with the goal of an improved protection of human rights) and the exclusion of *acta iure imperii* from the scope of the European procedural law instruments.

The distinction between the two levels (public international law on one side, European uniform rules on jurisdiction on the other) is clearly underlined in the final remarks of the casenote:

> *[A]s the Court of Justice has explained in its ruling, the Brussels Convention, as a measure facilitating the internal market by the mutual recognition and enforcement of judgments in civil and commercial matters, is not the right instrument for the assertion of compensation claims based on acts perpetrated by armed forces in the course of warfare. The consequences of war and occupation can […] only be dealt with at a public law level.*

The article is available here (also in downloadable .pdf version). Highly recommended.

New Conditions for Recognition of Judgements in France

On February 20, 2007, the French supreme court for private matters (*Cour de cassation*) held in *Avianca* that foreign judgements which had applied another law than the one that a French court would have applied could be recognised or enforced in France.

The case overrules a forty year old precedent, the famous *Munzer* decision, which had laid down the modern conditions for the enforcement and the recognition of judgements in France. In *Munzer* (1964), the Cour de cassation had ruled that five conditions, which were soon to be reduced to four (in the *Bachir* case in 1967), had to be fulfilled. First, the foreign court had to have jurisdiction from the French perspective. Second, the foreign court had to have applied the law that the French choice of law rule designated. Third, the foreign judgement should not be contrary to public policy. Fourth, the foreign judgement should not have been obtained for the sole purpose of avoiding the application of the applicable law (*Fraude à la loi*).

In *Avianca*, the Cour de cassation holds that there are now three conditions only for the recognition of foreign judgements, and that the application of the law designated by the French choice of law rule is not one anymore. The three conditions which remain unchanged are the jurisdiction of the foreign court, the compatibility with French public policy, and the absence of *fraude à la loi*.

The *Cour de cassation* does not give much details on the facts of case. I understand, and am happy to be corrected, that American companies (North American Air Service and Avianca) and Columbian companies (Avianca, Helicopteros Nacionales de Columbia and Aeronautico de Medellin Consolida) had sued a former director of one of the Columbian companies before a federal court in Washington D.C. On August 27, 1993, the U.S. Court ordered the former director to pay 3.9 millions dollars, plus interest. The former director moved to France, where the plaintiffs sought to enforce the judgement. The director argued

against the enforcement because the U.S. Court had applied U.S. law to the issue of the liability of a director, when the French choice of law rule provides that the law of the company governs. The Cour de cassation rules that the law applied by the foreign court is irrelevant.

Avianca makes it clear that the new conditions are only relevant absent any treaty regulating the recognition of foreign judgements. European regulations and conventions are obviously such treaties.

The evolution had long been advocated by the majority of French writers. To many, it seemed weird to accept in principle the recognition of foreign judgements while making it a condition that they would have ruled exactly like a French court. Also, it seemed that the main purpose of the condition was to avoid *fraude à la loi*, which has always been a separate and autonomous condition.

First Issue 2007 of "Rivista di Diritto Internazionale Privato e Processuale"

The first issue for 2007 of *Rivista di Diritto internazionale privato e processuale* (*RDIPP*, published by CEDAM, Padova), one of Italy's leading journals in private international law, has been recently released. It provides quarterly a complete coverage of the different sectors of conflict of laws and jurisdictions, with articles, comments, legal texts and cases by Italian, foreign and EC Courts. All the articles in this issue are in Italian, and unfortunately just an English translation of the titles is available, but no abstract. Here's the list:

ARTICLES

- *F. Mosconi* (University of Pavia), The protection of the Internal Order of the Forum: Balancing Italian Law, International Conventions and EC Regulations (La difesa dell'armonia interna dell'ordinamento del foro tra

legge italiana, convenzioni internazionali e regolamenti comunitari);
- *S.M. Carbone* (University of Genoa), Lex mercatus and lex societatis vis-à-vis Principles of Private International Law and Financial Markets Rules (Lex mercatus e lex societatis tra principi di diritto internazionale privato e disciplina dei mercati finanziari);
- *F. Salerno* (University of Ferrara), EC Jurisdiction Criteria in Matrimonial Matters (I criteri di giurisdizione comunitari in materia matrimoniale).

COMMENTS

- *C. Amalfitano* (University of Milan), The European Arrest Warrant, the Italian Corte di Cassazione and the Protection of Fundamental Human Rights (Mandato d'arresto europeo, Corte di Cassazione e tutela dei diritti fondamentali dell'individuo);
- *A. Atteritano*, The Jurisdiction of National Courts to Enforce Foreign Arbitration Awards under the 1958 New York Convention (La «jurisdiction» del giudice statale nei procedimenti di «enforcement» dei lodi arbitrali stranieri disciplinati dalla Convenzione di New York del 1958).

The *RDIPP* is not available online (for subscription information, refer to the publisher's website, CEDAM).

An archive of the TOCs since 1998 is available on the ESSPER website (an online project for indexing articles of Italian journals and working papers in law and other social sciences, headed by the library of LIUC University of Castellanza).

Vol. 3, Issue 1, Journal of Private International Law

The new issue of the **Journal of Private International Law, Volume 3, Issue 1 (April 2007)**, will be published shortly. The contents are (*click on the links below to view the abstract*):

Canada and the US Contemplate Changes to Foreign-Judgment Enforcement *by Vaughan Black (Professor, Dalhousie Law School, Halifax)*

The Rome I Proposal *by Ole Lando & Peter Arnt Nielson (Copenhagen Business School)*

Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu? *by Andrew Dickinson (Consultant, Clifford Chance LLP; Visiting Fellow in Private International Law, BIICL)*

Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of The Rome Convention by the Rome I Regulation *by Lorna Gillies (Lecturer in Law, University of Leicester)*

Parties' Choice of Law in E-Consumer Contracts *by Zheng Tang (Lecturer in Law, University of Aberdeen)*

Choice of Law in Maritime Torts *by Martin P. George (PhD Candidate & Postgraduate Teaching Assistant, University of Birmingham)*

The European Convention on Human Rights and English Private International Law *by Ben Juratowitch (DPhil candidate, University of Oxford)*

Child Abduction: Convention "Rights of Custody" – Who Decides? An Anglo-Spanish Perspective *by Kisch Beevers (University of Sheffield) & Javier Peréz Milla (University of Zaragoza)*

Book Review: J. Meeusen, M. Pertegàs and G. Straetmans (eds) Enforcement of International Contracts in the European Union: Convergence and Divergence between Brussels I and Rome I *by Lorna Gillies (Lecturer in Law, University of Leicester)*

For those who haven't yet subscribed to the **Journal of Private International Law**, subscription information can be found **here**. In addition to the Journal itself, you will also receive online access to all of the articles (current subscribers will be able to download the articles linked to above straight away).

E-Business Group Website and the Cost of Rome I

The E-Business Regulatory Alliance has set up a Rome I E-business Group website to examine the e-business legal issues associated with the current EU proposal on a regulation on the law applicable to contractual obligations (Rome I). [See our posts on Rome I here.] William Roebuck, Legal Policy Director at the E-RA, states:

> *The Federation of Small Businesses has undertaken research work concerning the costs of the proposal, covering legal fees, translation fees and implementation fees. The total cost of entry per member state is 15,052.59 euros (excluding VAT) for a business to comply with its commitments under Rome I. This amounts to 242,756.00 euros (excluding VAT) for entry to the single market. These figures, together with staff costs will put a significant brake on cross border e-commerce, to the detriment of businesses and consumers.*
>
> *We are urging MEPs, the European Council and Member States to rethink this proposal in line with the Commission's better regulation and i2010 strategies.*

Their excellent website can be found here. *Many thanks to Will Roebuck for the info.*

Lecture on European Private Law at Southampton

On Tuesday 24 April 2007, the *Annual Bond Pearce Lecture in European Law* at the University of Southampton, School of Law, will be delivered by

Alexander Layton QC, 20 Essex Street. Its title is:

> ***The Growth of European Private Law: Some Reflections on the 50th Anniversary of the Treaty of Rome.***

Time and Venue: 5.45 pm; Main Lecture Theatre, Room 1027, Nightingale Building, Highfield Campus, Southampton (UK).

Please visit this Website for more details, or contact: Sotirios Santatzoglou, School of Law, Southampton University, Tel. 023 8059 5333.

Mixed Contracts, the Vienna Sales Convention and the Brussels Convention

Ulrich G Schroeter (University of Freiberg – Faculty of Law) has posted "**Vienna Sales Convention: Applicability to 'Mixed Contracts' and Interaction With the 1968 Brussels Convention**" on SSRN; it originally appeared in the *Vindobona Journal of International Commercial Law and Arbitration, Vol. 5, pp. 74-86, 2001*. The abstract reads:

> *The present article discussed various questions pertaining to the interpretation of Article 3(1) and (2) of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG), the provisions which deal which so-called 'mixed contracts', i.e. contracts that involve elements of a 'sale' proper alongside obligations to manufacture or produce goods or to supply labour or other services.*
>
> *In its second part, the paper elaborates on the interaction between the CISG's provisions defining the place of performance (Articles 31 and 57 CISG) on one hand and Article 5(1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and*

Commercial Matters and its successor, Article 5(1) of the EC Council Regulation 44/2001 of 22 December 2000 on the Recognition and Enforcement of Judgements in Civil and Commercial Matters on the other hand.

You can download the paper from **here**.