Enforcement in France of a U.S. Financial Penalty

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

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

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

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

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

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

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

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

Cuadernos de Derecho Transnacional, 2009-2

The second issue of the *Cuadernos de Derecho Transnacional*, the Spanish online journal created by Profs. Calvo Caravaca and Carrascosa Gonzalez (see presentation post), has been published last week. The magazine, wholly available under this net address, contains articles and notes written by from authors of different nationalities (Spanish, Italian and Portuguese). All of them are summarized in an English abstract.

Table of contents (Studies)

Hilda Aguilar Grieder, "Arbitraje comercial internacional y grupos de sociedades"
Abstract: Within the framework of the companies of the group, the parties that have not signed the international contract often take part in its negotiation, execution and termination. When the aforementioned contract includes an arbitration clause, the question arises as to whether the clause would affect these non-signatories; that is to say, whether these parties are allowed to undertake legal proceedings or can have claims filed against them in court. According to the "group of companies" doctrine which is, in specific circumstances, widely accepted in arbitral and state practice, the effects of the arbitration agreement would extend to the non-signatories of the companies of the group even though they have not signed the contract in which the arbitration clause is written.

C.M. Caamiña Domínguez, "Los contratos de seguro del art. 7 del Reglamento Roma I"
Abstract: This study analyses Article 7 of the Rome I Regulation. This Article establishes the law applicable to insurance contracts covering a large risk whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. An insurance contract covering a large risk shall be governed by the law chosen by the parties. In the absence of choice, it shall be governed by the law of

the country where the insurer has his habitual residence unless the contract is manifestly more closely connected with another country. When an insurance contract covers a non-large risk situated within the EU, party autonomy is limited. To the extent that the law applicable has not been chosen, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. In accordance with Article 7, additional rules shall apply to compulsory insurances.

A.L. Calvo Caravaca, "El Reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas"
Abstract: The Rome I Regulation has tried to improve the 1980 Rome Convention. The final result has been uneven. This study focuses on three matters. Firstly, it explains how to select the law applicable to the contract (Art. 3 Rome I Regulation). It will be a controversial regulation because of the connection between jurisdiction and applicable law as well as its opposition to the new Lex mercatoria. Secondly, consumer contracts are examined (Art. 6 Rome I Regulation). The concept of consumer contracts includes any contract concluded by a natural person with another person acting in the exercise of his trade or profession. However, it does not solve two matters: if overriding mandatory provisions are applicable to those contracts and how to protect active consumers. Lastly, although Article 9 is inspired by Article 7 of the Rome Convention, it adds two innovations: a controversial Community definition of overriding mandatory provisions, and when to give effect to overriding mandatory provisions of a different law from the one of the forum.

E. Castellanos Ruiz, "Las normas de Derecho Internacional Privado sobre consumidores en la Ley 34/2002 de servicios de la sociedad de la información y de comercio electrónico"
Abstract: The rules of private law on consumers in Directive 2000/31 of 8 June 2000 on certain legal aspects of the information society, in particular electronic commerce in the Internal Market (Directive on e-commerce) and the Act transposing the Directive on the legal Spanish Law 34/2002 of July 11, services of information society and electronic commerce are very rare, and most have a "character clarification". These rules of private international law clarificatory highlighted in the arts. 26 and 29 of the LSSI concerning the law applicable to electronic contracts and determining the place of conclusion of contracts online, respectively.

C. Llorente Gómez de Segura, "La ley aplicable al contrato de transporte internacional según el Reglamento Roma I"
Abstract: Contracts of carriage have received a specific legal treatment under the Rome I Regulation following a trend initiated by the Rome Convention. However, Rome I has not merely introduced cosmetic changes with respect to the Rome Convention but has produced new rules particularly, although not exclusively, regarding carriage of passengers. In addition, this article aims to be a reference guide for the analysis of the Rome I general rules in order to facilitate its application to contracts of carriage.

D. Moura Vicente, "Liberdades comunitárias e Direito Internacional Privado"
Abstract: The «unity in diversity» demanded by European integration requires a system of coordination of the laws of the Member-States which is compatible with the free movement of persons, goods, services and capitals within the European Community. In recent legislative acts of the Community, as well as in the case-law of the European Court of Justice, a trend can be noticed towards the adoption of rules concerning the law applicable to private international relationships exclusively connected with the European internal market or calling for a principle of mutual recognition in the regulation of those relationships. This papers aims at determining whether and in what measure this «Private International Law of the internal market», which seems to be on the rise, involves a change of paradigm, from the standpoint of the methods and solutions that it enshrines, when compared with the common conflict of laws rules.

G. Pizzolante, "I contratti con i consumatori e la nuova disciplina comunitaria in materia di legge aplicabile alle obbligazioni contrattuali"
Abstract: The «Rome I» Regulation has converted the 1980 Rome Convention into a Community instrument. In relation to consumer contracts, the Regulation has expanded the scope of material application of Article 6. Under the new text, with certain exceptions, the special provision dealing with consumer contracts appliesto any contract entered into between a professional and a consumer, regardless of its object. This paper analyses in particular two aspects (a) the reasons that justified the modifications (b) its scope (subjective and objective) of application. It also shows the development of European consumer contract law within the whole area of European contract law and analyses the inclusion into EC directives on consumer protection of specific provisions as to their international scope in order to ensure their effective and uniform application to

international consumer transactions. In fact, certain number of directives contain a provision that, although not being a conflict of laws' rule, have an impact on the applicable law to a contract. If the contract has a direct link to the territory of one or more Member States, these provisions provide for the application of Community law even if the parties chose the law of a third country.

F. Seatzu, "La Convenzione europea dei diritti dell'uomo e le libertà di iniciativa imprenditoriale e professionale"
Abstract: This article looks at different aspects of the concept of "economic initiative" and delineate its indicia for the purpose of human rights discourse. It discusses the meaning of the notion of economic initiative as a human rights within the context of European Convention on Human Rights. The author argues that a theoretical framework is required in order to clarify how far the Convention allows public authorities to interfere with economic rights. The article addresses a number of issues, including the following questions: what is economic initiative? Is economic initiative a human rights? How are economic rights limited? How far can public authorities legitimately interfere with human rights? In order to do this, the author examines case law of the Convention organs and reflects on the result of cases in the light of the theoretical framework that has been established.

P. Zapatero Miguel, "Diplomacia y cultura legal en el sistema GATT/OMC"
Abstract: The GATT/WTO system has evolved from a diplomacy-based system to a rule-oriented system. This cultural process in which lawyers finally triumphed over diplomats as key professionals running the regime was the direct result of an internal battle over technical qualifications inside the GATT that lasted several decades. Legal techniques have significantly reinforced the multilateral trading system
in comparative institutional terms. However, incremental legalization and judicialization has inevitably broadened the scope of trade justiciability, reaching a critical point that generates some criticism and concern. From the point of view of institutional design, this flexible and adaptative regime is among the most powerful and advanced multilateral artifacts in international legal arquitecture.

*A **Varia** section follows, also enclosing English abstracts.*

Publication: Rossolillo, “Identità personale e diritto internazionale privato”

A very interesting book on conflict issues arising out of personal identity and name has been recently published by the Italian publishing house CEDAM.
The volume, “**Identità personale e diritto internazionale privato**“, is authored by Prof. ***Giulia Rossolillo*** (University of Pavia). Prof. *Rossolillo* carries on a thorough analysis of PIL issues relating to name, both in its “private” and “public” dimension, taking into account legislation, legal scholarship and caselaw from various national jurisdictions and from the ECJ and the European Court of Human Rights.

An abstract has been kindly provided by the author (the complete table of contents is available on the publisher’s website):

> *The transnational aspects of personal identity are today subject-matter not only of private international law provisions, but also of the case law of the European Court of Human Rights and of the Court of Justice of the European Communities. Through a comparative approach, this book underlines the role of the principle of continuity and stability of names in these three fields.*
>
> *As far as private international law is concerned, the two basic functions of the name (expression of one’s personality and identity, and means by which the State identifies the subjects) are mirrored in the functioning of the related private international law rules of many civil law countries. Indeed, one can distinguish conflict of laws provisions concerning the “private aspect” of the name, that is the transmission and changing of it linked to family relationships, and provisions related to the attribution and modification of the name through a public authority act. The first aspect in many continental European countries is regulated by rules referring to the national legal system of the subject as a whole and assuming its point of view, while the so called “public aspect” of the*

name is generally regulated by unilateral provisions, taking into account only the point of view of the forum State. The underlying idea of the first approach is that the assumption of the point of view of the nationality legal order can guarantee, to a certain extent, the continuity of name every time the person moves from one State to another, whereas the principle of continuity plays a weaker role as regards the second approach. The pivotal role of the principle of continuity comes out, moreover, from national provisions allowing the individual to choose the law that will be applied to his name, like the Swiss private international law provisions giving the individual the opportunity to submit his name to his national law, instead of having it regulated by the law of the State of domicile.

The attempt of balancing private and public interests and the importance of stability for the protection of the personal identity of the individual comes out also from the case law of the European Court of Human Rights. On the one hand the Court gives, in fact, a great importance to State's interests, but on the other hand these interests are overruled when the interference of the State would lead to oblige the individual to change a name that, having been used for a long time, has become an expression of his personal identity.

The Court of Justice of the European Communities seems, on the contrary, to protect personal identity in a different way: the obligation for every member State to recognize a name given by another member State, envisaged by the Court in the Grunkin-Paul judgment, is, in fact, independent of any effectiveness requirement, that is of the fact that the individual has made actual use of that name, which has become a part of his identity. State interests are, thus, always overruled by the right of the individual to obtain the recognition of his name in the whole Union.

Title: "**Identità personale e diritto internazionale privato**", by *Giulia Rossolillo*, CEDAM (Padova), 2009, XVI – 248 pages.

ISBN: 978-88-13-29065-8. Price: EUR 24,50. Available at CEDAM.

Conference: “Il diritto al nome e all’identità personale nell’Unione europea”

An interesting conference on issues relating to name and personal identity in private international law and EU law will be hosted by the Faculty of Law of the **University of Milan – Bicocca on 22 May 2009** (h. 9:15-13:45): **“Il diritto al nome e all’identità personale nell’Unione europea”** (*Right to Name and Personal Identity in the EU*).

Here’s the programme (*the session will be held in Italian, except otherwise specified*):

Chair: *Roberto Baratta* (University of Macerata, Permament Representation of Italy to the European Union);

- “Il diritto al nome come espressione del principio di eguaglianza tra coniugi nella giurisprudenza italiana”: *Maria Dossetti* (University of Milan – Bicocca), *Anna Galizia Danovi* (Centro per la Riforma del Diritto di Famiglia);
- “Le droit au nom dans la jurisprudence de la Cour de Justice” (*in French*): *Jean-Yves Carlier* (Université Catholique de Louvain);
- “Le droit au nom, entre liberté de circulation et droits fondamentaux” (*in French*): *Laura Tomasi* (Registry of the European Court of Human Rights);
- “La legge applicabile al nome: conseguenze dei principi comunitari ed europei sul diritto internazionale privato”: *Giulia Rossolillo* (University of Pavia);
- “Il riconoscimento del diritto al nome nella prassi italiana”: *Sara Tonolo* (University of Insubria);
- Shorter reports and debate: *Valeria Carfì* (University of Siena), *Alessandra Lang* (University of Milan), *Diletta Tega* (University of Milan Bicocca)

Concluding remarks: *Roberto Baratta.*

(Many thanks to Giulia Rossolillo for the tip-off)

On the Desirability of the Alien Tort Statute

> *Judicially made corporate human rights litigation is a luxury we can no longer afford.*

This is the conclusion of an op-ed (Rights Case Gone Wrong) published yesterday in the *Washington Post* by two leading American international law professors, Curtis Bradley (Duke) and Jack Goldsmith (Harvard).

An interesting debate is now following at opiniojuris between the supporters and the critics of the Alien Tort Statute: see the comments of, inter alia, Kevin Jon Heller, Julian Ku, Kenneth Anderson and Eric Posner.

ECJ Judgment in Gambazzi

The European Court of Justice (ECJ) has delivered today its judgment in *Gambazzi v. Daimler Chrysler Canada, Inc. and CIBC Mellon Trust Company*.

The case, previously known as *Stolzenberg*, had been already litigated in numerous jurisdictions (see our previous posts here and here). The defendants had sued Gambazzi in London and obtained there a *Mareva* injunction. As Gambazzi failed to comply with it, he was sanctioned by the English court and debarred from defending in the main proceedings. As a consequence, the defendants entered into a default judgment against him. They then sought enforcement of the said default jugdment throughout Europe, including in Italy. The Court of Appeal of Milan referred the case to the ECJ, and asked:

> *On the basis of the public policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party which had entered an appearance the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]? Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order made by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?*

Following closely the conclusions of Advocate General Kokott, the ECJ ruled this morning that it could only give guidelines to national courts so that they would make a decision themselves. It held:

> ***the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in [Article 27(1)], the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.***

Clearly, this is a bit disappointing. We will have to wait longer before getting a chance to know whether nuclear weapons of English civil procedure are compatible with human rights in general, and Article 6 of the European Convention on Human Rights (ECHR) in particular.

The ECJ addressed two issues in its judgment.

First, it made it clear that English default judgments are judgments within the meaning of Article 25 of the Brussels Convention. It held that they meet the *Denilauler* test of being adversarial. This is good to know, but I am not sure this was the most interesting issue. Advocate General Kokott had also focused on whether English default judgments meet the *Solokleinmotoren* test, and this was much more questionable. AG Kokott had concluded that they did meet that test, but the Court is silent in this respect.

Second, the Court discussed whether the English default judgment was contrary to public policy. It only addressed the issue referred to it by the Milan Court, i.e. whether rendering a 'default' judgment as a consequence of debarment from defending was a violation of the right to a fair trial. Along the lines of AG Kokott's conclusions, the ECJ only gave guidelines to national courts which will have to appreciate whether, in the light of all circumstances, there was such violation. In particular, the Court insisted that they should assess whether debarment was a proportionate sanction.

> *33 With regard to the sanction adopted in the main proceedings, the exclusion of Mr Gambazzi from any participation in the proceedings, that is, as the Advocate General stated in point 67 of her Opinion, the most serious restriction possible on the rights of the defence. Consequently, such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights.*
>
> *34 It is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case.*

The ECJ does not discuss whether the lack of reasons of English default judgments is contrary to Article 6 ECHR. It does not discuss either whether being prevented from accessing to one's evidence because it is withheld by one's lawyer is contrary to the right to a fair trial. As we had previously reported, other courts in Europe had found that these were violations of their public policy.

Publication: Liber Fausto Pocar – New Instruments of Private International Law

The Italian publishing house Giuffrè has recently published a very rich collection of essays in honor of Fausto Pocar, Professor at the University of Milan and judge and former President of the International Criminal Tribunal for the former Yugoslavia, one of Italian leading scholars in the field of public international law, EU law and private international law.

The collection, ***Liber Fausto Pocar***, edited by *Gabriella Venturini* and *Stefania Bariatti*, is divided in two volumes, devoted respectively to public international law (vol. I, Diritti individuali e giustizia internazionale – Individual Rights and International Justice) and private international law (vol. II, Nuovi strumenti del diritto internazionale privato – New instruments of Private International Law).

Here's the table of contents of the second volume:

- *Roberto Baratta*, Réflexions sur la coopération judiciaire civile suite au traité de Lisbonne;
- *Stefania Bariatti*, Filling in the Gaps of EC Conflicts of Laws Instruments: The Case of Jurisdiction over Actions Related to Insolvency Proceedings;
- *Maria Caterina Baruffi*, Il riconoscimento delle decisioni in materia di obbligazioni alimentari verso i minori: l'Unione europea e gli Stati Uniti a confronto;
- *Jürgen Basedow*, Lex mercatoria e diritto internazionale privato dei contratti: una prospettiva economica;
- *Paul R. Beaumont*, The Art. 8 Jurisprudence of the European Court of Human Rights on the Hague Convention on International Child Abduction in relation to Delays in Enforcing the Return of a Child;
- *Michael Bogdan*, Some Reflections Regarding Environmental Damage and the Rome II Regulation;

- *Andrea Bonomi*, Prime considerazioni sul regime delle norme di applicazione necessaria nel nuovo Regolamento Roma I sulla legge applicabile ai contratti;
- *Alegría Borrás*, Reservations, Declarations and Specifications: Their Function in the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance;
- *Nerina Boschiero*, Spunti critici sulla nuova disciplina comunitaria della legge applicabile ai contratti relativi alla proprietà intellettuale in mancanza di scelta ad opera delle parti;
- *Ronald A. Brand*, Evolving Competence for Private International Law in Europe: The External Effects of Internal Developments;
- *Andreas Bucher*, Réforme en matière d'enlèvement d'enfants: la loi suisse;
- *Sergio Maria Carbone*, Accordi interstatali e diritto marittimo uniforme;
- *Roberta Clerici*, Quale favor per il lavoratore nel Regolamento Roma I?;
- *Giuseppe Coscia*, La nuova azione collettiva risarcitoria italiana nel quadro delle discipline processuali di conflitto interne e comunitarie;
- *Saverio De Bellis*, La negotiorum gestio nel Regolamento (CE) n. 864/2007;
- *Patrizia De Cesari*, «Disposizioni alle quali non è permesso derogare convenzionalmente» e «norme di applicazione necessaria» nel Regolamento Roma I;
- *Harry Duintjer Tebbens*, Punitive Damages: Towards a Rule of Reason for U.S. Awards and Their Recognition Elsewhere;
- *William Duncan*, The Maintenance of a Hague Convention. Adapting to Change. A Discussion of Techniques to Ensure that a Convention Remains "Fit for Purpose";
- *Bernard Dutoit*, Le droit international privé des obligations non contractuelles à l'heure européenne: le Règlement Rome II;
- *Marc Fallon*, L'exception d'ordre public face à l'exception de reconnaissance mutuelle;
- *Paolo Fois*, La comunitarizzazione del diritto internazionale privato e processuale. Perplessità circa il carattere «definitivo» del trasferimento di competenze dagli Stati membri alla Comunità;
- *Marco Frigessi Di Rattalma*, La legge regolatrice della responsabilità da direzione e coordinamento nei gruppi multinazionali di società;
- *Manlio Frigo*, Ethical Rules and Codes of Honour Related to Museum

Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property;

- *Luigi Fumagalli*, Il caso «Tedesco»: un rinvio pregiudiziale relativo al Regolamento n. 1206/2001;
- *Giorgio Gaja*, Il regolamento di giurisdizione e il suo ambito di applicazione in materia internazionale;
- *Luciano Garofalo*, Diritto comunitario e conflitti di leggi. Spunti sulle nuove tendenze del diritto internazionale privato contemporaneo emergenti dal Regolamento Roma II;
- *Hélène Gaudemet Tallon*, Le destin mouvementé des articles 14 et 15 du Code civil français de 1804 au début du XXIème siècle;
- *Andrea Giardina*, Gli interessi: conflitti di leggi e diritto uniforme nella pratica giudiziaria e arbitrale internazionale;
- *Trevor C. Hartley*, The Integration Theory v Acquired Rights. The Way Forward for Matrimonial-Property Choice of Law in the EC;
- *Costanza Honorati*, La legge applicabile al nome tra diritto internazionale privato e diritto comunitario nelle conclusioni degli avvocati generali;
- *Monique Jametti Greiner*, La protection des enfants dans le cadre d'enlèvements internationaux d'enfants. Les solutions de La Haye
- *Hans Ulrich Jessurun D'Oliveira*, How do International Organisations Cope with the Personal Status of their Staff Members? Some Observations on the Recognition of (Same-Sex) Marriages in International Organizations;
- *Catherine Kessedjian*, Les actions collectives en dommages et intérêts pour infraction aux règles communautaires de la concurrence et le droit international privé;
- *Peter Kindler*, Libertà di stabilimento e diritto internazionale privato delle società;
- *Christian Kohler*, Trois défis : la Cour de justice des Communautés européennes et l'espace judiciaire européen en matière civile;
- *Paul Lagarde*, La culpa in contrahendo à la croisée des règlements communautaires;
- *Pierre Lalive*, L'ordre public transnational et l'arbitre international;
- *Riccardo Luzzatto*, Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato;
- *Maria Chiara Malaguti*, Brevi riflessioni sui moderni criteri di unificazione del diritto alla luce della disciplina sui titoli detenuti presso intermediari;

- *Alberto Malatesta*, Cultural Diversity and Private International Law;
- *Sergio Marchisio*, Les conventions de la Commission internationale de l'État civil;
- *Luigi Mari*, Equo processo e competenza in materia contrattuale. Note minime a proposito della giurisprudenza della Corte di giustizia;
- *Johan Meeusen*, Who is Afraid of European Private International Law?;
- *Paolo Mengozzi*, I conflitti di leggi, le norme di applicazione necessaria in materia di rapporti di lavoro e la libertà di circolazione dei servizi nella Comunità europea;
- *Robin Morse*, Industrial Action in the Conflict of Laws;
- *Franco Mosconi*, La Convenzione CIEC del 5 settembre 2007 sui partenariati registrati;
- *Francesco Munari*, L'entrata in vigore del Regolamento Roma II e i suoi effetti sul *private antitrust enforcement*;
- *Peter Arnt Nielsen*, European Contract Jurisdiction in Need of Reform?;
- *Tomasz Pajor*, The Impact of the United Nations Convention on Contracts for the International Sale of Goods on Polish Law;
- *Monika Pauknerová*, International Conventions and Community Law: Harmony and Conflicts;
- *Marta Pertegás*, The Interaction between EC Private International Law and Procedural Rules: The European Enforcement Order as Test-Case;
- *Paola Piroddi*, Between Scylla and Charybdis. Art. 4 of the Rome I Regulation Navigating along the Cliffs of Uncertainty and Inflexibility;
- *Ilaria Queirolo*, L'influenza del Regolamento comunitario sul difficile coordinamento tra legge fallimentare e legge di riforma del diritto internazionale privato;
- *Mariel Revillard*, Pratique de droit international privé de la famille en Italie et en France: perspectives de communautarisation;
- *Carola Ricci*, I fori «residuali» nelle cause matrimoniali dopo la sentenza *Lopez*;
- *Kurt Siehr*, The lex originis for Cultural Objects in European Private International Law;
- *Antoon V.M. (Teun) Struycken*, Bruxelles I et le monde extérieur;
- *Michele Tamburini*, La validità nel processo civile italiano della procura alle liti rilasciata all'estero;
- *Antonio Tizzano*, Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario;

- *Francesca Trombetta-Panigadi*, Osservazioni sulla futura disciplina comunitaria in materia di successioni per causa di morte;
- *Francesca Clara Villata*, La legge applicabile ai «contratti dei mercati regolamentati» nel Regolamento Roma I;
- *Gaetano Vitellino*, Conflitti di leggi e di giurisdizioni in materia di azione inibitoria collettiva.

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Title: **Liber Fausto Pocar – Vol. II: Nuovi strumenti del diritto internazionale privato**, edited by *Gabriella Venturini* and *Stefania Bariatti*, Giuffrè, Milano, 2009, XXXVII – 1020 pages.

ISBN: 8814149321. Price: EUR 110. Available at Giuffrè.

Gambazzi v. Daimler Chrysler, Part 10: Monte Carlo

And then there were ten! The *Soltzenberg – Gambazzi* case had already been litigated in nine jurisdictions, including the two European courts. A major jurisdiction of the western world was still missing, but it is not anymore: Daimler Chrylser Canada and CIBC Mellon Trust have also sought enforcement of the English default judgments in Monte Carlo.

Unfortunately for them, in a judgment of 4 December 2008, the first instance court of Monte Carlo denied recognition to the English judgments, on the ground that they violate Monte Carlo's public policy.

By way of background, it must be emphasized that Monte Carlo is not a Member State of the European Union, and is not a party to any European convention on jurisdiction and judgments (let alone to any regulation), including the Lugano Convention. The common law governs the recognition of foreign judgments. However, this does not make much difference, as the public policy exception is

common to all modern laws of judgments.

The Court found that the English judgments were contrary to public policy, because they did not state any reasons, and indeed barely stated anything. It ruled that they stated neither the claims of the plaintiffs, nor the reasons for the actual decisions, and that they failed even to refer to the writ of summons. The Court held that this was a breach of the fundamental rules of procedure, and thus of Monte Carlo international public policy.

The judgment does not refer to the European Convention on Human Rights. I do not know whether Monte Carlo courts rule that this instrument is relevant for the purpose of defining their international public policy, but Monte Carlo has certainly been a member of the Council of Europe since 2004. It would have been most interesting to have a look to the case law of the Strasbourg court on this, as the ECHR has consistently ruled that judgments failing to give reasons are a violation of Article 6 and the right to a fair trial. Of course, a critical issue is whether English default judgments can be characterized as completly lacking reasons (I have argued that there is a case for saying that they do not).

Remarkably, Advocate General Kokott did not discuss this potential violation of public policy in her recent opinion in the same case. She only addressed whether the English judgments were contrary to public policy because 1) Gambazzi was debarred from defending on the merits in the English proceedings and, 2) Gambazzi was denied access to his file by his English lawyers whose fees had not been paid.

So, let's recapitulate. What does Europe think of each of these three alleged breaches of public policy?

Is debarment from defending a violation of public policy?

- AG Kokott: maybe (probably?)
- Switzerland (Federal Tribunal): no*
- Strasbourg (ECHR): not even worth looking at

Is lack of access to one's legal file a violation of public policy?

- Switzerland: yes*
- AG Kokott: maybe

- Strasbourg: not even worth looking at

Is lack of reasons a violation of public policy?

- Monte Carlo: yes
- France (*Cour de cassation*): no
- Strasbourg: not even worth looking at

Interim conclusion: good that the protection of human rights is not only the business of the European Court of Human Rights.

*As reported by A.G. Kokott in her opinion.

Many thanks to Michele Potestà, Ilaria Anrò and Giorgio Buono for drawing my attention to the existence of this judgment.

ECJ: AG Opinion in "Apostolides"

On Thursday, the Opinion of *Advocate General Kokott* in case C-420/07 (*Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*) has been published.

I. Background of the Case

The background of the case was as follows:

Mr. Apostolides, a Greek Cypriot, owned land in an area which is now under the control of the Turkish Republic of Northern Cyprus, which is not recognised by any country save Turkey, but has nonetheless *de facto* control over the area. When in 1974 the Turkish army invaded the north of the island, Mr. Apostolides had to flee. In 2002, Mr. and Mrs. Orams – who are British citizens – purchased part of the land which had come into the ownership of Mr. Apostolides. In 2003, Mr. Apostolides was – due to the easing of travel restrictions – able to travel to the Turkish Republic of Northern Cyprus and saw the property. In 2004 he issued a writ naming Mr. and Mrs. Orams as defendants claiming to demolish the villa,

the swimming pool and the fence they had built, to deliver Mr. Apostolides free occupation of the land and damages for trespass. Since the time limit for entering an appearance elapsed, a judgment in default of appearance was entered on 9 November 2004. Subsequently, a certificate was obtained in the form prescribed by Annex V to the Brussels I Regulation. Against the judgment of 9 November 2004, an application was issued on behalf of Mr. and Mrs. Orams that the judgment be set aside. This application to set aside the judgment, however, was dismissed by the District Court at Nicosia on the grounds that Mr. Apostolides had not lost his right to the land and that neither local custom nor the good faith of Mr. and Mrs. Orams constituted a defence.

On the application of Mr. Apostolides to the English High Court, the master ordered in October 2005 that those judgments should be registered in and declared enforceable by the High Court pursuant to the Brussels I Regulation. However, Mr. and Mrs. Orams appealed in order to set aside the registration, *inter alia* on the ground that the Brussels I Regulation was not applicable to the area controlled by the Turkish Republic of Northern Cyprus due to Art. 1 of Protocol 10 to the Treaty of Accession of the Republic of Cyprus to the European Union.

This article reads as follows:

1. The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control. […]

Jack J (Queen´s Bench Division) allowed the appeal on 6 September 2006 by holding *inter alia*

that the effect of the Protocol [10 of the Treaty of Accession of the Republic of Cyprus] is that the acquis, and therefore Regulation No 44/2001, are of no effect in relation to matters which relate to the area controlled by the TRNC [i.e. the Turkish Republic of Northern Cyprus], and that this prevents Mr Apostolides relying on it to seek to enforce the judgments which he has obtained. (para. 30)

Subsequently, Mr. Apostolides lodged an appeal against the judgment of the Queen’s Bench Division at the Court of Appeal.

II. Reference for a Preliminary Ruling

The Court of Appeal decided to refer the following questions to the ECJ for a preliminary ruling according to Art. 234 EC-Treaty.

1. Does the suspension of the application of the acquis communautaire in the northern area [by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State Court from recognising and enforcing a judgment given by a Court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] ("Regulation 44/2001"), which is part of the acquis communautaire'?

2. Does Article 35(1) of Regulation 44/2001 entitle or bind a Member State court to refuse recognition and enforcement of a judgment given by the Courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control? In particular, does such a judgment conflict with Article 22 of Regulation 44/2001?

3. Can a judgment of a Member State court, sitting in an area of that State over which the Government of that State does exercise effective control, in respect of land in that State in an area over which the Government of that State does not exercise effective control, be denied recognition or enforcement under Article 34(1) of Regulation 44/2001 on the grounds that as a practical matter the judgment cannot be enforced where the land is situated, although the judgment is enforceable in the Government-controlled area of the Member State?

4. Where –

a default judgment has been entered against a defendant;

the defendant then commenced proceedings in the Court of origin to challenge the default judgment; but

his application was unsuccessful following a full and fair hearing on the ground that he had failed to show any arguable defence (which is necessary under national law before such a judgment can be set aside),

can that defendant resist enforcement of the original default judgment or the judgment on the application to set aside under Article 34(2) of Regulation 44/2001, on the ground that he was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence prior to the entry of the original default judgment? Does it make a difference if the hearing entailed only consideration of the defendant's defence to the claim.

5. In applying the test in Article 34(2) of Regulation 44/2001 of whether the defendant was "served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence" what factors are relevant to the assessment? In particular:

Where service in fact brought the document to the attention of the defendant, is it relevant to consider the actions (or inactions) of the defendant or his lawyers after service took place?

What if any relevance would particular conduct of, or difficulties experienced by, the defendant or his lawyers have?

(c) Is it relevant that the defendant's lawyer could have entered an appearance before judgment in default was entered?

III. Advocate General Kokott's Opinion

Now, Advocate General Kokott suggested that these questions should be answered by the ECJ as follows:

1. The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, provided for in Article 1(1) of Protocol No 10 to the Act of Accession of 2003, does not preclude a court of another Member State from recognising and enforcing, on the basis of Regulation No 44/2001, a judgment given by a court of the Republic of Cyprus involving elements with a bearing on the area not controlled by the government of that State.

2. Article 35(1) in conjunction with Article 22(1) of Regulation No 44/2001 does

not entitle a Member State court to refuse recognition and enforcement of a judgment given by a court of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control.

3. A court of a Member State may not refuse recognition and enforcement of a judgment on the basis of the public policy proviso in Article 34(1) of Regulation No 44/2001 because the judgment, although formally enforceable in the State where it was given, cannot be enforced there for factual reasons.

4. Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that recognition and enforcement of a default judgment may not be refused by reference to irregularities in the service of the document which instituted the proceedings, if it was possible for the defendant, who initially failed to enter an appearance, to commence proceedings to challenge the default judgment, if the courts of the State where the judgment was given then reviewed the judgment in full and fair proceedings, and if there are no indications that the defendant's right to a fair hearing was infringed in those proceedings.

The reasons given by the AG can be summarised as follows:

1. Impact of Art. 1 (1) Protocol No. 10 on the Application of Brussels I

Regarding the **first question**, i. e. the question whether the suspension of the application of the *acquis communautaire* in the northern area of Cyprus pursuant to Article 1(1) of Protocol No. 10 precludes the recognition and enforcement under the Brussels I Regulation of a judgment relating to claims to the ownership of land situated in that area, the AG first emphasises the difference between the territorial scope and the reference area meaning the area to which judgments of a court of a Member State, which are to be recognised and enforced under the Regulation, may relate (para. 25 et seq.). As the AG states, the reference area is broader than the territorial scope and also covers Non-Member States. The Regulation therefore also applies to proceedings which include a Non-Member-State element (para. 28). In this context, the AG refers to the ECJ's ruling in *Owusu* as well as its *Opinion on the Lugano Convention*.

With regard to the question which effect Protocol No. 10 has on the scope as well as the reference area of Brussels I, the AG clarifies that the suspension of the

application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control restricts the territorial scope of the Brussels I Regulation which leads to the result that the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus cannot be based on the Brussels I Regulation. Nor is it possible under the Regulation, for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State (para. 31).

However, according to the AG there is a significant difference between the aforementioned situations and the present case: She states that "the dispute before the Court of Appeal does not involve either of those situations. Rather, it is required to rule on the application for the enforcement in the United Kingdom of a judgment of a court situated in the area controlled by the Government of the Republic of Cyprus. The restriction of the territorial scope of Regulation No 44/2001 by Protocol No 10 does not, therefore, affect the present case" (para. 32). The AG stresses that Article 1(1) of Protocol No. 10 states that the *acquis communautaire* is to be suspended *in* that area and not *in relation* to that area (para. 34).

This point of view is further supported by referring to the case law according to which "exceptions to or derogations from rules laid down by the Treaty must be interpreted restrictively with reference to the Treaty provisions in question and must be limited to what is absolutely necessary." This principle has – in the AG's opinion – to be applied also with regard to secondary legislation, i.e. the Brussels I Regulation (para. 35).

Also political considerations raised by Mrs. and Mr. Orams did not convince the AG: The Orams have argued that the recognition and enforcement of the judgment of the District Court of Nicosia would conflict with the objectives of the Protocol and the relevant UN Resolutions aiming to bring about a comprehensive settlement of the Cyprus problem (para. 43). This argumentation, however, is rejected by the AG in particular by pointing out that the application of the Brussels I Regulation cannot be made dependent on political assessments since this would be detrimental with regard to the principle of legal certainty (para. 48).

Thus, the AG concludes with regard to the first question that "the suspension of

the application of the *acquis communautaire* in the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, provided for in Article 1 (1) of Protocol No. 10 of the Act of Accession of 2003, does not preclude a court of another Member State from recognising and enforcing, on the basis of Regulation No. 44/2001, a judgment given by a court of the Republic of Cyprus involving elements with a bearing on the area not controlled by the Government of that State" (para. 53).

2. Scope of the Brussels I Regulation

With regard to the remaining questions, the AG first addresses the preliminary question whether this case falls within the scope of Brussels I at all (para. 55 et seq.). Doubts had been raised in this respect by the European Commission questioning whether this case constitutes a civil and commercial matter in terms of Article 1(1) Brussels I. These doubts are based on the context of the case and therefore the fact that the disputes over land owned by displaced Greek Cypriot refugees have their origin in the military occupation of northern Cyprus (para. 55). The Commission submits that it has to be taken into consideration that a compensation regime has been enacted and that therefore an alternative legal remedy concerning restitution is available which can be construed as a convention in terms of Art. 71 (1) Brussels I stating that the regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (para. 57).

With regard to this argumentation, the AG first stresses the independent concept of civil and commercial matters and points out (at para. 59) that "only actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention, and only in so far as that authority is acting in the exercise of public powers". The present case has – according to the AG – to be distinguished from cases such as *Lechouritou* – since here "Mr Apostolides is not making any claims for restitution or compensation against a government authority, but a civil claim for restitution of land and further claims connected with loss of enjoyment of the land against Mr and Mrs Orams" (para. 60). Thus, in the present case "a private applicant is asserting claims governed by private law against other private persons before a civil court, so that, on the basis of all the relevant circumstances, the action is clearly a civil law dispute" (para. 63).

Further, the AG does not agree with the Commission's reasoning according to which the exclusion of civil claims has occurred, as it were, by operation of international law, since the TRNC has enacted compensation legislation approved, in principle, by the European Court of Human Rights (para. 66 et seq.). According to the AG, the case law of the European Court of Human Rights "gives no indication that the legislation in question validly excludes the prosecution of civil claims under the law of the Republic of Cyprus" (para. 68). Also the Commission's argument based on Art. 71 Brussels I is rejected by the AG by arguing that the requirements of a "convention" in terms of Art. 71 (1) Brussels I are not fulfilled (para. 72).

Thus, the AG concludes that the judgment whose recognition is sought in the main proceedings concerns a civil matter in terms of the Brussels I Regulation and therefore falls within its scope of application (para. 73).

3. Articles 22 (1), 35 (1) Brussels I

The **second question** referred to the Court raises the question whether Artt. 35 (1), 22 (1) Brussels I entitle or bind the court of a Member State to refuse recognition and enforcement of a judgment given by the courts of another Member State concerning land in an area of the latter Member State over which the government of that Member State does not exercise effective control. Mrs. and Mr. Orams argue in this respect that Art. 22 (1) Brussels I has to be interpreted restrictively and does therefore not accord jurisdiction to the courts of the Republic of Cyprus for actions concerning land in the northern area. This assumption is based on the consideration that the thought underlying Art. 22 (1) Brussels I, which is to assign for reasons of proximity exclusive jurisdiction to the court of the place where the property is situated (para. 83), cannot be applied here since the courts of the Republic of Cyprus do not in fact have the advantage of particular proximity due to its lack of effective control over that area (para. 84). This assumption, however, is rejected by the AG whereby she leaves the question whether that view is correct open since – according to her opinion – Art. 22 (1) Brussels I could only be infringed if – instead of the courts of the Republic of Cyprus – the courts of another Member State were to have jurisdiction by virtue of the place where the property is situated. This is, however, not the case (para. 85).

4. Public Policy – Art. 34 (1) Brussels I

The **third question** referred to the Court aims to ascertain whether the factual non-enforceability of a judgment in the State where it was given can be regarded as manifestly contrary to public policy in terms of Art. 34 (1) Brussels I (para. 95). This is answered in the negative by the AG by stating *inter alia* that "since the enforceability of the foreign judgment in the State of origin as a condition for a declaration of enforceability by the courts of another Member State is laid down definitively in Article 38 (1) of the regulation, the same condition cannot be taken up with a different meaning in the context of the public policy proviso" (para. 100). Further, the AG discusses also the submission brought forward by the Commission and the Orams as to whether the recognition and enforcement of the judgment of the District Court of Nicosia contravenes international public policy since it may undermine the efforts to find a solution to the Cyprus problem (para. 101). With regard to this problem, the AG first points out that this question has not been considered by the referring court and that, in principle, the Court is bound by the subject matter of the reference (para. 102). However, in case the Court should find it appropriate to discuss this question, the AG argues *inter alia* that "the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in northern Cyprus" (para. 111). Thus, according to the AG, a court of a Member State cannot refuse the recognition and enforcement of a judgment on the basis of Art. 34 (1) Brussels I on the grounds that the judgment cannot be enforced for factual reasons in the State where it was given.

5. Irregularities of Service – Art. 34 (2) Brussels I

With the **fourth question**, the referring court asks whether the recognition of a default judgment can be refused according to Art. 34 (2) Brussels I on account of irregularities in the service of the document instituting the proceedings when the judgment has been reviewed in proceedings instituted by the defendant to challenge it (para. 113). Here, the AG stresses that under Art. 34 (2) Brussels I the decisive factor is whether the rights of the defence are respected (para. 117). Since in the present case Mrs. and Mr. Orams had the opportunity to challenge the default judgment of the District Court of Nicosia, recognition and enforcement cannot -according to the AG – be refused on the basis of irregularities in the service of the writ (para. 120).

See with regard to this case also our previous post on the reference.

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)