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).

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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.

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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)

Spanish homosexual couple and surrogate pregnancy

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

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

According to press reports, the couple has ruled out the option of returning to Spain by registering the babies as born to a Spanish female mother; they want them to be acknowledged as their children, and them to be granted the Spanish nationality. Faced with the Spanish refusal they might decide to remain (to exile?) in the U.S.A., where they have been offered a residence permit. They have warned the Spanish government that they will start a legal battle both in the U.S.A. and before the European Court of Human Rights, claiming violation of the Declaration of the Rights of the Child. Considering the importance of their aim, how much it is worth; but also knowing how exhausting such processes will be,

we can only wish them courage and luck.

Daimler Chrysler v Stolzenberg, Part 9: Luxembourg

The *Stolzenberg* case will also be litigated before the European Court of Justice! Last year, the Court of Appeal of Milan, Italy, referred two questions to the ECJ on the interpretation of the public policy clause of Article 27(1) of the 1968 Brussels Convention.

The ECJ was one of the few major courts in the western world which was missing in this judicial odyssey. It has now lasted for more than 15 years. And it is not over.

Part 1: Canada

The case began in the early 1990s with the collapse of an investment company incorporated in Montreal, Castor Holdings. A bankruptcy was opened in 1992 in Canada. It has been presented by many as the largest ($ 1.5 billion) and the longest bankruptcy in Canadian history.

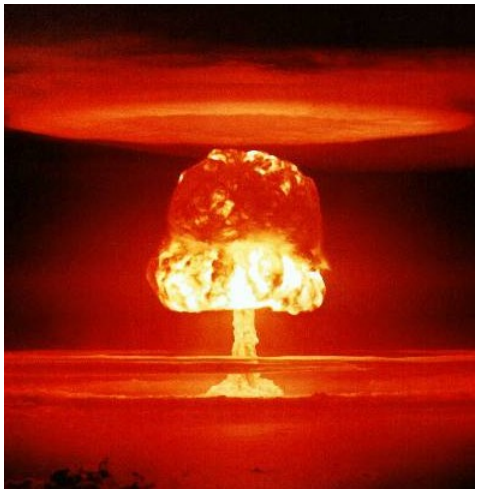
Essentially, the bankruptcy proceedings were about the auditors, Coopers & Lybrand (as they were then). In August 2008, the action against them was still pending. However, proceedings had also been initiated against the directors of the company for distributing $ 15.5 million of dividends in 1991, in the suspect period. Some of the directors settled with the bankruptcy, but five did not. In August 2008, the latter were eventually sentenced to pay $ 9.7 million. Among the five were the president of Castor, a German national named Stolzenberg, and a Swiss national named Gambazzi.

Part 2: England

Meanwhile, however, a small group of investors had brought proceedings before English courts. In 1996, Daimler Chrysler Canada and its pension fund, CIBC

Mellon Trust Co., initiated proceedings against the directors and close to forty other corporate entities. They claimed that their loss in the Castor bankruptcy was the result of wrongful conduct by the directors, including Stolzenberg and Gambazzi.

A key issue in the litigation was the jurisdiction of English courts. None of the 40 defendants had any connection with England, except Stolzenberg, who had once owned a house in London, but, it seems, did not own it anymore when the proceedings were served on the defendants. The case went all the way up the House of Lords, which held in 2000 in Canada Trust Company v. Stolzenberg, Gambazzi and others that what mattered was whether there was one defendant who was domiciled in England when the claim was issued by the English court, not when it was served on the defendants (8 months later).



Since the start of the English proceedings, the defendants had been subjected to a world wide *Mareva* injunction (now freezing order). As a result, they were under a variety of duties of disclosure that, they thought, were unacceptably far reaching. Some never appeared before English courts, but some did and complied for a while. At some point, however, they refused to provide any more information on their assets (which were situated abroad). They did not live in England, so there was not much the English court could do. But the Mareva injunction has been called one of the two nuclear weapons of English civil procedure. The English court pressed the nuclear button. Because they were not complying, the defendants were debarred from defending any action in England. This included the action *on the merits*. The English court then entered into a default judgment for close to € 400 million. There had been no trial, no assessment of the merits of the case. There was only a procedural sanction: you do not comply, your opponent will get whatever he asks for.

The Stolzenberg litigation entered into a new stage. It was not anymore about what had happened in Canada. It was about whether such a default judgment could be enforced abroad, where the defendants had assets.

Part 3: Germany

Stolzenberg had fled England early on. He was then, and is still now, believed to be living in Germany. Enforcement proceedings were initiated there, but I do not know much about them.

Part 4: New York

One of the corporate defendants in the English proceedings owned a hotel in mid-town Manhattan. In May 2000, enforcement proceedings of the English judgment were initiated in New York. Eventually, the matter came before the New York Court of Appeals (that is, I understand, the supreme court of the state of New York).

In a judgment of May 8, 2003, the Court confirmed that the judgment could be recognised in New York. It held that the English judgment was not incompatible with the requirements of due process of law. Indeed, the court endorsed previous statement of American courts saying that "*[c]onsidering that our own jurisprudence is based on England's, a defendant sued on an English judgment will rarely be in a position to defeat it with such a showing*", and "*any suggestion that [England's] system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible*".

Not only the Queen, but also the English, can do no wrong.

Part 5: France

Stolzenberg had some assets in Paris. Enforcement proceedings were thus initiated in France. In a judgment of 30 June 2004, the French Supreme Court for Private and Criminal Matters (*Cour de cassation*) confirmed the enforceability in France of both the *Mareva* injunction and the English default judgment. Although Stolzenberg's lawyers raised the issue of the compatibility of the judgement with French public policy, they did not insist on the fact that the default judgment was obtained as a consequence of the unwillingness of the defendants to comply with the *Mareva* injunction. The judgement of the *Cour de cassation* is thus silent on the issue.

Part 6: Switzerland

A Swiss lawyer, Gambazzi had obviously assets in his home country. Enforcement

proceedings were initiated there as well. But it was reported that, unlike American and French courts, Swiss courts found that the English judgments were a breach of process and thus denied recognition. More precisely, according to the same report, the Swiss Federal Court would have ruled twice on the case in 2004, as enforcement had been sought against the Swiss assets of two former directors of Castor (Gambazzi and Banziger) in two different Swiss *cantons*, and would only have denied recognition for the purpose of enforcement against Gambazzi's assets.

Part 7: Strasbourg

Of course, from the perspective of the defendants, this seemed like a perfect case for the European Court of Human Rights. Are nuclear weapons compliant with Article 6 and the right to a fair trial? This really looks like a good question to ask the Strasbourg court. So, in the early 2000s, some of the defendants to the English proceedings brought an action against the United Kingdom, arguing, inter alia, that being debarred from defending did not comply with Article 6 of the Convention.

Quite remarkably, the action was declared inadmissible by the ECHR at the earliest stage, as "manifestly ill-founded". The Court did not give any reasons for this decision, which is noteworthy when one knows that the court considers that judgments lacking reasons do not comport with the right to a fair trial.

The defendants would have to wait for another opportunity to have their day in (a European) court.

Part 8: Italy

It seems that Gambazzi also had assets in Italy, as enforcement proceedings were also initiated in Milan. His lawyers challenged the enforceability of the English judgment, arguing that it was contrary to Italian public policy. As the 1968 Brussels Convention governed the enforcement of such judgement, they relied on the public policy clause of Article 27. On 22 August 2007, the Court of Appeal of Milan decided to refer two questions of interpretation of Article 27 to the European Court of Justice.

Part 9: Luxembourg

And here we are now in Luxembourg.

The Court of Milan referred the two following questions (Case C 394/07):

> *1. 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 the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]?*
>
> *2. 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 issued 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)?*

So it seems that (some of) the defendants might eventually have their day in a European court.

On Spanish Civil War and Dictatorship: why not claim abroad?

The twentieth century has been the century of human rights vindication. Its last two decades have witnessed a very special phenomenon in this regard: the privatization of lawsuits brought for crimes against the most basic human rights. Individuals, singly or grouped, seek civil redress before domestic courts against the State (its officers, its agents; also multinational corporations), claiming it has

incurred in liability through the commission of acts condemned by International Law.

USA has became an unavoidable reference to human rights litigation due to two federal laws: the Alien Torts Claims Act, 1789 (*ATCA*) and the Torture Victims Protection Act of 1991 (*TVPA*). The Acts allow foreign claimants to engage in civil actions against individuals associated with foreign States, claiming damages for conduct prejudicial to human rights, which is proscribed by International Law. Similar ideas are germinating in other countries, like Canada and recently also the United Kingdom: and not only in the academic arena.

While Greece or Italy still evokes the Second World atrocities, Spain focuses in the Civil War (1936-1939) and the Franco regime (1939-1975) outrages. On September 22, associations for the recovery of historical memory published their estimate number of missing persons during that periods- no less than 143,000. Within this figure are the names of Republicans who died in Nazi concentration camps in Germany, Austria and France, and others who died in exile. On Oct. 16 Judge Baltasar Garzon, our most well-known judge thanks to the Pinochet case, declared himself competent to investigate these disappearances and related crimes.

Maybe "dirty line will be washed at home" this time. Judge Baltasar Garzon works at the *Audiencia Nacional*, which has no jurisdiction in civil matters. In Spain, however, the civil claim can be accumulated to the criminal proceedings. But, if there is no luck (or even if any), will the civil action be tried elsewhere? Spaniards have begun to appreciate the advantages offered by U.S. procedural and substantive law (e.g., in cases of maritime pollution; see also G. Cuniberti "Jurisdiction to prevent the End of the Wordl"). And besides, it may not be necessary to go that far: On February 2008 Lord Archer of Sandwell (United Kingdom) presented the *Torture (damages) Bill.* If the *Bill* becomes law (although it seems unlikely), it would provide the victim of torture with a civil action in England/Wales; that the facts took place elsewhere would be of no relevance at all.

At any rate, the idea of those Spanish cases being judged elsewhere requires more than universal civil jurisdiction covering acts described as crimes against humanity. The foreing judge would have to decide whether to apply -to take into account?- Spanish Law on amnesty (this morning the Spanish Public Prosecutor

appealed against Garzon's decision on amnesty grounds); or Law 52/2007, the so-called "Ley de momria histórica", recognizing and extending rights and establishing measures for those who suffered persecution or violence during the Civil War and the Dictatorship. Art. 4 of the Law provides those who suffered retaliation during the Civil War and the Dictatorship with the right to obtain a "Declaración de reparación y reconocimiento personal" (Declaration of apology and personal reconnaissance); but such a statement does not imply recognition of responsibility of the State or of any government, nor does it lead to monetary redress or compensation .

Book: Liber Amicorum Hélène Gaudemet-Tallon

The French publisher Dalloz has recently published a very rich collection of essays in honor of **Hélène Gaudemet-Tallon**, Professor Emeritus at the University of Paris II and Associate Member of the *Institut de Droit International*, one of French leading scholars in the field of conflicts of laws and jurisdictions (among her recent works, see *Le pluralisme en droit international privé, Richesses et faiblesse (le funambule et l'arc en ciel)*, General Course held in 2005 at the Hague Academy of International Law, and the forthcoming fourth edition of her authoritative book on the Brussels I reg., *Compétence et exécution des jugements en Europe*).

The volume, ***Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon***, includes 50 articles on almost all fields of Private International Law, written by leading academics.

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(Many thanks to Gilles Cuniberti and Etienne Pataut)

Jurisdiction to Prevent the End of the World

Which court has jurisdiction to prevent the end of the world? Any, one would think: after all, the end of the world is likely to have serious consequences pretty much everywhere.

Is that why an American retired radiation safety officer and a Spanish science writer decided to initiate proceedings in Hawaï to stop the running of the new Large Hadron Collider, a giant particle accelerator operating on the Swiss-French border near Geneva? The plaintiffs fear that the Collider might create a black hole which would spell the end of the Earth. No doubt, that would have an impact even in Hawaï.

The defendants were the European Center for Nuclear Research (CERN), the U.S. Department of Energy, the U.S. National Science Foundation and the U.S. Fermi National Accelerator Laboratory (Fermilab). In an interview to the *New York Times*, one of the plaintiffs revealed that his strategy focused on American parties. He did not know whether CERN would show up, but he had added it as a party to save expenses. In any case, part of the project was funded by the Department of Energy and the National Science Foundation, and the magnets of the Collider are supplied and maintained by Fermilab.

The complaint argued that the defendants had failed to comply with American legislation, namely the National Environmental Policy Act (NEPA), and also with the European precautionary principle.

As the *New York Times* reported, on September 26, 2008, the Hawaï District Court declined jurisdiction.

The order of the Court, which can be found here, is disappointing from a conflict's perspective. This is because Judge Gillmor was able to dismiss the action solely on domestic grounds. In other words, she held that the court lacked jurisdiction within the American legal system, as a federal court, which is not to say that an American state court would have lacked jurisdiction.

American federal courts are courts of limited jurisdiction. This means that this is for plaintiffs to demonstrate that the court has subject matter jurisdiction. Here, the plaintiffs solely argued that the court had federal question jurisdiction, i.e. that this was an action "arising under" U.S. federal law. The federal law that they put forward was NEPA. However, NEPA requires that there be a "major federal action significantly affecting the quality of the human environment" (42 USC §4332 (c)). The court finds that there was no such major federal action in that case. As a consequence, it rules that there is no federal question, and that it lacks jurisdiction on this ground as a U.S. federal court.

The court further rules that no other ground for subject matter jurisdiction were put forward by the plaintiffs and that they had the burden of doing so. Thus, there might have been other grounds to found the subject matter jurisdiction of the court. For instance, neither federal party jurisdiction, nor diversity jurisdiction are discussed.

Finally, the court rules that it does not need to address the issue of whether the plaintiffs had standing, given that their allegation of an injury was arguably "conjectural and hypothetical".

Meanwhile, a suit was also filed before the European Court of Human Rights (see the report of the *Telegraph* here). I don't know whether this action is more likely to be successful, but Strasbourg is certainly closer to Geneva than Honolulu.