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

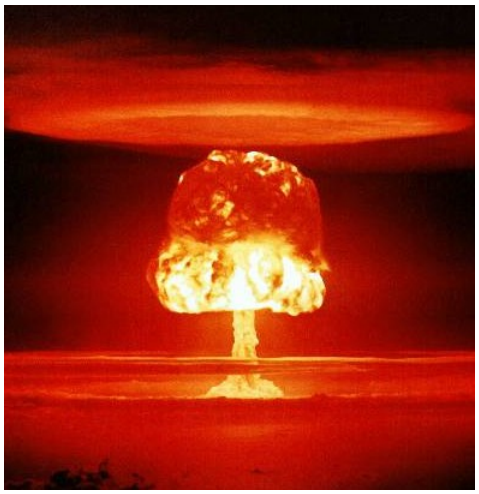
The case began in the early 1990s with the collapse of an investment company incorporated in Montreal, Castor Holdings. A bankruptcy was opened in 1992 in Canada. It has been presented by many as the largest ($ 1.5 billion) and the longest bankruptcy in Canadian history.

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.

Spanish PIL periodicals: la Revista Española de Derecho Internacional

The Revista Española de Derecho Internacional (REDI) is one of the main Spanish magazines concerning Private and Public International Law. Dating back to 1948, 57 volumes (two issues per volume; half-yearly periodicity) have already been published. Since 1997 the magazine belongs to the Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (AEPDIRI), and is co-edited by the Asociación and the Boletín Oficial del Estado (BOE).

Aiming to keep the members of the scientific community informed about what is happening in International Law in Spain and its environment, the magazine is opened to contributions from Spanish and foreing authors (though preference is given to the Latin-American Community and European authors). The unique determinant criteria are the interest and current importance of the subject, a suitable development and the scientific quality of the proposed contribution. The language of publication is normally Spanish.

Works are published either as Estudios or Notas. Both are doctrinal studies; they both require to be favourably reported by some member of the editorial board, or by some specialist by request of this organ. The difference between Estudios and Notas lies in the number of pages (up to 40 for Estudios, no more than 18 for Notas) and the depth of the approach (usually the departure point of a Nota is a recently passed resolution, or new legislation presenting special interest). Together with them each REDI issue contains four fixed sections dealing with jurisprudence (case law), practice, news (about congresses, seminars, meetings, etc, concerning Public and Private International Law worldwide), and a selection of the latest Spanish and foreing bibliography on Private and Public International Law. The "jurisprudence" section deserves a special mention: it contains the most important resolutions on Public and Private International Law passed either by Spanish or International Courts (the European Court of Justice, the European Court of Human Rights) in the months preceding the publication of each REDI issue. The most significant paragraphs of each resolution are reproduced, accompanied by a short doctrinal comment.

These are the contents of the future REDI issue (2008-1), expected soon:

I. ESTUDIOS

- SÁNCHEZ LEGIDO, ÁNGEL, Garantías diplomáticas, no devolución y prohibición de la tortura (Public International Law)
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- CRESPO NAVARRO, ELENA, La Segunda Conferencia de Paz de La Haya (1907) y la posición de España (Public International Law)
- LARA AGUADO, ÁNGELES, Adopción internacional: relatividad de la equivalencia de efectos y sentido común en la interpretación del Derecho extranjero (Private International Law)
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Which Law Governed at Abu Ghraib?

Four Iraqis who were detained in Abu Ghraib have sued U.S. military contractors before American courts. The cases were filed on June 30, 2008, in federal courts of Maryland, Ohio, Michigan and Washington state, where individual contractors reside. The plaintiffs are represented by law firms in Philadelphia and Detroit and by the Centre for Constitutional Rights.

Details on the parties can be found here.

The cases raise an interesting issue of choice of law. Which law will U.S. courts apply? The four complaints (which can also be found here) address the issue superficially, by stating that the laws of the United States have been violated, which seems to imply that they govern. Here is an excerpt of one of the

complaints, but they are all drafted similarly:

> *DEFENDANTS KNEW THAT THEIR TORTURE OF PRISONERS VIOLATED THE LAWS OF THE UNITED STATES*
>
> *48 [Contractors] knew that military officials were prohibited from torturing prisoners by the Army Field Manual and other controlling law, and that any military official who were doing so were violating the law.*
>
> *49 [Contractors] knew that the US government has denounced the use of torture and other cruel, inhuman or degrading treatment at all times. [Contractors] knew that it was illegal for them to participate in, instigate, direct or aid and abet the torture of X and other prisoners.*
>
> *50 For example, in its Initial Report to the UN Committee Against Torture, the US Department of State note that "[t]orture is prohibited by law throughout the US. It is categorically denounced as a matter of policy and as a tool of state authority …. No official of the government, federal, state or local, civilian or military is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form" (…) The State Department's Report on Human Rights Practices characterized the following as prohibited forms of torture: mock executions, sensory deprivation, repeated slapping, exposure to cold, stripping and blindfolding, food and sleep deprivation, threats to detainees or family members, dripping water on the head, squeezing of the testicles, rape and sexual humiliation.*
>
> *51 [Contractors] knew that the ban on torture is absolute and no exigent circumstances permit the use of torture.*
>
> *52 [Contractors] knew that the US intended and required that any person acting under the contract to the US would conduct themselves in accord with the relevant domestic and international laws.*
>
> *53 [Contractors] knew and understood that the US does not condone torture of prisoners.*
>
> *54 Defendants cannot credibly claim that the wrongful and criminal conduct of certain military and government personnel misled them into thinking that the torture of prisoners was lawful and permissible.*

Given that American federal courts apply state choice of law rules, the issue will likely be addressed differently by each of the four district courts. Most readers will of course be aware that while a few American states still follow the traditional approach, most have moved on to the so called “modern approach”, such as interest analysis. Although the complaints refer to the Army Field Manual and to the contract concluded by the contractors, this looks to me like a tort action. The complaints also rely on the Alien Tort Claims Act (though solely for jurisdictional purposes), so the plaintiffs may argue that public international law applies.

A Round-Up of Articles Recently Published

Conflicts scholars have been busy since my last round-up of published articles in February, so the time seems ripe for another list of potential material to add to your reading pile. The usual caveats apply: the list is limited to articles published in *English*, and even then is almost certainly not comprehensive. If you know of any articles, reviews or casenotes published in 2008 not included in either this list or the previous one, then **let me know**.

- M. Danov, ‘**Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element – the Rome II Regulation and the Commission’s White Paper on Damages**‘ (2008) 29 *European Competition Law Review* 430 – 436.

Discusses the importance of choosing the most appropriate EU jurisdiction to bring private proceedings to enforce competition law and to claim punitive or exemplary damages in jurisdictions where those remedies are available. Considers the absence of proposals for procedural harmonisation in the Commission White Paper on Damages actions for breach of the EC antitrust rules. Examines whether Regulation 864/2007 (Rome II) will require national courts which ordinarily do not award exemplary damages for breach of competition law to change their practice when it comes into force.

- C. Joerges, **'Integration through de-legalisation?**' (2008) 33 *European Law Review* 291 – 312. Abstract:

Discusses theories of governance and law with reference to changes in the forms of European governance, including the European committee system, the principle of mutual recognition, and the open method of coordination. Asks whether the rule of law is challenged by the change of governance proclaimed by the Commission's White Paper on European Governance in 2001. Suggests a shift towards a ***conflict*** *of* ***laws*** *approach in the conceptualisation of European law and governance.*

- A. Scott, **'Reunion Revised?**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 113 – 118. Abstract:

Discusses the European Court of Justice ruling in Freeport Plc v Arnoldsson (C-98/06) on the national court's jurisdiction to hear connected claims against foreign domiciliaries together with the main action against a domiciled defendant under Regulation 44/2001 (Judgments Regulation) art.6(1). Considers whether claims against a parent company and its subsidiary were connected even if the two claims had different legal bases. Examines whether the legal basis of each claim was relevant to jurisdiction under the ruling in Reunion Europeenne SA v Spliethoff's Bevrachtingskantoor BV (C-51/97). Looks at the possibility of abusive claims brought solely to found jurisdiction for connected claims.

- A. Rushworth, '**Assertion of ownership by a foreign state over cultural objects removed from its jurisdiction**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 123 – 129.

Discusses the Queen's Bench Division judgment in Iran v Barakat Galleries Ltd on preliminary issues in an action to recover antiquities taken without permission from Iran, examining whether the court had jurisdiction to enforce foreign law by returning property to a foreign sovereign.

- A. Briggs, **'Review: Brussels I Regulation (2007), edited by Ulrich Magnus and Peter Mankowski**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 244 – 246.

- J. Davies, '**Breach of intellectual property warranties and jurisdiction**' (2008) 19 *Entertainment Law Review* 111 – 113. Abstract:

Comments on the Chancery Division judgment in Crucial Music Corp (Formerly Onemusic Corp) v Klondyke Management AG (Formerly Point Classics AG) on whether to set aside service out of the jurisdiction in a dispute about warranties in a copyright licensing agreement for music. Considers the place of performance and the place where damage was sustained within the meaning of the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 art.5.

- A. Staudinger, **'From international conventions to the Treaty of Amsterdam and beyond: what has changed in judicial cooperation in civil matters?**' (2007) *European Legal Forum* 257 – 265. Abstract:

Discusses the shift from treaties and directives towards secondary EC law in the fields of European civil procedure law and conflict of law rules. Considers the scope of the allocation of competence under the EC Treaty arts 61(c) and 65, the absence of unified conflict of law rules within the inner market and the decreasing national competence and external competence of the EU Member States. Examines advantages and disadvantages of the shift from treaties and directives towards regulations, including in relation to legal consistency in the inner market, reducing sources of law, review and modernisation of regulations, the extent of conformity to a coherent system, and proceedings for a preliminary ruling.

- P. Hay, '**The development of the public policy barrier to judgment recognition within the European Community**' (2007) *European Legal Forum* 289 – 294. Abstract:

Discusses the extent to which national public policy concerns present an obstacle to the harmonisation of areas of substantive law, focusing on the role of public policy in trans-border litigation, in particular in relation to judgment recognition in the EU. Reviews traditional defences to judgment recognition, the defences in Regulation 44/2001 art.34 relating to violation of procedural due process or national public policy, and English judgments awarding or recognising punitive damages or contingent fees. Comments on calls for the

public policy exception to be abandoned.

- S. Calabresi-Scholz, '**Brussels I Regulation Article 5(2): the concept of "matters relating to maintenance**' – autonomous interpretation' (2007) *European Legal Forum* 294 – 295. Abstract:

Comments on the German Federal Supreme Court ruling in Bundesgerichtshof (XII ZR 146/05) on whether the German courts had jurisdiction to hear a claim by a German domiciled divorced spouse for compensation from her former husband, who had transferred his domicile from Germany to France, for the disadvantages she suffered as a result of the limited real income splitting under German tax law. Considers whether the action was a matter relating to maintenance within the meaning of Regulation 44/2001 art.5(2).

- T. Simons, '**Lugano Convention Article 21: lis alibi pendens – priority**' (2007) *European Legal Forum* 296 – 297. Abstract:

Comments on the Swiss Federal Supreme Court judgment in Bundesgericht (4A 143/2007) on whether an application to stay Swiss proceedings, under the Lugano Convention art.21, on the basis that the defendants had lodged a negative declaratory action in the Italian courts prior to the commencement of the Swiss proceedings, should be refused on the basis that the defendants' comportment had been fraudulent.

- L. Osona, **'Brussels I Regulation Article 33(2), Article 1(2)(d): contract for the supply of services – arbitration clause'** (2007) *European Legal Forum* 297 – 298. Abstract:

Reviews the Dusseldorf Court of Appeal ruling in Oberlandesgericht (Dusseldorf) (I 3 W 13/07) on whether an order of a Spanish court denying jurisdiction over a dispute on the basis that the agreement between the parties contained an arbitration clause in favour of an arbitration court in Barcelona should be recognised by the German courts.

- S. Magniez, **'Brussels II Regulation Article 2(1)(a), (2) and (6): jurisdiction over matrimonial matters – last habitual residence of the spouses'** *European Legal Forum* 301 – 302. Abstract:

Comments on a Luxembourg Court of Appeal ruling dated June 6, 2007 on whether the Luxembourg courts had jurisdiction under Regulation 1347/2000 to hear divorce proceedings brought by the ambassador of Luxembourg to Greece where the spouses had been resident in Greece and where the husband had returned to Luxembourg and the wife had moved to Germany. Considers whether the husband had established a habitual residence in Greece.

- C. Wadlow, **'Bugs, spies and paparazzi: jurisdiction over actions for breach of confidence in private international law'** (2008) 30 *European Intellectual Property Review* 269 – 279. Abstract:

This, the first of two connected articles, discusses the allocation of jurisdiction for breach of confidence actions, focusing on trade secrets. Reviews cases under common law, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 and Regulation 44/2001.

- G. Ward, **'Protection of the right to a fair trial and civil jurisdiction: the institutional legitimacy in permitting delay'** (2008) *Juridical Review* 15 – 31. Abstract:

Examines the operation of the right for proceedings to be heard within reasonable time, provided by the European Convention on Human Rights 1950 art.6, in the context of civil jurisdiction, with reference to case law on the compatibility of the reasonable time requirement with: (1) the lis pendens system of the Brussels civil jurisdiction regime; and (2) the forum non conveniens doctrine.

- S. Kingston & C. Burrows, **'Europe and beyond'** (2008) 76 *Family Law Journal* 5 – 7. Abstract:

This, the second of a two-part article on the approach in different countries towards jurisdiction in family proceedings, considers the application of Regulation 1347/2000 (Brussels II) through case law of the European Court of Justice and domestic courts of Member States. Discusses the jurisdictional rules followed by non-EU countries, giving information on the jurisdiction, domicile, residence and matrimonial property provisions in Australia, Switzerland, Denmark, California, and New York.

- Y. Amin & A. Rook, **‘Capacity to marry and marriages abroad’** (2008) 152 *Solicitors Journal* 8 – 10. Abstract:

Examines the Court of Appeal ruling in Westminster City Council v IC on whether: (1) the marriage of a British man with severe learning disabilities conducted over the telephone to a woman in Bangladesh, which was valid according to Sharia law was recognised as a valid marriage according to English law, where it was accepted by the parties that the man lacked the capacity to marry in accordance with English law; (2) the court’s inherent jurisdiction was usurped by the Mental Capacity Act 2005; and (3) the court could prevent the man leaving the jurisdiction to travel to Bangladesh.

- W. Shi, **‘Review: Private International Law and the Internet (2007) by Dan Jerker B. Svantesson’** (2008) 13 *Communications Law* 64 – 65.
- C. Knight, **‘Of coups and compensation claims: Mbasogo reassessed’** (2008) 19 King’s Law Journal 176 – 182. Abstract:

Comments on Adrian Briggs’s analysis of the Court of Appeal decision in Mbasogo v Logo Ltd (No.1), on the justiciability of Equatorial Guinea’s claim for compensation against the participants of an attempted coup, which appeared in the Law Quarterly Review (2007, 123(Apr), 182-186). Evaluates Briggs’s assessment of the Court’s application of the rule that the English courts lack jurisdiction to hear an action for the enforcement of a public law brought by a foreign state. Considers how this rule was applied in the Court of Appeal decision in Iran v Barakat Galleries Ltd where the state party attempted to enforce Iranian law.

- C. Bjerre & S. Rocks, **‘A transactional approach to the Hague Securities Convention’** (2008) 3 *Capital Markets Law Journal* 109 – 125. Abstract:

Examines the scope and effect of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the Hague Securities Convention). Reviews the background to the Convention, its core agreement based mechanism, including the substantive issues for which the Convention prescribes applicable law, key definitions, the Convention’s scope, the main ways that parties can draft agreements to achieve the Convention’s

effect and the "Qualifying Office" requirement, and the Convention's impact on agreements which do not fully use the Convention's core agreement based mechanism, including the fall back rules and pre-Convention agreements.

- B. Ubertazzi, **'The law applicable in Italy to the capacity of natural persons in relation to trusts'** (2008) 14 *Trusts & Trustees* 111 – 119. Abstract:

Examines Italian law on the capacity of natural persons in relation to trusts. Reviews the substantive law categories of capacity under Italian private international law and the four rules on the law applicable to capacity related to international trade of natural persons. Discusses Italian law applicable to the capacity of the settlor, trustee, protector and beneficiary and to the capacity to choose the governing law of the trust.

- I. Thoma, **'Applicable law to indirectly held securities: a non-"trivial pursuit"'** (2008) 23 *Butterworths Journal of International Banking & Financial Law* 190 – 192. Abstract:

Discusses conflict of laws issues arising in connection with indirectly held securities. Considers difficulties in the application of the lex cartae sitae rule. Examines the respective approaches to conflict of laws of the EC law of the place of the relevant intermediary (PRIMA), the free choice of applicable law under the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary and the draft UNIDROIT Convention on Intermediated Securities.

- D. Rosettenstein, **'Choice of law in international child support obligations: Hague or vague, and does it matter? – an American perspective'** (2008) 22 *International Journal of Law, Policy and the Family* 122 – 134. Abstract:

Discusses, from a US perspective, the choice of law rules under the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance. Considers the significance and value of these rules, and compares them to the regime applicable in US child support proceedings.

- S. James, **'Rome I: Shall we Dance?'** (2008) 2 *Law & Financial Markets Review* 113 – 122. Abstract:

Discusses whether the UK should opt into the Draft Regulation on the law applicable to contractual obligations (Rome I), comparing Rome I with the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention), including the provisions on: (1) party autonomy; (2) applicable law in the absence of express choice; (3) overriding laws; (4) insurance contracts; (5) consumer contracts; (6) contracts of carriage; and (7) assignment. Illustrates the operation of the Rome I Regulation with flowcharts, and presents text from the Regulation in boxes. Notes how its applicable law clauses differ from those of Regulation 864/2007 (Rome II Regulation).

- L. Enneking, **'The common denominator of the Trafigura case, foreign direct liability cases and the Rome II Regulation: an essay on the consequences of private international law for the feasibility of regulating multinational corporations through tort law.'** (2008) 16 *European Review of Private Law* 283 – 312. Abstract:

Identifies a trend towards claims that parent companies should be liable in their home country for damage caused by their subsidiaries abroad. Cites the claim issued in 2006 in the UK against Trafigura Beheer BV for environmental damage caused in the Ivory Coast as an example of this type of claim. Appraises the adequacy of regulation of international corporate activities and considers whether tort law could fill gaps in the regulatory framework. Examines the background to and provisions of Regulation 864/2007 (Rome II) and the impact it could have on tortious liability in this field.

- A. Mills, **'Arbitral jurisdiction and the mischievous presumption of identity of foreign law'** (2008) 67 *Cambridge Law Journal* 25 – 27. Abstract:

Examines the Commercial Court judgment in Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd on whether a dispute over the pricing arrangements under an electricity supply contract between two Indian parties, which involved elements to be determined by Indian regulatory authorities, fell outside the scope of an arbitration agreement governed by English law.

Considers the extent and validity of the supposed presumption of English law that, if the content of foreign law is not proved satisfactorily, the equivalent English law rule will apply.

- R. Bailey-Harris, **'Jurisdiction: Brussels II revised'** (2008) 38 *Family Law* 312 – 314. Abstract:

Reports on the European Court of Justice decision in Sundelind Lopez v Lopez Lizazo on whether the Swedish or French court had jurisdiction in a divorce petition where the respondent was a Swedish national but was habitually resident in France. Comments on Regulation 2201/2003 arts 3, 6 and 7 and whether a court of a member State has exclusive jurisdiction where the respondent is neither habitually resident in, nor a national of, a Member State.

- D. Eames, **'The new Hague Maintenance Convention'** (2008) 38 *Family Law* 347 – 350. Abstract:

Discusses the Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007. Considers: (1) the scope of the Convention and provisions therein in relation to recognition and enforcement of judgments, including the grounds upon which recognition can be refused, and the definition of a maintenance arrangement; (2) the Protocol on applicable law; and (3) the EU draft Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

- M. Matousekova, **'Private international law answers to the insolvency of cross border groups: comparative analysis of French and English case law'** (2008) *International Business Law Journal* 141 – 163. Abstract:

Compares the approaches of French and UK courts to the conflict of laws issues arising from the insolvency of cross border groups of companies, particularly whether to adopt different strategies towards each entity in a group. Reviews the relevant provisions of French domestic law, the UK statutory regime before and after 2006, and case law on the policy of each jurisdiction towards application of the conflict of laws rules in Regulation 1346/2000. Considers the

extent to which French courts have applied the principle of automatic recognition to the UK's centralisation of group interests.

- Y. Farah, **'Allocation of jurisdiction and the internet in EU law'** (2008) 33 *European Law Review* 257 – 270. Abstract:

Assesses the scope and interpretation of Regulation 44/2001 Art.15(1)(c) in its application to electronic consumer contracts. Outlines policy considerations and whether they are achieved by Regulation 44/2001. Questions whether traditional rules determining jurisdiction are adequate or whether internet-specific rules are required. Discusses the concept of a consumer contract, the jurisdictional risks for website operators, the meaning of the words "directs such activities" in Art.15(1)(c), the principle of good faith, and fairness. Compares the EU and the US approach.

- S. Voigt, **'Are international merchants stupid? Their choice of law sheds doubt on the legal origin theory'** (2008) 5 *Journal of Empirical Legal Studies* 1 – 20. Abstract:

Evaluates the legal origin hypothesis, the commonly held view in economic literature that common law systems are superior to civil law systems, by examining the choice of law of international trade transactions in cases referred to the International Court of Arbitration. Presents data in tables comparing the expected proportion of contracts choosing the law of a common law jurisdiction with the actual findings. Considers the effects and implications of the legal origin hypothesis.

- I. Fletcher, **'Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd'** (2008) 21 *Insolvency Intelligence* 61 – 64. Abstract:

Comments on the British Virgin Islands High Court decision in Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd on the role of expert evidence in the proof of foreign law, and the meaning of the words "to appropriate the collateral" in the Financial Collateral Arrangements (No.2) Regulations 2003 reg.17, implementing Directive 2002/47. Notes the novelty of a Commonwealth court having to interpret an English statutory provision not previously considered by the English courts, and the reference made by the court to the

Directive as an aid to interpretation.

- P. Shine, **'Establishing jurisdiction in commercial disputes: arbitral autonomy and the principle of kompetenz-kompetenz'** (2008) *Journal of Business Law* 202 – 225. Abstract:

Examines the balance of power between the courts and arbitral tribunals on questions of jurisdiction. Analyses the judgments in Fiona Trust & Holding Corp v Privalov and Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD on the extent to which a challenge to the validity of an agreement containing an arbitration clause affects the validity of the clause itself. Considers the application of the principles set out in those cases in other cases. Notes the approach of other countries which have also adopted the UNCITRAL Model Law for International Commercial Arbitration 1985 as the basis for their arbitration legislation.

Rome I Reg. Adopted (and Other Results of the JHA Council Session of 5-6 June 2008)

Following our post on the agenda of the JHA session held in Luxembourg on 5-6 June 2008, a factsheet has been released by the Slovenian Presidency with the main results of the Council in the field of judicial cooperation in civil matters.

The first and most important achievement is the **adoption of the Rome I Regulation on the law applicable to contractual obligations** (text of the regulation and declarations), that will be soon published in the OJ. The application in time of the act is set out in its Articles 28 and 29 (18 months after its adoption, to contracts concluded after the same date).

As regards the other items discussed in the Council, here's an excerpt of the

factsheet (emphasis added):

> ***Maintenance obligations***
>
> *The Council agreed on a set of political guidelines for further work on a proposal for a Regulation on maintenance obligations and in particular on the principal goal of the Regulation: the complete abolition of exequatur on the basis of harmonised applicable law rules. […] The guidelines agreed contain compromise solutions on six key elements of the proposal: its scope, jurisdiction, applicable law, recognition and enforceability, enforcement and a review clause.*
>
> ***Rome III – Applicable law in matrimonial matters***
>
> *A large majority of Member States supported the objectives of this proposal for a Council Regulation. Therefore and due to the fact that the unanimity required to adopt the Regulation could not be obtained, the Council established that the objectives of Rome III cannot be attained within a reasonable period by applying the relevant provisions of the Treaties. Work should continue with a view to examining the conditions and implications of possibly establishing enhanced cooperation between Member States. […]*
>
> ***The Hague Convention – Protection of children***
>
> *The Council adopted a Decision authorising certain EU member states to ratify, or accede to, the 1996 Hague Convention, and to make a declaration on the application of the relevant internal rules of EU law. This very important Convention concerns jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. It constitutes a crucial instrument to protect the interest of a children at worldwide level. [see also this press release by the Commission and a preparatory document to the attention of COREPER]*
>
> ***Recognition and enforcement of judgments on civil and commercial matters (Lugano)***
>
> *Pending the assent of the European Parliament the Council approved the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which will replace*

the Lugano Convention of 16 September 1988 (see Council doc. n. 9196/08 of 27 May 2008). […]

External dimension

The Council agreed on an update of the external relations strategy in the field of judicial cooperation in civil matters. The document is not a legal framework but rather an evolving process of defining and achieving policy objectives in full conformity with the provisions of the EC Treaty.

In The Hague Programme the European Council called for the development of a strategy reflecting the Union's special relations with third countries, groups of countries and regions and focusing on the specific needs for JHA cooperation with them.

In April 2006 the Council approved a strategy document outlining aspects of judicial cooperation in civil matters (doc. n. 8140/06). As indicated in this document, the development of an area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries on these issues which includes strengthening the rule of law and promoting respect for human rights and international obligations.

The external dimension of judicial cooperation in civil matters has growing significance. On the one hand, international agreements with third countries are indispensable for providing legal certainty and foreseability for European citizens on a global scale. On the other hand, it is also important to safeguard the uniform application of Community law in international negotiations.