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General Report: «Transnational Litigation and Elements of Fair Trial», Prof. REMO CAPONI, University of Florence, Italy

«Remarks on Fair Trial in Enforcing Foreign Judgments», Prof. ELENA D'ALESSANDRO, Italy

1. Introduction: The European Convention of Human Rights, The leading case *Pellegrini* v *Italia* and the General Duty to Deny Enforcement to Foreign Judgments Obtained in Proceedings which do not Comply with Article 6 of the Convention

Pursuant to Article 6 of the European Convention of Human Rights (hereinafter "Article 6"), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
The right to a fair trial within a reasonable has been interpreted as providing only a procedural guarantee. In accordance with this approach, the European Court of Human Rights (hereinafter "the ECHR") will intervene insofar as the national courts bear upon compliance with procedural guarantees in Article 6.
Article 6 applies only to contracting parties[1]: it means, among others, that each Court of a State which is contracting party to the European Convention of Human Rights has the duty to guarantee the right to a fair hearing in his national proceedings.
Although the European Convention of Human Rights is not clear about the relationship between the right of a "fair hearing" mentioned in his Article 6 and the recognition or enforcement of foreign judgments obtained in proceedings which do not comply with the mentioned guarantee, the ECHR went to consider these relationship in the leading case *Pellegrini* v *Italy*[2].
The applicant, Mrs. Pellegrini, complained of a violation of Article 6 of the European Convention of Human Rights on the ground that the Italian courts declared the decision of the ecclesiastical courts annulling her marriage enforceable at the end of proceedings in which her defence rights had been breached.

[1] See *e.g.* Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, Second Edition, New York, 2009, 203.
[2] ECHR, July 20, 2001, case *Pellegrini* v *Italy*, 35 EHRR 44.

As a matter of fact, in proceedings under canon law the respondent was not informed before being questioned by the court either of the identity of the petitioner or of the grounds on which they allege that the marriage should be annulled and he was not informed of the possibility of securing the assistance of a defence lawyer or of requesting copies of the case file. Consequently, their defence rights were greatly reduced.
Therefore, the Italian Court had dismissed the claim presented by Mrs Pellegrini on the ground of violation of procedural public policy and had recognized the judgment of the Vatican court.
The ECHR held that, even if The Vatican has not ratified the European Convention of Human Rights, in that particular case the application was lodged against Italy:

> "The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties"[3].

As implication, it can be said that from the point of view of the ECHR[4], each Court having its own seat in a State contracting party to the European Convention of Human Right, is entitled to deny recognition or enforcement to foreign judgments obtained in proceedings which do not comply with Article 6, leaving out of consideration the fact that the State in which the decision was rendered was or not a contracting party of the mentioned Convention[5]. In other words: every European Court is entitled to deny recognition or enforcement to a judgment if the foreign proceeding at the end of which was rendered, was unfair.

[3] At 40.
[4] It should be noted that is beyond the scope of this paper to determine if the decisions of the ECHR are binding only for the State involved in the claim or, on the contrary, if the authority of the Court's case-law goes beyond the judgment's mandatory effect on the parties.
[5] Cf. Fentiman, *International Commercial Litigation*, New York, 2010, 704.

2. Is there a duty to deny the recognition/enforcement of a foreign judgment obtained in proceeding which does not comply with the guarantee of fair trial on the grounds of public policy?

The right of a fair trial is unanimously considered by literature as a part of the European procedural public policy. This view has received a substantial support from:

A) The ECJ's case-law.

Firstly in *Krombach*[6] and subsequently in *Gambazzi*[7] the ECJ has made clear that

> "the exercise of the rights of the defence, to which the question submitted for a preliminary ruling refers… occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, among which the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is of particular importance"[8];

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B) The text of Article 6 (3) of the Treaty of the European Union, which stated that fundamental rights, as guaranteed by the European Convention of Human Rights and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. Again, the guarantee of fair trial is now reaffirmed in Article 47 of the Charter of the Fundamental Right of the European Union[9]

In the light of the foregoing, it seems clear, as a matter of interpretation, that courts having their own seats in a State which is contracting party to the European Convention of Human Rights, are entitled to deny the enforcement of a foreign judgment obtained in proceeding which does not comply with the guarantee of fair trial on the grounds of procedural public policy, in order to avoid the risk to be condemned by the ECHR in a

[6] Judgment of 28 March 2000, Case C-7/98, at 28.
[7] Judgment of 2 April 2009, Case C-394/07.
[8] Case C-394/07, at 28.
[9] According to Article 47 of the Charter of Fundamental Rights of the European Union "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented".

subsequent proceeding against the State, contracting party to the European Convention of Human Rights, as stated in *Pellegrini v Italia*.
Having said that, it is important to ascertain whether a national Court has a mere faculty or a duty to deny recognition or enforcement.
If such a refuse is considered as mandatory, recognition and enforcement of foreign judgments might be denied by the Court on his own motion even if the public policy defence was not raised by the interested party.
At this regard, two possibilities are open:
The first possibility is to imagine the national Courts as obliged to deny the recognition. The purpose served by this solution consist in ensuring the respect of the guarantee of fair trial in a State, which is part of the European Convention of Human Rights, even if the defendant voluntarily renounces to spend for the first time his own right to a fair trial in the State of recognition and, for such reason, he has not invoked the public policy objection.
As alternative approach, it can be said that the recognition/enforcement of a foreign judgment may be refused by the national court only if the defendant has invoked such ground of denial. The objective of this interpretation is to take into account the self responsibility of the interested party. By this point of view, the Court having seat in a State, contracting party to the European Convention of Human Rights, would have the duty to respect the right of a fair trial, even when the *Pellegrini* v *Italy* conditions are satisfied, only if the interest party (defendant or plaintiff) really wants to have a fair trial in the Member State of the recognition and, therefore, he has invoked the public policy objection to preclude the enforcement of the foreign judgment.
Each of these solutions has its advantages and disadvantages and the choice among the two depends on the value preferred. I suppose we would discuss these aspects during this conference.
At this regard, I would just add a point to the debate noting that the second proposed approach seems not to be disturbed by the leading case *Pellegrini* v *Italy*. Such a case has involved a decision of the ecclesiastical courts which was declared enforceable by the Italian court, notwithstanding the public policy objection proposed by Mrs Pellegrini.
In other words: in the case decided by the ECHR the interest party had invoked the protection of her right to a fair trial before the national Court, and was in such a situation that the ECHR has affirmed the existence of a duty to deny recognition or enforcement.

3. May the right of a fair trial be raised in the State of enforcement if the defendant didn't exhaust his means of objection to the judgment in the State of origin?

In my opinion there is another important point on which we may discuss during this conference.
It would be interesting to ascertain if there is infringement of the fundamental right of fair trial, under the point of view of the State of the recognition, even when the interested party was in a position to appeal the judgment in the State of origin on grounds of procedural irregularity and, therefore, he has not done so.
If the recognition is under the field of application of Brussels I Regulation, the affirmative solution seems to prevail in virtue of Article 34 (2) of the Regulation No 44/2001[10]. The text of this article makes clear that the recognition of a foreign judgment cannot be refused under the ground of procedural public policy if the defendant has failed to use the means of objection given by the State of origin to try to remediate, in that country, to the infringement of fair trial. This concept was also illustrated by the ECJ, firstly in *ASML Netherlands BV* v *Semiconductor Industry Services GmbH*[11] where the Court pointed out that

> "Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given"[12].

Subsequently, in *Apostolides*[13] the ECJ has reaffirmed that

> "the recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No 44/2001 (hereinafter "Brussels I Regulation") where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the

[10] On this point see Marco De Cristofaro, *La crisi del monopolio statale dell'*imperium *all'esordio del titolo esecutivo europeo*, in *Int'l Lis* 2004, 141 *et seq*., spec. 143 *et seq*.; Marco De Cristofaro, *L'onere di impugnazione della sentenza quale limite al rilievo dei vizi nella fase introduttiva del giudizio chiuso da sentenza contumaciale: tra diritto di difesa e* full faith and credit, *Int'l Lis* 2007, 7 *et seq*.; Peter Gottwald, *Münchener Kommentar zur Zivilprozessordnung,* III Band, München, 2008, *sub* art. 34 EuGVO, Rn. 15-17; Jan Kropholler, *Europäisches Zivilprozessrecht*, 8. Auflage, Frankfurt am Main, 2005, *sub* art. 34, 394 et seq. spec. Rn. 29; Elena Merlin, *Riconoscimento ed esecutività della decisione straniera nel Reg."Bruxelles I", Rivista di diritto processuale* 2001, 433 ss., spec. 439 *et seq*.; Elena D'Alessandro, *Il riconoscimento delle sentenze straniere*, Torino, 2007, 180 ss.
[11] ECJ, December 14, 2006, case C-283/05, *ASML Netherlands BV* c. *Semiconductor Industry Services GmbH (SEMIS)* available at http://curia.europa.eu/jcms/jcms/j_6/.
[12] At 49.
[13] ECJ, April 28, 2009, case C-420/07, *Apostolides* v *Orams*, spec. at 80.

> proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence".

For the purpose of this conference, probably we have to compare European and Extra-European law rules on this subject hoping to find one convergent answer to the mentioned question. Maybe the stronger rationale for explaining the prevalence of the second of the above suggested interpretations consists in emphasizing the behaviour of the interested party. If the defendant has voluntarily failed to use the means of objection given by the State of origin, it is to presume that he didn't want to exercise his right to a fair hearing in that forum as well as in any other State. For this reason, the refuse of recognize such judgment in the member State of execution seems not to be a violation of the guarantee of fair trial.

4. **A) May recognition be denied to a default judgment obtained against a party barred from appearance by reason of contempt?**
B) Shall an American order of anti suit-injunction be recognized in a European member State?

Other open issues on which we can debate are the following:

A) The enforceability of default judgments obtained against a party barred from appearance by reason of contempt, which is frequent in the common law world.
Particularly, it is not clear:

1) If such a kind of penalty shall be considered as an infringement of fair trial by the civil law countries;
2) If such a hypothesis is covered by the leading case *Pellegrini* v *Italy*.

The ECJ has considered the problem in *Gambazzi* v *Daimler Chrysler Canada Inc.*[14]
As well known, Mr Gambazzi failed to comply with a freezing order (previously referred to in literature as Mareva injunction) pronounced by the High Court of Justice, England & Wales, Chancery Division pursuant to Article 25.1 of the Civil Procedure Rules. As a consequence, judgment on the claim was given in default. The question referred to the ECJ was involved with Article 34 (2) of the Brussels I Regulation and the enforceability of the default judgment.
The ECJ has held that

> "the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in that article,

[14] ECJ, April 2, 2009, case C-394/07, *Gambazzi* v *Daimler Chrysler Canada Inc.*

> 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"[15].

In the light of this leading case, it can be said that a civil law court, in Europe, is entitled to refuse the recognition of an English default judgment, under the Brussels I regime, if the judgment was entered with a manifest infringement of the defendant's right to be heard.

Shall the ECJ's solution become general and consequently binding also outside the field of application of the Brussels I Regulation, in the light of the leading case *Pellegrini* v *Italia*?

For the purpose of this debate it is to note that in the common law world and, particularly, in the United States, the fact that a foreign judgment was a default judgment will not by itself be a sufficient defence against a claim for its recognition. On the contrary, foreign default judgments are recognized and enforced if the parties have had the opportunity to defend against them[16]

B) Fair trial in enforcing orders of anti-suit injunction grated by American Courts.

As stated by the ECJ, an English anti-suit injunction addressed to enjoin the party or parties from beginning or prosecution an action in another Member State, cannot be recognized or enforced under the Brussels I regime[17].

Furthermore, it is uncertain whether an American or, more generally, an order of anti-suit injunction granted by an extra-European Court shall be recognized in a European Member State or if, vice versa, such recognition would infringe the right of a fair trial in the Member State of execution.

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[15] At 48.

[16] See e. g. *Bank of Montreal* v *Kough,* 612 F.2d 467 (9th Cir. 1980); *John Sanderson & Co. (Wool)* v *Ludlow Jute Co.*, 569 F.2d 696 (1st Cir. 1978).

[17] ECJ, December 9, 2002, case C-116/02, *Gasser*; ECJ, April 27, 2004, case C-159/02, *Turner* v *Grovit* both available at http://curia.europa.eu/jcms/jcms/j_6/. A British anti-suit injunction is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.

It is also important to note that the focal point of this inquiry is only the issuance of anti suit injunction by courts as opposed to other courts.

Some European Authors have suggested that such recognition would be contrary to the procedural policy[18].

Particularly, such kinds of orders are considered as contrary (not to right to a fair trial itself but) to the general principle that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.

The opposite argument was adopted by the French *Cour de cassation*, in *In Beverage international Sa* v *Zone Brands International Inc.*[19]

The events: The firma Zone Brands International Inc. sought a declaration of enforceability of the American anti-suit injunction order. The French parties argued that the anti-suit injunction infringed French sovereignty and their right of access to court as recognized by Article 6 of the European Convention of Human Rights and should thus be denied enforcement.

The *Cour de cassation* confirmed the enforceability of the American judgment declaring that anti-suit injunctions are not contrary to French public policy as long as they only aim at enforcing a pre-existing contractual obligation, and no Treaty or European regulation applies. By the point of view of the French *Cour de cassation*, there is no contravention of the fair trial guarantee.

The French solution seems to me to be read as if the recognition of such orders would not be in contrast with the French procedural public policy and with the leading case *Pellegrini* v *Italy* too.

The problem of the effect of an anti-suit injunction outside the State of rendition is also debated in most common law countries, for instance in the United States, where it was defined as "the most troublesome of the open issue in the area of full faith and credit to judgments"[20].

Most American courts have considered themselves not bound to stay or dismiss the action pending before them, even if the anti-suit order was rendered in a Sister State,

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[18] See e.g. Claudio Consolo, *L'arbitrato con sede estera, la natura della relativa eccezione e l'essenziale compito che rimane affidato al regolamento transnazionale della giurisdizione italiana, Rivista trimestrale di diritto e procedura civile* 2009, 603 *et seq.*; Elena Merlin, *Le anti suit injunctions e la loro incompatibilità con il sistema processuale comunitario*, *Int'l Lis* 2005, 14 *et seq.*; Jan Kropholler, *Europäisches Zivilprozessrecht,* 5 Auflage, Frankfurt am Main, 2005, 88 *et seq.*

[19] Cour de cassation, I Section, October 14, 2009 No 1017, available at http://www.legifrance.gouv.fr. = *Rivista di diritto processuale* 2010, 1148 critized by Gilles Cuniberti, *French Court agrees with Anti-suit Injunctions*, available at http://conflictoflaws.net/2009/french-court-agrees-with-u-s-anti-suit-injunction and Elena Merlin, *«*Anti suit injunctions*» e ordine pubblico internazionale: un sorprendente* arrêt *della Corte di cassazione francese*, *Rivista di diritto processuale* 2010, 1149 *et seq.*

[20] Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, *Harvard Law Review*, 1968-1969, 798, spec. 808. On the same problem see Laura Eddleman Hein, *Protecting Their Own? Pro-American Bias and the Issuance of Anti-Suit Injunctions*, 69 *Ohio State Law Journal* 2008, 701; Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity, Virginia Journal of International Law*, 2004-2005, 285 *et seq*,.; Charles H. Helein, E*xtraterritorial Recognition of Foreign Antisuit Injunctions, St. Louis University Law Yournal* 1960-1961, 552 *et seq.*

because the duty to entitled full faith and credit to sister State's judgments is limited to decisions on merit and anti-suit injunction is not an order on merit[21].
So it can be said that at common law, the above mentioned seems not to be considered as a problem of guarantee of fair trial. Again, the hope is that there will be a convergence between the civil and common law countries on the way of solution of such issue.

[21] See the Authors at 20.