Research project: *Effects of European Rules Overcoming Res Judicata in the Italian Civil Justice System.*

SSD: IUS/15

GUIDOMARIA DE CESARE

My research project wants to explore the nature of the principle of primacy of European law and the requirements that the national procedural rules which are found to be incompatible with legally binding and enforceable provisions of Union law should be disapplied by the domestic courts and the European Court of Justice.

Section one explains the relationship between the *res judicata* principle and the State authority. The historical analysis of *res judicata* – from Ancient Roman law up to the age of codification, passing through the copious elaboration of the Glossators – confirms the following idea: the non-retractability of the *res judicata* does not depend on the state authority but rather from the principle of legal civilization of legal certainty.

According to the ancient doctrine: «*Res judicata pro veritate accipitur*» or «*quia res iudicata praeiudicat veritati*».

However, we can prove that the institution of *res judicata* has nothing to do with Truth. The *res judicata* historically was pigged in the middle between the myth of its stability and the problem of compliance, a phenomenon not belonging to modern times but rooted in the history of the institute.

Only with the modern State the *res judicata* receives such coverage as to become unchangeable because it is linked to the general need for legal certainty.

Reconstructed the evolution of the *res judicata* through the centuries, until the modern State, we will move on to the analysis of them in the Italian legal system. The file-rouge of this analysis is represented by the following question: does the civil *res judicata*, despite the absence of a specific provision, have constitutional importance?

In this perspective, it is worth mentioning from the start that *res judicata* effects generally arise from judicial decisions given after a full-fledged trial was at least made available to each of the involved parties. It is also useful to clarify that *res judicata* effects not only do not necessarily coincide with enforceability, or mere preclusion of re-examination of facts, but also with mere limitation of grounds for a challenge.

The distinctive feature of *res iudicata* effects, in fact, consists in a preclusion for the losing party from pleading that a new law retroactively changed the rules governing the conflict resolved by a

judicial decision: that from the point of view of a substantive theory of *res judicata*, because from that moment on that decision becomes a self-standing source of the law of the case (so that changes of the substantive law applied, even if they are retroactive for every other interested party, are irrelevant for the parties bound by res iudicata); from the point of view of a procedural theory of *res judicata*, because immunity of judicial adjudication from the effects of new retroactive law is an essential feature of the balance of powers in a democratic system.

It is the principle of the separation of powers and the autonomy and independence of judges, ex artt. no. 102 and 104 of Constitution, which justifies the immutability of the *res judicata* and the irrelevance of the retrospective *ius superveniens* following the formation of the *res judicata*. If this were not the case, it would be accepted, under normal conditions, that the legislative power could invade the sphere of competence of the judiciary to the point of disempowering it.

Therefore, the conclusions reached at the end of the first section are the following: 1) the importance of *res judicata* in correlated by the constitutional nature of her; 2) in a non-state dimension, such as the EU-law dimension, it is admissible, with the limits and the *caveat* identified during the research, that the stability of the *res judicata* may fail.

Section two explains the inseparable relationship between primacy of European law and the legal tool of disapplication, by domestic court and European Court of Justice, of the national provisions which preclude the correct application of EU-law.

According to the oldest rules of European Court of Justice, in the absence of centrally harmonized rules, the Union must defer to national procedural autonomy the regulation of institute like the *res judicata*.

Howewer, national procedural autonomy, based on an accrued decentralized enforcement by national judges, contains the inherent disadvantage that the functioning and quality of the judicial process diverges so widely between the different Member States.

The European Court of Justice's caselaw has confirmed that restrictions on the enforcement of Union rights and obligations based on the principle of *res judicata* will indeed be governed by the standard requirements of equivalence and effectiveness.

When the principle of *res judicata* prevents the effective application of European law or that it achieves its purpose, it too can be considered as a compensable tort and in the most extreme cases it will have disapplicate.

The **third section** aims of the case-law of ECJ in which the *Plateau Kirchberg* which analyzed the *res judicata*.

Initially, the Court of Justice ruled, for example in the *Kobler* case, that the formation of a *res judicata* contrary to European law, although it does not entail an obligation for the Member States to remove

it, is a source of responsibility for the State towards the citizen who has suffered an infringement of his rights recognized by European law.

In particular, the ECJ has held that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, without prejudice to compensation for damage caused by the Member State and by its courts which have misgoverned European law, to the citizen.

Thus, in addition to being a rule of the specific case, *res judicata* in the *hortus conclusus* of Community law, may at the same time be a compensable tort, if compensation for the damage restores the European citizen of the suffered injury.

Howewer, in some special sectors, which belong to the exclusive competences of the European Union, such as that of state aid to companies or European taxation, *ex* Article 3 TFEU, the Court of Justice has gone so far as to disapply *res judicata*.

the Court of Justice, in the well-known Lucchini case, disapply the Italian res judicata that prevented the implementation of a decision of the Commission to recover illegal state aid.

European law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final.

Similarly, in the Klausner-Holz Niedersachsen case, in which, however, the Commission had only begun to investigate a certain scheme of State aid to companies, the Court of Justice suggested to the national court, before which the question of the compatibility of the certain State aid scheme with the internal market and with European law, (a) to verify whether the rule of implicit *res judicata*, on a question not deduced but deductible in the national process, is also formed on the question of the compatibility of a certain State aid scheme with the internal market; (b) suspend the process pending the Commission's decision; (c) disapply *sic et simpliciter* the ruling which it has expressed on the compatibility of a certain State aid scheme with the European Common Market.

Also, in line with the compatibility of res judicata with the obligation for Member States to recover unlawful State aid belongs to the case of CSTP vs Commission.

In this case, unlike Lucchini, the decision to recover the unlawful State aid was after the formation of *res judicata*. Nevertheless, the Court of Justice concluded that the national *res judicata* was disapplied, even though it had been formed five years before the recovery decision.

European Court of Justice confirms that the principle of effectiveness is an almost all-overriding principle in recovery of unlawful State aid, and it becomes clear from the three ECJ judgments that,

in practice, there is hardly any escape for Member State from the obligation to recover unlawfully granted aid.

The analysis of the case-law on State aid will lead to the assertion that: in matters falling within the exclusive competence of the Union, no national *res judicata* can be formed. The national court, in matters falling within the jurisdiction of the European Union, hears questions relating to European law only *incidenter tantum* and, therefore, without the force of *res judicata*.

More problematic is the case where the Commission's recovery decision is after and not prior to the formation of *res judicata*.

In this case, the European "principle of custody" would strengthen the stability of *res judicata*. Precisely, in order to avoid such a contradiction within the system, *de jure condendo*, mechanisms for suspending the national process will be proposed pending the closure of the investigation of the legality of State aid by the Commission, as the § 148 of the German Code of Civil Procedure, according to which where the decision on a legal dispute depends either wholly or in part on the question of whether a legal relationship does or does not exist, and this relationship forms the subject matter of another legal dispute that is pending, or that is to be determined by an administrative agency, the court may direct that the hearing be suspended until the other legal dispute has been dealt with and terminated, or until the administrative agency has issued its decision.

Moreover, it is also possible to give a different reconstruction of the relationships between the weakness of *res judicata* formed in matters of exclusive competence of the Union, such as State aid, and disapplication by the Court of Justice.

Indeed, if we focus on the feature of the interpretative rules of the Court of Justice, ex art. 267 TFEU, they generally have retroactive effect or clarify the meaning of the European provisions as soon as it enters into force. According to the most careful doctrine and according to Italian and European case law, the European Court of Justice rules have the nature of retroactive *jus superveniens* which effects are produced in the past. That said, the *res judicata*, as we said in the first section, is generally protected by the retroactive *ius superveniens* because the *res judicata* replaces the norm engraved by the retroactive *ius superveniens* becoming the *lex specialis* of the concrete case.

Therefore, if it is considered that the *res judicata* holds up when a retroactive *jus superveniens* features the rule underlying the finding that has become definitive, the hypotheses of transferability must for this purpose be ascribed to a retrospective ius superveniens — suitable for realizing for the past legal values of constitutional importance — which, to overcome the lex specialis constituted by the *res judicata*, must have a "*hyperretroactive*" effect.

However, as warned by doctrine, the hypotheses of hyperretroactive *jus superveniens* are quite exceptional and mainly concern the introduction of values of constitutional importance concerning

the protection of human rights and not the protection of competition and the European Common Market.

It must therefore be demonstrated that the rules of the Court of Justice which have disapplied the *res judicata* which have been formed contrary to the obligation on the Member States to recover unlawful State aid are justifiable, from the point of view of the general theory, by invoking the hyper-retroactive *jus superveniens*.

In **fourth section** we focus attention on the recent cases in which the Court of Justice ruled the disapplication of *res judicata* in Business to Consumers litigations.

According to art. 4 of TFEU, the "consumer's protection" is a matter of shared competence between the Union and the Member States.

In the recent case, SPV Project 1503 Srl and Dobank SpA vs YB, the Court of Justice disapplied the Italian rule of implicit force *res judicata*. According to the principle of the implicit force of *res judicata*, all the terms in the financing contracts at issue in the main proceedings would be deemed to have been examined by that court and covered by that form of res judicata. It follows that the court hearing the enforcement proceedings cannot examinate the unfairness of the terms of a contract because that order, where the debtor has not lodged an objection ex art. 645 of Italian civil procedural code, has acquired the force of *res judicata*. According to the Court of Justice, the lack of explicit examination of the unfairness terms of the contract constitutes incomplete and insufficient protection of the consumer.

Italian procedural law provides that, in the context of proceedings for the enforcement of uncontested orders for payment, the enforcing court may not conduct a review of the substance of the order for payment or review, of its own motion or at the request of the consumer, the unfairness of the contractual terms on which that order is based, on account of the force of *res judicata* which that order has acquired.

Thus, the Court of justice, according to the requirement of effective judicial protection, disapplied the rule of implicit *res judicata* to allow the court of enforcement proceedings to assess for the first time the contractual terms are unfair ex artt. no. 6 e 7 of 93/13/CEE Dir.

Howewer, in matter of shared competence between the Union and the Member States the domestic courts have the competence to rule with the strength of res judicata.

The Court of Justice can remove the *res judicata* in in matters of shared competence?

If it is excluded, as must be excluded, that the Court of Justice may remove the *res judicata* in all matters of European competence, exclusive and shared, the coherence of the system can be saved by supposing that the Court of Justice has disapplied not the *res judicata* itself but the rule of implicit

res judicata, which does not allow the consumer to know *ex ante* what the *res judicata* will be formed in order to prepare for the better their own defenses.

This solution, which in any case is unsatisfactory, is an expression of the lack of dialogue between the national courts of last instance, such as the Court of Cassation, which has led to the extreme consequences of the theory of implicit force of *res judicata*, and the Court of Justice.

The lack of judicial dialogue will be the object of the last part of the research.

In **fifth section** I analyzed the lack of dialogue between Member States and European Institutions and the difficult relations between the Supreme Courts and the Court of Justice.

The remedy of disapplication of *res judicata* is a tool of conflict resolution at the disposal of the domestic courts when faced with an irreconcilable mismatch between legally cognizable provisions of Union and national law. Howewer, disapplication is an *extrema ratio* which excludes any prospect of dialogue between the courts. When the Court of Justice disapplies, it merely eliminates the problem without offering a solution for the future. The consequence of this is the persistence of problems about future disputes of *eadem re*.

Moreover, the lack of reasoning as regards the choice to order the disapplication, as in the case of the disapplication of the implicit force of res judicata in the field of consumer protection, reveals the difficulty of the Court of Justice to look beyond the individual case, thus making it impossible to construct a common core of principles that are knowable *ex ante* by the national courts.

In judicial dialogue a court does not seek to critique the prior decision of another. Rather, its orientation is to some future decision or norm. Past determinations of a court are not the focus of judicial dialogue. The focus of judicial dialogue is instead on the implications for forthcoming decisions. Judicial dialogue is characterized unlike appeal by some dimension of voluntariness. This voluntariness suggests the limited role of judicial power in the dialogic interaction of courts. True dialogue does not depend on, and is arguably inconsistent with, the assertion or exercise of power between the relevant judicial bodies. Neither court enjoys authority over the other; hence, their engagement is a dialogue rather than a monologue.

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