

ECJ: AG Opinion in “Apostolides”

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

I. Background of the Case

The background of the case was as follows:

Mr. Apostolides, a Greek Cypriot, owned land in an area which is now under the control of the Turkish Republic of Northern Cyprus, which is not recognised by any country save Turkey, but has nonetheless *de facto* control over the area. When in 1974 the Turkish army invaded the north of the island, Mr. Apostolides had to flee. In 2002, Mr. and Mrs. Orams - who are British citizens - purchased part of the land which had come into the ownership of Mr. Apostolides. In 2003, Mr. Apostolides was - due to the easing of travel restrictions - able to travel to the Turkish Republic of Northern Cyprus and saw the property. In 2004 he issued a writ naming Mr. and Mrs. Orams as defendants claiming to demolish the villa, the swimming pool and the fence they had built, to deliver Mr. Apostolides free occupation of the land and damages for trespass. Since the time limit for entering an appearance elapsed, a judgment in default of appearance was entered on 9 November 2004. Subsequently, a certificate was obtained in the form prescribed by Annex V to the Brussels I Regulation. Against the judgment of 9 November 2004, an application was issued on behalf of Mr. and Mrs. Orams that the judgment be set aside. This application to set aside the judgment, however, was dismissed by the District Court at Nicosia on the grounds that Mr. Apostolides had not lost his right to the land and that neither local custom nor the good faith of Mr. and Mrs. Orams constituted a defence.

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

Union.

This article reads as follows:

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

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

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

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

II. Reference for a Preliminary Ruling

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

1. Does the suspension of the application of the acquis communautaire in the northern area [by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State Court from recognising and enforcing a judgment given by a Court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹ ("Regulation 44/2001"), which is part of the acquis communautaire'?

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

control? In particular, does such a judgment conflict with Article 22 of Regulation 44/2001?

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

4. Where -

a default judgment has been entered against a defendant;

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

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

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

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

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

after service took place?

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

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

III. Advocate General Kokott's Opinion

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

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

2. Article 35(1) in conjunction with Article 22(1) of Regulation No 44/2001 does not entitle a Member State court to refuse recognition and enforcement of a judgment given by a court of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control.

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

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

in full and fair proceedings, and if there are no indications that the defendant's right to a fair hearing was infringed in those proceedings.

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

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

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

With regard to the question which effect Protocol No. 10 has on the scope as well as the reference area of Brussels I, the AG clarifies that the suspension of the application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control restricts the territorial scope of the Brussels I Regulation which leads to the result that the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus cannot be based on the Brussels I Regulation. Nor is it possible under the Regulation, for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State (para. 31).

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

The AG stresses that Article 1(1) of Protocol No. 10 states that the *acquis communautaire* is to be suspended *in* that area and not *in relation* to that area (para. 34).

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

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

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

2. Scope of the Brussels I Regulation

With regard to the remaining questions, the AG first addresses the preliminary question whether this case falls within the scope of Brussels I at all (para. 55 et seq.). Doubts had been raised in this respect by the European Commission questioning whether this case constitutes a civil and commercial matter in terms of Article 1(1) Brussels I. These doubts are based on the context of the case and therefore the fact that the disputes over land owned by displaced Greek Cypriot

refugees have their origin in the military occupation of northern Cyprus (para. 55). The Commission submits that it has to be taken into consideration that a compensation regime has been enacted and that therefore an alternative legal remedy concerning restitution is available which can be construed as a convention in terms of Art. 71 (1) Brussels I stating that the regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (para. 57).

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

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

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

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

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

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

The **third question** referred to the Court aims to ascertain whether the factual non-enforceability of a judgment in the State where it was given can be regarded as manifestly contrary to public policy in terms of Art. 34 (1) Brussels I (para. 95). This is answered in the negative by the AG by stating *inter alia* that “since the enforceability of the foreign judgment in the State of origin as a condition for a declaration of enforceability by the courts of another Member State is laid down definitively in Article 38 (1) of the regulation, the same condition cannot be taken up with a different meaning in the context of the public policy proviso” (para. 100). Further, the AG discusses also the submission brought forward by the Commission and the Orams as to whether the recognition and enforcement of the judgment of the District Court of Nicosia contravenes international public policy since it may undermine the efforts to find a solution to the Cyprus problem (para. 101). With regard to this problem, the AG first points out that this question has not been considered by the referring court and that, in principle, the Court is bound by the subject matter of the reference (para. 102). However, in case the

Court should find it appropriate to discuss this question, the AG argues *inter alia* that “the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in northern Cyprus” (para. 111). Thus, according to the AG, a court of a Member State cannot refuse the recognition and enforcement of a judgment on the basis of Art. 34 (1) Brussels I on the grounds that the judgment cannot be enforced for factual reasons in the State where it was given.

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

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

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