German Casenote on ECJ Lechouritou Judgment

A very interesting article commenting the recent ECJ *Lechouritou* case (C-292/05, judgment of 15 February 2007) has been published in the latest issue of the German Law Journal, an online review in English devoted to developments in German, European and international jurisprudence.

The casenote has been written by *Veronika Gaertner* (University of Heidelberg), editor of conflictoflaws.net for Germany, who has extensively reported on the case for our site (see her posts on the opinion of AG Ruiz-Jarabo Colomer and on the judgment of the Court).

An abstract of the article (**"The Brussels Convention and Reparations – Remarks on the Judgment of the European Court of Justice in Lechouritou and others v. the State of the Federal Republic of Germany"**) has been kindly provided by the author:

The article analyses the judgment of the European Court of Justice in the case Lechouritou and others v. the State of the Federal Republic of Germany. In this judgment the Court had held that an action aimed at the payment of compensation for acts perpetrated by armed forces in the course of warfare does not constitute a civil matter in terms of the Brussels Convention.

The case note first classifies the judgment in the previous case law of the Court on the concept of civil matters in terms of the Brussels Regime. Hereby, the relevant rulings are examined in view of the criteria developed by the Court for defining the term of "civil and commercial matters" – in particular in distinction to public matters. In this regard, it is argued that the Court followed its previous rulings by basing its argumentation on the question whether the acts constituting the origin of the action for damages result from the exercise of public powers.

In the second part the case note addresses – in reference to objections raised by the plaintiffs – the question whether the qualification of the acts perpetrated by German armed forces as acta iure imperii excluded from the scope of the Brussels Convention can be agreed with. Here, the focus is on the question

> *whether the term of act iure imperii could be regarded as limited to lawful acts, as partly argued with regard to the law of State immunity. This restriction of acta iure imperii to lawful acts is, however, rejected and consequently the assessment of the Court to regard the action of the plaintiffs as excluded from the scope of the Convention is agreed with.*

In addition to a thorough analysis of previous ECJ rulings on the matter, the article contains numerous references to national and international Courts' case law regarding the classification of military acts as the emanation of State authority and the restriction of State immunity in relation to wrongful acts, even if the author points out the different rationales underlying these restrictions in the field of State immunity (with the goal of an improved protection of human rights) and the exclusion of *acta iure imperii* from the scope of the European procedural law instruments.

The distinction between the two levels (public international law on one side, European uniform rules on jurisdiction on the other) is clearly underlined in the final remarks of the casenote:

> *[A]s the Court of Justice has explained in its ruling, the Brussels Convention, as a measure facilitating the internal market by the mutual recognition and enforcement of judgments in civil and commercial matters, is not the right instrument for the assertion of compensation claims based on acts perpetrated by armed forces in the course of warfare. The consequences of war and occupation can […] only be dealt with at a public law level.*

The article is available here (also in downloadable .pdf version). Highly recommended.

The thing that should not be:

European Enforcement Order bypassing acta jure imperii

In a dispute between two Cypriot citizens and the Republic of Turkey concerning the enforcement of a European Enforcement Order issued by a Cypriot court, the Thessaloniki CoA was confronted with the question, whether the refusal of the Thessaloniki Land Registry to register a writ of control against property of the Turkish State located in Thessaloniki was in line with the EEO Regulation.

I. THE FACTS

The dispute began in 2013, when two Cypriot citizens filed a claim for damages against the Republic of Turkey before the Nicosia Disctrict Court. The request concerned compensation for deprivation of enjoyment of their property since July 1974 in Kyrenia, a city occupied by the Turkish military forces during the 1974 invasion on the island. The Kyrenia District Court **(***Eparchiakó Dikastírio Kerýneias*), which operates since July 1974 in Nicosia, issued in May 2014 its ruling, granting damages to the claimants in the altitude of 9 million €. Almost a year later, the latter requested the same court to issue a certificate of European Enforcement Order. The application was granted. Within the same year, the claimants filed an application before the Athens Court of first Instance for the recognition and enforcement of the Cypriot judgment. Prima facie it seems to be a useless step, however there was a rationale behind it; I will come back to the matter later on. The Athens court granted exequatur (Athens CFI 2407/2015, unreported).

Following almost a year of inactivity, the claimants decided to proceed to the execution of their title by attaching property of the Turkish State in Thessaloniki. Pursuant to domestic rules, the enforcement agent serves the distraint order to the debtor; afterwards, (s)he requests the order to be registered at the territorially competent land registry. Both actions are imperative by law. At this point, the chief officer of the land registry refused to proceed to registration,

invoking Article 923 Greek Code of Civil Procedure (CCP) which reads as follows: *Compulsory enforcement against a foreign State may not take place without a prior leave of the Minister of Justice*. The claimants challenged the registrar's refusal by filing an application pursuant to Article 791 CCP, which aims at the obligation of the registrar to proceed to registration by virtue of a court order. The Thessaloniki 1. Instance court dismissed the application (Thessaloniki CFI 8363/2017, unreported). The claimants appealed.

II. THE RULING

The Thessaloniki CoA dismissed the appeal, confirming the first instance ruling in its entirety. It began from the right of the land registrar to a review of legality, thus the right to examine the request beyond possible formality gaps. It then referred to Articles 6.1 ECHR, 1 of the 1. Additional Protocol to the ECHR, and Articles 2.3 (c) and 14 of the 1966 International Covenant on Civil and Political Rights, in order to support the right to enforcement against a foreign State. The appellate court continued by analyzing Article 923 CCP and its importance in the domestic legal order. It emphasized the objective of the provision, i.e. to estimate potential repercussions and to avoid possible tensions with the foreign State in case of execution. The court founded its analysis on two ECHR rulings, i.e. the judgments in the *Kalogeropoulou and* Others *v. Greece and* Germany (59021/00), and *Vlastos v. Greece* (28803/07) cases, adding two rulings of the Full Bench of the Greek Supreme Court from 2002. Finally, the court concluded that there has not been a violation of the EEO Regulation, stating that the process under Article 923 CCP is not to be considered as part of *intermediate proceedings needed to be brought in the Member State of enforcement prior ro recognition and enforcement*; hence, the rule in Article 1 of the EEO Regulation is not violated.

III. COMMENTS

In general terms, one has to agree with the outcome of the case. Nevertheless, there are a number of issues to be underlined, so that the reader gets the full picture of the dispute.

- The claim before the Kyrenia District Court bears some similarities with

the ruling of the ECJ in the *Apostolidis/Orams* case: The Court decided then that: *The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] … does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.* In both cases, the property under dispute was located in the Kyrenia district. The difference lies in the defendants: Unlike the *Orams* case, the respondent here was a foreign State. Article 4 Brussels I Regulation grants the right to claimants to avail themselves of domestic rules of jurisdiction, which is presumably what the claimants did in the case at hand.

- The issue of the EEO certificate seems to run contrary to Article 2.1 EEO Regulation. The matter was not examined by the Thessaloniki courts, which focused on the subject matter, i.e. the refusal of the land registrar on the grounds of Article 923 CCP.
- The exequatur proceedings in Greece seem to be superfluous, given that a EEO may be enforced without the need for a declaration of enforceability (Article 5 EEO Regulation). One reason which possibly triggered additional exequatur proceedings might have been the fact that, unlike the EEO Regulation, the acta iure imperii clause was not included in the Brussels I Regulation (see Article 1.1). Still, the matter was examined in the *Lechouritou* case even before the entry into force of the Brussels I bis Regulation. Hence, it would not have made a difference in the first place.
- The appellate court focused on the compatibility of Article 923 CCP with the EEO Regulation. However, the claimants carried out the execution in Greece on the grounds of the Cypriot judgment, not the EEO certificate.

Finally, two more points which should not be left without a comment.

- Throughout the proceedings, the Turkish State demonstrated buddhistic apathy. There was not a single remedy brought forward, neither in Cyprus

nor in Greece. It was a victory in absentia. A reason for this stance was surely the following: The property of the Turkish state in Thessaloniki hosts one of its General Consulates in Greece. This is not just another Turkish Consulate around the globe: It is built upon the place where the father of the Turkish Republic (Mustafa Kemal Atatürk) was born. It also includes the house where he was raised.

- The Thessaloniki CoA emphasized that a potential refusal of the Greek Minister of Justice to grant leave for execution would not harm the essence of the Cypriot judgment: Enforceability and res iudicata remain untouched; hence, the claimants may seek enforcement of the judgment in the foreign country, i.e. Turkey… The argument was 'borrowed' by the ruling of the ECJ in the *Krombach* case (which is cited in the text of the decision); therefore, it is totally alien to the case at hand. Even if the claimants were to find any assets of the Turkish Republic in the EU, like the Villa Vigoni in Italy, the ruling of the ICJ in the case *Germany v. Italy: Greece intervening)* would serve as a tool to grant jurisdictional immunity to the Turkish state.

IV. CONCLUSION

Article 923 CCP is the first line of defence for foreign states in Greece. In the unlikely event that the Greek Minister of Justice grants leave for execution, a judgment creditor will be confronted with a second hurdle, if (s)he's aiming at the seizure of property similar to the case discussed here: the maxim ne impediatur legatio (ad hoc see Greek Supreme Court, 29 November 2017, decision no. 1937/2017, reported in English here). Hence, the chances to capitalize on the enforceable title are close to zero.

The saga of the Greek State bonds

and their haircut: Hellas triumphans in Luxemburg. Really?

By Prof. Dr. Peter Mankowski, University of Hamburg

The Greek State financial crisis has sent waves of political turmoil throughout the Eurozone and is certainly going to continue. It has provided much enrichment for International Procedural Law, yet not for the creditors of Greek State bonds. 'Haircut' has become an all too familiar notion and part of the Common Book of Prayers of State bonds. Some creditors, particularly from Germany and Austria, were not content with having their hair cut involuntarily and put it to the judicial test. Greece has thrown every hurdle in their way which she could possibly muster: service, immunity, lack of international jurisdiction. The service issue was sorted out by the CJEU in *Fahnenbrock* (Joined Cases C-226/13 et al., ECLI:EU:C:2015:383), already back in 2015. The German BGH and the Austrian OGH took fairly different approaches, the former granting immunity to Greece because of the haircut, the latter proceeding towards examining the heads of international jurisdiction under the Brussels Ibis Regulation. Quite consequently, the OGH referred some question concerning Art. 7 (1) Brussels Ibis Regulation to the CJEU. In its recent *Kuhn* decision (of 15 November 2018, Case C-308/17, ECLI:EU:C:2018:911), the CJEU answered that the entire Brussels Ibis Regulation would not be applicable by virtue of its Art. 1 (1) 2nd sentence since the CJEU believed the haircut to constitute an *actum iure imperii*. Rapporteur was the newly (only six days before) promoted Vice President *Rosario Silva de Lapuerta* from Spain. The core of the judgment is surprisingly succinct, not too say: short, comprising only some ten paragraphs:

> *34 Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of that regulation, it is otherwise where the public authority is acting in the exercise of its public powers (judgment of 15 February 2007, Lechouritou and Others, C?292/05, EU:C:2007:102, paragraph 31 and the case-law cited).*
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> *35 That applies, namely, to disputes resulting from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private*

individuals (judgment of 15 February 2007, Lechouritou and Others, C?292/05, EU:C:2007:102, paragraph 34).

36 As regards the dispute in the main proceedings, it must, consequently, be established whether its origin stems from the acts of the Hellenic Republic, which arise from the exercise of public authority.

37 As stated by the Advocate General in points 62 et seq. of his Opinion, the manifestation of that exercise is the result of both the nature and the modalities of the changes to the contractual relationship between the Greek State and the holders of the securities at issue in the main proceedings and the exceptional context in which those changes took place.

38 Those securities, following the adoption of Law 4050/2012 by the Greek legislator and the retroactive introduction of a CAC according to that law, were replaced by new securities with a much lower nominal value. Such a substitution of securities was not provided for in the initial borrowing terms or in the Greek law in force at the time that the securities subject to those conditions were issued.

39 Thus, that retroactive introduction of a CAC allowed the Hellenic Republic to impose on all of the holders of securities a substantial amendment to the financial terms of those securities, including on those that would have sought to oppose that amendment.

40 Furthermore, the unprecedented reliance on the retroactive inclusion of a CAC and the resulting amendment to the financial terms took place in an exceptional context, in the circumstances of a serious financial crisis. They were namely dictated by the necessity, within the framework of an intergovernmental assistance mechanism, to restructure the Greek State's public debt and to prevent the risk of failure of the restructuring plan of that debt, to avoid that State failing to pay and to ensure the financial stability of the euro area. By declarations of 21 July and 26 October 2011, the euro area Heads of State or Government affirmed that, regarding the participation of the private sector, the situation of the Hellenic Republic called for an exceptional solution.

41 The exceptional nature of that situation also results from the fact that, according to Article 12(3) of the EMS Treaty, CACs are to be included, as of 1 January 2013, in all new euro area government securities with maturity above

one year, in a way which ensures that their legal impact be identical.

42 It follows that, having regard to the exceptional character of the conditions and the circumstances surrounding the adoption of Law 4050/2012, according to which the initial borrowing terms of the sovereign bonds at issue in the main proceedings were unilaterally and retroactively amended by the introduction of a CAC, and to the public interest objective that it pursues, the origin of the dispute in the main proceeding stems from the manifestation of public authority and results from the acts of the Greek State in the exercise of that public authority, in such a way that that dispute does not fall within 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012.

43 In those circumstances, the answer to the question referred is that Article 1(1) of Regulation No 1215/2012 is to be interpreted as meaning that a dispute, such as that at issue in the main proceedings, relating to an action brought by a natural person having acquired bonds issued by a Member State, against that State and seeking to contest the exchange of those bonds with bonds of a lower value, imposed on that natural person by the effect of a law adopted in exceptional circumstances by the national legislator, according to which those terms were unilaterally and retroactively amended by the introduction of a CAC allowing a majority of holders of the relevant bonds to impose that exchange on the minority, does not fall within 'civil and commercial matters' within the meaning of that article.

This mirrors sometimes to the letter the core of the opinion delivered by A-G *Bot* from France (delivered on 4 July 2018, ECLI:EU:C:2018:528 paras. 62-76). Only rarely the CJEU has argued in such an openly political manner when deciding issues of the Brussels I/Ibis regime. The underlying *ratio* is evident: Greece must not fall for otherwise the Eurozone in its entirety is feared to break down. The individual creditors' particular interests are sacrificed for the common good of Greece, the Eurozone and the EU. (The so called Troika including the EU was mainly responsible for the introduction of the haircut into Greek law by demanding the reduction of Greece's public debt.)

Yet a second, more technical thought appears necessary: Hellas might have triumphed in the concrete case. But the victory she scored might turn out to be a

Pyrrhic victory. Declaring Art. 1 (2) 2nd sentence Brussels Ibis Regulation operational wipes out for instance jurisdiction under Art. 7 (1) Brussels Ibis Regulation – but it also wipes out Art. 5 Brussels Ibis Regulation. Greece as the defendant is left to the possibly tender mercy of the *national* jurisdiction rules of her EU partner States once one is prepared to proceed to the realm of international jurisdiction. Hence, as to the admissibility of the claims all boils down to the question whether Greece enjoys immunity for her haircut administered. *Kuhn* in fact reduces the number of defenses available to Greece by one.

The procedural impact of the Greek debt crisis: The CJEU rules on the applicability of the Service Regulation

by Anastasia Gialeli

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The Court of Justice of the European Union (CJEU) on 11 June 2015 delivered its judgment in the joined cases C-226/13, C-245/13, C-247/13 and C-578/13 regarding the concept of "civil and commercial matters", now for the first time within the meaning of the Service Regulation (No 1393/2007).

1. Background

In the main four proceedings before German courts (i.e. Landgericht Wiesbaden

and Kiel), the claimants, all holders of Greek State bonds, had initiated legal actions against the Hellenic Republic based on German civil law. They were claiming compensation for disturbance of ownership and property rights, contractual performance of the bonds which have reached maturity or damages caused by the retroactive and unilateral change of the bonds by the Greek State in the framework of the Private Sector Involvement (PSI). The judgment is particularly important because it concerns numerous civil legal actions of German bondholders against Greece brought before German courts (cf. the identical request for a preliminary ruling made by Landgericht Aachen in case C-196/14 and the cited case law as follows).

In the decision made by the European Council regarding financial assistance for Greece at the summit of 21 July 2011 a "voluntary" PSI was included. It was regarded as an exceptional and unique solution for the sustainability of the Greek debt (Euro Summit Statement of 26 October, 2011, page 4-5, Statement by the Eurogroup of 21 February, 2012). A successful PSI operation was therefore a requirement for Greece in order to achieve a second Economic Adjustment Programme with the EU, the IMF and the ECB (Statement by the Eurogroup of 21 February, 2012). In line with this, the Greek Parliament adopted the Law No 4050/2012 entitled „Rules relating to the adjustment of securities, their issue or guarantee by the Greek State with the agreement of the bond holders" (hereinafter: Greek Bondholder Act) on 23 February 2012.

In accordance with the Greek Bondholder Act, the Greek State in February 2012 submitted an exchange offer to the applicants which provided for the original bonds to be exchanged for new bonds with a considerably reduced nominal value (53,5%) and a longer period of validity, which the applicants, however, rejected. Nevertheless, the Greek State carried out the proposed exchange in March 2012, by means of the restructuring clause contained in the Greek Bondholder Act, also known in financial terms as a so-called "CAC" (Collective Action Clause) (see the detailed presentation by *Sandrock* RIW 2012, 429). Pursuant to this clause, the unilaterally proposed change of the initial conditions of the bonds could be accepted (or refused, but not renegotiated or modified) by a quorum representing 50% of the total outstanding bondholders concerned and with a decision by the qualified majority corresponding to two thirds of the participating capital. This decision then had to be approved by a resolution of the Greek Council of Ministers and executed by the Greek Central Bank. Article 1(9) of the Greek Law

furthermore provides for an *erga omnes* effect of the decision adopted by the majority, which is also binding on the minority of the concerned bondholders and overrides any general or specific law and any contracts conflicting with it. Finally, it stipulates that these provisions protect the public interest and, thus, they constitute overriding mandatory rules, excluding any liability of the Greek State.

The exchange of the bonds was disadvantageous for the applicants, who obviously belong to the disagreeing minority (hold-out creditors, 5% pursuant to the Second Economic Adjustment Programme for Greece of March 2012, page 48). In order to serve the documents initiating the proceedings against the Greek State, the transmitting body (Bundesamt für Justiz, i.e. the German Federal Office for Judicial Administration and Cooperation) raised the question as to whether, for the purpose of Article 1 (1) of Regulation No 1393/2007, those actions concerned "civil or commercial matters" or acts or omissions in the exercise of State authority, which are, pursuant to Article 1 (1, 2nd sentence), explicitly excluded from the scope of the Regulation (*acta iure imperii*). The crucial question is whether the interpretation of the concept of civil or commercial matters should be made by focusing on the civil law basis of the legal actions or on the subject matter of the dispute.

The Landgericht Wiesbaden (one of the referring courts) tended towards characterizing the claims based on the subject matter of the dispute, namely the intervention by law in a case originally of a civil nature – i.e. the purchase of the bonds – and its effects on the property or contract rights of the applicants. Thus, according to this court, the case at issue should be classified as falling under the explicit exclusion in Article 1 (1, 2nd sentence) concerning the liability of a State acting in the exercise of public authority (LG Wiesbaden, 18.4.2013 para. 14-15). This is in line with the case law of other German civil courts, which in similar cases involving German bondholders' actions have argued that the subject matter concerns the Greek State's public authority and that, accordingly, the Hellenic Republic should enjoy immunity in this regard (cf. LG Konstanz 19.11.2013, para. 27; OLG Schleswig-Holstein 04.12.2014, para. 48-72, pending before the BGH ref. number XI ZR 7/15). This line of reasoning also corresponds with the leading judgment of the plenum of the Greek Council of State No 1116/2014 of 21 March, 2014.

2. Judgment

The CJEU, however, holds that article 1 (1) of the Service Regulation *"must be interpreted as meaning that legal actions for compensation for disturbance of ownership and property rights, contractual performance and damages, such as those at issue in the main proceedings, brought by private persons who are holders of government bonds against the issuing State, fall within the scope of that regulation in so far as it does not appear that they are manifestly outside the concept of civil or commercial matters."*

Standard of evidence

First, the CJEU points out that it *"suffices that the court hearing the case concludes that it is* ***not manifest*** *that the action brought before it falls outside the scope definition of civil and commercial matters"* (para. 49). The Court adopts the Commission's opinion and argues that, because of the complexity of the distinction between civil or commercial matters and *acta iure imperii*, the court usually has to decide on this question only after having heard all the parties and thus having all the necessary information. In the case of the Service Regulation however, this question arose in a very early phase, i.e. even before the defendant had been served with the initiating document. Moreover, the answer to this question determines the methods of service of that document. Thus, *"the court must limit itself to a preliminary review of the available evidence, which is inevitably incomplete, in order to decide"* about the application of the Service Regulation.

As far as the question of distinguishing between civil or commercial matters, on the one hand, and *acta iure imperii*, on the other, arises within the framework of the Service Regulation, the answer is restricted to the method of the service without prejudice to the international jurisdiction and the substance of the case at issue (para. 46). Thus, the Court reasonably takes into account that the court seised may not have the jurisdiction that is required to deliver its judgment in substance. As a consequence, the Court facilitates the initiation of the proceedings, one of the key aims of the Regulation.

However, the Court argues that its interpretation is also confirmed by the general scheme of the Service Regulation, as this results from recital 10, which states that *"the possibility of refusing service of documents should be confined to exceptional situations"*, in conjunction with Article 6 (3), which enables the receiving agency to return the documents to the transmitting agency if the concerned request for

service is *"manifestly outside the scope of that regulation"*. This argument is not fully convincing as it should be noted that the cited provision is a special rule and is addressed to the receiving agency because of the non-judicial nature of those bodies in contrast to the seised court. The seised court, however, is the competent body to decide on the applicability of the Service Regulation. Thus, the systematic argument of the Court is rather doubtful (see also Advocate General *Bot* 9.12.2014, para 72 and footnote 73).

The CJEU further stipulates that, in conformity with its case law on the Brussels Convention and Brussels I, the concept of civil or commercial matters must be regarded as an independent concept within the framework of the Service Regulation as well, interpreted by referring to the objectives and the scheme of that Regulation. With regard to the main objectives of the Service Regulation, the Court points out that recitals 2, 6 and 7 provide for the improvement and the expediency of the transmission of judicial and extrajudicial documents, in order to ensure the proper functioning of the internal market. In this context, it should be noted that – in contrast to the opinion of AG *Bot* (AG *Bot* 9.12.2014, para. 49) – the Court seems not willing to take into proper consideration the general objectives of legal certainty and coherence of law, but overestimates the objective of the effectivity of the Service Regulation. The service of a document should certainly be improved and facilitated, but only under the condition that the case at issue falls into the scope of the Regulation at all.

Decisive criterion for the distinction

The wording of the Court's ruling that *"legal actions (…) fall within the scope of that regulation* ***in so far as it does not appear*** *that they are manifestly outside the concept of civil or commercial matters"* is rather unfortunate and unusual – compared to, e.g., C-302/13 flyLAL, C-292/05 Lechouritou, C-645/11 Sapir, C-14/08 Roda Golf – and ends in a vicious circle, which does not provide a safe harbour for national courts having to determine whether the case at issue falls in or outside the scope of the Regulation.

In the reasoning of its judgment, the Court tries to define the crucial criterion for determining whether the case at issue falls in or outside the scope of the Service Regulation. In general terms, the disputed act of the state authority should lead directly and immediately to a change in the legal relationship involved and therefore should cause the alleged damage. The Court holds that *"it is not obvious*

that the adoption of the Law No 4050/2012 led ***directly and immediately*** *to changes to the financial conditions of the securities in question and therefore* ***caused*** *the damage (…)"* (para. 57). Instead of the Greek Bondholder Act itself, the Court considers the decision of the majority of the bondholders accepting the exchange offer as the event giving rise to the damage. This is hard to square with the fact that it was exactly the Greek Bondholder Act which imposed the retroactive *erga omnes* effect of a majority decision upon the hold-out bondholders' contracts in order to safeguard public interests. The direct binding effect of the majority's decision on the contracts of the hold-out applicants does not, however, fall under the scope of ordinary legal rules applicable to relationships between private individuals. Further, it should be pointed out that, first, the bond exchange was executed by the Central Bank of Greece after a resolution of the Council of Ministers had approved the majority's decision, also by an administrative process, and secondly, that the content of the decision itself was not negotiable by the majority but in fact unilaterally designated by the Greek Bondholders Act. Finally, this Act was adopted in order to deal with a severe financial crisis and especially to restructure the public debt and secure the stability in the Eurozone, objectives closely linked to state sovereignty. Those objectives are also noticed by the Court, but the judges do not consider them as decisive. Thus, the Court, similar to its earlier *Sapir* judgment (C-645/11 para. 35-37) concerning Brussels I, interprets the concept of civil or commercial matters widely in the framework of the Service Regulation as well.

In contrast, AG *Bot* had pleaded persuasively that the case at issue should be excluded from the scope of the Service Regulation because the present dispute was rooted in the adoption and the implementation of the Greek Bondholders Act, which constitutes an act in the exercise of public power (AG *Bot* para. 63-70). This opinion is in accordance with my reading of the earlier case law of the CJEU with regard to the unilateral and binding manner of acting by a public authority, which appears as inextricably linked to a State's public interest, in the case at issue to financial policy (cf. especially CJEU Lechouritou C-292/05 para. 37; Baten C-271/00, para. 36; Tiard C-266/01, para. 33; Sapir C-645/11, para. 33; flyLAL C-302/13, para. 31; cf. *Kropholler/von Hein* EuZPR, 9th ed., Art. 1 EuGVO para. 6; Stein/Jonas/*Wagner* ZPO, 22nd ed., Art. 1 EuGVO para. 11).

The initial purchase of the bonds is, in line with the Court's judgment, governed by the ordinary financial market and legal rules applying to individuals. However,

the decision of the majority of the bondholders, which pursuant to the Court should be regarded as the decisive act, does constitute the implementation of the Greek Bondholders Act itself. It seems that the Court adopts an inconsistently technical view of the subject matter when it refuses to consider the form of the crucial act of the Greek State, i.e. the adoption of the Law in itself, as decisive, but at the same time characterizes the majority bondholders' acceptance as the decisive criterion, although that acceptance was in fact only motivated by a desire to avoid an absolute loss (cf. *Sandrock* RIW 2013, 12, 15: Bondholders had the choice between Scylla and Charybdis). Furthermore, the argument that the *intention* of the Greek State (para. 57) was to keep the handling of the bonds within a regulatory framework of a civil nature should be irrelevant to an autonomous definition in European civil procedure law.

3. Outlook

After the Court has paved the way for applying the Service Regulation in the cases of German bondholders, it must be awaited how the German courts will evaluate the parallel issue at the level of jurisdiction. As far as the courts accept the civil nature of the case, they must then determine which head of jurisdiction under Brussels Ia could apply. After the *Kolassa* judgment (C-375/13), the only available basis is found in Article 7 No 2, which in turn may be overruled by a choice of court agreement (Article 25). On a conflict of laws level, it is assumed that in the general terms of the exchange of the bonds at issue a choice of law clause in favour of Greek, English or Swiss law has been made (*Sandrock*, RIW 2012, 429 434). In case that the *lex causae* is not Greek law, the question arises as to whether the Greek Bondholder Act must be characterized as an overriding mandatory rule (cf. the request for a preliminary ruling of the BAG, 25.2.2015 in case C-135/15 Nikiforidis, concerning labour contracts with the Greek State, and the previous post by *Dr. Lisa Günther* on this issue).

Should Brussels I Have Been Applied in "Land Berlin"? Some Thoughts on the Judgment of the ECJ from April 11th, As. C- 645/11

Many thanks to Polina Pavlova for sharing her comments on this recent ECJ ruling, first in our (MPI) weekly Referentenrunde and now here. Paulina Pavlova is research fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.

On April 11th, the ECJ rendered what at first sight appears to be a non-controversial judgment on the scope of application of the Brussels I Regulation. Whether the decision in the case C-645/11, *Land Berlin v. Ellen Mirjam Sapir and Others* is indeed as consistent as it might seem, is, however, highly questionable.

Mr. Busse owned a plot of land in East Berlin. During the Third Reich he was persecuted under the NS regime and was forced to sell the land to a third party in 1938. Later on, the plot was expropriated by the German Democratic Republic and became part of a larger, State-owned, parcel of land. After the German reunification, the ownership of this land transferred to the Land Berlin and the Federal Republic of Germany.

In 1990, the *Vermögensgesetz* (Law on Property) provided for the possibility that such expropriated land be returned to the original owner. Ten successors of Mr. Busse domiciled in four different States then applied for a return of the land which once belonged to Mr. Busse. However, in 1997, fulfilling this request became impossible since the Land Berlin and the Federal Republic of Germany sold the whole parcel to an investor. This was allowed by the *Investitionsvorranggesetz* – a Law on priority for investments in the case of claims for return under the Law on Property. As compensation, the successors were entitled to receive the corresponding proceeds of the sale or the market value of the property.

The competent authority ordered the Land Berlin to pay the respective share of the proceeds to Mr. Busse's successors. However, the Land Berlin unintentionally transferred the entire amount of the sell price to their lawyer instead of paying only the amount corresponding to the share of Mr. Busse in the big parcel of land. The Land Berlin then brought an action before the *Landgericht Berlin* against the successors of Mr. Busse and their lawyer in order to recover the overpayment. The claim was based on unjust enrichment against the successors and on tort against the lawyer.

As far as the merits are concerned, the defendants claim to be entitled to the whole amount they received alleging that the parcel had been sold under value anyway. More important for us is whether the *Landgericht Berlin* has jurisdiction over the defendants who are not domiciled in Germany but in the UK, Spain and Israel. This question concerns the application of the Brussels I Regulation and more specifically its Article 6 (1). The case went through all instances and finally to the *Bundesgerichtshof* which referred three questions to the ECJ on: (1) the notion of "civil matters" in the sense of Article 1 of the Brussels I Regulation, (2) the criteria of a close connection as required in Article 6 (1) and (3) the applicability of the latter provision to defendants not domiciled in a Member State. With regard to the specific case the ECJ basically gave a "Yes-Yes-No" answer.

Let me briefly comment the Court's interpretation in a reversed order, starting from the third question.

Third State defendants and Article 6 (1)? To the question of applicability of Article 6 (1) to defendants not domiciled in a Member State the Court answered with a clear "No", thus confirming not only the unambiguous wording but also the prevailing view in legal literature.

A close connection? As far as the second question is concerned, the ECJ basically ruled the *Land Berlin* case fulfills the criterion of the close connection as required in Article 6 (1). Although the Court always lays emphasis on the need of a strict interpretation of this rule, recent case-law has shown the opposite trend. With this in mind, the new decision can hardly be qualified as groundbreaking. This, however, cannot be said for the interpretation of the notion of civil matters in *Land Berlin*.

A civil matter? With regard to the (preliminary) question of whether a case as the one described falls under the concept of "civil and commercial matters" in the sense of Article 1 (1) of the Brussels I Regulation, the ECJ recalled its relevant judgments stating that the regulation is not applicable only when a public authority is acting in the exercise of its public powers. In the Court's view, the Land Berlin did not act in the exercise of such powers. The main argument in the reasoning seems to be that the Law on Property and the Law on Investment that are governing the compensation process apply equally to both private persons and public authorities. What is more, the court explains, in order to recover the overpayment, the Land Berlin has to bring an action before a civil court on the basis of a provision of the German Civil Code (Paragraph 812, unjust enrichment). All these circumstances lead the ECJ to the conclusion that we have a civil matter within the meaning of the Regulation despite the involvement of a public authority and the administrative proceedings preceding the compensation.

As convincing as it may seem, this reasoning is far from solid.

To start with, the Court's view on the scope and purpose of the two laws governing the compensation process, the Law on Property and the Law on Investment, seems questionable. While the scope of the laws is not limited to cases involving the ownership of State entities – they can indeed apply when both the previous and the actual owners are private persons, what is completely left aside by the Court is the *purpose* these legislative acts actually seek to achieve and the *nature* of their subject matter. The provisions ensure the compensation for the expropriation of the lawful owner taken place in the circumstances of a totalitarian regime. Even where the State has not (directly) acquired the property, the loss of ownership can still be considered as equal to such an expropriation since it was facilitated by the rules of the regime. What is more, both acts envisage special administrative proceedings preceding the claim for compensation, and even the establishment of special public bodies competent to deal with the multiplicity of restitution cases. And finally, and most importantly, restitution and compensation for expropriation connected with the specificity of a political regime are *per se* matters deeply rooted in the relationship between the private individual and the State.

Furthermore, the Court brings the argument that the restitution of the overpayment is not a part of the administrative procedure foreseen in the

above-mentioned laws. It is not entirely clear whether the ECJ aims at a distinction between the overpayment and the sum which the Land Berlin actually wanted to transfer or between the (over)payment and its restitution. As to the first assumption (which seems less probable), it has to be pointed out that a mistake in an administrative procedure cannot result into the transformation of a public administrative matter into a civil one. With regard to the second interpretation, whether the restitution of a payment is a civil matter or not, is a question necessarily linked to the nature of the payment itself. In a nutshell: Payment, *over*payment and recovery of overpaid amount necessarily share the same legal nature when it comes to ascribing them to the public or the private domain.

The rather supplementary argument of the ECJ concerning the jurisdiction of the Civil courts on the overpayment recovery claims in the aforementioned context is also misleading as it clearly contradicts to established case-law. As the Court rightfully noted in *Lechouritou and others* (paragraph 41), the civil nature of the proceedings previewed in national law is entirely irrelevant when it comes to qualifying a claim for the purpose of Article 1 of the Regulation. From *Lechouritou* (paragraphs 36 f.) we can conclude that it is the nature of the claim, the context it derives from and the acts at the origin of the damage pleaded that are decisive for the qualification of the claim as falling in or outside of the scope. While it is beyond doubt that the questions in the main proceedings of *Lechouritou* – State immunity in the context of armed forces activities during the Second World War – demonstrate a much stronger link to a State related matter, the reasoning of this judgment nonetheless offers clear criteria that can be (or rather should have been) applied to the *Land Berlin* case.

The last point in the reasoning of *Land Berlin* that merits examination is the question of the legal basis of the claim – a factor to which the Court itself seems to ascribe a significant importance. The action for recovery of the overpayment is based on Paragraph 812 (1) of the German Civil Code: a rule governing restitution in cases of unjust enrichment which applies to both private persons and public authorities. However, it seems arbitrary to consider a claim as a civil matter simply because a national legislator has anchored the general provision on unjust enrichment in the Civil Code without distinguishing between public and private cases. This rather technical

approach adopted in *Land Berlin* promotes another, very controversial consequence: It results in the general inclusion of claims based on unjust enrichment into the scope of the Regulation irrespective of their true nature. Unjust enrichment as such, however, cannot exist outside of a context, whether it is a contractual one, a tortious one or – for the sake of this debate – an administrative one.

As a conclusion, a critical view on this note seems appropriate: Is the position stated here one too deeply rooted in the German understanding of a civil matter that disregards the need of an independent, autonomous definition of the Regulation's scope? While the compensation for expropriations during the NS regime is in Germany indeed framed in an administrative procedure and strongly differs from the civil context, might the European legislator still consider it as a civil matter?

I would argue that this is not the case. The core elements that deserve attention from a EU perspective are: the subject matter of the action and the legal relationships between the parties (*LTU*, paragraph 4; *Lechouritou*, paragraph 30; *Henkel*, paragraph 29). There is no rule under which restitution claims necessarily constitute a civil issue, nor is every action brought before a civil court by all means subject to the Regulation's jurisdiction rules. Therefore, with regard to the aforementioned specifics of the *Land Berlin* case, the judgment sets an alarming trend: Following *Land Berlin*, the Brussels I Regulation risks to eventually apply to subject matters it never meant to govern.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2010)

Recently, the March/April issue of the German law journal "Praxis des

Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

This issue contains some of the papers presented at the Brussels I Conference in Heidelberg last December. The remaining papers will be published in the next issue.

Here is the contents:

- ***Rolf Wagner***: "Die politischen Leitlinien zur justiziellen Zusammenarbeit in Zivilsachen im Stockholmer Programm" – the English abstract reads as follows:

Since the coming into force of the Amsterdam Treaty in 1999 the European Community is empowered to act in the area of civil cooperation in civil and commercial matters. The "Stockholm Programme – An open and secure Europe serving and protecting the citizens" is the third programme in this area. It covers the period 2010–2014 and defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. This article provides an overview of the Stockholm Programme.

- ***Peter Schlosser***: "The Abolition of Exequatur Proceedings – Including Public Policy Review?"

The – alleged – basic paper to which reference is continuously made when exequatur proceedings and public policy are discussed is a so-called Tampere resolution. The European Council convened in a special meeting in the Finnish city in 1999 to discuss the creation of an area of security, freedom and justice in the European Union. The outcome of this meeting was not a binding text which would have been adopted by something like a plenary session of the heads of States and Governments. Instead, the document is titled "presidency's conclusion" and is a summary drafted by the then Finish president. It is a declaration of intention for the immediate future, pre-dominantly concerned with criminal and asylum matters and not binding on any European legislator. As far as "civil matters" are concerned, the "presidency's conclusion" reads as follows: "In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested state. As a first step, these intermediate procedures

should be abolished for titles in respect of small consumer or commercial claims and for certain judgments in the fields of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law. "The conclusion does no say whether it would be advisable to generally abolish intermediate procedures. It only states that intermediate procedures should be further "reduced". If one takes the view that the "first step" of reduction should be followed by a second or third one, one could refer to the regulation on "Creating a European Enforcement Order for Uncontested Claims" and to the regulation on "Creating a European Order for Payment Procedure". Not a single word mentions that at the end of all steps taken together the intermediate procedure or any control whatsoever in the requested state shall become obsolete and that even the most flagrant public policy concern shall become irrelevant. The need for a residuary review in the requested state is powerfully demonstrated by a recent ruling of the French Cour de Cassation: A woman resident in France had been ordered by the High Court of London to pay to the Lloyd's Society no less than £ 142,037. The judgment did not give any reasons for the order except for stating that "the defendant had expressed its willingness not to accept the claim and that the judge accepted the claim pursuant to rule 14 par. 3 of the Civil Procedure Rules." The relevant text of this provision is drafted as follows: "Where a party makes an admission under rule 14.1.2 (admission by notice in writing), any other party may apply for judgment on the admission. Judgment shall be such judgment as it appears to the court that the applicant is entitled for on the admission." The judgment neither revealed at all the dates of the respective admissions made during the proceedings although the defendant had expressed its willingness to defend the case nor referred to any document produced in the course of the proceedings. One cannot but approve the ruling of the French Cour de Cassation confirming the decision of the Cour d'Appel of Rennes. The courts held that the mere abstract reference to rule 14 of the Civil Procedure Rules was tantamount to a total lack of reasons and that the recognition of such a judgment would be incompatible with international public policy. Further, that the production of documents such as a copy of the service of the action could not substitute the lacking reasoning of the judgment. The importance of the possibility to invoke public policy when necessary to hinder recognition of a judgment was evident

also in the earlier Gambazzi case of the European Court of Justice (ECJ). In that case the defendant was penalized for contempt of court by an exclusion from further participation in the proceedings. The reason for the measure was the defendant's violation of a freezing and disclosure order. The ECJ ruled that in the light of the circumstances of the proceedings such a measure had to be regarded as grossly disproportionate and, hence, incompatible with the international public policy of the state where recognition was sought. In its final conclusions, general advocate Kokott emphasized that a foreign judgment cannot be recognized if the underlying proceedings failed to conform to the requirement of fairness such as enacted in Art. 6 of the European Convention on Human Rights. It is worth noting that also Switzerland refused to enforce the English judgment. The Swiss Federal Court so decided because after having changed its solicitor, Gambazzi's new solicitor was refused to study the files of the case. Even in the light of the pertinent case law regarding a very limited review in the requested state and the known promptness and efficiency of exequatur proceedings, the Commission still intends to abolish this "intermediate measure". In its Green Paper it literally states:" The existing exequatur procedure in the regulation simplified the procedure for recognition and enforcement of judgment compared to the previous systems under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad." The context reveals that the term "the expenses" relates to the expenses of the exequatur procedure. However, the European Union is not the only internal market covering multiple jurisdictions. How is the comparable issue dealt with in other integrated internal markets? This is to be shown in the first part of this contribution. In the second part, I shall analyze in more detail and without any prejudice the ostensibly old-fashioned concept of exequatur.

- ***Paul Beaumont/Emma Johnston***: "Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?"

The principle of mutual recognition of judicial decisions and the creation of a genuine judicial area throughout the European Union was endorsed in Tampere in October 1999. Thus, one of the primary objectives of the Brussels I is to enhance the proper functioning of the Internal Market by encouraging free

movement of judgments. It is clear that in Tampere the European Council wanted to start the process of abolishing "intermediate measures" ie the declaration of enforceability (exequatur). It went further and said that in certain suggested areas, including maintenance claims, the "grounds for refusal of enforcement" should be removed. It did not specifically require the abolition of intermediate measures in relation to Brussels I and certainly did not require the abolition of the "grounds for refusal of enforcement" in Brussels I. The European Council in Brussels in December 2009, after the entry into force of the Lisbon Treaty and with the adoption of the Stockholm Programme, is still committed to the broad objective of removing "intermediate measures". This is a process to be "continued" over the 5 years of the Stockholm Programme from 2010–2014 but not one that has to be "completed". The European Council no longer says anything about abolishing the "grounds for refusal of enforcement". Article 73 of the Brussels I Regulation obliged the European Commission to evaluate the operation of the Regulation throughout the Union and to produce a report to the European Parliament and the Council. In 2009 the Commission produced such a Report and a Green Paper on the application of the Regulation, which proposes a number of reforms. One of the main proposals concerns the abolition of exequatur proceedings for all judgments falling within the ambit of the Regulation. Brussels I is built upon the foundation of mutual trust and recognition and these principles are the driving force behind the proposed abolition of exequatur proceedings. Article 33 of Brussels I states that no special procedure is required to ensure recognition of a judgment in another Member State. At first glance this provision seems to imply that recognition of civil and commercial judgments within the EU is automatic. The reality is however, somewhat more complex than that. In order for a foreign judgment to be enforceable, a declaration of enforceability is required. At the first instance, it involves purely formal checks of the relevant documents with no opportunity for the parties or the court to raise any of the grounds for refusal of enforcement. An appeal against the declaration of enforceability by the judgment debtor will trigger the application of Articles 34 and 35 which provide barriers to the recognition and enforcement of judgments. According to the European Court of Justice (ECJ), any such obstacle must be interpreted narrowly, "inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the [Regulation]" The overwhelming majority of cases are successful and if the application is complete, then the decision is likely to be made within a matter of weeks. The Commission is of the view that given the

high success rate of applications, the exequatur proceedings merely hinder free movement of judgments at the expense of the enforcement creditor and provide for delays for the benefit of the male fides judgment debtor. It is with this in mind that the Commission asks whether, in an Internal Market without frontiers, European citizens and businesses should be expected to sacrifice time and money in order to enforce their rights abroad. It is argued that in the Internal Market, free movement of judgments is necessary in order to ensure access to justice. Exequatur proceedings can create tension between Member States, creating suspicion and ultimately destroying mutual trust. It will be seen however, that total abolition of exequatur proceedings would effectively mean judgments must be recognised in every case with no ground for refusal unless the grounds for refusal are moved to the actual enforcement stage. Total abolition of the grounds for refusing enforcement would result in an unfair bias in favour of the judgment creditor to the detriment of the judgment debtor. The Commission on the one hand proposes to abolish the exequatur procedure provided by Brussels I but on the other hand, suggests that some form of "safeguard" should be preserved. The Green Paper tentatively suggests that a special review a posteriori could be put in place which would in effect create automatic recognition of a judgment reviewable only after becoming enforceable. Such an approach would enhance judicial co-operation and aid progressive equivalence of judgments from other Member States. Yet it is questioned whether allowing an offending judgment to be enforced in the first place, only to review it a posteriori is the most effective way of dealing with the problem. It is instead argued that a provision similar to that of Article 20 of the Hague Child Abduction Convention could strike a fair balance between the interests of the judgment creditor and debtor.As Brussels I stand it is open to the judgment debtor to appeal the declaration of enforceability. The appellant may claim a breach of public policy or lack of due process in the service of the documents instituting proceedings which may amount to a breach of Article 6 of the European Convention on Human Rights (ECHR). The grounds to refuse recognition of a foreign judgment are restrictive and under no circumstances may the "substance" of the judgment be reviewed. Such a review of the substance would seriously undermine the mutual trust between courts of the European Union. However, the public policy exception does allow States to uphold essential substantive rules of its own system by refusing to enforce judgments from other EU States that infringe the fundamental principles of its own law. The question is whether Member States will be prepared to abandon

the "public policy" defence and thereby give up this right to protect the fundamental principles of their substantive law? Will they be content to have a defence that simply focuses on protecting the fundamental rights of the defendant?

- ***Horatia Muir Watt***: "Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation"

Recent litigation relating to the recognition and enforcement of US class action judgments or settlements under Member States' common private international law (still applicable to relationships with third States), along with current trends in their domestic legislation towards the acceptance of representative, class or group actions, herald a whole set of new issues linked to the appearance of collective redress within the common area of justice. It is the thesis of this paper that the Brussels I Regulation in its present form is ill-equipped to deal with the onslaught of aggregate claims, both in its provisions on jurisdiction and as far as the free movement of judgments and settlements is concerned. It may well be that the same could be said for the conflict of laws rules in Regulations Rome I and Rome II, which were also designed to govern purely individual relationships. Indeed, one may wonder whether the difficulties which arise under this heading are not the sign of an at least partial obsolescence of the whole European private international law model, insofar as it rests upon increasingly outdated conceptions of the dynamics, function, structure and governance requirements of litigation and adjudication. Although this conclusion may seem radical, it is in fact hardly surprising. Indeed, as it has been rightly observed, within the civilian legal tradition which is the template for the conceptions of adjudication and jurisdiction underlying the Brussels I Regulation (like the other private international law instruments applicable in the common area of justice), the recourse to group litigation, which is now beginning to appear in the European context as one of the most effective means of improving ex post accountability of providers of mass commodities freely entering the market, represents a "sea-change" in legal structures, away from exclusive reliance on public enforcement.

- ***Burkhard Hess***: "Cross-border Collective Litigation and the Regulation Brussels I"

The European law of civil procedure is guided by the "leitmotiv" of two-party-proceedings. Litigation is generally regarded as taking place between one specific plaintiff and one specific defendant. Especially Article 27 JR (JR = Brussels I Regulation) which concerns pendency and Articles 32 and 34 No. 3 JR which address res judicata and conflicting judgments, are based on this concept. However, the idea of collective redress is not entirely new to European cross border litigation. Article 6 No. 1 JR explicitly states that several connected lawsuits can be brought to the courts of a Member State where one of the defendants is domiciled. When related actions are pending in different Member States, the court which was seized later may stay its proceedings. By providing for a discretionary stay, Article 28 JR also includes situations of complex litigation. Several cases concerning the JR have dealt with collective redress. The most prominent case is VKI ./. Henkel. In this case, an Austrian consumer association sought an injunction against a German businessman. Another example is the Lechouritou case, where approximately 1000 Greek victims of war atrocities committed during WW II sued the German government for compensation. The famous Mines de Potasse d'Alsace case involved damages caused to dozens of Dutch farmers by the pollution of the river Rhine. It goes without saying that in addition to the case law presented, several cross-border collective lawsuits have been filed in the Member States. These lawsuits mainly deal with antitrust and (less often) product liability issues. Finally, the Injunctions Directive 98/27/EC permits consumer associations from another state to institute proceedings for the infringement of consumer laws in the Member State where the infringement was initiated. However, this directive has not been very successful. It has only been applied in a few cross-border cases.

- ***Luca G. Radicati di Brozolo***: "Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation"

Similarities and differences between choice of court and arbitration agreements in the perspective of the review of Regulation (EC) 44/2001Choice of court agreements and arbitration agreements have much in common. Both involve the exercise of party autonomy in the designation of the judicial or arbitral

forum for the settlement of disputes and have the effect of ousting the default jurisdiction. Both aim to ensure predictability and to allow the parties to choose the forum they consider best suited to adjudicate their dispute. The importance of these goals is by now largely acknowledged especially in international commercial transactions. Although it has not always been a foregone conclusion that parties could exclude the jurisdiction of local courts in favor of foreign ones or of arbitration, today most systems recognize the role of procedural party autonomy in this context. Also the policy reasons for favoring party autonomy in the choice of forum are largely similar for both types of agreements. Because of the broad recognition of the crucial role of these agreements, there is a growing concern that their effects are not sufficiently guaranteed in the European Union. It is not uncommon that proceedings are brought before a court of one member State in alleged violation of a choice of the courts of another member State or of arbitration by litigants who appear to attempt to circumvent these agreements by exploiting the perceived inefficiencies of some courts, or their reluctance to enforce such agreements effectively. In a number of well known, the European Court of Justice has found itself unable – quite correctly, in light of the existing text of Regulation (EC) 44/2001 (the "Brussels Regulation") – to accept interpretations aimed at preventing such situations, foremost amongst which anti-suit injunctions. Partly for these reasons forum selection and arbitration agreements (and more generally arbitration) are amongst the topics on which the Commission has invited comments in the Green Paper on the review of the Regulation.

- ***Urs Peter Gruber***: "Die neue EG-Unterhaltsverordnung" – the English abstract reads as follows:

Actually, the relevant rules on jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations are contained in the Brussels I Regulation. In the near future, a new Regulation, which specifically deals with maintenance obligations, will apply. This new Regulation will bring about several significant changes. It will considerably strengthen the position of the maintenance creditor, in particular in the field of recognition and enforcement of decisions. It will contain rules on issues, which up to now have been left to the national legislators. Therefore, it can be said that the new Regulation marks a new level of integration in the field of

European civil procedure.

- ***Ansgar Staudinger***: "Streitfragen zum Erfüllungsortsgerichtsstand im Luftverkehr" – the English abstract reads as follows:

In case of carriage of passengers by air the Bundesgerichtshof has to interpret article 5 (1) lit. b Brussels I-Regulation. In the author's view the grounds as well as the conclusion deserve absolute consent. However there persist several questions: The location of the place of the arrival or departure in the state, where the defendant carrier is domiciled or in a Non Member State of the EU does not a priori exclude the application of article 5 (1) lit. b Brussels I-Regulation including its passenger's voting right. The customer factual only stay an option for that place, which neither corresponds with the defendants domicile nor a EU-Non Member State. Are both connection factors located outside the Member State, remains a recourse to article 5 (1) lit. a Brussels I-Regulation. Waiving the courts jurisdiction for the place of performance of the obligation in question by a standard form contract through the carrier and stipulating an exclusive conduct of a case in the Member State of his domicile seems to be improper in terms of the Council Directive 93/13/EEC on unfair terms in consumer contracts respectively §§ 307 (1), 310 (3) no. 3 of the "Bürgerliches Gesetzbuch" opposite to consumers, which are domiciled in the EU-Member State of the arrival or departure. This applies particularly when claims according to the Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights are concerned.

- ***Rolf Wagner***: "Die Entscheidungen des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO – unter besonderer Berücksichtigung der Rechtssache Rehder" – the English abstract reads as follows:

The article deals with the place of performance as a base for jurisdiction. There has been a lot of case law by the ECJ concerning Art. 5 No. 1 Brussels Convention: According to this case law, in general the place of performance had to be determined for each obligation separately (de Bloos-rule) according to choice of law rules of the forum (Tessili-rule). This system, however, has been strongly criticised. Thus, after long discussions during the negotiations concerning the revision of the Brussels Convention, a new wording was found

for Art. 5 No. 1 Brussels Regulation, even though it was a compromise: The Brussels Regulation now defines at least the place of performance for the majority of contracts in international trade, i. e. for contracts for the sale of goods and contracts for the provision of services. Therefore it does not come as a surprise that the ECJ has been asked to give guidance in the interpretation of this definition. The present article comments on three important judgments by the ECJ connected to this question. In particular the author analyses in depth the judgment given in Rehder: In this case, the ECJ determined the place of performance with regard to contracts for the transport of passengers. Thus the author concludes that the European legislator neither could nor will be able to find a perfect solution. Therefore, patience is required with regard to the interpretation of the new definition because there are still open questions which have to be answered by the ECJ.

- ***Gilles Cuniberti***: "Debarment from Defending, Default Judgments and Public Policy"

The origin of the Gambazzi case is to be found in the collapse of a Canadian investment company, Castor Holding Ltd., at the beginning of the 1990s. Castor had been incorporated in Montreal in 1977. Its first president was a German-born Canadian businessman named Karsten von Wersebe. In the 1980s, however, its main manager became a German national named Otto Wolfgang Stolzenberg. Marco Gambazzi was a Swiss lawyer who had specialized in assets management. He first invested in Castor, and was then offered to become a member of the board of directors of the company. In 1992, however, Castor was declared insolvent. Dozens of suits followed. First, the trustee (syndic) sought to challenge payments made by Castor before 1992. He focused on a Can$ 15 million distribution of dividends to shareholders at the end of 1990, which he was eventually able to claim back after establishing that the company was already insolvent in 1990. More importantly, many investors sued the auditors of Castor, Coopers & Lybrand, who had certified its accounts between 1978 and 1991. After more than ten years of litigation, there was still no judgment on the merits, which led the Montreal Court of appeal to conclude that "it is not exaggerated to say that the Castor Holding case has been an exceptional one in Canadian legal history, a genuine judicial derailment". In 1996, a remarkable decision was made by a handful of Canadian investors. DaimlerChrysler Canada and certain pension and other benefit funds that it had established for its

employees decided to initiate proceedings in London against four individuals formerly involved in the management of Castor (Stolzenberg, Gambazzi, von Wersebe and Banziger) and more than thirty corporate entities allegedly related to them. The plaintiffs argued that they had been defrauded by the defendants in Canada, and thus sought restitution. The reason why the proceedings were brought to England is unclear. There was virtually no connection between the case and the United Kingdom. The only exception was that Stolzenberg once owned a house in London, as he owned others in Paris and, it seems, Germany, Canada and South America. But even that house, which was the sole connecting factor which was likely to give jurisdiction to the English court over the entire case and the thirty-six defendants, was sold before the defendants were served with the writ instituting the proceedings in March 1997. Unsurprisingly, therefore, the jurisdiction of the English court was challenged. The case went up to the House of Lords which eventually ruled that the date which mattered to appreciate whether one defendant was domiciled in England and could thus be the anchor allowing to drag an infinite number of co-defendants to London was the time when the writ was issued by the English court. In this case, that meant May 1996, because the English court had permitted the plaintiffs to postpone service of the writ in order to enable them, first, to conduct ex parte hearings of several days for the purpose of convincing the court that it should grant a world wide freezing order, and, second, to carefully prepare simultaneous service so that none of the defendants could escape the English trial by initiating parallel proceedings elsewhere. The only reasonable explanation for choosing to bring the case to England is the availability of powerful interim measures which have turned London into a magnet forum for international fraud cases. English world wide freezing orders and, even more importantly, English disclosure orders seem to be remarkably and uniquely efficient in the process of tracing stolen assets, so much so that an English court once called them one of the two nuclear weapons of English civil procedure. If other jurisdictions have not been able to tackle as efficiently the issue of international frauds, alleged victims cannot be blamed for seeking justice where it can effectively be achieved. But the quest for justice, or for making England the jurisdiction of choice, cannot justify everything. In this case, available nuclear weapons were used to their full capacity. This certainly enabled plaintiffs to secure a decisive victory. But this was at the costs of the fairness that the English legal system ought to have afforded to the defendants.

- ***Herbert Roth*** on the ECJ's judgment in case C-167/08 (Draka NK Cables Ltd.): "Das Verfahren über die Zulassung der Zwangsvollstreckung nach Art. 38 ff. EuGVVO als geschlossenes System"
- ***Christian Heinze***: "Fiktive Inlandszustellungen und der Vorrang des europäischen Zivilverfahrensrechts" – the English abstract reads as follows:

Some EU Member States' national procedural laws allow or used to allow service on defendants domiciled in another EU Member State by a form of "fictitious" service within the jurisdiction. Under these provisions and certain further requirements, service may be deemed to take effect at the moment when a copy of the document is lodged with a national authority or at the time when it is sent abroad for service, irrespective of the time when the recipient actually receives the copy. Even if the national law deems this form of service to take effect within the jurisdiction, the following article argues that the practice is incompatible with Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents, because it impairs the effectiveness of the European rules, in particular as concerns the date of service.

- ***Yuanshi Bu***: "Danone vs. Wahaha – Anmerkungen zu Schiedsverfahren mit chinesischen Parteien" – the English abstract reads as follows:

The legal feud between Danone and Wahaha, both being leading beverage manufacturers in the Chinese market, had developed into one of the most significant investment disputes in the history of the People's Republic of China. A number of arbitration proceedings and civil actions were filed inside and outside China. In particular, several arbitration proceedings pending before the Swedish Chamber of Commerce since May 2007, the outcome of which was supposed to largely decide that of the disputes between the two parties, had drawn considerable public attention. Despite the surprising settlement shortly before the arbitration tribunals rendered their decisions, the disputes between Danone and Wahaha offer a valuable opportunity to inquire into the law and practice of arbitration relating to foreign investments in China. This case note will first comment on the award of a Chinese domestic arbitration proceeding dealing with one of the major issues of the whole disputes – the ownership of the trademark "Wahaha" – and then discuss questions that were relevant to the

proceeding in Stockholm.

- ***Boris Kasolowsky/Magdalene Steup***: "Insolvenz in internationalen Schiedsverfahren – lex arbitri oder lex fori concursus" – the English abstract reads as follows:

The article deals with a recent English Court of Appeal decision which addresses the effects of the insolvency of a party to pending arbitration proceedings.The Court of Appeal concluded that the effects were to be determined by reference to English law and considered that the arbitration tribunal acted well within its jurisdiction when it ordered the proceedings to be continued. In reaching this Conclusion the Court of Appeal just as the arbitral tribunal and the High Court relied on the European Insolvency Regulation which forms part of English law. Being the first major court of an EU Member State to address the question of the insolvency of a party to pending arbitration proceedings by reference to the European Insolvency Regulation, the judgment is likely to serve as a signpost for what is to be expected in other Member States. The article further considers the likely impact of this particular decision on the future practice of choosing arbitration seats, and possibly also the timing for commencing arbitration proceedings. In doing so, the authors will consider in particular the decision of the Swiss Bundesgericht which, by contrast to the English Court of Appeal judgment, concludes that the relevant company law/the lex concursus (i.e. the provisions of law applicable to the party that happens to have become insolvent in the course of the proceedings) are decisive for the purposes of determining the effects of the insolvency of one of the parties on the continuation of the proceedings.

- ***Erik Jayme*** on the meeting of the European Group for Private International Law in Padua in September 2009: "Die Vereinheitlichung des Internationalen Privat- und Verfahrensrechts in der Europäischen Union: Tendenzen und Widerstände Tagung der „Europäischen Gruppe für Internationales Privatrecht" (GEDIP) an der Universität Padua"
- ***Marc-Philippe Weller*** on the Heidelberg symposium on the occasion of the 75th birthday of Prof. Dr. Dr. h.c. mult. Erik Jayme: "Symposium zu Ehren von Erik Jayme"

Dámaso Ruiz-Járabo Colomer

Advocate General Dámaso Ruiz-Jarabo Colomer has passed away in Luxembourg. Born in 1949, Mr Dámaso Ruiz-Jarabo Colomer was Judge and then Member of the Consejo General del Poder Judicial (General Council of the Judiciary of Spain). He worked as professor of Administrative Law and served as Head of the Private Office of the President of the Consejo General del Poder Judicial. He was an ad hoc Judge at the European Court of Human Rights and Judge at the Tribunal Supremo (Supreme Court of Spain) from 1996. Since 19 January 1995 he was also Advocate General at the Court of Justice. Among his writings we may recall the book "El Juez nacional como juez comunitario" (Civitas, 1993), or the articles "Los derechos humanos en la Jurisprudencia de Tribunal de las Comunidades Europeas" (Poder Judicial, 1989, pp. 159-184); "Técnica Jurídica de protección de los derechos humanos en la Comunidad Europea" (Revista de Instituciones Europeas, 1990, pp. 151-186); "La jurisprudencia del Tribunal de Justicia sobre la admisibilidad de las cuestiones prejudiciales" (Revista del Poder Judicial, 1997, pp. 83-114); "La réforme de la Cour de Justice opérée par le Traité de Nice et sa mise en oeuvre future" (Revue Trimestrielle de Droit Euopeen, 2001, pp. 705-725); "Los Tribunales constitucionales ante el Derecho comunitario" (Estudios de Derecho Judicial, 2006, pp. 185-202), or the recent "El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa" (Noticias de la Unión Europea, 2009, pp. 31-40). As Advocate General he worked in many fields, including Private International Law. He will be remembered among us for his opinion in cases as Lechouritou (as. C- 292/05, on the Brussels Convention), Deko Marty (as. C- 339/07, on Regulation num. 1346/2000 of 29 May 2000 on insolvency proceedings) Roda Golf (as. C-14/08, concerning Regulation num. 1348/2000 on the service of documents).

May he rest in peace.

ECJ: AG Opinion in "Apostolides"

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

I. Background of the Case

The background of the case was as follows:

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

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

Union.

This article reads as follows:

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

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

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

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

II. Reference for a Preliminary Ruling

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

> *1. Does the suspension of the application of the acquis communautaire in the northern area [by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State Court from recognising and enforcing a judgment given by a Court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*[1] *("Regulation 44/2001"), which is part of the acquis communautaire'?*
>
> *2. Does Article 35(1) of Regulation 44/2001 entitle or bind a Member State court to refuse recognition and enforcement of a judgment given by the Courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective*

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

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

4. Where –

a default judgment has been entered against a defendant;

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

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

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

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

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

after service took place?

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

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

III. Advocate General Kokott's Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Scope of the Brussels I Regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

Enforceability of a Judgment and State Immunity: a Recent Decision

of the Italian Court of Cassation

Following the post by Marta Requejo Isidro on jurisdiction over civil claims against States for violation of basic human rights, and the related comments, we would like to report an interesting decision recently handed down by the United Divisions ("Sezioni Unite") of the Italian *Corte di Cassazione*, on the declaration of enforceability against a foreign State of a foreign judgment condemning that State in respect of war crimes. Even if the declaration of enforceability was limited to the part of the decision related to the costs of the proceedings (this being the claim brought before Italian courts by the plaintiff), the court's reasoning dealt with the issue in more general terms.

The ruling of the Italian Supreme Court (29 May 2008, no. 14199, available on the Court's website) has been kindly pointed out to us by *Pietro Franzina* (University of Ferrara), who has commented it in an article forthcoming on the Italian review "Diritti umani e diritto internazionale" (n. 3/2008). The article is also available for download on the website of the Italian Society for International Law (SIDI).

The facts of the case, that is part of a "legal saga" involving a number of judicial actions brought before Italian and Greek tribunals for atrocities committed by the Nazi troops in the final years of World War II (1943-1945), are as follows.

In 2000, the Federal Republic of Germany had been condemned by the Greek Court of Cassation (Areios Pagos) to pay damages to the victims of the massacre made by the German army in the Greek village of Distomo in 1944, and to bear the costs of the judicial proceedings (see a partial translation of the ruling, and a comment by *B.H. Oxman*, *M. Gavouneli* and *I. Banterkas*, in Am. J. Int'l L., 2001, p. 198 ff.). The enforcement of a judgment against a foreign State is, under Greek law (Art. 923 of the Greek Code of Civil Procedure), subject to an authorization by the Ministry of Justice, which in the present case refused to grant it.

Thus, the Administration of the Greek Region of Vojotia (the plaintiff) sought a declaration of enforceability of the Greek judgment, limited to the decision on costs, before the Italian courts. The exequatur was granted by the Court of Appeal (Corte d'Appello) of Firenze, and confirmed by the same court on a subsequent opposition by the German State. The case was then brought before the Italian Supreme Court (Corte di Cassazione).

Germany's challenge to the declaration of enforceability of the Greek judgment rested on three main grounds:

1) the decision cannot be declared enforceable, as the Court of Appeal of Firenze did, on the basis of Reg. 44/2001, since its subject matter is outside the scope of application (either *ratione materiae* and *ratione temporis*) of the EC uniform rules;

2) even taking into account the Italian ordinary regime on recognition and enforcement of foreign judgments (Articles 64 ff. of the Italian Act on Private International Law, no. 218/1995) the Greek judgment does not fulfil all the conditions set out by the Italian provision, since it cannot be considered an enforceable "res iudicata", as requested by Art. 64, lit. d), of the Italian PIL Act, because in the Greek legal system it lacks the authorization of the Greek Ministry of Justice in order to be enforced; and

3) its effects are contrary to the Italian public policy (Art. 64, lit. g)), since it was rendered in violation of the jurisdictional immunity enjoyed by the German State in respect of *acta iure imperii*, such as the ones committed by the German army during WWII.

The Corte di Cassazione, while agreeing on the first argument (quoting the ECJ judgment in the *Lechouritou* case, on the scope of application *ratione materiae* of Reg. 44/2001: see our posts here), rejected the second and the third, and held the Greek decision enforceable under the Italian ordinary rules.

On the second ground, the Court made a distinction between the enforceability "in abstracto" of a foreign judgment and the actual enforcement of it (i.e., the concrete taking of executive measures), which is a different and subsequent step. The simple fact that the execution of a decision against a foreign State is made dependent, in the legal system of origin, upon a governmental authorization does not imply that the judgment is not "per se" enforceable, in a different context of time and space, provided that it is final and binding upon the parties.

On the third ground, the Court held that denying foreign State immunity, when the defendant State is accused of serious violations of fundamental human rights, is not only non-incompatible with Italian public policy, but moreover perfectly in line with the reasoning already upheld by the Corte di Cassazione itself in a previous ruling (the well-known decision in the "Ferrini" case – judgment no.

5044 of 11 March 2004 – in which the United Divisions of the Corte di Cassazione had denied foreign State immunity to Germany in respect of an action brought by an Italian victim of deportation and forced labour).

The judgment of the Corte di Cassazione in the Ferrini case is published in an English translation in International Law Reports (vol. 128, p. 658 ff.): see also the article by Prof. Carlo Focarelli (University of Perugia), "Denying Foreign State Immunity for Commission of International Crimes: the Ferrini *Decision", in* International and Comparative Law Quarterly*, 2005, p. 951 ff. Other comments in English to the decision can be found in Prof. Focarelli's article.*

On the practice of national courts in Europe with regard to enforcement immunity, see the detailed analysis carried on by A. Reinisch in his article "European Court Practice Concerning State Immunity from Enforcement Measures", in Eur. J. Int'l Law, 2006, p. 803 ff. (abstract available on SSRN).

(Many thanks to Marta Requejo Isidro and Gilles Cuniberti)

First Issue of 2008's Revue Critique de Droit International Privé

The first issue of 2008's *Revue Critique de Droit International Privé* has just been released. It contains three articles, but only one dealing with a conflict issue per se, the public law exception within the Brussels I Regulation after the *Lechouritou* case ("*Les actes* jure imperii *et le Règlement Bruxelles I – A propos de l'affaire* Lechouritou"). The two other articles discuss immigration law issues.

The article is authored by French scholars Horatia Muir Watt, who teaches at Paris I University (and who was our Guest Editor of last month), and Etienne Pataut, who teaches at Cergy University.

The authors have kindly provided the following abstract:

Inasmuch as private international law in continental legal systems is entirely structured by the distinction between private cross-border relationships subjected to the conflict of laws, and the public sphere, correlatively excluded, it is now undergoing profound transformations due to to the changing nature and function of substantive « private » law. The traditional opposition between public and private law is if not discredited, at least in search of re-definition. It is not surprising, therefore, that the "public law exception" which first appeared in the Brussels Convention in 1968 and continues to figure unaltered in the new Community private international law instruments, raises considerable difficulties in the case-law of the Court of justice, and gives rise to varying constructions in the courts of the various Member States. The 2007 Lechouritou case (C-292/05) is emblematic of these difficulties, insofar as it reveals a lack of coherence between the scope of sovereign immunity and the public law exception within the Brussels I Regulation. This article uses the Lechouritou case to revisit the distinction between public and « civil and commercial matters » and suggests a new reading of the Regulation in this context.