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.

AG Opinion in Gambazzi

Advocate General Kokott has delivered her opinion today in *Gambazzi v. Daimler Chrysler* (Case C 394/07). For the time being, it is not available in English, but is in a few other languages.

I reported earlier on this judicial odyssey which has already been litigated in (at

least) nine jurisdictions. The case was referred to the European Court of Justice by the Court of Appeal of Milan, which asked:

> *1. On the basis of the public-policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]?*
>
> *2. Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order issued by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?*

The fairly long opinion of AG Kokott can be summarized as follows.

First, AG Kokott addressed the issue of whether an English default judgment can be considered a judgment in the meaning of article 25 of the Brussels Convention and thus benefit from the European law of judgments. The first argument against such characterization was that it was held in *Denilauler* that judgments made ex parte are outside the scope of the Brussels Convention. AG Kokott writes that default judgments are not made ex parte, as they are the product of procedures which are typically not ex parte. The second argument against the inclusion of English default judgments within the scope of article 25 is that they are no actual decisions of the English court, but rather the automatic consequence of the failure of the defendant to appear before the court. And in *Solo Kleinmotoren*, the ECJ held that decisions in the meaning of article 25 are those made of the own intiative of the court. This seemed to imply that automatic judgments would not qualify. AG Kokott, however, was not convinced by this interpretation of *Solo Kleinmotoren,* as she thinks that the content of an English default judgment is not merely the consequence of the action of a party, but an actual decision of the court, which must find that the requirements for making an English default judgment are met.

Then, AG Kokott moves to the public policy exception of article 27 of the Brussels Convention (she notes in passing that the new language of the Brussels Regulation is similar – not an obvious statement). However, she believes that it is difficult to reach a conclusion, for two reasons. First, she is of the opinion that the compatibility of proceedings to public policy should be envisaged globally, in the light of all circumstances, and that this is delicate in such a complex case. Certainly, the single act of debarring the defendants from defending cannot be taken in isolation and decide the case. Second, there is not enough evidence in the procedure to know what really happened. It should thus be for the Italian court to decide, in the light of all the evidence.

At the same time, AG Kokott underlines that while member states ought to have sanctions for parties refusing to comply with injunctions, full debarment is probably the most severe sanction one could imagine. As a consequence, she believes that the threshold for the compatibility of such sanction with the right to a fair trial ought to be very high. And she insists on the importance of a proportionality test.

Finally, despite the content of the reference of the Italian referring court, she briefly mentions a second potential infringment to public policy, that Gambazzi's lawyers put forward. Not only was he debarred from defending, but he was also prevented from accessing to his evidence and documents, because his English lawyers withheld them, arguing that he had not paid their fees. AG Kokott finds that the ECJ should only answer questions of the referring court, but that, should the ECJ decide to address the issue, it could rule along the same lines.

At the end of the day, this will probably not be such an unpleasant read for English lawyers. There are some peculiarities of English civil procedure which do not appear wholly unacceptable to a continental advocate general.

ECJ Judgment in Cartesio

The much awaited judgment of the European Court of Justice in *Cartesio* was delivered yesterday.

In this case (C-210/06), the ECJ discussed whether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

Cartesio was a company which was incorporated in accordance with Hungarian legislation and which, at the time of its incorporation, established its seat in Hungary, but transferred its seat to Italy and wished to retain its status as a company governed by Hungarian law. Under the relevant Hungarian Law, the seat of a company governed by Hungarian law is to be the place where its central administration is situated.

The European Court ruled that "**As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.**"

A critical part of the judgment reads as follows:

> *110 Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.*
>
> *111 Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is*

converted into a form of company which is governed by the law of the Member State to which it has moved.

112 In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.

The full judgment can be found here.

Many thanks to Andrew Dickinson for the tip-off.

Irish Case on Hague Convention on Child Abduction

I am grateful to Michelle Smith de Bruin BL for preparing the following report on a recent Irish case on the Hague Convention on the Civil Aspects of International Child Abduction.

In a case (*N. v N.*: High Court, December 3rd, 2008) brought under the Hague Convention on the Civil Aspects of International Child Abduction, Mrs Justice Finlay Geoghegan found that the views of the child, who was aged six, should be heard, while stressing that the weight to be given to such views was a separate matter.

Background

The parents of the child are both citizens of another EU state. They were married in 2002, the year in which the child was born, and divorced in 2008. The court in

the other EU state ordered that the child live with the mother and that the father have certain access rights.

The mother moved with the child to Ireland, where the child is now attending school. He also attends classes with children of his own nationality on Saturdays. Both the teacher in this school and in the national school reported that he is bright and enthusiastic and learning both English and Irish. The mother brought a notice of motion that he be heard as part of the proceedings.

The dispute in the application related to the criteria the court should use in deciding whether it is "appropriate having regard to his or her age or degree of maturity" to give the child the opportunity to be heard on the facts of this application.

Outlining the legal background, Mrs Justice Finlay Geoghegan said that Article 13 of the Hague Convention gave the court discretion to refuse the return of a child if the child objected and had reached an age and degree of maturity at which it was appropriate to take account of its views.

Article 12 of the UN Convention on the Rights of the Child, ratified by Ireland, provided that a child who is capable of forming his or her own views should have the right to express them in all matters concerning the child, and should be given the opportunity to be heard in judicial or administrative proceedings affecting him or her.

Council Regulation (EC) No 2201/2003 also made reference to hearing the child, and also to the Charter of Fundamental Rights of the EU, where Article 24 refers to the rights of the child, including those of expressing their views freely, and having such views taken into account in matters concerning them.

Decision

Following the consideration of written legal submissions, Mrs Justice Finlay Geoghegan said that a mandatory obligation is placed on a court by Article 11 (2) of the Council Regulation 2201/2003 to provide a child with an opportunity to be heard, subject only to the exception of where this appeared inappropriate having regard to his or her age or maturity.

"The starting point is that the child should be heard," she said. "The court is

only relieved of the obligation where it is established it would be inappropriate for the reasons stated.

She said that in Hague Convention proceedings this was a separate and distinct issue from the weight the court should give to the views expressed by the child in relation to an application for his or her return.

While the UN Convention on the Rights of the Child had not been made part of Irish domestic law, it had been acceded to by many (if not all) EU member states, and it appeared, having regard to the wording of Article 24 of the EU Charter of Fundamental Rights, that it intended to guarantee a similar right to children as that in the Convention.

This assumed that the child had a view that he or she would be capable of expressing. It is the child's own view which Article 24 of the Charter gave him the right to express, which presupposed that he was capable of forming his own view.

In the Irish procedural system there was no mechanism readily available to the court to obtain an independent professional assessment as to the probable level of maturity of the child. The court should therefore form what could only be a prima facie view of the capability of the child to form a view. The order to be made on this application would both allow the child to be heard and assist the court in deciding what weight, if any, should be given to his views.

On the facts of this case, the child appears from the affidavit evidence to be of a maturity at least consistent with his chronological age. She said she did not find he was not capable of forming his own views.

A judge must rely on his or her own general experience and common sense. "Anyone who had had contact with normal six-year-olds will know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life," she said.

Accordingly, she was making the order sought, and would modify the form normally used in relation to older children.

This judgment is available on www.courts.ie

First Electronic Apostille in Europe

The report of the Hague Conference on Private International Law is here.

Fourth Issue of 2008's Journal du Droit International

The fourth issue of French *Journal du Droit International* (also known as *Clunet*) will shortly be released. It contains three articles dealing with conflict issues.

The first is authored by Mathias Audit, a professor of Private International Law at the University of Cergy Pontoise. The article deals with Procurement Contracts Concluded by International Organizations *(Les contrats de travaux, de fournitures et de services passés par les organisations internationales*). The English abstract reads:

> *In order to carry out assigned missions or merely to ensure their proper functioning, international organisations enter into procurement agreements that have the specificity to bring together a subject of international public law and a subject of internal law, namely the institution's co-contractor. This peculiar legal status, on the verge of several legal systems, gives a special quality to the rules applicable to tender offer procedures as well as the final contracts themselves.*

In the second article, Didier Lamethe, the Secretary General of French electricity company Electricité de France (EDF International) discusses Closing

Memorandums in the Context of Share Purchase Agreements (*L'accord de cloture : l'exemple des cessions internationales de participations. Antropologie d'une création contractuelle empirique*). The English abstract reads:

> *With regard to Shares Purchase Agreements, the Closing Memorandum was developed by practitioners in order to achieve better legal certainty. Meeting some opposition, it first remained unknown and proved in practice difficult to enforce. Organised as a categorised and detailed chronology of actions to be performed prior and subsequent to the transfer, it includes a financial aspect and covers several administrative items to comply with in order to achieve the transfer. The scope of the memorandum progressively got larger with time and practice to such an extend that it now belongs to the category of useful and recognised international contractual practices. Yet this framework could still evolve in a unexpected manner.*

Finally, I am the author of the third article. The paper revisits the Principle of Territoriality of Enforcement (*Le principe de territorialité des voies d'exécution*). Here is the abstract:

> *The French law of enforcement has long been dominated by a principle of territoriality. The principle was understood as prohibiting attachments purporting to reach foreign assets. However, recent cases of the French supreme court have accepted that French enforcement authorities could validly reach accounts opened in foreign branches.*
>
> *The article revisits the foundation of the principle of territoriality of enforcement. As the principle has traditionally been presented as a direct consequence of a rule of international law, the first part of the essay discusses the relevance of the rules of international law which could be the source of the principle. It finds that the relevant rule is the territoriality of the actions of state organs, and that international law does not prohibit the attachment of assets situated abroad as long as enforcement operations are conducted in the state of origin. As a consequence, it is critical of the judgement of the House of Lords in Société Eram Shipping. The second part of the Article explores whether Article 22-5 of the Brussels I Regulation instituted a different principle of territoriality or merely incorporated the rule of international law in European law. Finally, in the third part, the issues of the risk of double payment and the*

recognition of foreign enforcement acts are discussed.

Articles of the *Journal* can be downloaded by suscribers to LexisNexis JurisClasseur.

Enforcement in Netherlands of German ex parte decision under Brussels Regulation

In a case between Realchemie Nederland BV (The Netherlands) and Fa. Feinchemie Schwebda GmbH (Germany) the Dutch Supreme Court ruled that a German "Kostenfestsetzungsbeschluss" (decision on the costs of the procedure), based on an "einstweilige Verfügung" (provisional measure) was to be recognized and enforced pursuant to the Brussels Regulation (Hoge Raad, 7 November 2008, No. 07/12641; LJN: BD7568), even though both were granted *ex parte*.

Referring to the ECJ cases Denilauler v. Couchet (ECJ, 21 May 1980, case 125/9) and Maersk v. De Haan (ECJ, 14 October 2004, case C-39/02) the Supreme Court argued that measures that (a) concern the granting of provisional and protective measures, (b) ordered without the party against whom they are directed having been summoned, and (c) which are intended to be enforced without prior service, are not covered by Chapter III of the Brussels Regulation, dealing with recognition and enforcement . However, since both the "einstweilige Verfügung" and the "Kostenfestsetzungsbeschluss" were served on the defendant, and were, according to German law, subject to challenge after service, these decisions – although granted *ex parte* – are to be regarded as decisions within the meaning of Chapter III of the Brussels Regulation.

Further, the ground of refusal laid down in Article 34(2) Brussels Regulation is, according to the Supreme Court, applicable in a situation where the decision was rendered in default, and does not apply where the defendant was not summoned

and did not have to be summoned (see also Hoge Raad, 20 June 2008, No. R07/124HR; LJN: BD0138, German Graphics Graphische Maschinen GmbH v. Van der Schee).

Publication: Dickinson on the Rome II Regulation

On 18th December 2008, Oxford University Press will publish Andrew Dickinson's new work on **The Rome II Regulation – The Law Applicable to Non-Contractual Obligations**. Here's the blurb:

> *Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (the so-called "Rome II Regulation") is the product of almost 40-years work by the institutions and Member States of the European Community. From 11th January 2009, it will introduce an entirely new set of rules for determining the law applicable to non-contractual obligations (including tort/delict, unjust enrichment and some equitable obligations). This work, written by an experienced practitioner, provides a user-friendly article-by-article commentary to assist practising lawyers in understanding the structure and practical application of the Regulation. The book also considers the background to, and treaty base, of the Regulation and its relationship to other EC instruments creating or affecting rules of private international law. Links to primary materials, news and updates will appear on the companion website at www.romeii.eu.*

You can also view a table of contents, as well as an endorsement from Lord Mance, on the OUP website.

Price: £145.00 (Hardback)**.** ISBN: 978-0-19-928968-4. Andrew has kindly offered a **20% discount** for pre-publication orders to readers of Conflict of Laws .net (reducing the price from £145 to **£116**) – the code to enter is **ALCWDICK08**. Needless to say, it is *highly recommended*.

Exception to the Arbitration Exception: the 1896/2006 Regulation

It is hardly necessary to remind readers of this blog that the Brussels I Regulation contains an Arbitration Exception. It is pretty difficult not to have heard of, or read about, the *West Tankers* litigation lately.

Of course, the Arbitration Exception is not peculiar to the Brussels I Regulation. It is of general application in European civil procedure. All regulations in the field include the same exception. All? Well, not really. There is an exception to the exception.

Regulation 1896/2006 creating a European Order for Payment Procedure does not keep the Arbitration Exception. In the most usual way, article 2 of Regulation 1896/2006 defines the scope of the regulation, first by stating that it applies to civil and commercial matters, and then by excluding certain fields. As could be expected, social security or bankruptcy appear, but not arbitration (and not status and legal capacity of natural persons either, actually).

So it seems that Regulation 1896/2006 does apply to arbitration. Is it a new direction for European civil procedure? That prospect might make some people happy in Heidelberg, but we are not quite there yet. Regulation 861/2007 Establishing a European Small Claims Procedure (article 2) reincludes the Arbitration Exception.

This remarkable exception to the exception beggs two questions:

First, why? What are the reasons which led the drafters of the regulation to delete the Arbitration Exception? Are there any?

Second, what are the consequences? At first sight, not many. After all, if there is an arbitration agreement, courts will lack jurisdiction to do anything, or almost.

And when courts will be petitioned to help constituting an arbitral tribunal, it will be hard to use the European Order for Payment Procedure in any meaningful way. But the issue of the availability of the European remedy in aid of the arbitral proceedings may well arise.

And if it does, a second issue will arise, as discussions in a recent conference at the Academy of European Law (ERA) on Cross-Border Enforcement in European Civil Procedure have shown. It will be necessary to coordinate with the Brussels I Regulation, which governs the jurisdiction of European courts granting European Orders for Payment.

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)