Australian difficulties for "service of suit" clauses in insurance contracts

AIG UK Ltd v QBE Insurance (Europe) Ltd [2008] QSC 308 (28 November 2008) reveals some of the difficulties that can be created for insurers and reinsurers of Australian liabilities by the form of "service of suit" clauses often found in Lloyds and other non-Australian insurance contracts. Typically of such clauses, the service of suit clause in the insurance contract in this case provided that any dispute concerning the contract would be governed by "Australian Law" and that the insurers and the insured agreed "to submit to the jurisdiction of any Court of competent jurisdiction within Australia" and that "[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such Courts". The reinsurance contract defined "jurisdiction" as "Commonwealth of Australia and New Zealand only, as original", and this appears to have been accepted to "pick up" the service of suit clause in the underlying insurance contract.

The case arose out of an accident which occurred during a motor race in New South Wales. The driver sued the Confederation of Australian Motor Sports ("CAMS") in Victoria, apparently attempting to avoid the operation of a New South Wales statute which would have barred the claim. The proceedings settled. CAMS was insured by QBE. QBE was reinsured by AIG and two other reinsurers (together, "the reinsurers"). The reinsurers took action against QBE in the Supreme Court of Queensland, seeking a declaration that they were not liable to indemnify QBE on the reinsurance contract, because QBE had failed to comply with a condition precedent to liability that it advise the reinsurers of any loss which might give rise to a claim as soon as practicable and without undue delay.

QBE sought orders staying the proceedings or setting aside the originating process. Mackenzie J refused to make such orders, considering that the effect of the service of suit clause was that QBE and the reinsurers had submitted to the jurisdiction of the Supreme Court of Queensland, it being a "Court of competent jurisdiction within Australia".

QBE also sought a transfer of the proceedings to the Supreme Court of Victoria

pursuant to the Australian Cross-Vesting Scheme, which provides for a transfer from the Supreme Court of one Australian state to the Supreme Court of another state if it is "more appropriate" that the proceedings be heard in another state. QBE's application appears to have been motivated, at least in part, by the fact that a provision in the Victorian *Instruments Act* 1958 of assistance to insureds and reinsureds in cases of non-disclosure had no analogue in Queensland. Indeed, the absence of such a provision in Queensland may have been the reason the reinsurers instituted proceedings there. Mackenzie J declined to order the transfer, considering that any connection with Victoria was incidental and that no preference was expressed in the service of suit clause for one Australian jurisdiction over another.

This case serves as a reminder that service of suit clauses like the one considered often mean that proceedings may be instituted in the courts of *any* Australian state, and that obtaining a stay or a transfer in the face of such a clause may be difficult.

One issue not decided by this case is whether the Victorian *Instruments Act* will apply even if the proceedings continue in Queensland, if the governing law of the reinsurance contract is Victorian law. This highlights a difficulty with the specification in the service of suit clause of the governing law as "Australian Law", together with the submission to the jurisdiction of any Court of competent jurisdiction within Australia and the reference to matters being determined "in accordance with the law and practice of such Courts", rather than the selection of the law of a particular Australian state.

As part of the argument in this case, the parties disagreed as to the effect of this clause. QBE submitted that it mandated the application of the law of the Australian state with the closest and most real connection with the transaction. This was said to call for consideration of the particular claim in question, with its Victorian connections, and consequently the application of Victorian law, ie Commonwealth statutes, the common law of Australia and Victorian statutes (including the Victorian *Instruments Act*). In contrast, the reinsurers submitted that the service of suit clause could not be read as directing application of the law of any particular Australian state, and either was not a choice of law clause at all (resulting in the application of English law as the proper law of the contract) or mandated only the application of Commonwealth statutes and the common law of Australia, ignoring any state statutes.

Mackenzie J did not need to resolve this issue for the purposes of QBE's application, but it is one which will presumably need to be resolved if the proceedings continue. More generally, it is an issue which inevitably can arise in cases involving service of suit clauses such as that considered here. Perhaps a clearer choice of law clause would be advisable.

Forum non conveniens, anti-suit injunctions, and concurrent US and Australian copyright proceedings

In *TS Production LLC v Drew Pictures Pty Ltd* [2008] FCAFC 194 (19 December 2008), the Full Court of the Federal Court of Australia considered difficult issues concerning *forum non conveniens* and anti-suit injunctions in the context of concurrent US and Australian copyright proceedings.

Both proceedings arose out of a dispute concerning a film, and a book based on the film, called *The Secret*. Finkelstein J described the film as follows:

> *The film is a documentary-style narrative presentation of a philosophy known as the "law of attraction". It is told through a series of interviews with authors and inspirational speakers. The message is that positive thinking will improve one's health, wealth and love life. The film was reviewed in the New York Times. The reviewer said it was "the biggest thing to hit the New Age movement since the Harmonic Convergence". Obviously he had in mind the film's staggering commercial success: gross revenue from the sale of the film has exceeded USD$69.9 million and book sales have brought in more than USD$215.55 million.*

The film was produced by an Australian company, which claimed to have been the

original copyright owner and to have assigned that copyright to TS Production. The film was directed by an Australian citizen, Mr Drew Heriot, who claimed to have done so on behalf of his own company, Drew Pictures. Substantial steps in the production of the film took place in Australia. At the time of production, Mr Heriot was resident in Australia, though he subsequently moved to the US.

The Australian proceedings were brought by TS Production against Drew Pictures and Mr Heriot, seeking a declaration that it owned copyright in the film and the book under the Australian *Copyright Act* 1968 (Cth) ("the Australian Act") and an injunction restraining Drew Pictures and Mr Heriot from asserting any claim to copyright under the Australian Act. The US proceedings were instituted subsequently by Drew Pictures and Mr Heriot against TS Production and others, seeking a declaration that Drew Pictures was a joint owner of copyright in the film and the book under the US *Copyright Ac*t (17 USC §§101, 201) and the common law of Illinois (together, "US law"), an account of profits and damages. In both proceedings, a significant factual dispute concerned the role of Mr Heriot in the production of the film.

After instituting the US proceedings, Drew Pictures and Mr Heriot sought a stay of the Australian proceedings on *forum non conveniens* grounds. For such a stay to be granted, it was necessary that the Australian court be a "clearly inappropriate forum" for the resolution of the dispute, which would be so only if continuance of the Australian proceedings there amounted to "vexation" or "oppression": see, recently, *Puttick v Tenon Ltd* (2008) 250 ALR 582; [2008] HCA 54, discussed here. The primary judge granted the stay. It was therefore not necessary for the primary judge to consider an application by TS Production for an anti-suit injunction, restraining Drew Pictures and Mr Heriot from prosecuting the US proceedings.

The Full Court unanimously concluded that the primary judge erred in granting a stay of the Australian proceedings on *forum non conveniens* grounds. The key consideration, expressed in different ways by Finkelstein J on one hand and Gordon J (with whom Stone J agreed) on the other, was the distinct nature of the two proceedings, notwithstanding the common factual substratum and the common description of the rights as "copyright". Gordon J emphasised that the Australian proceedings concerned rights arising under the Australian Act, in respect of events which occurred at least partially in Australia between parties then resident in Australia, whereas the US proceedings concerned rights arising

under US law which the parties accepted were not able to be vindicated in an Australian Court. Finkelstein J went somewhat further. He noted the Australian case law that, as an application of the *Moçambique* rule, an Australian court will not deal with questions of ownership of foreign copyright. In the absence of evidence presented by the parties, he presumed that US law was the same on this point, and, by a brief review of US cases, satisfied himself that that presumption was well founded. Accordingly, as between the US court and the Australian court, only the latter could resolve the claim to copyright under the Australian Act. Finkelstein J also considered that neither any duplication of costs nor the fact that the US proceedings were more advanced justified a stay of the Australian proceedings. In the result, it could not be said that the Australian court was a "clearly inappropriate forum" for the resolution of the Australian proceedings.

However, as to the anti-suit injunction, the Court split: Gordon J (with whom Stone J agreed) considered that an anti-suit injunction should not be granted; Finkelstein J, in dissent, considered that such an injunction should be granted. It was accepted by all members of the Court that, since it was not suggested that the US proceedings interfered with the Australian proceedings or that they had been instituted to prevent pursuit of the Australian proceedings, an anti-suit injunction could only be granted where continuance of the US proceedings amounted to "vexation" or "oppression". Applying the language adopted by the High Court to explain the concepts of "vexation" and "oppression" in the context of an application for a stay on *forum non conveniens* grounds, all members of the Court considered that they meant "productive of serious and unjustified trouble and harassment" or "severely and unfairly burdensome, prejudicial or damaging", and that the mere existence of simultaneous proceedings did not suffice.

Applying these principles, Gordon J considered that while maintaining the simultaneous proceedings may be burdensome, it was not "unjustified" or "unfair" to do so as they concerned different legal rights and remedies. Her Honour considered that this "restrictive" approach was mandated by the statement of the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 393; [1997] HCA 33 that an anti-suit injunction can be granted "only if there is nothing which can be gained by [the foreign proceedings] over and above what may be gained in local proceedings", as where there is "complete correspondence" between the foreign and local proceedings.

In contrast, Finkelstein J considered that it was sufficient that the two sets of proceedings here had an overlapping factual dispute, notwithstanding the different legal rights asserted in each proceeding. He considered that the High Court in *CSR* did not intend to narrow the test from that of "vexation" and "oppression", in the relevant sense. That test was made out here, as there was no reason to put the parties to the inconvenience of having two trials to resolve the one issue. Since the Australian proceedings were instituted first, the Australian court should resolve the dispute and, subsequently, the US proceedings could continue.

It remains to be seen whether the parties seek special leave to appeal to the High Court.

Hague Abduction Convention Before the U.S. Supreme Court: Abbott v. Abbott

On this blog, we have long noted the splits of authority among U.S. courts regarding the operation of the Hague Abduction Convention. (See here, and here.)A new cert petition in the United States Supreme Court brings one of these disagreements to the forefront.

In No. 08-645, *Abbott v. Abbott*, the issue is whether a *ne exeat* clause – which precludes a parent from taking his or her child out of the country without the other parent's permission – is a "right of custody" for purposes of the Hague Convention on the Civil Aspects of International Child Abduction, thereby requiring the child's return. The courts of appeals are not only divided on this question, but the approach taken by the majority of circuits is at odds with the approach employed by the overwhelming majority of foreign courts that have considered the question.

The petition for writ of certiorari currently pending before the court makes a

strong case for a grant. And, just last week, the Permanent Bureau of the Hague Conference on Private International Law – which is responsible for monitoring the implementation of the Convention – filed an amicus brief supporting the petition.

The brief in opposition to certiorari, and the reply thereto, have also been filed.

Updates on this case are posted on the SCOTUSblog. We will mirror those updates when they become available.

A Network for Legislative Cooperation

A Resolution of the Council and of the Representatives of the Governments of the Member States, on the establishment of a Network for legislative cooperation between the Ministries of Justice of the European Union has been published in OJ C 326, 20.12.2008. The Resolution acknowledges that obtaining information about foreign law may prove unpredictable and complicated; therefore, a network for legislative cooperation should be set up to give effective access to the national legislation of other Member States. Unfortunately, although the Council's Resolution bears in mind the "objective of providing [European] citizens with an area of freedom, security and justice", she addresses the problem mainly regarding Ministries of Justice concerns (first Whereas: "Knowledge of the legislation of other Member States or even of certain third countries is an essential tool for the Ministries of Justice of the Member States of the European Union, in particular for drafting legislation and for transposing lawof the European Union"). They (the Ministries of Justice) will be the senders and addresses of the requests for information.

To build the net, each Member State should designate a correspondent -or a limited number of other correspondents if this were considered necessary because of the existence of separate legal systems or the domestic distribution of competences. The Network should in particular provide its members with coherent and up-to-date information on legislation, and with case-law on selected

subjects; make accessible the results of comparative law research carried out by or for the Ministries of Justice of each State in fields of law falling within the sphere of competence of those Ministries, including in the context of reforms carried out by the Member States or of transposition of law of the European Union; and be aware of major legal reform projects.

The Resolution does note indicate any closing date (not even an approximated one) for the creation of the network.

Merry Christmas and a Happy New Year!

From everyone at Conflict of Laws .net, we wish you a very Merry Christmas (or Happy Holiday, as the case may be), and an excellent New Year. Just in case you're not yet in the festive spirit, here's White Christmas, as sung by The Drifters, performed by Santa and his reindeers:

State Immunity: Germany Institutes Proceedings Against Italy Before the ICJ

The "legal saga" that involved in recent years the Federal Republic of Germany, brought before Italian courts in a number of judicial cases regarding civil claims for atrocities committed during WWII (see our previous post here, and the ones on similar issues in other countries by Marta Requejo Isidro and Gilles Cuniberti), has finally found its way to the International Court of

Justice in The Hague.

As stated in a press release issued by the Information Department of the ICJ, on 23 December 2008 "**[t]he Federal Republic of Germany […] instituted proceedings before the International Court of Justice (ICJ) against the Italian Republic, alleging that '[t]hrough its judicial practice . . . Italy has infringed and continues to infringe its obligations towards Germany under international law'**".

Here's an excerpt of the press release (*external links added*):

> *In its Application, Germany contends: "In recent years, Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State. The critical stage of that development was reached by the judgment of the Corte di Cassazione of 11 March 2004 in the Ferrini case, where [that court] declared that Italy held jurisdiction with regard to a claim . . . brought by a person who during World War II had been deported to Germany to perform forced labour in the armaments industry. After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by persons who had also suffered injury as a consequence of the armed conflict." The Ferrini judgment having been recently confirmed "in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008", Germany "is concerned that hundreds of additional cases may be brought against it".*
>
> *The Applicant recalls that enforcement measures have already been taken against German assets in Italy: a "judicial mortgage" on Villa Vigoni, the German-Italian centre of cultural exchange, has been recorded in the land register. In addition to the claims brought against it by Italian nationals, Germany also cites "attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a . . . massacre committed by German military units during their withdrawal in 1944".*
>
> *The Applicant requests the Court to adjudge and declare that Italy:*
>
> *"(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect*

the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni' [the German-Italian centre for cultural exchange], German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that:

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

Germany reserves the right to request the Court to indicate provisional measures in accordance with Article 41 of the Statute of the Court, "should measures of constraint be taken by Italian authorities against German State assets, in particular diplomatic and other premises that enjoy protection against such measures pursuant to general rules of international law".

As the basis for the jurisdiction of the Court, Germany invokes Article 1 of the European Convention for the Peaceful Settlement of Disputes adopted by members of the Council of Europe on 29 April 1957, ratified by Italy on 29 January 1960 and ratified by Germany on 18 April 1961. […]

Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European

> *integration. It adds that outside of that "specific framework" the Member States "continue to live with one another under the regime of general international law".*
>
> *The Application was accompanied by a Joint Declaration adopted on the occasion of German-Italian Governmental Consultations in Trieste on 18 November 2008, whereby both Governments declared that they "share the ideals of reconciliation, solidarity and integration, which form the basis of the European construction". In this declaration Germany "fully acknowledges the untold suffering inflicted on Italian men and women" during World War II. Italy, for its part, "respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of state immunity [and] is of the view that the ICJ's ruling on State immunity will help to clarify this complex issue".*

The full text of the Federal Republic of Germany's application ~~will be available shortly~~ is available on the Court's website. See also this post by Jacob Katz Cogan over at the International Law Reporter blog.

Gambazzi v. Daimler Chrysler, Part 10: Monte Carlo

And then there were ten! The *Soltzenberg – Gambazzi* case had already been litigated in nine jurisdictions, including the two European courts. A major jurisdiction of the western world was still missing, but it is not anymore: Daimler Chrylser Canada and CIBC Mellon Trust have also sought enforcement of the English default judgments in Monte Carlo.

Unfortunately for them, in a judgment of 4 December 2008, the first instance court of Monte Carlo denied recognition to the English judgments, on the ground that they violate Monte Carlo's public policy.

By way of background, it must be emphasized that Monte Carlo is not a Member

State of the European Union, and is not a party to any European convention on jurisdiction and judgments (let alone to any regulation), including the Lugano Convention. The common law governs the recognition of foreign judgments. However, this does not make much difference, as the public policy exception is common to all modern laws of judgments.

The Court found that the English judgments were contrary to public policy, because they did not state any reasons, and indeed barely stated anything. It ruled that they stated neither the claims of the plaintiffs, nor the reasons for the actual decisions, and that they failed even to refer to the writ of summons. The Court held that this was a breach of the fundamental rules of procedure, and thus of Monte Carlo international public policy.

The judgment does not refer to the European Convention on Human Rights. I do not know whether Monte Carlo courts rule that this instrument is relevant for the purpose of defining their international public policy, but Monte Carlo has certainly been a member of the Council of Europe since 2004. It would have been most interesting to have a look to the case law of the Strasbourg court on this, as the ECHR has consistently ruled that judgments failing to give reasons are a violation of Article 6 and the right to a fair trial. Of course, a critical issue is whether English default judgments can be characterized as completly lacking reasons (I have argued that there is a case for saying that they do not).

Remarkably, Advocate General Kokott did not discuss this potential violation of public policy in her recent opinion in the same case. She only addressed whether the English judgments were contrary to public policy because 1) Gambazzi was debarred from defending on the merits in the English proceedings and, 2) Gambazzi was denied access to his file by his English lawyers whose fees had not been paid.

So, let’s recapitulate. What does Europe think of each of these three alleged breaches of public policy?

Is debarment from defending a violation of public policy?

- AG Kokott: maybe (probably?)
- Switzerland (Federal Tribunal): no*
- Strasbourg (ECHR): not even worth looking at

Is lack of access to one's legal file a violation of public policy?

- Switzerland: yes*
- AG Kokott: maybe
- Strasbourg: not even worth looking at

Is lack of reasons a violation of public policy?

- Monte Carlo: yes
- France (*Cour de cassation*): no
- Strasbourg: not even worth looking at

Interim conclusion: good that the protection of human rights is not only the business of the European Court of Human Rights.

*As reported by A.G. Kokott in her opinion.

Many thanks to Michele Potestà, Ilaria Anrò and Giorgio Buono for drawing my attention to the existence of this judgment.

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.