

APOSTOLIDES v. ORAMS: AN AMERICAN PERSPECTIVE

By **Nicholas G. Karambelas, Esq.**¹

Abstract

*The European Court of Justice (ECJ) ruled that under the EU law on the recognition and enforcement of judgments of the courts of Member States which is Council Regulation 44/2001, the courts of the United Kingdom must recognize and enforce the judgment of the courts of the Republic of Cyprus. Even though the *acquis communautaire* of the European Union is suspended in that portion of the Republic of Cyprus over which the Government of Cyprus does not exercise effective control because of the Turkish invasion and continuing occupation and the land which is the subject of a lawsuit is located in Turkish occupied, the *acquis communautaire* applies because the court which rendered the judgment in the lawsuit is located in that portion of Cyprus over which the Government of Cyprus does have effective control. Consequently, the courts of the United Kingdom must recognize and enforce the judgment of the Cyprus court which awarded possession and damages to the person who holds title to the land under the laws of the Republic of Cyprus. The ruling is a matter of EU law not British law or Cypriot law.*

INTRODUCTION

¹ **Nicholas G. Karambelas** is a founding partner of Sfikas & Karambelas, LLP which practices law in Washington, D.C., Baltimore, Maryland, New York City, New York and has affiliated offices in Athens, Greece and Nicosia, Cyprus. He practices in the areas of business entity organization, international law and business transactions, e-commerce, securities, franchising and real estate. Mr. Karambelas has served as Special Counsel to a committee of the U.S. House of Representatives. He participated in drafting legislation for the U.S. Congress and the Council of the District of Columbia. He has written numerous articles on business entity law, Greek and Cypriot company law and federal elections law as well as international law and politics. He has authored a three volume treatise entitled “Limited Liability Companies: Law, Practice and Forms” published in its second edition by Thomson West Company and which is updated twice a year. He is writing a treatise on contract law and international business transactions which will be published in 2009. Mr. Karambelas is admitted to practice law in New York, the District of Columbia, Maryland, the federal courts and the Supreme Court of United States.

Mr. Karambelas holds a Bachelor of Arts from Union College, a Juris Doctor from Fordham University School of Law and a Master of International Affairs (M.I.A.) from Columbia University School of Public and International Affairs. He serves on the Publications Committee of the D.C. Bar. He served as Secretary of the D.C. Bar for 2004-2005. He is an instructor in the D.C. Bar CLE Program and teaches numerous CLE courses including business organization, international business transactions, Greek and Cypriot company law. He is an arbitrator for the Superior Court of the District of Columbia. Mr. Karambelas chairs the American Hellenic Lawyers’ Society of Greater Washington, D.C.

The European Court of Justice (ECJ) held that a judgment of a court of the Republic of Cyprus² must be recognized and enforced by the United Kingdom even if the subject matter of the judgment is land located in the part of Cyprus over which the Government of Cyprus does not exercise effective and in which the *acquis communautaire* is suspended.³ The ruling of the ECJ is an interpretation of Council Regulation No. 44/2001 which requires the courts of one EU Member State to recognize and enforce the judgment of a court of another EU Member State.⁴ The concept underlying Council Regulation No. 44/2001 functionally the same as the concept underlying the doctrine of full faith and credit under the Constitution of the United States.⁵ While the ruling is significant to persons who own property in occupied Cyprus, it is also significant as an interpretation of a fundamental EU law.

The ruling is essentially a matter of EU law not British law, Cypriot law or even international law. Although there are important differences between the two courts, the ECJ performs a function in the EU that is similar in certain respects to the function that the United States Supreme Court performs in the United States. The ruling must be understood in the context of the EU, EU law, the *acquis communautaire* and the EU institutions. The purpose of this Article is to present the case and the ruling in the EU context and in a way which is

² The term “Cyprus” is generally used interchangeably to mean either the Republic of Cyprus, which an internationally recognized nation-state, or an island in the Eastern Mediterranean Sea, which is a geological formation. For the purpose of this Article, the term “Cyprus” refers only to the Republic of Cyprus.

³ *Meletis Apostolides v. David Charles Orams & Linda Elizabeth Orams*, Judgment of the Court of Justice in Case C-420/07 (April 28, 2009)

⁴ Council Regulation No. 44/2001, also referred to as Brussels I Regulation

⁵ U.S. Const. Art. IV, § 1

comprehensible to Americans. The Article will provide a brief overview of the EU, the ECJ and the *acquis communautaire*. The Article will then analyze *Apostolides v. Orams* by setting forth the historical facts, particular facts, procedural history and the ruling. This Article does not present an analysis of the origins and development of the events that preceded the Turkish invasion or the elements of the Cyprus issue.

PART ONE: THE EUROPEAN UNION

The European Union (EU) is one of the most significant transnational political and economic organizations in the world. It was originally called the European Coal and Steel Community, then the European Economic Community or Common Market, then the European Community and, after 1993, the European Union. The EU consists of 27 Member States, occupies most of the land mass of Europe, has a Gross Domestic Product (GDP) almost equal to the GDP of the United States and has a population of almost 500 million people.⁶ The EU has changed its name over the years.⁷

The dream of a united Europe dates back to medieval times. In the 20th century, the devastating experience of two catastrophic world wars provided an urgent impetus to making the dream into a reality. The evolution of the EU began in the years following the Second World War and has continued to evolve through a series of treaties among the Member States. Because the EU is a work in progress and still evolving, it defies any neat political science or legal

⁶ As of June 1, 2009, the Member States are Ireland, United Kingdom, France, Netherlands, Belgium, Luxembourg, Denmark, Sweden, Finland, Germany, Spain, Portugal, Italy, Malta, Austria, Greece, Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Cyprus, Slovenia, Bulgaria and Romania.

⁷ For the purpose of this Article, only the term European Union or EU will be used .

categorization. Although the EU has been described as a federation and a confederation, it is neither although it has elements of both a federation and a confederation.

The most accurate description of the EU is that it is a voluntary association of sovereign states each of which has agreed to vest sovereignty over certain enumerated subjects of national policy in supranational institutions created by treaties among those states. These institutions are charged with deciding issues with respect to these subjects national policy. The Member States as well as the citizens of the Member States must comply with the decisions of the EU institutions. The Member States must implement these decisions through their domestic legal and political processes. The citizens of the Member States are also citizens of the EU just as the citizens of a state of the United States are also citizens of the United States.

The fundamental difference between the EU and the United States is that the EU does not yet have a constitution to which each Member State is bound and which sets forth the powers and authorities of the EU institutions in relation to the powers and authorities of the Member States. Consequently, the “constitution” of the EU is contained in a series of treaties and not all Member States are party to all provisions of each such treaty. The fundamental purpose of the treaties is to set forth those subjects of national policy over which the Member States have released sovereignty to EU institutions. Because releasing sovereignty is necessarily a domestic political issue, the process by which the EU treaties develop is neither orderly nor neatly linear. It is not a process by which there is a basic treaty that has been amended over the years. Instead, whenever the leading Member States sought to expand the powers and authorities of the EU, the Member States would conclude a treaty which amended a previous treaty but might also overlap with previous treaties or even conflict with previous treaties. Subsequent treaties even created

separate institutions to administer the terms of the treaty. The cumulative effect of this process is that several treaties operate parallel to one another rather than sequentially to one another.

I. ORIGINAL TREATIES AND AMENDING TREATIES

The Treaty establishing the European Coal and Steel Community (ECSC Treaty) was the first treaty to begin the EU process. It took effect in 1952 and set in motion the EU treaty process. The ECSC Treaty was a complicated document which established a comprehensive commercial and trade regulatory regime for the production and sale of coal and steel. Significantly, the ECSC Treaty also established the four institutions to administer the terms of the Treaty and which have become the four fundamental institutions of the EU. These institutions are the European Parliament, the Council of the European Union, European Commission, and the European Court of Justice.

The Treaty which established the European Economic Community (EC Treaty) took effect in 1957 and is the document that is the closest to a constitution among all of the treaties. The purpose of the EC Treaty was to establish a common market among the Member States. Taking the concepts underlying the ECSC Treaty beyond just coal and steel, the EC Treaty eliminated customs duties and quotas among Member States, established a common external tariff and trade policy toward Member States, guaranteed free movement of persons, capital and services among the Member States, adopted common agricultural and transportation policies and common competition policies.

In 1965, the Merger Treaty eliminated parallel sets of institutions and created one Council and one European Commission for all purposes under each existing Treaty. By 1986, Ireland, Greece, Spain and Portugal acceded to the EU. The EU resolved to eliminate all internal barriers

and impediments to trade and commerce and create a single internal market without borders. The Single European Act (SEA) amended and expanded the EC Treaty. It took effect in 1987 in an effort to eliminate all physical, technical and fiscal impediments and integrate the free movement of persons, goods, services and capital into one market by 1992. In this respect the EU sought to create a national market similar to the national market of the United States under the Commerce clause of the U.S. Constitution.⁸

In 1993, the Treaty on European Union (TEU) fundamentally amended and expanded the EC Treaty. The TEU established the structure for the creation of the euro as a single currency and the basis for a full political and economic union of the Member States. The TEU embodies the three pillars of the EU which are, one, the common trade and commerce measures contained in the EC Treaty as amended by the SEA and the TEU, two, common foreign and defense policy and, three, common justice and police policy.

The Treaty of Amsterdam of 1999 and the Treaty of Nice of 2003 made further procedural and structural changes to the manner in which the EU institutions operate and relate to the Member States and EU citizens. The EU is a party to a series of Accession Treaties which govern the terms upon which certain nations have become Member States.⁹ There are a number of other treaties to which the EU as an entity is a party with non-Member States.

In 2004, the EU heads of government signed the European Constitution. The European Constitution was to replace all of the original and amending treaties and improve the operations of

⁸ U.S. Const. Art. I, Sec. 8 cl.2

⁹ The EU has an Accession Treaty with each of Ireland, United Kingdom, Denmark, Sweden, Finland, Spain, Portugal, Malta, Austria, Greece, Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Cyprus, Slovenia, Bulgaria and Romania.

the EU institutions.¹⁰ However, to take effect the European Constitution had to be ratified by each of the Member States. The ratification procedure was a matter for each Member State to decide. In some Member States, the ratification was accomplished by a vote of the national legislature while in other Member States ratification was accomplished by a national referendum. Ultimately, in national referenda held in 2005, each of France and the Netherlands voted against ratifying the European Constitution.

In December 2007, the EU heads of government signed the Treaty of Lisbon which is essentially a simpler and more accessible form of the European Constitution but contains most the substantive provisions and concepts of the European Constitution. Like the European Constitution, the Treaty of Lisbon must be ratified by each Member State according to a procedure set by the laws, processes and traditions of each Member State. As of June 1, 2009, 26 of the 27 Member States had ratified the Treaty of Lisbon and one Member State, Ireland, had rejected the Treaty of Lisbon by national referendum.¹¹ If the Treaty of Lisbon ultimately enters into force, the substance and scope of the powers and operations of the EU institutions set forth in this Article will be modified.

II. THE EU INSTITUTIONS

The primary EU institutions consist of two legislative institutions, the European Parliament and the Council of the European Union, an executive institution, the European Commission, a judicial institution, Court of Justice/Court of First Instance and budgetary and management

¹⁰ Laeken Declaration

¹¹ Ireland is scheduled to hold a second national referendum on the Treaty of Lisbon in the fall of 2009.

institution, the Court of Auditors. The TEU and subsequent treaties and acts have constituted other institutions such as European Economic and Social Committee, Committee of the Regions the European Central Bank and European Investment Bank.

A. Legislative Institutions

European Parliament

The European Parliament performs a legislative function which is similar to the U.S. House of Representatives. Each Member State elects a number of members which is proportional to the ratio that the population of each Member State bears to the EU population as a whole. Each member is elected on a popular basis by each Member State on the same day for a term of five years.¹² The Parliament is not an assembly of delegates from various nations like the United Nations. The members do not caucus as delegates from a nation but rather they caucus according to their respective political persuasions. The members elected from Greece do not sit or act as representatives of Greece. The Greek socialists caucus with the socialists from Italy or France and the Greek conservatives caucus with the conservatives from Italy or France. The Parliament operates through a series of specialized committees.

The Parliament exercises a supervisory role over the budget and the Commission which is generally similar to the oversight function of the U.S. Congress. The members of Parliament may pose questions to the Council or the Commission on any subject matter and receive answers. The Parliament shares legislative power with the Council and, to a lesser extent, the Commission through a complicated set of procedures.

1. Assent Procedure - enables the Parliament to approve or disapprove proposed acts of

¹² EC Treaty Art 189-201

the Council on certain enumerated matters such as accession of new Member States, the operations of the European Central Bank, particular financial matters and human rights. In effect, by a vote of an absolute majority, the Parliament may veto Council acts on these enumerated matters.

2. Co-decision Procedure - enables the Parliament to force the Council to negotiate on a comprehensive list of enumerated matters such as freedom of movement, education, health, internal market, customs and social policy. If Parliament disagrees with a proposed act, then Parliament and the Council must form a conciliation committee and agree on a common position with respect to the proposed act. If Parliament and the Council cannot agree then the proposed act cannot be take effect.

3. Cooperation Procedure - operates in the same manner as the co-decision but only on a limited number of enumerated matters including EU accepting liability for acts of Member States and currency issues. The difference is that if the conciliation committee is unable to agree, then the position of the Council on a proposed act prevails.

4. Consultation Procedure - applies only to matters to which the co-decision and cooperation procedure do not apply. The Council is empowered to make a final decision but the proposed act must be submitted to the relevant consultative bodies of the EU so that their views are expressed before the act is final.

Council of the European Union

The Council of the European Council, also referred to as the Council of Ministers, is composed of a certain number of representatives from each Member State who are appointed by the government of each Member State. Each Member State holds the Presidency of the Council for a term of six months on a rotating basis.¹³ The Council works through committees and a Secretary-General with a staff. The Secretary-General of the Council acts as the EU High Representative for the Common Foreign and Security Policy which means the Secretary-General acts in a manner generally similar to the U.S. Secretary of State. On certain enumerated matters, matters, the Council must decide on a unanimous basis. Most often, the Council acts by a qualified majority which that a proposed act must have a threshold number of votes based on a complicated

¹³ EC Treaty Art 202-210

formula before a final vote can be taken on the act. The Council is functionally a cross between the U.S. Senate and the Cabinet in the Executive Branch.

The Council essentially exercises the following powers:

1. Jointly with the Parliament, it legislates on all matters and adopts the EU budget,
2. Concludes agreements between the EU and non-Member States,
3. Articulates the common foreign and defense policies of the EU.

European Council

Distinct from the Council of the European Union, the European Council, also referred to as the European Summit, is composed of heads of state or of government of each of the Member States. The European Council does not have a functional equivalent in U.S. government. It does not have any legislative or executive powers. However, it defines the broad outlines and concepts of the policy agenda of the EU. Lacking any enumerated powers or specific authority, the European Council exercises its influence by virtue of the fact that it is composed of the national leaders of the Member States.

B. Executive Institution

European Commission

The Commission is composed of one commissioner from each Member State. Each commissioner is appointed by the Council and approved by the Parliament.¹⁴ Each commissioner serves a term of five years. The President of the Commission is appointed by the Council acting through the heads of state or government of the Member States and approved by the Parliament.¹⁵

¹⁴ EC Treaty Art 211-219

¹⁵ TEU Art 4

The Commission functions through a series of directorates, each of which has a designated policy subject matter. The Commission is generally similar to the U.S. Executive Branch. The

Commission essentially exercises the following powers:

1. Initiates legislation which is forwarded to the Council and the Parliament but does not vote on the legislation,
2. Implements the budget of the EU,
3. Enforces compliance with the EU Treaties by Member States, other EU institutions and citizens and represents the EU in legal proceedings, and
4. Represents the EU in negotiations with non-Member States.

C. Judicial Institutions¹⁶

The European Court of Justice (ECJ) was created to assure that the EC Treaty is interpreted and applied in a consistent and systematic manner.¹⁷ The ECJ has been described as a constitutional court, which performs a function similar to that of the U.S. Supreme Court. However, unlike the Supreme Court, the ECJ does not hear appeals from the decision of the courts of Member States. The Court of First Instance (CFI) was established in 1989 and has original jurisdiction of cases arising in matters over which the ECJ formerly had jurisdiction.

D. Management and Budget Institution

European Court of Auditors

The Court of Auditors is composed of one national from each Member State. Each

¹⁶ See Part Two, *infra*.

¹⁷ EC Treaty Art 220

Auditor is appointed by the Council and serve for a term of six years.¹⁸ The Court of Auditors acts through a qualified majority. The duties of the Court of Auditors are to examine all revenue and expense accounts of the EU and each EU institution, provide annual audited financial statements to the Council and the Parliament and advising the EU on fiscal management issues.

PART TWO: THE EUROPEAN COURT OF JUSTICE AND EU LAW¹⁹

I. THE EUROPEAN COURT OF JUSTICE

A. Jurisdiction

The ECJ has exclusive original subject matter jurisdiction over any case asserted by:

1. The European Commission against any Member State that the European Commission alleges has failed to fulfill an obligation under the EC Treaty²⁰ and
2. A Member State against another Member State for the failure of a Member State to fulfill an obligation under the EC Treaty. The case must first be brought before the Commission, which may render an opinion. If the Commission does not render an opinion within three months, the ECJ may hear the case without a commission opinion.²¹

The ECJ is empowered to levy money penalties on any Member State that fails to comply with a judgment of the court.²² The ECJ has exclusive appellate jurisdiction over cases appealed

¹⁸ EC Treaty Art 246-248

¹⁹ See generally Karambelas, Nicholas G. *Fundamentals of the European Union Court System*, Vol. 18 No. 4 The Washington Lawyer December, 2003

²⁰ EC Treaty Art 226

²¹ EC Treaty Art 227

²² EC Treaty Art 228

from the Court of First Instance (CFI). The ECJ can only review matters of law and not matters of fact.²³

B. Preliminary Rulings

The ECJ performs another function that is not strictly a matter of jurisdiction. It may issue preliminary rulings on questions concerning EU law that arise in the domestic courts of the Member States.²⁴ A preliminary ruling is not advisory but rather mandatory. The court which requests the preliminary ruling must comply with it. The lower courts of a Member State may, but are not obligated to, seek “authoritative guidance” from the ECJ in the form of a preliminary ruling. However, if the highest court of a Member State has before it a case involving a question of EU law, then that court must seek a preliminary ruling on the question from the ECJ. The highest court can avoid seeking a preliminary if it can invoke either the doctrine of *acte eclairé* or the doctrine of *acte clair*.²⁵

1. Under *acte eclairé* the domestic court can avoid seeking a preliminary ruling on the grounds that the issue has already been satisfactorily adjudicated.
2. Under *acte clair* the domestic court can avoid seeking a preliminary ruling on the grounds that the resolution of the issue is self-evident as long as the resolution is clear to the courts of other Member States and to the ECJ.²⁶

The ECJ issues preliminary rulings in cases involving interpretation of the EC Treaty, the validity and interpretation of acts of any EU institution and the interpretation of the statutes of any

²³ EC Treaty Art 225(1)

²⁴ EC Treaty Art 234

²⁵ Ibid.

²⁶ *Srl CILFIT v. Ministry of Health*, 283/81, [1982] ECR 3415

bodies established by the Council where such statutes allow for preliminary rulings. After it receives a request for a preliminary ruling, the ECJ assesses the arguments presented, the relevant case law, and treaty provisions. It then issues a ruling that is binding on the parties and which the requesting domestic court must apply.

Preliminary rulings ensure that domestic courts make legally “correct” decisions with respect to EU law, promote the uniform interpretation and application of EU law in the Member States and provide valuable access to the ECJ for private individuals who cannot directly appeal to the court, either for lack of legal standing or for lack of funding. For an efficient and effective performance of its legal and economic functions, the EU relies heavily on the preliminary ruling procedure. Some commentators assert that the preliminary ruling procedure essentially vests in the ECJ the power of judicial review over the national courts of member states, such that the ECJ is rapidly evolving into an actual supreme court for the EU.²⁷

C. Composition and Procedure

The ECJ is composed of 27 judges and eight advocates general appointed by the Member States. The judges serve 6-year terms and can be reappointed. Each panel of judges elects a president from among them who serves a 3-year term and whose duties are to manage the business of the court and preside over plenary sessions of the ECJ and the CFI respectively. The judges generally sit in chambers of 3, 5, or 7 judges. A Member State or an EU institution can request that the ECJ sit in a plenary session of at least nine judges in any action to which a Member state of an EU Institution is a party. The duties of the advocates general are to provide the ECJ and CFI with

²⁷ See generally Paul Craig and Grainne De Burca. *EU Law: Text Cases and Materials*, 11(3d ed. 2003)

a reasoned and impartial analysis of the cases so as to assist them in deciding cases. Both the ECJ and the CFI sit in Luxembourg.

Court procedure is both written and oral. A direct action is commenced by a written application that is filed with the registrar and served on the parties. Any party may serve a defense. The asserting party can reply, and the defending party can serve a rejoinder. Where a domestic court has made a referral for a preliminary ruling, that court files a written request with the ECJ and serves the parties to the case in the domestic court, the Commission, each Member State, and the Council.

The presentation of the case has three stages. In the first stage the advocate general reports its preliminary view of the case, and the ECJ or CFI decides whether to hear the case in a plenary session or in chambers and sets a date for a hearing. In the second stage the case is heard in open session and presented by lawyers admitted to practice in any Member State. Parties may present experts and witnesses, but can only address the ECJ or CFI, and cannot examine or cross-examine. The ECJ or CFI can examine any person before it. In the third stage the advocate general submits a comprehensive analysis of the case and a proposed judgment. The ECJ or CFI deliberates in secret and issues its judgment publicly. Cases from the CFI are appealed to the ECJ. There is no appeal from a judgment of the ECJ. A party may request that the ECJ revise its judgment based on a material fact that was not known at the time of judgment.²⁸

II. ACQUIS COMMUNAUTAIRE AND SUPREMACY OF EU LAW

A. Acquis Communautaire

²⁸ EC Treaty Art 221-223

The entire body of EU laws is referred to as the *acquis communautaire* which translates from French as “that which is obtained by the community”. The *acquis communautaire* consists of primary legislation, secondary legislation and the case law of the ECJ/CFI.²⁹

1. Primary legislation is the treaties as amended,
2. Secondary legislation is the following:
 - a. Regulations - are adopted by the European Parliament and the Council or by the Council alone or the Commission alone. Once adopted, a regulation is binding on each Member State and no national legislation to implement the regulation is required.
 - b. Directives - are adopted similar to regulations but each Member State may implement a directive with its own national legislation within 18 to 24 months after the directive is adopted.
 - c. Decisions - are adopted similar to regulations. Once adopted, a decision binds the party to whom it is addressed without national legislation. That party can be a one or more of the Member States, an entity or an individual.
 - d. Recommendations, Interpretive Communications and Commission Comments - are not binding but are rules of conduct which have persuasive or practical effects.
3. Case law of the ECJ and CFI.

Each nation which seeks to accede to the EU must accept the *acquis communautaire* and make the *acquis communautaire* part of its domestic law.

B. Supremacy of EU Law³⁰

A fundamental issue in the EU is the relationship between EU law and the law of Member

²⁹ EC Treaty Art 249; C. Delcourt, *The Acquis Communautaire: Has the Concept Had its Day?*, 38 Common Market Law Review 829 (2001).

³⁰ See generally Karambelas at n. 5

States when those laws conflict with one another and the role of the ECJ with respect to that conflict. The EC Treaty does not contain a supremacy clause similar to the supremacy clause in the U.S. Constitution.³¹ In a manner similar to method by which the U.S. Supreme Court developed its power of judicial review, the ECJ has developed its power and influence with the aim of promoting uniformity in EU law.³² The ECJ maintains this uniformity through the principles of direct effect and primacy.

The principle of direct effect holds that certain EU law provisions either confer rights or impose obligations on individuals that domestic courts must recognize and enforce. The ECJ established the principle in case law when it ruled “any unconditionally worded treaty provision, being ‘self sufficient and legally complete,’ did not require further intervention at the national or Community levels and therefore applied directly to individuals.”³³

The principle of primacy was developed by the ECJ to implement the principle of direct effect. The principle of primacy holds that EU law supersedes the domestic law of the Member States. The ECJ ruled that in creating a community like the European Union, with legitimate power granted by willing limitation and transfer of sovereignty from the member states to the community, the Member States created a body of law binding upon “both their nationals and themselves.”³⁴ If domestic legislation could prevail over EU law, the fundamental legal basis of the EU would be undermined. The ECJ further ruled that the Member States must repeal any laws

³¹ U.S. Const. Art VI, cl.2

³² *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803)

³³ Case 6/62, *Van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 ECR 3

³⁴ Case 6/64, *Costa v. ENEL*, 1964 ECR 585

that conflict with EU law, and that the courts of the Member States must apply EU law as a whole.³⁵

PART THREE: APOSTOLIDES v. ORAMS

I. HISTORICAL BACKGROUND

Located just south of Turkey, just west of Syria and north of Egypt, the island of Cyprus has been both the beneficiary and the victim of its strategic location in the Eastern Mediterranean. Despite having been ruled by a succession of Middle Eastern and Western powers, since at least Homeric times, Cyprus has had a predominantly Hellenic character.³⁶ The modern history of Cyprus begins in 1571 when the Ottoman Emperor Sultan Selim II conquered Cyprus. The Turkish Muslims who migrated to Cyprus in the wake of the conquest established the Turkish Cypriot community.

In 1878, Great Britain assumed the administration of Cyprus from the Ottoman Empire primarily as a coaling station for the British Navy and to protect the Suez Canal. In 1914, when the Ottoman Empire entered the First World War on the side of the Central Powers, Great Britain annexed Cyprus. Under the Treaty of Lausanne of 1923 which ended the First World War in the Middle East, the newly established Republic of Turkey waived any claims it had or may have to Cyprus. In 1925 Cyprus became a Crown Colony of Great Britain.

³⁵ Case 92/78, *Simmenthal SPA v. Commission*, 1979 ECR 777

³⁶ “...Centuries of Hellenic culture, and they [the Cypriots] by inclusion in the East Roman and Byzantine Empires, have created undeniable links which no one will deny, between Cyprus and the Greek world.” Address by Harold MacMillan, British Foreign Secretary, *Tripartite Conference on the Eastern Mediterranean and Cyprus August 29 1955 - September 7, 1955*, published in H.M. Stationery Off. (London, 1955)

British colonial rule proved to be oppressive, neglectful and divisive.³⁷ From the 1930s through 1959, the Greek Cypriot community, which constitutes 80% of the population of Cyprus, waged bitter and bloody guerrilla hostilities against the British.³⁸ Joining other colonies of Great Britain, the Greek Cypriots sought self determination under the United Nations Charter.³⁹ With support of Greece, the Greek Cypriots agitated not for independence but to unite Cyprus with Greece. To confront the hostilities, the British employed Turkish Cypriots, who constituted 18% of the population of Cyprus, as police and militia to oppose the Greek Cypriots. Furthermore, Great Britain encouraged Turkey to seek the partition of Cyprus between the two communities ostensibly to protect the Turkish Cypriot minority.⁴⁰ The result was that the Greek and Turkish Cypriot communities, which had lived more or less peaceably in mixed cities and villages, became estranged and hostile to one another.

In 1959, Great Britain resolved to grant a form of independence to Cyprus.⁴¹ In 1960, Great Britain, Greece, Turkey, the Greek Cypriot community and the Turkish Cypriot community signed a Constitution for the Republic of Cyprus. Also, Great Britain, Greece, Turkey, and the newly constituted Republic of Cyprus signed the Treaty of Establishment, the Treaty of Guarantee and the Treaty of Alliance. The broad legal effect of the Constitution and the Treaties was that

³⁷ Mallinson, William. Cyprus, A Modern History. New York: I.B Tauris, 2005.

³⁸ Xydis, Stephen G., Cyprus: Conflict and Conciliation, 1954-1958. Columbus: Ohio UP, 1967.

³⁹ UN Charter Art. 1(2)

⁴⁰ Mallinson, p. 22-27

⁴¹ Cyprus Act of 1960

union with Greece and partition were each rejected. As a compromise, the Republic of Cyprus was established as an independent nation but not a fully sovereign nation.⁴²

The 1960 Constitution established a republican form of government with a president, legislature and judiciary. The president is a Greek Cypriot and the vice president is a Turkish Cypriot, each elected by their respective communities. The vice president has the right of veto in matters of foreign policy, defense and internal security.⁴³ A ten member council of ministers would be composed of seven Greek Cypriots and three Turkish Cypriots with one of ministries of foreign affairs, defense or finance being held by a Turkish Cypriot and decisions made by an absolute majority. A house of representatives composed of fifty members of which 70% are Greek Cypriot and 30% are Turkish Cypriots decides by a simple majority except that in areas of electoral law, municipalities and taxation, vote of a simple majority of each of the Greek Cypriot members and of the Turkish Cypriot members was required.⁴⁴ Two separate communal chambers are established which govern matters of personal status, education and religion.⁴⁵ The Supreme Constitutional Court has jurisdiction over constitutional issues, discrimination and disputes between organs of the government. The Court consists of one Greek Cypriot judge with one vote, one Turkish Cypriot judge with one vote and a judge from a neutral country who would have two votes.⁴⁶ Separate

⁴² See generally U.S. Department of State, Bureau of Intelligence and Research, Intelligence Report No. 8047, July 1, 1959

⁴³Hatzivassiliou, Evanthis. Britain and the International Status of Cyprus, 1955-59. Minneapolis: University of Minnesota, 1997; 1960 Const Art 30-50

⁴⁴ 1960 Const Art 83

⁴⁵ 1960 Const Pt. V

⁴⁶ 1960 Const Pt IX

Turkish municipalities were established in the five main towns. Most significantly, the basic 27 articles of the Constitution could not under any circumstances be amended.⁴⁷

The Treaty of Establishment defines the territory of the Republic of Cyprus as being the island of Cyprus except for two military bases which remain under the sovereignty of Great Britain. Referred to as Sovereign British Bases (SBAs), the bases comprise 99 square miles. That Treaty contains provisions for the transfer of sovereignty from Great Britain to the Republic of Cyprus.⁴⁸ The Treaty of Guarantee obligates Cyprus not to unite with any other country and not to partition itself. That Treaty also obligates Great Britain, Greece and Turkey to guaranty the independence, territorial integrity and security of Cyprus.⁴⁹ The Treaty of Alliance signed by Greece, Turkey and Cyprus provides for the stationing of 950 Greek troops and 650 Turkish troops. The ostensible function of these troops is to assist in training the Cypriot army.

By 1963, the contradictions that were inherent in the constitutional arrangement paralyzed the government.⁵⁰ In August 1963,⁵¹ President Archbishop Makarios proposed 13 amendments to the Constitution, the cumulative effect of which was to eliminate the veto of the Turkish Cypriot

⁴⁷ 1960 Const art 182(1)

⁴⁸ Treaty of Establishment, Appendix O

⁴⁹ Rossides, Eugene T., *Cyprus and the Rule of Law*, 17 Syracuse J. Int'l L. & Com. 21 (Spring 1991) p. 55

⁵⁰ Polyviou, Polyvios G. Cyprus: The Tragedy and the Challenge. London: John Swain & Son, Ltd. 1976 p.35-36

⁵¹ See generally, Packard, Martin: Getting It Wrong, Fragments from a Cyprus Diary 1964, (AuthorHouse UK Ltd., 2008)

community.⁵² Turkey rejected the proposal before the Turkish Cypriot community rejected it. Inter-communal violence erupted in December 1963 and Turkey threatened to invade Cyprus. The Turkish Cypriots moved into armed enclaves in various locations in Cyprus. The Turkish Cypriot leaders and civil servants withdrew from the government and set up a separate administration.⁵³

In 1967, a cabal of army colonels took power in Greece, referred to as the “junta”.⁵⁴ Seeking to pursue the objective of uniting Cyprus with Greece, the junta actively fostered ties with extreme nationalist elements within the Greek Cypriot community with which the junta had an ideological affinity. The policy of the junta led to increasing fratricidal tensions between these nationalist elements and President Archbishop Makarios as well as attacks by these nationalist elements on Turkish Cypriots.⁵⁵ An invasion of Cyprus threatened by Turkey was averted following intense diplomacy conducted by the United States. The Greek and Turkish Cypriot communities entered into talks to resolve their differences.⁵⁶

By 1974, the antipathy between the Greek junta along with its surrogates in the Greek Cypriot community and President Archbishop Makarios had degenerated into open hostilities epitomized by several assassination attempts on President Archbishop Makarios and rumored coup attempts. On July 15, 1974, the duly elected government of President Archbishop Makarios was

⁵² Polyviou p. 37-38

⁵³ Joseph p. 31

⁵⁴ Stern, Laurence. The Wrong Horse, the Politics of Intervention and The Failure of American Democracy. New York: Times Books, 1977. p.41

⁵⁵ Stern p.85

⁵⁶ Ibid.

overthrown in an armed coup directed by the Greek junta.⁵⁷ He managed to escape unharmed from Cyprus. The Greek junta installed one of its Greek Cypriot functionaries as president. Five days later, Turkey invaded Cyprus and took control of a narrow corridor that ran from the northern sea coast to the Turkish Cypriot enclave in the capital of Nicosia located in the center of Cyprus which amounted to 5% of the territory of Cyprus.⁵⁸ Within forty-eight hours both the Greek junta in Athens and its functionary government in Cyprus fell out of power.

Consistent with the 1960 Constitution, the President of the House of Representatives of Cyprus assumed the presidency and reestablished the constitutional government of Cyprus. Following an initial cease fire, Turkey launched a second offensive in August 1974 and took control of northern Cyprus which amounted to about one-third of the territory of Cyprus. Turkey forcibly removed 210,000 Greek Cypriots and foreign nationals of Greek Cypriot descent from their homes and businesses.⁵⁹ Turkey began providing incentives to Turks from Turkey to settle in Turkish occupied Cyprus.⁶⁰

In 1975, the leaders of the Turkish Cypriot community declared the establishment of the “Turkish Federated State of Cyprus” in Turkish occupied Cyprus and was renamed the “Turkish Republic of Northern Cyprus” (referred to as TRNC) in 1983. Only Turkey has recognized the TRNC. The international community has complied with the United Nations Security Council

⁵⁷ Stern p.103-109

⁵⁸ Stern 120-121

⁵⁹ *Cyprus v. Turkey*, Application No. 25781/94, Report of the European Commission of Human Rights, para. 255, 274-275

⁶⁰ Parliamentary Assembly of the Council of Europe, *Report on the demographic structure of the Cypriot communities*, Doc. 6589, April 24, 1992 (Rapporteur: Mr. Cuco, Spain Socialist)

which called upon “all States not to recognize any Cypriot state other than the Republic of Cyprus.”⁶¹ In the years since 1974, various concepts, schemes and plans have been proposed and counter proposed to settle the Cyprus issue. These efforts culminated in 2004 with a comprehensive plan for settlement which came to be known as the Annan Plan. Promulgated primarily by the United States, Great Britain and Turkey, a fifth iteration of the Annan Plan was submitted to each Cypriot community for approval in April 2004. By an affirmative vote of 65% the Turkish Cypriot community approved the Annan Plan while the Greek Cypriot community rejected the Annan Plan by a margin of 76%.⁶² On May 1, 2004, Cyprus acceded to the European Union (EU).⁶³ The *acquis communautaire* of the EU was suspended in those portions of Cyprus which are not controlled by the Republic of Cyprus.⁶⁴

II. UNDERLYING FACTS

Meletios Apostolides holds title to land near Lapithos in Cyprus under the laws of Cyprus. In 1974 the armed forces of the Republic of Turkey invaded Cyprus and occupied about one-third of the territory of Cyprus. The Turkish military forced most of the Greek Cypriot population to leave its homes and businesses located in the occupied area of Cyprus and has excluded them from their property since the date of the invasion. The land to which Mr. Apostolides holds title is located in the occupied area. He has been excluded from his property since the Turkish invasion in

⁶¹ Sec Res 541 (1983)

⁶² Palley, Claire. An International Relations Debacle, The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004. Oxford and Portland, Oregon: Hart, 2005.

⁶³ Hoffmeister, Frank. Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession, Nijhoff Law Specials. Vol. 67. Leiden: Martinus Nijhoff, 2006. p.VI and VII,

⁶⁴ Act of Accession 2003 of Cyprus to the EU Art (1)1 Protocol 10

1974 and denied the use and enjoyment of his property by Turkey and its agents. Mr. Apostolides is a citizen of Cyprus.

In 2002, David and Linda Orams tendered money to a Turkish Cypriot who purported to have the authority to convey title to property under the laws of the TRNC . The property included land to which Mr. Apostolides holds title under the laws of Cyprus. The Orams improved the property by building a villa, a garden and a swimming pool. Each of Mr. and Mrs. Orams is a citizen and domiciliary of the United Kingdom. They own other property located in the United Kingdom.

III. PROCEDURAL FACTS

A. Proceedings in Cyprus

Mr. Apostolides asserted a cause of action against the Orams in the District Court of Nicosia which is the trial level court of the courts of Cyprus. On October 26 2004, Mrs. Orams was personally served at the subject property with duly issued writs which are the functional equivalent of a summons and complaint. There is some confusion as to the facts leading up to the service of process. However, the method and manner of service was proper under the laws of Cyprus.⁶⁵

Mr. Apostolides moved for a default judgment after the time within which a defendant under Cyprus must respond to a duly issued writ had expired. The District Court issued a judgment which granted the relief sought by Mr. Apostolides. The judgment required the Orams to demolish the villa, the pool and fencing, relinquish possession of the property to Mr. Apostolides, to pay damages and imputed rent with interest and refrain from interfering with Mr.

⁶⁵ *Orams et al. v. Apostolides*, [2006] EWHC 2226 (QB), paras. 6, 42-44

Apostolides' property rights.⁶⁶

The Orams moved to set aside the judgment. On April 19, 2005, after hearing evidence and argument, the District Court denied the motion. The District Court ruled that:

1. Title to land located in occupied Cyprus is and has been vested in persons who hold title under the laws of Cyprus citing *Loizidou v. Turkey* [1997] 23 EHRR 513 and subsequent case law of the European Court of Human Rights,
2. Because Mr. Apostolides held proper title, the Orams had trespassed and continued to trespass on his property,
3. To prevail on motion to set aside a default judgment, the moving party had to demonstrate that it had a cognizable defense. The Orams were unable to so demonstrate.⁶⁷

The Orams appealed that judgment to the Supreme Court of Cyprus. The appeal was denied on December 21, 2006 and the judgment of the District Court was affirmed.

B. Proceedings in the High Court of Justice (England and Wales) , Queens's Bench Division and Court of Appeal (England and Wales) (Civil Division)

A judgment rendered by the courts of an EU Member State must be enforced by courts of another EU Member State as long as the judgment satisfies the legal requirements of Council Regulation No. 44/2001 and the legal requirements for the enforcement of foreign judgments under the law of the EU Member State in which the judgment is being enforced.⁶⁸ Under the

⁶⁶ Ibid. para.9

⁶⁷ Ibid. para. 10

⁶⁸ See IV, B *infra*.

applicable law of the United Kingdom (referred to as the UK)⁶⁹, to enforce the judgment of the court of another EU Member State, the applicant must register the judgment in that part of the UK in which the person or property against whom enforcement is sought is located.⁷⁰ The Orams are domiciled in England.

Mr. Apostolides registered the Cyprus judgment in the High Court of Justice (England and Wales) Queens Bench Division. Under the procedure in that court, the application to enforce the judgment is made *ex parte* which means without notice to the opposing party. A Master of the Court reviews the application and issues a Notice of Registration, if the application is satisfactory. The Notice of Registration states the terms of the judgment, identifies the opposing party and sets forth the appeal rights of the opposing party. The Notice of Registration is served on the opposing party. The Notice of Registration was duly served on the Orams and they appealed.

After a hearing in July 2006, the High Court issued a judgment in September 2006.⁷¹ The High Court ruled as follows:

1. Citing the case law of the ECHR, Mr. Apostolides holds title to the property and the Orams are trespassers.⁷²
2. Because the *acquis communautaire* is suspended in that territory of Cyprus under which the government of Cyprus has no effective control, the judgment of the court of Cyprus cannot be enforced by the courts of another Member State.⁷³

⁶⁹ The United Kingdom is comprised of England, Wales, Scotland and Northern Ireland. It is the name under which the nation known as Great Britain joined the EU.

⁷⁰ Civil Jurisdiction and Judgments Act of 1982, as amended.

⁷¹ *Orams et al. v. Apostolides*, [2006] EWHC 2226 (QB) (Mr. Justice Jack)

⁷² *Ibid.* para.31, 36

⁷³ *Ibid.* para. 30

3. Even if the Cyprus judgment was enforceable, the High Court must refuse to enforce it because it was obtained by default and the Orams did not have sufficient time to cure the default.⁷⁴

Mr. Apostolides appealed the judgment of the High Court to the Court of Appeal (England and Wales) (Civil Division). The Court of Appeal determined that the appeal raised issues of EU law. The Court of Appeals stayed the proceedings and referred certain questions to the ECJ under the preliminary ruling procedure.⁷⁵ In essence, the Court of Appeal asked the ECJ to render a judgment on the following issues of EU law:

1. Because the *acquis communautaire* is suspended in that territory of Cyprus under which the government of Cyprus has no effective control, does that mean that the judgment of the court of Cyprus cannot be enforced by the courts of another Member State under Council Regulation 44/2001?
2. Because the judgment of the Cyprus court could not be executed in Cyprus, can the judgment still be enforced in another Member State?
3. Even if the Cyprus judgment was recognizable and enforceable under Council Regulation No. 44/2001, can the court of the Member State in which enforcement is sought refuse to enforce the judgment because it was obtained by default?

C. Proceedings in the ECJ

The ECJ received the referral for a preliminary ruling from the Court of Appeals in September 2007. The Government of Cyprus, the Government of Greece, the Government of Poland and the EU Commission submitted briefs. The EU Commission effectively argued that the Cyprus judgment should not be recognized and enforced under Council Regulation No. 44/2001. In December 2008, the Advocate General of the ECJ rendered an opinion that answered each of the questions referred by the Court of Appeal in the affirmative. The Advocate General concluded

⁷⁴ Ibid. para. 54, 57-58

⁷⁵ *Apostolides v. Orams et al.*, Case C-420/07 reported at Official Journal of the European Union C 297/20-21 (December 8, 2007)

that the UK courts must recognize and enforce the judgment of the Cyprus court even though Cyprus does not exercise effective control on the territory in which the subject property is located and the Orams had an opportunity to contest the default judgment. On April 28, 2009, the ECJ adopted the conclusions of the ANALYSIS OF THE ECJ JUDGMENT judgment of the ECJ.⁷⁶

A. Even though the *acquis communautaire* is suspended in occupied Cyprus, the judgment of a court sitting in the unoccupied portion of Cyprus must be recognized and enforced under Council Regulation No. 44/2001.

The threshold issue for the ECJ under the reference from the UK courts was whether the derogation from the *acquis communautaire* set forth in the Act of Accession under which Cyprus became an EU Member State prevented Council Regulation No 44/2001 from being applied in occupied Cyprus. Clearly, if the *acquis communautaire* did not apply in occupied Cyprus then there were no further issues to be decided in the case. There is no question that Council Regulation No. 44/2001 is part of the *acquis communautaire*. There is no question that the *acquis communautaire* is suspended in “those areas of the Republic of Cyprus in which the Government of Cyprus does not exercise effective control” which means occupied Cyprus.⁷⁷ The Orams argued that because the subject property was located in occupied Cyprus the *acquis communautaire* did not apply. Therefore, Council Regulation No 44/2001 did not apply so that the judgment of the Cyprus court could not be recognized and enforced by the UK courts under Council Regulation No 44/2001.

The ECJ began its analysis by stating the fundamental principle that when a new Member State accedes to the EU, the *acquis communautaire* applies fully and completely to the Member

⁷⁶ *Apostolides v. Orams et al.*, ECJ Case C-420/07

⁷⁷ Act of Accession Art 1(1) of Protocol No. 10

State except where the express terms of accession allow for derogations from the *acquis communautaire*. Derogations from and exceptions to the *acquis communautaire* have been common, primarily in the form of transitional provisions, especially among recently admitted Member States.⁷⁸

Cyprus was not partially admitted to the EU. All of Cyprus is a Member State and the *acquis communautaire* applies to all of Cyprus except for any derogation. To the extent that there are derogations in the Act of Accession, such derogations must be strictly construed and limited only to that which is absolutely necessary to attain the objective of the derogation.⁷⁹ The ECJ considered the physical location of the subject property to be irrelevant to the issue. The significant fact to the ECJ was that the court which rendered the judgment was sitting in an area of Cyprus over which the Government of Cyprus *did* exercise effective control.⁸⁰ Therefore, because the judgment emanated from a court that was physically located in a Government-controlled area of Cyprus, the *acquis communautaire* applied.

The ruling on this issue is unnecessarily narrow. The ECJ describes the suspension of the *acquis communautaire* as a transitional derogation based on the “exceptional situation” prevailing in Cyprus.⁸¹ This description places the suspension *in pari materia* with other derogations in effect

⁷⁸ Act of Accession

⁷⁹ *Apostolides v. Orams et al.*, *supra*. n.78, para. 32,35

⁸⁰ *Ibid.*, para. 39

⁸¹ *Ibid.*, para.34

for other Member States.⁸² Derogation means that a particular EU law or regulation of the *acquis communautaire* is not enforced against or by an EU Member State by voluntary agreement between the Member State and the EU.⁸³ A derogation can apply within the territory of the EU Member State or a part of the territory of an EU Member State.

The suspension of the *acquis communautaire* in Cyprus is unlike any other EU derogation because the suspension is not the result of negotiated and voluntary agreement between Cyprus and the EU. Rather the suspension is required solely because a portion of Cyprus is outside the effective control of the Government of Cyprus as the direct result of the Turkish invasion and the continuing illegal occupation of that portion of Cyprus. The significant legal fact is not the physical location of the court which issued the judgment but the fact that the judgment was issued by the court of an EU Member State. The rationale of the ECJ should have been that solely because the judgment was issued by the court of an EU Member State, Council Regulation No. 44/2001 applies.

B. Under Council Regulation No. 44/2001, the UK courts must recognize and enforce the judgment of the Cyprus court.

The Council Regulation No. 44/2001 is part of the *acquis communautaire*. Once the ECJ determined that Cyprus judgment was subject to the *acquis communautaire*, then the ECJ had to determine whether the Cyprus judgment satisfied the statutory requirements of Council Regulation

⁸² There are territories which are constitutionally linked to an EU Member State but are subject to certain specific negotiated derogations from the *acquis communautaire*. These territories include the Åland Islands, the Faroe Islands, the Channel Islands, the Isle of Man, Gibraltar, Ceuta and Melilla.

⁸³ Raworth, Philip. Introduction to the Legal System of the European Union (Oceana, 2001) p. 190

No. 44/2001. The Council Regulation No. 44/2001 is another step toward unifying the internal market of the EU. Because business and commercial activity which crosses the borders of EU Member States has increased exponentially, it is common for a party to be sued in one Member State in which it has no assets to satisfy a judgment rendered by the courts of that Member State but that party has assets in another EU Member State, the courts of which have not rendered a judgment.

Without a reciprocal regime for the recognition and enforcement of judgments, the party holding the judgment would, as a practical matter, be unable to satisfy its judgment. The purpose of Council Regulation No. 44/2001 is to set forth principles and a procedure by which a judgment rendered by the courts of one EU Member State is recognized by the courts of another EU Member State as if the rendered judgment had been rendered by the courts of the recognizing Member State and enforced by the courts of the enforcing EU Member State as if the rendered judgment was a judgment of the courts of the enforcing EU Member State.⁸⁴ As long as the judgment of the rendering court satisfies the requirements of Council Regulation No. 44/2001, that judgment must be recognized and enforced by the courts of each other EU Member State except for Denmark.⁸⁵

The Council Regulation No. 44/2001 is a comprehensive statute. It has a Preamble which consists of 29 paragraphs, 75 articles and 5 annexes. It covers jurisdiction issues, conflicts of laws, procedure as well as the conditions for the recognition and enforcement of judgments. The only provisions that are implicated are whether the case involves either a civil or commercial matter,

⁸⁴ Preamble to Council Regulation No. 44/2001

⁸⁵ Preamble to Council Regulation No. 44/2001, para. 21 and 22.

whether Cyprus judgment is a judgment which is excluded from Council Regulation No. 44/2001, whether the Cyprus court had jurisdiction to render the judgment, and whether the fact that the judgment cannot be executed in Cyprus excludes the case from Council Regulation No. 44/2001.

The Full Faith and Credit clause of the U.S. Constitution is the functional equivalent in U.S. law of the Council Regulation No. 44/2001.⁸⁶ Under this clause the courts of each state of the United States must recognize a judgment rendered by the courts of another state and enforce that judgment.⁸⁷ Generally, the enforcing court cannot refuse to recognize and enforce the judgment because the enforcing court determines that the judgment violates the public policy of the state of the enforcing court.⁸⁸

1. The case is a civil or commercial matter (Art.1)

As a threshold matter, the case must be a civil or commercial matter. This issue is not determined merely by reference to the national law of the recognizing EU Member State but rather by reference to general principles of law which are common to all EU national legal systems. The issue is determined by the nature of the parties, the nature of the legal relationship between the parties and the subject in controversy between the parties. The ECJ found that the parties are private individual and no party is a public authority, the legal relationship between the parties is that of tortfeasor and victim and the subject in controversy is possession of land. No public powers are implicated in the case. Consequently, the case is clearly a civil matter.⁸⁹

⁸⁶ U.S. Const. Art. IV, § 1; 28 U.S.C. § 1738

⁸⁷ *Fauntleroy v. Lum*, 210 U.S. 230 (1908)

⁸⁸ *Baker v. Forum General Motors*, 522 U.S. 222 (1998)

⁸⁹ *Apostolides v. Orams et al.*, *supra*. n.78, para. 40-46

2. The Cyprus judgment is not an excluded judgment. (Art.34)

Of the four types of judgments which are excluded only two are relevant to the Cyprus judgment, whether the judgment is manifestly contrary to the public policy of the UK and whether, because the judgment was obtained by default, the Orams were able to challenge the default judgment.

- a. The issue for the ECJ is not whether the judgment was manifestly contrary to the public policy of the UK but rather to set the framework within which the UK courts must decide the issue, Art. 34(1)

Each EU Member State must decide on the substance of public policy.⁹⁰ However, whether an EU Member State may assert the public policy of the Member State as a basis for refusing to recognize and enforce the judgment of another EU Member State is strictly limited.⁹¹ The UK courts can assert the public policy exclusion only if recognizing and enforcing the Cyprus judgment would so vary from the legal order of the UK that a fundamental principle of the UK legal order is infringed. The infringement would have to be a manifest breach of a rule of law which is fundamental to the legal order of the UK. The ECJ found that the UK Court of Appeal had not identified any fundamental rule of law in the UK legal order which would be infringed by recognizing and enforcing the Cyprus judgment.⁹²

The ECJ implies that the court that makes a referral under the preliminary ruling procedure on the public policy exclusion must specify the rule of law that would be breached if the Cyprus

⁹⁰ Ibid. para. 56

⁹¹ Ibid. para. 57

⁹² Ibid. para. 61

judgment is recognized and enforced. No such requirement is discernable from the rules of procedure of the ECJ or the case law of the ECJ. Most likely, this is because it is not the function of a referring court to be an advocate in the preliminary ruling procedure. If the public policy of the UK is at issue the proper party to assert that issue is the UK as an EU Member State.

The UK did not join in the case although it was entitled to do so under the Statute of the ECJ. Even if the UK had joined the case on this issue, its arguments would likely have been without merit. The legal order of the UK would be fundamentally infringed if the UK courts do *not* recognize and enforce the Cyprus judgment. The Cyprus judgment is based on the simple but fundamental principle that any person who holds title to property under law is entitled to the use and quiet enjoyment of that property without unlawful interference.⁹³ If that person is denied the use and quiet enjoyment of the property, that person is entitled to legal redress and remedies. This principle is as fundamental to the legal order of the UK as it is to the legal order of Cyprus. The European Commission argued that while recognizing and enforcing the Cyprus judgment may not infringe UK public policy, it would infringe international public policy by “undermining the efforts of the international community to find a solution to the Cyprus problem”.⁹⁴ The Advocate General rejected this argument.⁹⁵ The ECJ did not even consider this argument.

- b. Where the judgment is obtained by default of appearance but the defendant had an opportunity to challenge the default judgment, the default judgment is not excluded.(Art.34(2))

⁹³ Stoebeck, William and Whitman, Dale. The Law of Property, (West , 3rd Ed 2000), Sec. 1.1

⁹⁴ *Apostolides v. Orams et al.*, *supra*. n.78, Opinion of Advocate General Kokott para. 101 (December 18, 2008).

⁹⁵ *Ibid.* para. 109-111.

The Cyprus judgment was a default judgment. A default judgment is granted to the plaintiff in a lawsuit when the defendant does not answer the complaint or otherwise appear before the court within the period of time set by law. There is no trial on the merits of the case and the only issue before the court is which remedy is appropriate. As a condition to obtaining a default judgment, the plaintiff must present evidence satisfactory to the court that the defendant was served with a document that commenced the legal proceedings in such a manner and in sufficient time to enable the defendant to present a defense. However, a default judgment is not excluded under Council Regulation No. 44/2001 as long as the defendant had an opportunity to challenge the granting of the default judgment.

There was no question that the Orams were properly served with the proper documents as required under Cyprus law.⁹⁶ For reasons that are unclear from the record, an attorney for the Orams entered an appearance in the Cyprus one day after the date on which the time to answer the complaint expired. The Cyprus court granted a default judgment to Mr. Apostolides. The Orams challenged the grant of the default judgment in a proceeding which, under U.S. law, is referred to as a motion to vacate the default judgment. The Cyprus court denied the challenge by the Orams. The Orams appealed to the Supreme Court of Cyprus which denied the appeal. Consequently, even though the judgment was a default judgment, it was not an excluded judgment because the Orams had a full and fair opportunity to challenge the grant of the default judgment.⁹⁷

An equally significant issue, which neither the ECJ nor the Advocate General addressed, is that in challenging the default judgment the Orams were required to demonstrate that they had a

⁹⁶ See n.67, *supra*.

⁹⁷ *Apostolides v. Orams et al.*, *supra*. n.78, para. 80

meritorious defense. The Cyprus court found that the Orams did not have a meritorious defense.⁹⁸ In effect, the Cyprus court treated the pleadings that had been filed by the parties as a motion for summary judgment. In a motion for summary judgment, a court must determine that there is no genuine issue of material fact in dispute and that the case can be resolved solely by applying the relevant law.⁹⁹ In order to deny the Orams challenge, the Cyprus court had to first consider each arguable legal or equitable defense that the Orams could raise. Since there was no dispute as to the facts underlying the complaint, the Cyprus court made the same legal determinations with respect to the defenses that it would have made if there had been a trial. The ECJ should have ruled that not only did the Orams have the opportunity to challenge the default judgment, but as a practical matter they also effectively received the same consideration of the legal merits of their case that they would have received in a trial.

3. The Cyprus court had jurisdiction to render the judgment even though the Government of Cyprus did not exercise effective control over the area in which the subject property is located (Art. 22 (1), 35(1)).

In cases in which real property is at issue, any judgment sought to be enforced must be rendered by the courts of the EU Member State in which the real property is located.¹⁰⁰ To render such a judgment the courts of Cyprus must have jurisdiction under the law of the EU to render the judgment. The courts of Cyprus have jurisdiction under EU law simply because Cyprus is an EU Member State. The mere fact that the real property is located in the territory of Cyprus is

⁹⁸ See n. 69, *supra*.

⁹⁹ Fed R Civ Pro Rule 55

¹⁰⁰ *Apostolides v. Orams et al.*, *supra*. n.78, para. 49, 51-52

sufficient for the purposes of jurisdiction under Council Regulation No. 44/2001.. The Cyprus judgment must be recognized and enforced by the UK court. Whether the Cyprus court has jurisdiction according to the domestic law of Cyprus or whether the Government of Cyprus exercises effective control over the area within its territory where the real property is located is irrelevant to the jurisdictional requirement under Council Regulation No. 44/2001.¹⁰¹

4. The UK courts cannot refuse to recognize and enforce the Cyprus judgment on the grounds that the judgment is not executable in Cyprus (Art. 38(1)).

In order for the Cyprus judgment to be recognized and enforced by the UK courts, the Cyprus judgment must be enforceable in Cyprus. The ECJ concluded that the Cyprus judgment is enforceable in Cyprus despite the fact that the Government does not exercise effective control over the area where the real property is located.¹⁰² The ECJ does not provide a clear basis for this conclusion. The only basis that the ECJ could have provided for the conclusion is simply that the judgment is rendered by a validly constituted court of an EU Member State and therefore it is *per se* enforceable. The ECJ should have set forth this basis for its conclusion.

The actual question on this issue is the distinction between enforcement of a judgment and execution or levy on a judgment. The ECJ refers to this distinction but does not analyze the legal effect of the distinction.¹⁰³ A judgment is enforceable because it has been rendered by a duly constituted court. Executing on a judgment is the process by which the assets of the defendant are acquired by the plaintiff to satisfy the judgment. A judgment that is enforceable may not be

¹⁰¹ *Apostolides v. Orams et al., supra.* n.78, para.47-52

¹⁰² *Apostolides v. Orams et al., supra.* n.78, para.67

¹⁰³ *Apostolides v. Orams et al., supra.* n.78, para.69

executable for many reasons, *e.g.* the assets of the defendant are exempt from execution by law or the assets are encumbered. However, whether a judgment is executable is irrelevant to whether a judgment is enforceable. A judgment is enforceable as long as the judgment is rendered by the court of an EU Member State.

PART FOUR: THE SIGNIFICANCE OF APOSTOLIDES v. ORAMS

The ECJ judgment is a judgment of EU law and not UK law or Cypriot law. The most prominent beneficiary of the ECJ judgment is the EU. The recognition and enforcement of the judgments of coordinate jurisdictions within a federal system are essential to the functioning of that federal system. This concept has been fundamental to U.S. law for more than two centuries. However, the concept is very recent in EU law and, in a sense, is still a developing concept. For the EU, the ECJ judgment is significant because it affirms the single internal market which has been an ultimate objective of the EU since it was founded.

Because the ECJ judgment involves the judgment of a Cyprus court, it necessarily involves legal matters at issue within that which the Advocate General refers to as the “Cyprus conflict”.¹⁰⁴ The most fundamental of these legal matters is the right to property which has been taken and illegally occupied as the result of an invasion by foreign military forces. In this connection, it is the judgment of the High Court which is significant and not the ECJ judgment. Ultimately and most significantly, the case of *Apostolides v. Orams* is about a simple trespass to real property and the legal remedies to which the aggrieved property owner is entitled.

¹⁰⁴ *Apostolides v. Orams et al.*, *supra*. n.78, Opinion of Advocate General Kokott para. 110.

A. Affirmation of ECHR judgments by the High Court.

The only issues considered by the ECJ were the questions referred to it by the Court of Appeal in the preliminary ruling procedure. The only questions were the applicability of the *acquis communautaire* in occupied Cyprus and whether the Cyprus judgment must be recognized and enforced under the provisions of Council Regulation No. 44/2001. The Court of Appeal did not refer to the ECJ any issue in connection with the substantive property rights of Mr. Apostolides. Consequently, the ECJ did not consider or rule on the property rights issue.

It was the High Court that ruled on the substantive property rights of Mr. Apostolides. The High Court reached the wrong conclusion on both the applicability of the *acquis communautaire* and whether the Cyprus judgment must be recognized and enforced by the UK courts. However, the High Court did correctly analyze and rule on the substantive property rights of Mr. Apostolides. The High Court analyzed and determined it was bound by the three primary judgments of the ECHR on the substantive property rights of persons who hold title under the laws of Cyprus to property located in occupied Cyprus.¹⁰⁵ The Orams asserted that the Cyprus judgment should not be recognized and enforced because then the property “is being expropriated contrary to Art 1 Protocol 1 to the [European Convention on Human Rights].”¹⁰⁶ The High Court considered this issue to have been resolved by the Cyprus court. The High Court found that Art 1 Protocol 1 was not implicated because title was held by Mr. Apostolides and not by the Orams.

¹⁰⁵ *Orams et al. v. Apostolides*, *supra*. n.72, para. 16-22; *Loizidou v. Turkey*, [1997] 23 EHRR 513, *Cyprus v. Turkey*, [2002] 35 EHRR 30, *Xenides-Arestis v. Turkey*, App. No. 46347/99 (2005).

¹⁰⁶ *Orams et al. v. Apostolides*, *supra*. n.72, para.35-36

The Orams were trespassers.¹⁰⁷

B. The significance of the ECJ judgment to persons who hold title to property in occupied Cyprus under the laws of Cyprus.

The ECJ ruling is significant because it enables lawful owners of property located in occupied Cyprus to obtain damages from a person who possesses their property if that person has any type of property located in any of 26 of the 27 Member States of the EU.¹⁰⁸ However, the lawful owner must complete the following procedure:

1. File a complaint in the appropriate court of the Republic of Cyprus,
2. Serve a summons/complaint on the person who possesses the property (referred to as the defendant) in a manner required under the laws of Cyprus,
3. Litigate the case through the court to judgment,
 - a. If the defendant answers the summons/complaint and appears in court the parties must litigate the case, or
 - b. If the defendant does not answer or appear in court, ask the court to grant a judgment by default.
4. Determine in which of the 26 EU Member States (not including Denmark) the defendant has property, identify the property and assert a cause of action in the courts of that Member State to recognize and enforce the judgment.
5. If the court of a Member State has jurisdiction over the defendant and the defendant has property in a country which is not an EU Member State and the Member State has a treaty under which judgments in the Member State are recognized and enforced in the courts of the non Member State, then the lawful owner may also enforce the Cyprus judgment in the non Member State.
6. Note that the crucial fact is not the citizenship of the defendant but whether the defendant has property located in an EU Member State which is available under the laws of that Member State to satisfy a judgment. Consequently, the property of Turkish Cypriots or Turkish

¹⁰⁷ *Orams et al. v. Apostolides, supra.* n.72, para.36

¹⁰⁸ Denmark has not adopted Council Regulation No. 44/2001

citizens located in another EU Member State may be available to satisfy a judgment if 1 through 4 are accomplished.

PART FIVE: CONCLUSION

Since the fall of 2007, President Christofias of Cyprus and Mehmet Talat, leader of the Turkish Cypriot community have negotiated for a comprehensive settlement that would re-unify Cyprus. While there are substantial governance and economic issues, the property issue is probably the most intractable issue. The reason it is intractable is not because the legal principles underlying the property issue are complicated, in fact, they are quite simple. The property issue is intractable because Turkey and the Turkish Cypriots insist that the property issue can only be resolved within the context of comprehensive negotiations. Even the High Court accepted this position in its judgment.¹⁰⁹

The predicate for this position is that the Government of Cyprus has the legal authority to negotiate away the property rights of persons who hold title to property under the laws of Cyprus. However, by their nature, property rights are rights which are vested in persons not nation states.¹¹⁰ Property rights cannot be aggregated and disposed by the government of a nation. Property rights are not the collective rights of the people of a nation. The legal conundrum raised by the position of Turkey and the Turkish Cypriots is that Cyprus inherently lacks the power or authority to negotiate away the property rights of persons who hold title under the laws of Cyprus. The Annan Plan was based on a misunderstanding of this legal reality. Hopefully, no future plan will be similarly misconceived.

¹⁰⁹ *Orams et al. v. Apostolides*, n.78, para. 30

¹¹⁰ See generally Stoebuck, William and Whitman, Dale. The Law of Property, *supra*. n.95

