ECtHR, Avotins v. Latvia, judgment of 23 May 2016

Deciding bodies and decisions

ECtHR (Grand Chamber), judgment of 23 May 2016, *Avoti?š v, Latvia,* app. n. 17502/07

Area of law

Effective judicial protection -Civil Law - Mutual recognition

Subject matter

EC Regulation No. 44/2001 on the recognition and enforcement of judgments in civil and commercial matters (Bruxelles I Regulation), now replaced by EU Regulation No. 1215/2012 (Bruxelles I bis), in force since 10 January 2015.

When a national court that is requested to execute a judgment issued in default of appearance by another Member State and falling within the scope of EU Regulation on the recognition and enforcement of judgments in civil and commercial matters must verify whether Article 6(1) ECHR was respected in the Member State of origin.

When the protection afforded to fair trial rights by the Member State of origin is manifestly deficient, so that the presumption of equivalent protection (so called Bosphorus presumption) is not applicable and the Member State conduct must be subject to full review of compatibility with the ECHR, despite the fact that it constituted implementation of an EU law obligation.

How the mechanisms of mutual recognition and the principle of mutual trust interact with the Bosphorus Presumption.

Summary Facts Of The Case

In 1999, Mr Avoti?š, a Latvian national working as an investment consultant, and a commercial company incorporated under Cypriot law signed before a notary an acknowledgment of debt deed, whereby the former undertook to repay a sum that had borrowed from the latter. By express provision, the deed was governed by Cypriot law and Cypriot courts had non-exclusive jurisdiction to hear any disputes arising out of it. In 2003, the company brought proceedings against Mr Avoti?š in the Limassol District Court in Cyprus, in order to obtain the payment of the debt with interests. The notice of the proceedings was served on Mr Avoti?š at the address that was on the

deed. Yet, the man did not appear and, on 24 May 2004, the Limassol District Court ruled in his absence, ordering the repayment of the debt with interests.

On 22 February 2005, the company sought the recognition and enforcement of the judgment before the Riga District Court, indicating as Mr Avoti?š's place of residence an address that differed from the one previously notified. The company's request was granted by order of 27 February 2006. Later on that year, Mr Avoti?š appealed the order before the Riga Regional Court, arguing that he had learned of the existence of the Cypriot judgment and of the order for its enforcement of the Riga District Court only in June 2006, from the bailiff responsible for the enforcement. In his appeal, Mr Avoti?š contended that the recognition and enforcement of the Cypriot judgment in Latvia breached the Brussels I Regulation, because he had never received notice of the proceedings.

On 2 October 2006, the Riga Regional Court quashed the impugned order and rejected the request for recognition and enforcement of the Cypriot judgment. Yet, the company lodged an appeal with the Senate of the Supreme Court, which on 31 January 2007 quashed and annulled the judgment of the Riga Regional Court, ordering the recognition and enforcement of the Cypriot judgment. In particular, the Supreme Court dismissed Mr Avoti?š's argument that he had not duly received notice of the proceedings before the Limassol District Court, on the grounds that he had not appealed against the judgment in Cyprus.

Judgment of the Chamber

On 20 February 2007, Mr Avoti?š lodged an application with the ECtHR, against both Cyprus and Latvia, alleging the violation of Article 6(1) ECHR. The case was assigned to a Chamber of the Fourth Section, which declared inadmissible, being out of time, the complaint against (concerning whether the Limassol District Court had complied with Article 6(1) ECHR). Thus, the Chamber focussed on whether, in ordering the enforcement of the Cypriot judgment in Latvia, the Latvian courts had observed the fundamental principles of a fair hearing under that same ECHR provision.

The Chamber found that the case fell within the scope of the Bosphorus presumption, which, in its view, could not be rebutted: in light of the circumstances of the case, Mr Avoti?š could be expected to familiarise himself with the legal consequences of any failure on his part to repay the debt and with the manner in which any proceedings would be conducted in Cyprus. Thus, according to the Chamber, it was on the applicant the onus to demonstrate the lack of any effective remedy before the Cypriot courts. For these reasons, the Chamber concluded that, in dismissing the applicant's arguments simply on the grounds that he had not appealed against the Cypriot judgment, the Supreme Court had taken sufficient account of the rights protected by Article 6§1 of the Convention.

Judgment of the Grand Chamber

On 23 May 2014, Mr Avoti?š filed a request that the case was referred to the Grand Chamber, under Article 43 ECHR, which was granted on 8 September 2014. On 23 May 2016, the Grand Chamber held by sixteen votes to one that there had been no violation of Article 6(1) ECHR.

As preliminary considerations (paras. 96?100), the Court stressed that it was the first time where it had been called to examine observance of the guarantees of a fair hearing in the context of mutual recognition based on European Union law. However, it confirmed the applicability of its general approach, whereby a court examining a request for recognition and enforcement of a foreign judgment cannot grant the request without first conducting some review in the light of the guarantees of a fair hearing, although the intensity of that review may vary depending on the nature of the case. Accordingly, the Court's task was to ascertain whether the review conducted by the Senate of the Latvian Supreme Court was sufficient for the purposes of Article 6(1) ECHR, taking into account all relevant circumstances of the case. By contrast, unless there was an issue of arbitrariness, which could itself amounts to a breach of Article 6(1) ECHR, the Court had not to give a judgment as to whether the Senate of the Latvian Supreme Court correctly applied Article 34(2) of the Brussels I Regulation or any other provision of European Union law; this is indeed the CJEU's task.

The Court then summarised its case law on the Bosphorus presumption (paras. 101?104). Interestingly, relied on Article 52(3) CFR and stressed "the importance of compliance with the rule laid down [by this provision]" (para. 103).

As a next step, the Court focussed on whether that presumption was applicable to the case at issue. It answered in the affirmative, holding that both conditions to which the application of the Bosphorus approach is conditioned were satisfied (paras. 105?112). Concerning the first condition (the absence of any discretion on the part of the domestic authorities), the Court stressed two elements: the fact that EU law obligation at issue found its source in an EU Regulation, which is, as such, directly applicable in the Member State's legal order, and the circumstance that, in several cases, the CJEU had interpreted Article 34(2) of the Brussel I Regulation in a way such as that the Senate of the Latvian Supreme Court did not enjoy any margin of manoeuvre. Thus, it distinguished the case from that of *M.S.S*.

As regards the second condition (the deployment of the full potential of the supervisory mechanism provided by EU law), it observed that the Senate of the Latvian Supreme Court had not raised a reference for preliminary ruling to the CJEU. However, it argued that this condition should be applied without excessive formalism, notably in the sense that the application of the Bosphorus presumption cannot depend on the condition that the domestic court referred to the

CJEU when there are no serious interpretative issues, or when that Court already addressed them. It also distinguished the case from that of Michaud, because, unlike in this latter, Mr Avoti?š had not advanced arguments concerning the interpretation of Article 34(2) of the Brussel I Regulation or made a request for a preliminary reference being referred to the CJEU that the Latvian Supreme Court ignored.

The Court therefore had to consider whether the protection of fair trial rights had been manifestly deficient in the case, so that it should have rejected the Bosphorus presumption. However, before dealing with the specific circumstances of the case, the Court made some general remarks on how the Bosphorus approach interacts with the principles of mutual recognition and mutual trust (paras. 113?116). After acknowledging the importance of mutual recognition mechanisms under EU law, it stressed that – despite the express reference, in Article 67(1) TFEU, to the fact that these mechanisms shall not infringe fundamental rights ?, in practice, "*the review of the observance of fundamental rights [is] tightly regulated or even limited*" by some of the mutual recognition mechanisms.

The Court then observed that "[l]*imiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment*, [as the CJEU held in *N.S*. and Opinion 2/13], *could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient*" (para. 114).

This *obiter dictum* is of particular importance to our purposes, as it suggests that, in mutual recognition cases, national courts may be confronted with conflicting obligations under EU law (which does not allow to review another Member State's judgment) and under the ECHR (which, by contrast, does require some measure of review of that judgment).

Moving on to consider the specific circumstances of the case (paras. 117 127), the Court observed that the requirement that the ground of non-execution of Article 34(2) of the Brussels I Regulation is subject to the condition that the defendant exhausted the remedies in the State of origin of the judgment is not problematic in light of Article 6 ECHR. However, the right to a fair hearing requires that "*each party* [is] *afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage visàvis the opponent or opponents*", though Article 6(1) ECHR does not prescribe a specific form of service of documents.

The Court observed that it was crucial to establish whether, under Cypriot law, there were legal remedies available to Mr Avoti?š to challenge the judgment of the Limassol District Court. Relying on the information provided by the Cyprus Government, the Court observed that Cypriot law " *afforded the applicant, after he had learned of the existence of the judgment, a perfectly realistic opportunity of appealing despite the length of time that had elapsed since the judgment had been*

given". Indeed, a Cypriot court presented with an appeal against a judgment in default, in a case such as that at issue, has the duty to set it aside. In the Court's view, the applicant had sufficient time to pursue that remedy, but for reasons known only to himself, he did not.

Accordingly, the Court concluded that, since the protection of Convention rights was not manifestly deficient, the presumption of equivalent protection could not be rebutted. It therefore held that there had been no violation of Article 6(1)ECHR.

Relation to the scope of the Charter

Article 47 EU Charter - Right to an effective remedy and to a fair trial

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Relation between the Charter and EHCR

According to its official explanation, the first paragraph of Article 47 of the EU Charter corresponds to Article 13 of the ECHR, while the second paragraph corresponds to Article 6 (1) of the ECHR. With regard to the third paragraph, the explanation of Article 52(3) points out that "Article 47(3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation". Thus, the scope of legal aid under the Charter is broader than under the ECHR. It follows from Article 52(3) of the EU Charter and the related official explanation that Charter provisions that correspond to fundamental rights already granted by the ECHR shall be interpreted as having the same scope and meaning afforded by the ECHR to their correspondents, taking into account also the case law of the European Court of Human Rights. However, a higher level of protection can be granted under EU law (meaning that the ECHR only sets a minimum standard of protection – non-derogable *in peius* – for corresponding Charter provisions).

Impact on Legislation / Policy

Impact at EU level

The CJEU interpreted the Brussel I Regulation in several judgments (see Section "EU law sources and CJEU jurisprudence"):

Judgment of 14 December 2006, Case C-283/05*, ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)*

par. 49:“Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that it is ‘possible’ for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given”.

Judgment of 28 April 2009, Case C-420/07, *Apostolides v Orams*:

“The recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.

Judgment of 6 September 2012, Case C-619/10, Trade Agency Ltd v Seramico Investments Ltd:

“Article 34(2) of Regulation No 44/2001, to which Article 45(1) thereof refers, read in conjunction with recitals 16 and 17 in the preamble, must be interpreted as meaning that, where the defendant brings an action against the declaration of enforceability of a judgment given in default of appearance in the Member State of origin which is accompanied by the certificate, claiming that he has not been served with the document instituting the proceedings, the court of the Member State in which enforcement is sought hearing the action has jurisdiction to verify that the information in that certificate is consistent with the evidence”.

Sources - EU and national law

The National Law provisions in question are:

Latvian Law:

- Sections 8, 9, 230, 637 and 644 Latvian Civil Procedure Law (*Civilprocesa likums*);

Cypriot Law:

- Civil Procedure Rules

EU Law

- The case fell under EC Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation – Articles 33 and 34). Since 10 January 2015, Regulation Brussels I has been replaced by EU Regulation No. 1215/2015 (Brussels I *bis*), whose Article 45(1), however, reiterates the terms of Article 34 of the Brussels I Regulation

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Sources - ECHR

- Right to a fair trial (Article 6 ECHR)

Sources - CJEU Case Law

On the interpretation of Article 34 of the Brussels I Regulation

- C283/05, *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS),* EU:C:2006:787
- C-420/07, *Apostolides v Orams*, EU:C:2009:271
- C-619/10, *Trade Agency Ltd v Seramico Investments Ltd*, EU:C:2017:531
