The Impact of Recent Judgments of the European Court on English Procedural Law and Practice

The Impact of Recent Judgments of the European Court on English Procedural Law and Practice

Adrian Briggs*

Writing in 1991[1] in the *Revue critique de droit internationale privé*, and analysing three decisions of the English courts on the relationship between jurisdiction under the Brussels Convention and the common law doctrine of forum non conveniens, Professor Gaudemet-Tallon entitled her paper «*Forum non conveniens*: une menace pour la convention de Bruxelles (a propos de trois arrêts anglais recents)». Such a title left the reader in little doubt of the gist of the views which were to follow. But it marked the beginning of a period of intellectual debate, which required English lawyers to consider the extent to which the rules of the common law on the jurisdiction of courts would relate to the new arrangements contained in the rules of the Brussels and Lugano Conventions. By and large it is fair to say that the views of English lawyers were not uniform though, as is the way in England, the most influential view tends to be that of the Civil Division of the Court of Appeal; and it generally adhered to the view that a court could still find that the forum conveniens was in a non-Contracting State[2] and so stay the proceedings, which had caused Professor Gaudemet-Tallon such alarm.

In preparing this paper for the seminar, I had seriously considered giving it the sub-title «La Cour de Justice: une menace pour la moralité du litige commercial (a propos de trois arrêts européens recents)». But it seemed to me

---

* Professor of Private International Law, Oxford University; Fellow & Tutor in Law, St Edmund Hall, Oxford; Barrister (England and Wales). – I acknowledge with pleasure the kind invitation of the Swiss Jurists Association, and of my colleague Professor Berti in particular, to deliver this common law perspective on European Civil Procedure at the meeting in Geneva. It is no less a pleasure to thank Professor Pierre Lalive for his kind words after the oral presentation of this paper, and especially for his insight that the common law prespective on the enforcement of agreements on jurisdiction is not at alien to the pragmatic tendency within Swiss law.

1 Revue critique de droit international privé, 1991, p. 491.

2 I shall use the terminology of Contracting State (signifying the states party to the Conventions), rather than Member State (signifying those bound by Council Regulation (EC) 44/2001), for convenience only. For the purposes of this paper there is no intention to draw distinctions between them.

that it was a strategic mistake to tell people what they were going to hear for fear that they would stop listening. So let me introduce this paper by observing that, when seen from London, the European Court has just completed fifteen months of infamy. Or, to put it another way, its three recent judgments on matters of acute relevance to commercial litigation in London have left a sense of real disappointment, and more than a little indignation. In part this is attributable to the lamentable quality of the reasoning displayed on the face of the judgments. But in further part, as it seems to me, it proceeds from a realisation that the European Court brings a public lawyers' approach to an issue which ought to be seen as being one of intensely private law, and appears to be unaware or unconcerned that this is itself an issue which is controversial.

The structure of this paper is therefore as follows:

I. The fundamental nature of English law on the jurisdiction of courts
   1. Rules of Jurisdiction
   2. Control of forum shopping
   3. The role of consent
II. The material judgments of the Court of Justice
   1. Failure to enforce jurisdiction agreements: *Erich Gasser GmbH v MISAT srl*
   2. Failure to prevent wrongdoing in the assertion of jurisdiction: *Turner v Grovit*
   3. Rejection of the right to apply forum non conveniens: *Owusu v Jackson*
   4. Summary view
III. An explanation for differences in approach of English courts and the European Court
IV. The limits of the decisions: how far do they go?
   1. Jurisdiction under Article 2
   2. Jurisdiction under Article 4
   3. Proceedings between parties who have agreed to arbitrate
   4. Enforcement of jurisdiction agreements by other means
   5. Future legislation on choice of law
V. Conclusions.

I. The fundamental nature of English law on the jurisdiction of courts

1. Rules of jurisdiction

English law has traditionally taken a relaxed approach to civil jurisdiction: if the defendant was present within the territorial jurisdiction of the court, he

could be served with a writ of summons and was, when served, subject to the jurisdiction of the court. The rule for individual defendants was applied by analogy, and confirmed by statute, for other kinds of defendant, so a company may be served at a place of business within the jurisdiction,[3] and proceedings against those interested in a sea-going ship may be served on the ship within the territorial waters of the court.[4] Proceedings against those not physically present within the jurisdiction cannot be commenced in the same way, for it was seen as inconsistent with the respect which sovereign nations owe to each other for a royal summons to an English court to be served within the territorial jurisdiction of another sovereign. So the practice developed of allowing a plaintiff to apply to the English court for permission to serve process on a defendant out of the jurisdiction, and this was gradually reduced into a quasi-statutory form of procedure.[5] Indeed, so seriously did the English courts take the point about trespassing on foreign sovereignty that until 1979 it was not possible to serve the writ itself, the law instead requiring that the defendant be served with notice of the writ. It was therefore largely accurate, if not particularly helpful, to say that English civil jurisdiction was defined by rules about the service of process, which were themselves predicated on the view that any person who chose to be present within the territory was liable to be summoned to the courts, and any person was entitled to cause the summons to be issued. Considerations of nationality, residence, domicile, and so on, were wholly irrelevant, but so (admiralty jurisdiction aside) was any question of whether the defendant had property within the jurisdiction.

2. *The issue of forum shopping*

It came to be realised that the English approach to civil jurisdiction, though entirely rational, was not based on the only rationality which it was possible to imagine. Accordingly, the judges drew on a rather unnoticed doctrine, which held that English proceedings could be stayed if it was wrongful («vexatious or oppressive») for the plaintiff to have commenced them, even though there was no formal or other objection to them.[6] It broadened the concepts of vexation and oppression to find it that it was present, in essence, if proceedings were being in England when three things were true: (i) the courts of a

3 Principally Companies Act 1985 ss 691–695, though Civil Procedure Rules («CPR») Part 6 is also applicable to service on companies, including oversea and unregistered companies.

4 The grounds on which a sea-going ship may be arrested to secure a claim, and may be arrested to found jurisdiction, overlap but are not identical.

5 Now to be found in CPR Part 6 rr 19–22.

6 St Pierre *v* South American Stores (Gath & Chaves) Ltd [1936] 1 KB 382.

foreign country were clearly more appropriate for the trial of the dispute, and (ii) the defendant wished the English proceedings to be stayed in favour of that court, and (iii) no injustice would be done to the plaintiff by staying[7] the English proceedings and leaving him to go to that court. Unless all three conditions were shown to be met, a stay would not be ordered, and the proceedings would therefore proceed in England.[8] And it then applied the same principle, in converse form, to applications for permission to serve process out of the jurisdiction: (i) England was required to be shown to be the most appropriate forum, (ii) the plaintiff must wish to have the case heard in England, and (iii) no injustice is done to the defendant by requiring him to defend the claim in England. And though there were many, many judgments attending to the detail of these principles in their application to individual cases, there was remarkably little dissent from anyone in England. Indeed, the converse is true: the new doctrine struck very deep roots because it was seen to be inherently right. And, though subject to certain qualifications which we shall have to examine later on, so did the rest of the common law world.[9] Moreover, it was accepted easily into civilian jurisdictions which knew something of the common law. In fact, as far as we are concerned, the doctrine is a Scottish one, and Scotland is an arguably civilian jurisdiction. More tellingly yet, it was accepted in Québec, which is by any measure a civilian jurisdiction, and one where rules of jurisdiction are contained in its code of civil procedure.[10] The compatibility of common law concepts with civilian legal structures often appears to have been better examined and better understood in Québec than in continental Europe.

---

7 A stay is not the same as a dismissal: the proceedings remain pending but suspended *sine die*. The stay may be ordered on undertakings given by the applicant-defendant to the court, and if these are then resiled from, the stay may be lifted and the action recommenced.

8 As to the court's formal power to grant such relief, it was originally part of the court's inherent jurisdiction to control its own procedure, and then was confirmed by statute (Supreme Court Act 1981 s 37; Civil Jurisdiction and Judgments Act 1982 s 49).

9 Australia (but which is discussed further below), New Zealand, Singapore, Malaysia, Ireland. In the United States it was considered to be inherent in the constitutional guarantee of due process. And in Canada it has been used as the principal tool for staying proceedings, ordering restraint of parties to foreign proceedings, and the recognition and enforcement of foreign judgments.

10 Spar Aerospace Ltd *v* American Mobile Satellite Corp (2002) 220 DLR 4th 63. The provision in question is in: Civil Code of Québec, S. Q. 1991, c. 64, which (in translation) provides: «3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.»

3. The role of consent in the law on civil jurisdiction

It is sometimes difficult for outsiders to understand what underpins rules of common law jurisdiction. For an English lawyer looking at a civilian system, there is also a danger of not understanding what one thinks one has seen. The reason is, in part, because what appear to be the rules of jurisdiction are not the whole of the story. We know that there are jurisdictional rules set out in codes of civil procedure, but we know much less well that other rules of law modify these in their operation. Every legal system, we suppose, must have rules to prevent their law being asserted abusively, and this must surely extend to rules of civil jurisdiction. We therefore suppose that if someone invokes the jurisdiction of a French court by improper means – for example, in flagrant breach of an agreement not to institute proceedings during a period of settlement negotiations – there must be a power to deal with the wrong otherwise done. No civilised system of law can be without power to prevent abusive recourse to the courts; and no court can be without power, inherent or statutory, to deal with it.

But also, there is a tendency to see rules of civil jurisdiction as just rules, as prescriptions which produce a particular outcome, lacking any more fundamental justification. It is in this blindness that we fail to see truth. The truth, so far as English law is concerned, that a very large amount of the law on jurisdiction, but also on choice of law,[11] is dependent on the very private law notions of consent and obligation. This is a large point, with many ramifications, and we will need to return to it from time to time. It is first necessary to understand this, though, because it explains much of what is truly fundamental to the common law approach to jurisdiction.

First, if the parties to a dispute wish the English court to exercise jurisdiction, the court will do so. Submission to the court is a fundamental principle of jurisdictional competence. If P wishes to sue in England and D is prepared to defend in England, the court has no power to decline to adjudicate on the ground that another court would be far better placed to do so.[12] It is true that there are a few instances in which the agreement of the parties will not establish jurisdiction, such as the traditional principle that an English court cannot

---

11 The extent to which one may choose the law to govern the substance of claims, aside from the law of contract where it is obvious, is sometimes misunderstood. But as the rules governing proof of foreign law allow the parties to choose for themselves whether to plead and prove foreign law (and if they do not, English domestic law will be applied) gives the parties a broad choice to have their dispute governed by English law.

12 One of the truly shocking aspects of the decision of the European Court in Case C-281/02 Owusu *v* Jackson [2005] ECR I-1383, [2005] QB 801, is that this point is simply and comprehensively misunderstood: see paragraph [42] of the judgment.

be called on to adjudicate on title to foreign immovable property,[13] but by and large this is the rule. Consent founds jurisdiction, for *volenti non fit injuria*.

Secondly, if the parties have agreed in advance to the exclusive jurisdiction of a foreign court, by an agreement on the jurisdiction of that court by an agreement which stands up to the scrutiny of its validity, an English court will generally stay the proceedings and give effect to the agreement on jurisdiction by specific remedy.[14] It is true that it will not do so in absolutely every case, but this is entirely explicable in terms of English contract law.[15] This may be illustrated in two respects. The doctrine of privity of contract imposes obligations on the parties to an agreement, but not on strangers. It follows that a judge, who was not party to the agreement on jurisdiction, is not himself bound to give effect to it in the exercise of his judicial function, but will regard himself as entitled to do so. So if there are strong counter-indications, such as complex litigation involving some parties who are not bound as parties to any such agreement, the court is entitled to conclude that the agreement should not be given specific force.[16] This leads to the second point: in English contract law, the awarding of specific remedies is discretionary, and is a matter for the judge in the exercise of a judicially-structured discretion. There is a right to damages for breach of contract, but there is no right to specific relief. For an English court to withhold specific relief from a complainant who demonstrates a breach of contract is not remarkable, because there is always another remedy to be claimed.[17]

Thirdly, such agreements on jurisdiction impose obligations as well as conferring rights. Accordingly, a person who had agreed to the exclusive jurisdiction of the English courts by a contractual promise which was otherwise valid and binding on him, commits a breach of contract when he sues in another court. And if the victim of the breach does not acquiesce but insists on the performance of the contract, and can bring his opponent before the Eng-

---

13 British South Africa Co *v* Companhia de Moçambique [1893] AC 602.

14 For the most authoritative statement of the principle that jurisdiction agreements will be given specific effect by staying English proceedings, or ordering restraint of those bringing foreign proceedings, see the statement of Lord Bingham in Donohue *v* Armco Inc [2002] 1 Lloyd's Rep 425.

15 We see here an explanation for the exclusion of jurisdiction and arbitration agreements from the Rome Convention on the law applicable to contractual obligations (1980), Art 1.2(d). English law would have had no difficulty with seeing these as falling within the material scope of the Convention, because they are just contractual terms. Other states presumably took a different view.

16 This was the conclusion in Donohue *v* Armco Inc, where a jurisdiction agreement for the English courts was not, therefore, enforced by anti-suit injunction.

17 The issue of damages for breach of a jurisdiction agreement is examined below.

lish court,[18] proceedings to restrain a breach of contract may be brought as a matter of course. The right of the claimant will be to a pecuniary remedy, to damages for breach of contract, but where damages will be an inefficient or ineffective remedy, the court will make a restraining order, in the form of an injunction. As it sometimes says, the only way to enforce a negative stipulation is by injunction; and a promise not to sue in a foreign court is a negative stipulation.

Fourthly, rights and wrongs do not just arise from contracts. The stipulations of the general law demand that a person not commit tortious wrongs and not behave unconscionably in the exercise of his legal rights. In England, the distinct historical jurisdictions of common law and equity meant that these two species of wrong grew up in parallel, but they are both simply wrongs. So if a person exercises a legal right, such as to invoke the jurisdiction of a court, but in a way which is unconscionable or oppressive, he commits a wrong which is functionally equivalent to a tort or a breach of contract.[19] So, as has already been said, if the institution of English proceedings is oppressive or vexatious, the person bringing them may be prevented from proceeding with his claim. As the requirements of oppression or vexation have since been re-expressed in the language of the natural forum, this more modern form of wrongdoing still attracts the same form of remedy: a stay of proceedings. Likewise, if a person sues in a foreign court for reasons and in circumstances which may also be regarded as oppressive or vexatious, he may be proceeded against for his wrongdoing, just as though he had made a clear and express contractual promise not to do what he was doing. The anti-suit injunction responds to the wrongdoer and the wrongdoing, and lifts its eye no higher than that.[20]

And that, more or less, summarises the whole of the modern law of civil and commercial jurisdiction in the English courts. It is based on rules which may be seen as rules of law, but the essence of the system is one which regards jurisdiction as being largely based on the concepts of right and obligation, of contract, tort, and unconscionable behaviour. It is entirely keeping with the laisser-faire approach of the English courts to these issues, and it may just be one of the reasons why the jurisdiction of the English commercial court is so attractive to persons who have no connection to England.

---

18 As a matter of common law, jurisdiction will exist because the existence of a jurisdiction agreement for the English courts gives the court a right to authorise service out of the jurisdiction: CPR r 6.20(5).

19 Albeit that the remedies are not identical.

20 It is true that the English courts will always say that as the indirect consequences of the injunction will affect the foreign court, it is not to be ordered without proper caution. In this the court is behaving as it does when considering whether to order any specific remedy.

II. The material judgments of the Court of Justice

It is against this background that we need to assess the judgments of the European Court with which we are concerned.

1. Case C-116/02, Erich Gasser GmbH v MISAT srl

In *Erich Gasser GmbH v MISAT srl*,[21] two commercial entities, an Austrian supplier and an Italian distributor entered into contractual relations on terms which required all disputes to be brought before an Austrian court. Fearing that the supplier was about to institute proceedings against it in accordance with the agreement, the distributor brought proceedings before the courts in Rome.[22] This manoeuvre has come to bear the singularly inappropriate label[23] of the «Italian torpedo»: inappropriate not because it will not wreck the supplier's chance to enforce the agreement for years to come, but because it will take the supplier so long to escape from the Italian courts that it is more like the forcible administration of a barbiturate than the firing of a torpedo. The supplier did not move with particular speed either, but seven-and-a-half months later brought proceedings in Austria for payment of sums due under the contract. When objection was taken by the distributor, contending that the Austrian court was second seised of a dispute which was first brought before the Italian courts, it was argued that as the Austrian courts were nominated by an agreement which was valid and binding, this justified the court in proceeding to hear the merits of the claim. It was also suggested that were the Austrian court to reach the conclusion that the tactics of the distributor had the effect of depriving the supplier of his right of access to a court for the determination of his civil rights, this may constitute a violation of Article 6 of the European Convention on Human Rights, a matter which the Austrian court had a legal duty to prevent. The view of the European Court was that both arguments were irrelevant. The rule about courts being incompetent if they were second seised yielded to no exception, no matter how flagrant the circumstances, and reference to the European Convention was *nihil ad rem*, for

---

21 [2003] ECR I-14693, [2005] QB 1. For comment, see Mance, 2004, 120 LQR, p. 357.

22 For relief predicated on the termination of the contract, or the submission that it had been terminated.

23 The terminology is, as far as one can tell, that of an Italian lawyer, Mario Franzosi, Worldwide Patent Litigation and the Italian Torpedo, 1997, 7 EIPR, p. 383, and dealing with the manner in which proceedings for patent infringement may be derailed by proceedings, brought in Italy and which, as Franzosi says «may take an outrageous length of time», so taking advantage of Article 21 of the Convention (Article 27 of the Council Regulation) to block proceedings elsewhere.

the European Convention was not referred to in the Brussels Convention, which therefore made no allowance for it.

According to a long and consistent line of reasoning in the Court of Appeal, an English court would have seen matters very differently. On its being shown that the Italian proceedings were bring brought in breach of contract, the way would have been open to the supplier for it to apply for an anti-suit injunction to restrain the breach, and it would have been also open to the Austrian supplier to take advantage of its contractual rights by bringing proceedings before the nominated court.[24] It would have rejected the application of Article 21 of the Brussels Convention on the common sense ground that *ex turpi causa non oritur exceptio*. It would have found no need to enter onto the debate about the application of Article 6 ECHR,[25] as it would have found that the common law, providing as stated, served to secure the rights of the supplier.[26] At almost every point it would have followed reasoning which would contradict that put forward by the European Court.

2. *Case C-159/02 Turner v Grovit*

In *Turner v Grovit*,[27] Paul Turner, an employee who had been hounded out of his job by the allegedly wrongful behaviour of Grovit, his employer, brought proceedings against the employer in England before the Employment Tribu-

---

24 Continental Bank NA *v* Aeakos Compania Naviera SA [1994] 1 WLR 588 represents the starting point, where the primary relief sought was an anti-suit injunction against the borrower who broke his loan agreement by suing in Greece. But the bank subsequently brought proceedings to enforce the loan agreement in the English courts. As the Court of Appeal is, in English law, bound by its own decisions, there is no need to list the cases which, as they were bound to do, followed and applied this decision. But for its application in the field of arbitration agreements, and in especially strong terms, see The Angelic Grace [1995] 1 Lloyd's Rep 87.

25 The cursory dismissal of this argument by the European Court is most troubling, and in the light of previous decisions which had appeared to derive substance from it, baffling. Maybe the view was that as the Court was interpreting a Treaty entered into between sovereign states, it was not competent to extend its wording, directly or indirectly, so as to make way for the ECHR. Maybe not. But as far as the Austrian court was concerned, it was presumably open to it to give effect to the obligations of Austria under the European Convention, and to disregard what the European Court had said on the matter. In England, a court in a similar position would have been required to make a declaration, under Human Rights Act 1998, of the incompatibility of Article 21 of the Brussels Convention with the European Convention, but would otherwise have had no power to disregard primary legislation.

26 For similar, see Lubbe *v* Cape plc [2000] 1 WLR 1545.

27 [2004] ECR I-3565, [2005] 1 AC 101. For comment, see Briggs, 2004, 120 LQR, p. 521. The judgment of the Court of Appeal is reported at [2000] QB 345, and the reference from the House of Lords at [2002] 1 WLR 107.

nal. He was well on the way to succeeding when Grovit caused proceedings to be brought against Turner in Spain. The Spanish proceedings were brought by a variety of legal entities, but all could be accurately described as creatures of Grovit. Turner was an impecunious litigant, whose very impecuniosity had been brought about by Grovit and so, unable to afford to instruct Spanish lawyers and objecting to this shameless attempt to undermine his English proceedings, he sought an injunction from the English courts, which were still seised, to restrain Grovit from continuing the proceeding in Spain. He was entitled to this relief as a matter of English law, on the basis that the requirements for this form of personal relief which are specified by English law – that Grovit was subject to the personal jurisdiction of the court, his behaviour was oppressive or vexatious, and England was the natural forum for the proceedings – were satisfied in his case. The Court of Appeal agreed and ordered an injunction, rejecting the arguments advanced on behalf of Grovit in exceptionally forthright terms.

According to the European Court, the order should not have been made, because it was inconsistent with the obligations of trust and confidence imposed on the states party to the Brussels Convention. Moreover, an English court had no right to protect the integrity of proceedings before it by injunction against a wrongdoer; and it had no right to restrain a wrongdoer from oppressing a plaintiff when the oppression was found in the bringing of proceedings before the courts of another Contracting State. It followed that someone in the position of Turner was required and expected to rely on the Spanish courts to detect and expose the wrongdoing, and to restrain it. Where he was supposed to find the money to do this was doubtless beneath the notice of the Court; at any rate, it was not mentioned in the judgment.

So determined was the Court to show its disapproval of the anti-suit injunction that it ignored a substantial element of its previous case-law. It rejected the proposition, legally unimpeachable, that the anti-suit injunction operates *in personam* and does not have as its object the jurisdiction of the foreign court. In doing this it refused to accept the doctrinal analysis of an equitable right under English law. Yet ten years earlier, in *Webb v Webb*,[28] it had accepted the English doctrine that equity operates *in personam* to explain why a plaintiff, who claimed to be entitled in equity to have the defendant trustee ordered to convey land to him, was not bringing proceedings which had as their object rights *in rem* in French land: even though he claimed as equitable owner,[29] equity operated *in personam* so that he was in fact suing to enforce a personal obligation owed to him. This is simply dispiriting, for it

28 Case C-294/92, [1994] ECR I-1717.

29 This being the consequence in English law of the fact that the defendant son held the legal title to the land on resulting trust for the claimant father.

suggests that the Court is not prepared to take its own case-law seriously, and is just making up the law as it goes along. And it also ignored[30] the fact that, a year before, the Cour de Cassation in Paris had granted relief which certainly looked to an outside observer indistinguishable from an anti-suit injunction.[31]

3. Case C-281/02 Owusu v Jackson

In *Owusu v Jackson*,[32] Andrew Owusu had been on holiday in Jamaica, staying at premises owned by Jackson but managed and supervised by five other Jamaican legal entities. He was grievously injured in a swimming accident and brought proceedings against all six defendants in England. Jackson raised a plea of *forum non conveniens*, contending that the Jamaican court was clearly more appropriate than England for the trial of the action, and that it was not unjust to Owusu for him to have to bring his claim there. The Court of Appeal declined to rule on the submission until it had ascertained whether it had power to grant such relief at all;[33] and the European Court said it had no such power, as jurisdiction under Article 2 was mandatory. And it was irrelevant that there was no question of a Contracting State other than the United Kingdom having any interest in where the litigation was to take place.

4. Summary view

To put it just a little crudely, MISAT srl broke its contract and got away with it; Grovit oppressed the claimant whose impoverishment he had brought about to begin with and got away with it; and even if it true that a foreign court is manifestly more appropriate than England for the trial of the action, and it will not be unjust to the plaintiff to expect him to sue there, a court may not stay its proceedings. The trilogy therefore contradicts the principles which, as I have sought to show, make up the most fundamental underpinnings of the system of civil jurisdiction in England. Wrongdoers break their contracts with impunity, a court has to stand aside and watch oppression take place and is powerless to prevent a party to litigation from undermining its proceedings,

---

30 Though perhaps it did not know: one never knows how well counsel or the Court have done their research.

31 The decision is referred to in more detail in the following section.

32 [2005] ECR I-1383, [2005] QB 801. See, for comment, Briggs, 2005, 121 LQR 535; Peel, 2005, LMCLQ, p. 363; Briggs, ibid., p. 378.

33 It will be submitted below that this approach was wrong in law.

and a court has to exercise jurisdiction even though the case would be much better tried in the courts of a non-Contracting State. This is not to say that there are not other ways to present the material in these three cases, but these truths do not appear to be minor ones; and they invite the question whether there is anything which English courts, or those litigating before them, can do about it. But before we embark on that issue, it is perhaps helpful to try and understand how the European Court could, as it is seen from England, have got it so wrong.

III. Explaining the differences in the approach of English courts and the European Court

Two general points need to be made at the outset, First, no-one will be surprised to discover that the way these matters may be seen from outside England is different from the way they are seen from our side of the Channel. But as one gets older, one learns how often it is true that the questions one asks in one system of law will usually receive the same answer in another. The language may be different, and the patterns of thinking and explanation may be distinctive, but on the whole legal systems in western Europe give answers which are more similar than they are dissimilar. Secondly, national legal systems are capable of learning from each other. In a domestic context, English law learned from Scots law when it adopted the principle of forum non conveniens: having spent many decades refusing to have any truck with it, it finally admitted that it was superior to the corresponding rules of English law, adopted it, and never looked back.[34] Indeed, one sometimes hears Scottish grumbling about how the English, manifesting the faintly-unattractive zeal of the convert, now act as though it was their own invention. In an international context, an open-minded acceptance that national courts follow their own paths to the same goals seems to have led the German courts from some time ago,[35] and the Swiss[36] and French[37] courts more recently, to give effect to and

34 The first sign that the English courts were prepared to admit that the Scots doctrine was superior to the English counterpart (that in St Pierre, supra. n 6), was in The Abidin Daver [1984] AC 398; the full reception of the Scots doctrine took place in Spiliada Maritime Corp *v* Cansulex Ltd [1987] AC 460.

35 The most accessible example is to be found in European Consulting Unternehmensberatung AG *v* Refco Overseas Ltd, the decision of the Oberlandesgericht Karlsruhe being reported and analysed by Zuckerman/Grunert, ZZPInt 1996, p. 89.

36 Decision of the Swiss Federal Tribunal of 30 June 2003 in Case No 4P.88/2003: BGE 129 III 626.

37 Stolzenberg *v* Daimler Chrysler Canada Inc (Cass. Civ. I, 30.6.2004): Rev Crit 2004, p. 815 (note Muir Watt), Clunet, 2005, p. 112 (note Cuniberti).

to enforce English freezing injunctions. And in the most interesting of all, the Cour de Cassation in Paris recently accepted that a French court had the right to order creditors of an insolvent company to discontinue proceedings which they had brought in Spain with the aim of recovering more than the dividend to be expected from the French administration.[38] It looked very much like an anti-suit injunction, because it was very like an anti-suit injunction; and the ground on which the court justified it:

> «Mais attendu que l'injonction à la personne du défendeur d'agir ou de s'abstenir, quelle que soit la localisation des biens en cause, dès lors qu'elle est prononcée par le juge français de la faillite légitimement compétent au fond, n'entre pas dans le régime des règles de compétence visé au moyen . . .»

could have been lifted in its entirety from an English book.

These developments may not be completely steady,[39] and there will be other cases which manifest a more negative tendency. But the spirit of the times appears to mean that, though needing the aid of the European legislation to provide the spur to action, judges in superior courts are prepared to give credence to their fellow judges, and to co-operate with and learn from each other.

The English approach to these fundamental matters of jurisdiction is, as I have explained, to see the matter very much in terms of private law rights and obligations, which may be enforced as contracts generally are enforced, and which impose duties which are just another aspect of the private law of obligations. There is therefore a moral dimension to the enforcement of these rules, which comes directly from their being conceptualised as rights. It is at its most obvious when one's opponent has broken a clear contractual promise: when one is able to stand before the commercial judge and open an application by telling him or her that the application is for an order against a contract-breaker, to make him do what he promised to do because he promised to do it, one is making an argument which, in English terms, is seductive to the point of being almost irresistible. The same point can be made – it is a little less obvious, but it is still there – when a defendant tries to show that it is really wrong for his opponent to bring him before the English courts when the proper place to litigate is overseas. The roots of the doctrine of forum non conveniens lie in the proposition that if it is oppressive or vexatious, privately wrongful, to sue in England, the action will not be allowed to proceed.

---

38 Banque Worms *v* Brachot (Cass. Civ. I, 19.11.2002), Dalloz, 2003, p. 797 (note Khairallah); Rev Crit 2003, p. 816 (note Muir-Watt).

39 In his note on Stolzenberg, Cuniberti draws attention to the manner in which the court declines to approve of anti-suit injunctions, and appears to seek to distance Banque Worms from the allegation that this is exactly what it had just approved. But the reasoning in Banque Worms speaks for itself. And see the very helpful analysis of Muir-Watt, 2003, CLJ, p. 573.

But the Court of Justice does not appear to see the issue of jurisdiction in terms of rights, agreements, private law. It made it clear, in *Gasser* and *Turner*, that it saw the issue in terms of public law, of rules of jurisdiction which were wholly and exclusively the concern of the court whose jurisdiction had been invoked, and which were of no legitimate concern to the courts of another Contracting State. To put it another way, while English law sees the rules of jurisdiction as instructions to a plaintiff and a defendant, setting out what they may and may not do in relation to the jurisdiction of a court, which depends on service and consent, the Convention is to be read as containing instructions to a court which are not within the parties' power, and over which they have no private rights. If one looks at the matter in those terms, *Gasser* and *Turner* become much more obviously correct, and the fact that they would have looked very different if they had been analysed in terms of private rights and private duties is quite irrelevant: the two points of view never approach each other, never mind converge. As the homely Chinese saying has it, the dialogue is like chickens talking to a duck; and if it is, it is pointless to say that one approach is right and the other is wrong. Seen from the one vantage point, the other is wrong to the point of being incomprehensible, but such a conclusion is not a helpful one. The problem was not noticed by those who negotiated the accession of the United Kingdom to the system of the Brussels Convention. The report of Professor SCHLOSSER does recite, in rather pedestrian terms, the basic rules of English civil jurisdiction.[40] But he did not realise, and certainly was not given any assistance towards realising, that the fundamentals of common law jurisdiction are so radically different that it was not possible to make adjustments to the common law to accommodate the Convention. The effect of the accession on the United Kingdom, was in fact far more brutal: it was to impose a wholly alien system on the common law, rather as when a meteorite crashes into the earth. There will be life after and outside the crash-site, but where there is contact there be can no co-existence; and the proposition that there can be harmonisation or integration is, frankly, childish. Those who negotiated the accession of the United Kingdom appear to have had no idea about these fundamental matters. Their ignorance did no service to the law.

This explanation works also to explain *Owusu* which is, by any standards, the most extraordinary depressing of the three decisions. The Court seems to have persuaded itself – despite the analysis which I have set out above, and notwithstanding the relatively careful analysis of its Advocate-General[41] – that the doctrine of forum non conveniens may operate to the disadvantage of a defend-

40 OJ 1979 C.71.

41 December 14, 2004 (Légér). His conclusions are not what one can easily support, but one must admire the thoroughness of the analysis.

ant. The manifestation of its error, of its egregious error, is at paragraph [42] where, in appraising the doctrine of forum non conveniens, it says that

> «The legal protection of persons established in the Community would also be undermined. First a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those foreseen in the main proceedings, reasonably to foresee before which other court he may be sued . . .»

which is nonsensical. The doctrine takes the form of a plea, of a submission which may be made only by a defendant. A court may never take the point of its own motion. There is, therefore, absolutely no chance, ever, of the shortcoming which the Court identified coming to pass. One wonders whether this would allow us to say that the judgment in *Owusu*, dealing as it claims to do with a doctrine which is wholly alien to English law, may be overlooked as irrelevant to the real question, which is of the compatibility of the English doctrine of forum non conveniens with the Convention. But there is no reason to suppose that the European Court will admit error, still less change its mind.

But there may also be an explanation for the Court's rather embarrassing error. The English doctrine is one which gives the defendant a right: he may defend in England if he wishes, but if he wishes to relinquish this, he may give this up. True, it is a complex, rather than a unilateral, right, for the defendant may not give it up in circumstances in which it would be unjust to the plaintiff to be denied *his* ancient right to sue any person whom he may lawfully serve with process within the jurisdiction: one may say that each side has rights which each may elect to invoke, and each may seek to give up. But it is nonetheless a right, because if the defendant does not avail himself of it, it will not arise for consideration. If the European Court is unwilling or unable to see the issue in terms of rights, this subtlety will by entirely lost. As it seems to have been.

The significance of this difference in perception is something which English lawyers are only now coming to appreciate, and the consequential questions which it provokes are complex. But it is worth observing that though English lawyers in their thinking and writing express the ideas of the Conventions in terms of rights – that a defendant has a right to defend in his home courts, that an agreement on jurisdiction gives the plaintiff a right to invoke that jurisdiction, and a right to object to and prevent his being sued elsewhere, the European Court has not used the idiom of rights; and perhaps the English have misled themselves. The Court tends to speak, instead, of parties being able to tell where they are liable to be sued, of the rules of jurisdiction being certain and predictable, of there being general rules from which others operate by way of derogation. It does not use the language of rights.

It is in this, in the moral *versus* amoral nature of the law on jurisdiction, that the real cultural difference is to be found, and why the conversation does re-

semble the chicken-duck dialogue. English courts spend a surprising amount of time dealing with jurisdictional disputes in terms of rights and obligations, and the intellectual structures within which they currently work are therefore simply alien to the concerns of the European Court. Whether this means that the European Court is simply incapable of understanding that private is different and distinct from public law, or whether English courts are wrong to understand the law on jurisdiction in terms of rights and wrongs, is an arid and a futile question, at least when the immediate question is how to dispose of a jurisdictional application. But it is the question which lies at the heart of the proceedings. It explains why the English view of anti-suit injunctions is so different from that taken by the European Court, and it may explain why some continental jurisdictions are similarly unsympathetic.[42]

It should also be admitted that the reference by the Court of Appeal in *Owusu* was inept and inappropriate, and it is unsurprising that the European Court was hostile to the whole idea. It is significant that the leading cases in which the House of Lords developed the doctrine in England were cases in which one company was suing another; cases in which there was no human dimension to the facts. From *The Atlantic Star*[43] to *Spiliada Maritime Corp v Cansulex Ltd*,[44] the cases were almost all commercial. By the time the principles had to be applied to a case involving a claim by a private individual against a large corporation, it had become clear and well understood that a stay was less likely to be granted, because it was more likely that a stay of proceedings would be unjust: the test would be the same one, but its outcome would be expected to be different. So in *Connelly v RTZ Corp*,[45] where an employee was injured in the uranium mines of Namibia run by RTZ, his employer and the largest mining house in the world, and in *Lubbe v Cape plc*,[46] where the widows and orphans of those who had been killed by exposure to asbestos in the South African mines and factories of the defendant corporation, the House of Lords refused to stay proceedings even though the courts at the foreign place of injury were plainly more appropriate for the trial of the claims. This also explains why, when the doctrine was first argued for before

42 Cf the point made above in n 15, concerning Art 1.2(d) of the Rome Convention.

43 [1974] AC 436.

44 [1987] AC 460. There is one exception to this: MacShannon *v* Rockware Glass Ltd [1978] AC 795. There, a Scottish employee sued his employer for a workplace injury sustained in Scotland. He was able to sue in England because the employer was a company incorporated in England, and because his trade union was giving him assistance which would not have been withdrawn if the action had been brought in Edinburgh instead. For the House of Lords to decide that the natural forum was in Scotland and that there was no injustice in requiring him to sue there was wholly unsurprising.

45 [1998] AC 854.

46 [2000] 1 WLR 1545.

the High Court of Australia,[47] it was rejected, or only adopted in a very attenuated way. Their leading cases were *Oceanic Sun Line Special Shipping Co Ltd v Fay*,[48] where an Australian holidaymaker had gone on a Greek island cruise, had been injured, and wished to sue the company in Australia, and *Zhang v Régie Nationale des Usines Renault SA*,[49] where a young man applying for permanent resident status in Australia was injured while in New Caledonia, waiting for his application to be approved. Faced by claims from plaintiffs who were poor, local, and the victims of a foreign corporation's negligence, it was not altogether surprising that the High Court was reluctant to accept the doctrine, at least in what it understood to be its English form. And what was true for the High Court of Australia may also have had an influence in the European Court. Mr Owusu, a holidaymaker, had been rendered quadriplegic by an event which, no matter who was at fault, was a personal catastrophe. He had been injured in 1997. When the Court of Justice heard argument on the reference for a preliminary ruling, almost seven years had elapsed since the accident; if the Court had answered to the effect that a stay was permitted, the Court of Appeal would have re-listed the case for further argument nearly nine years after the original accident. One may see why, if the judges were to wonder about the facts underlying the law, this would strike them as being utterly unacceptable. The truth is that the Court of Appeal was utterly wrong to make the reference,[50] for this was a case, if ever one was, where it would have been unthinkable for a stay of proceedings to have been ordered, some nine years after the plaintiff had been crippled. It was a spectacular error for the Court of Appeal to consider that a ruling on a preliminary reference was required,[51] for there can have been no proper basis for supposing that a stay of proceedings could ever have been ordered. The whole procedure, from accident to Ruling, suffered from ineradicable flaws. But now it has entered into English law, and we must learn to live with it.

---

47 A tribunal which in England enjoys the highest degree of respect extended to any foreign court.

48 (1988) 165 CLR 197.

49 (2002) 210 CLR 491.

50 In partial defence of the Court of Appeal, the general question of whether the doctrine of forum non conveniens was compatible with the Brussels Convention had been live for many years, and certainly since the decision in Re Harrods (Buenos Aires) Ltd [1992] Ch 72, one of the three cases which Professor Gaudemet-Tallon characterised as menacing. The Court of Appeal may simply have thought that it was time to sort the matter out for the sake of certainty and clarity in the law. But it seems to have chosen a most inappropriate case in which to do it.

51 1971 Protocol to the Brussels Convention, Article 2.

IV. The limits of the decisions: how far do they go?

1. Jurisdiction under Articles 2 and 5

It is now established that jurisdiction under Article 2 is mandatory, and that the instruction it gives to a judge is that he must hear the case which falls within the scope of the provision, subject only to other rules also found elsewhere in the express words of the Convention. This immediately raises the question of the effect which may be given to jurisdiction agreements for the courts of non-Contracting States. To judge from the absolutist terms in which the European Court answered the first question referred by the Court of Appeal, and its disreputable refusal to say anything in relation to the second,[52] it remains formally unclear how a court should deal with a stay application founded on the parties' agreement that, say, the courts of New York are to have exclusive jurisdiction.

The Advocate-General had raised the possibility that the solution lay in according a «reflexive effect» to the rule in Article 17 of the Convention. This curious proposal owes its intellectual origins to a suggestion from the late Mr Droz, who proposed it at the time of the original Brussels Convention.[53] It may be supposed, if this is to be the solution, that the other requirements of Article 17, especially as to formal validity, will also have to be met before an English court may give effect to such an agreement. But two points to the contrary may be made. First, it is to be observed that this would be contrary what the Court said in its judgment in *Coreck Maritime GmbH v Handelsveem BV*,[54] where it dealt in passing with the effect to be given to a jurisdiction agreement for a court in a non-Contracting State. The validity of such agreements, said the Court,[55] is to be assessed by reference to the applicable law, including private international law, where it sits. This, though oddly expressed in English, seems to dictate a renvoi to the national law of the court seised. It does not direct attention to a law which contains provisions corresponding to those in the first paragraph of Article 17, and as a result there is a choice of approach to be made. Secondly, there is a view that the correct interpretation of «reflexive effect» is that it delineates the territory, but does

52 It said that it was not necessary to do so. This approach to its task is at odds with what it had done in Turner *v* Grovit, where it had laid down the law in wide terms and then said it applied even in the facts of the given case.

53 In Droz, Compétence judiciare et effets des jugements dans le marché commun (1972), paragraph 164 et seq. And see also Gaudemet-Tallon, Compétence et exécution des jugements en Europe (3rd edn, 2002), paragraph 100.

54 Case C-387/98, [2000] ECR I-9337.

55 At paragraph [19] of the Judgment.

not prescribe the rules, within which the exception is to operate.[56] Likewise, if a case is brought against a defendant domiciled in England, but the claim has some connection with a question of title to land in a Contracting State, is the court permitted (or required) to stay its proceedings if these «have as their object rights *in rem* in» the foreign land,[57] or may it decline jurisdiction if it would be required to adjudicate on title to the foreign land[58]? These versions of exclusionary formulations certainly overlap, but they are not wholly congruent. If the question is which is it to be, the better prediction is that the English courts will simply accept the advice given in *Coreck Maritime*, and will not consider that they are driven to a contrary conclusion by the rather careless observations in *Owusu*. The reasoning in *Owusu* is so superficial, so conclusory, and so wrong, that it is improbable that it will be held to have the conviction to extend to a case which the Court has already said lies outside the regime of the Convention.

If that is correct, a third question which arises will be how an English court is to proceed if asked to hear a case against a defendant domiciled in England, but where the same dispute between the same parties is already pending before the courts of a non-Contracting State. As a matter of common law, an English court will deal with such a case by the application of forum non conveniens: no separate doctrine of *litispendence* is required. It will surely appear to an English court that if the proceedings are well developed in the courts of a non-Contracting State, it would be wrong in principle to allow an action, a spoiling action, to be brought in England. All possible solutions have their drawbacks. If it is held that Article 2 is mandatory and that there is nothing that the English court may do but hear the action, the result is anarchy: it is not in anyone's legitimate interest to take no account of litigation actually taking place in a court. That will not do. If the answer is that Articles 21 and 22 of the Convention are to be applied by analogy, this makes everything turn on the precise dates on which proceedings were instituted. This may be a crude-but-acceptable rule operating within the tightly-drawn boundary of the Contracting States, but it has no attractions when applied to the world outside, for the jurisdictional rules applicable in the courts of non-Contracting States may well be far wider and less appropriate than those of the Contracting States: to defer to the court first seised in such a context, without a chance to

---

56 To this effect, Gaudemet-Tallon, Compétence et exécution des jugements en Europe (3rd edn, 2002), para. 131; Gothot & Holleaux, La Convention de Bruxelles du 27 September 1968 (1985) para 216. And see Briggs, [2005] LMCLQ 378.

57 The formulation in Article 16.1 of the Conventions and Article 22.1 of the Council Regulation.

58 According to the principle of exclusive jurisdiction at common law: British South Africa Co *v* Companhia de Moçambique (supra, n 13).

examine the jurisdiction of the court first seised, is dangerous and wrong. If the answer is that court may apply its own law to the question, in England this will mean the operation of a combination of stays of proceedings on the ground of forum non conveniens, if it is judged that the foreign proceedings should continue alone, or anti-suit injunctions if the bringing of the foreign proceedings may be regarded as wrongful. This is probably the best outcome, but it will be open to the criticism that it leads to an unevenness in the operation of the Convention in a context in which that unevenness is generally absent. And it is still a question, rather than an answer, because the European Court saw no need to answer the second question which had been put to it.

We can be less certain about jurisdiction under Article 5. In principle one would suppose that it is like Article 2 in the sense that it comprises a direction to a court to hear a case, albeit that the conditions which prescribe the limits of the jurisdiction are more complex. This has the potential to cause particular difficulties in the law of defamation. For reasons which are not much to the credit of English law, it has become common for those who consider that they have been libelled in the press to come to England to sue, claiming that they are concerned only to object to the material which was published in England, and confining their claims to the readership, or the downloading, in England.[59] According to the European Court in *Shevill v Presse Alliance SA*[60] this is a permissible tactic.[61] But recently the Court of Appeal, hearing a case where jurisdiction over the American publisher had been established under Article 4 of the Convention, struck the proceedings out as being an abuse of the process of the court. Its conclusion was that the plaintiff had no real desire to seek damages in respect of the English readership, which appeared to number seven, three of whom were members of his «team». Rather he sought to make use outside England of a verdict in English libel proceedings. The claim was therefore struck out.[62]

Abusive the proceedings may have been, but the basis for finding them to be abusive was, in substance, that they should have been brought somewhere else – where the plaintiff lived and had a real reputation, or where the defendant was established and published the statements of which complaint was made. If this case had arisen where jurisdiction had been based on Article 5.3, as it was in *Shevill*, could the court have disposed of the case as it did?

---

59 The most blatant example being the Russian oligarch, Boris Berezovsky: Berezovsky *v* Michaels [2000] 1 WLR 1004. But see also the internet-defamation cases of Gutnick *v* Dow Jones Inc (2003) 210 CLR 575; King *v* Lewis [2004] EWCA Civ 1329; Richardson *v* Schwarzenegger [2004] EWHC 2422 (QB).

60 Case C-68/93, [1995] ECR I-415.

61 A term which is chosen deliberately, given its faintly pejorative undertones.

62 Dow Jones & Co Inc *v* Jameel [2005] EWCA Civ 75.

2. *Jurisdiction under Article 4*

This may not be a major point, but it still seems bound to arise in England. It will be recalled that where jurisdiction is asserted over someone who is present within the territorial jurisdiction of the court, he may be served with process as of right, but that once he has been served, an application for a stay of proceedings on the ground of forum non conveniens may be made and may be granted. Now as Article 4 provides, in some form that, over certain kinds of defendant, jurisdiction is to be based on the jurisdictional rules of national law, it has tended to be assumed that the role of forum non conveniens will have been allowed to remain within the scheme of jurisdictional rules protected by Article 4.

Article 4.2 of the Council Regulation[63] provides, however that when one is dealing with a claim against such a defendant «any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force and in particular those specified in Annex I . . .». In relation to proceedings in the United Kingdom, Annex I specifies «rules which enable jurisdiction to be founded on (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom». It is therefore possible to argue that if the plaintiff is entitled to avail himself of the rule of jurisdiction just set out, it cannot be consistent with his right so to avail himself for the court, on the application of the defendant, to have the power to order a stay of proceedings. If this were to be held to be correct, the width of the judgment in *Owusu*, and in particular its strident insistence on giving effect to the wording of Article 2 according to its literal terms, will have been found to be wide enough to have this effect of Article 4, and to have actually widened the jurisdictional rules of the common law. It is hard to believe it could be so, but the judgment in *Owusu* does leave the possibility open for such an argument to be made.

3. *Proceedings between parties who have agreed to arbitrate*

This point really involves reflection upon the further consequences of *Turner v Grovit*, and it requires us to look at some rather more difficult law. The point of departure is the proposition that Article 1 excludes from the material scope of the Convention «arbitration». That laconic form or word has always been

63 Article 4.2 of the Conventions is in the same terms, though the rules which appear in Annex I to the Regulation are (so far as the Contracting States are concerned) set out in Article 3.2 of the Convention instead.

a remarkably economical way to express what must be a large point, and it is unsurprising that it has led to some difficulty. Add to that the fact that the whole of arbitration is rested on the foundation of a promise and its enforcement, and the cultural clash of systems is inescapable.

According to the European Court, we know that proceedings for judicial appointment of an arbitrator fall outside the material scope of the Convention (*Marc Rich & Co AG v Soc Italiana Impianti SpA*[64]), so that a court may entertain the application even though there are proceedings in respect of the substantive dispute before the courts of another Contracting State. But we also know, apparently, that if parties have agreed to arbitrate a dispute arising from their agreement, the correct analysis is that the matter is still a civil or commercial one, though one over which no court has jurisdiction (*Van Uden Maritime BV v Firma Deco-Line*[65]). What is to happen, therefore, if an English court concludes that the parties are bound by an agreement to arbitrate, but the courts of another Contracting State take the opposite view, and allow proceedings to be instituted, rejecting the argument that there is a binding agreement to arbitrate?

The question arose before the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd.*[66] Pared to its essentials, the case concerned claims on a policy of liability insurance: A had insured B who had been injured by C whose liability had been insured by D. A settled with B and was thereupon subrogated to his rights against C. But C had become insolvent, leaving A to make a direct claim against D. Slightly less pared, the facts were these: goods were consigned to be carried by sea from Calcutta to Kotka in Finland, and thence by road to Moscow, by a carrier. The consignment made it to and through Finland; but after it left Finnish territory it vanished, never to be seen by its lawful owner again. The shipper, an Indian company, therefore made a claim on its insurer, New India. This was compromised, and New India therefore stepped into the shipper's shoes for the purpose of making a claim against the carrier. But the carrier had filed for bankruptcy and been struck off the register in Finland. The attention of New India therefore turned to the carrier's liability insurer, Through Transport Mutual Insurance Association («the Association»), a mutual insurance association. The members of the Association had bound themselves in terms that all insurance provided by the Association was subject to London arbitration. As a matter of Finnish law, in such circumstances a third party, A, has a statutory right to make a direct claim against the liability insurer, D. The (Finnish) Insurance Contracts Act 1994, s. 67, was clear and

64 Case C-190/89, [1991] ECR I-3855.
65 Case C-391/95, [1998] ECR I-7091.
66 [2005] 1 Lloyd's Rep 67.

straightforward in the sense that it was plain that New India was entitled to make the claim against Through Transport, and could expect to succeed. By contrast, had New India proceeded in London on the basis of the Third Parties (Rights Against Insurers) Act 1930, it would have failed in its claim.[67] New India therefore instituted proceedings in Finland, the Finnish court apparently accepting that it had special jurisdiction over the (English) Association on the ground of Article 5(3) of the Judgments Regulation.[68] The Association objected to the jurisdiction of the Finnish courts. It also issued an arbitration claim form in London by which it sought a declaration that there was a binding agreement to arbitrate in London, and an injunction to restrain New India from proceeding by action in the Finnish courts. The first instance judge took the view that New India was enforcing a contractual right which was subject to an obligation to arbitrate, and granted the injunction. The Court of Appeal agreed with the conclusion that the claim being advanced in Finland was a contractual one which should be arbitrated in London, but disagreed that it followed that New India should be restrained by injunction from pursuing the Finnish proceedings. It therefore set aside the judge's order.

The ground on which the Court of Appeal set aside the injunction is curiously unconvincing. It concluded that where A made a direct claim on C's insurance, which had contained an arbitration agreement, C's claim was also subject to that agreement, as though it had acquired the right by assignment, with all its benefits and burdens.[69] It further concluded that the conclusion to be drawn from *Marc Rich* was that where the whole of the English proceedings were concerned with arbitration, whether this meant the procedure to set up the tribunal or to defend its integrity from attack, these likewise fell outside the material scope of the Convention. It therefore concluded that there was power to grant the anti-suit injunction, for this was seen to fall under the general exemption of and for arbitration. But mindful of two further factors – the fact that A had not, as a matter of fact and record, agreed with D or with anyone else to arbitrate, and the fact that *Turner* had shown a fierce hostility to the grant of anti-suit injunctions which aimed to prevent proceedings in other Contracting States – it declined to order the injunction. It may have been right, but if so, it was for the wrong reasons.

---

67 The reasons are unimportant, but depend on the relationship between the terms of the insurance (which contained a «pay to be paid» clause, which is not our immediate concern), and the 1930 Act.

68 On the apparent footing that the harmful event, in the sense of economic loss, occurred in Finland: *sed quaere*.

69 Cf Schiffahrtsgesellschaft Detlev von Appen GmbH *v* Vöst Alpine Intertrading [1997] 2 Lloyd's Rep 279.

From a purely English perspective, the criticism of the judgment must be that if the court believed that A was bound by the express agreement of C to arbitrate its claim against D, it was wrong not to restrain A from breaching its legal obligation by injunction. It was absurd to go to that length and then to allow A to disregard an obligation by which it was held to be bound.

But from the perspective of European law, the correctness of the decision that the court had power to order an injunction is very hard to assess. On the one hand, for the court to consider that A was acting in breach of its legal obligations, it appears that the court would have to conclude that the Finnish court was wrong to believe that it had jurisdiction when, according to *Van Uden*, it had no such jurisdiction. If it is forbidden for an English or other court to determine that, in a civil or commercial matter, the courts of another Contracting State have no jurisdiction, as was expressly held in *Overseas Union Insurance Ltd v New Hampshire Insurance Co*,[70] it was not open to the Court of Appeal to conclude that the Finnish court had no jurisdiction, and was forbidden for it to find that there was an arbitration agreement which had that same legal effect. The breadth of the judgment in *Turner* made it more than ever clear that it was not open to an English court to find that a foreign court had no jurisdiction over a civil or commercial matter, and therefore was not open to it to order an injunction to reinforce that conclusion. On the other hand, proceedings for a declaration that the parties were bound by an arbitration agreement would have fallen outside the material scope of the Convention,[71] and an order to give further effect to that conclusion does not appear to go beyond the material scope of the concept of arbitration either. A similar problem is likely to arise if an English court has ruled that the parties are contractually obliged to arbitrate, but judgment on the merits of the claim/dispute is given by a court in another Contracting State, which takes a different view of the alleged obligation to arbitrate, and is then presented in England for recognition and enforcement. What is to be done? Is the English court entitled to draw the conclusions which follow from its own decision on a matter which fell outside the material scope of the Convention, as was said in *Hoffmann v Krieg*[72]? Or is it required to recognise and enforce a judgment from a Contracting State which has made, or made only, an error in considering that it had jurisdiction to adjudicate?

It will not take long to reach the point of decision. The Court of Appeal in *Through Transport* concluded that no injunction should be granted, with the inevitable consequence that the proceedings in Finland were allowed to

70 Case C-351/89, [1991] ECR I-3855.

71 Without reaching this conclusion (whether or not asked to make a formal declaration) a court could not do as was done in Marc Rich and appoint an arbitrator to the tribunal.

72 Case 145/86, [1988] ECR 645.

progress without impediment from the English courts. Even so, it remained the view of the English courts that there was a binding agreement to arbitrate, and very soon afterwards, D applied to the English court for an order, against A, appointing the arbitrator which A, continuing to deny that it was interested in arbitrating, had refused to appoint. In *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (No 2)*,[73] the judge considered himself to be bound by the earlier decision of the Court of Appeal, and by *Marc Rich,* to conclude that such proceedings fell outside the scope of the Convention, and made the order appointing an arbitrator for A to constitute the tribunal. The result is that there will be approximately parallel proceedings in London, before a tribunal, and Helsinki, before a court; and as soon as they reach judgment or award, a fresh round of litigation will arise from the attempt to enforce each of the outcomes. When this happens, at it assuredly will,[74] it will be necessary to decide whether the arbitration exclusion means what it really says, or is restricted to excluding from the Convention (a) the setting up and supervision of arbitration tribunals, (b) the arbitration itself, and (c) the enforcement of awards, even if these have been decreed for enforcement by a judge in a Contracting State.[75]

The *Through Transport* litigation is a forewarning of the messy outcome to be anticipated. It appears to me that the whole problem arises from the attempt to say a little or a lot with one word, «arbitration», and from the inconvenient fact that the European Court has suggested[76] that it may take a rather restricted view of what this actually means. When this is added to the reasoning in *Turner v Grovit*, the result is an outcome which cannot rationally be defended. From an English perspective, the answer in *Through Transport* should have been easy enough: the application for an injunction was almost unanswerable and should have been granted; and as it was very unlikely that A would have felt commercially comfortable about defying the English order, it would in all probability have complied. That would have been far better. As far as I can see, the consequence of *Through Transport (No 2)* is likely to be that the English courts will look at the price which is paid for giving effect to a wider view of *Turner v Grovit* than is perhaps strictly necessary, and a narrow view of the exclusion of «arbitration», and will change their minds. This will mean that instead of reading *Turner* as not formally forbidding the grant

---

73 [2005] EWHC 455 (Comm).

74 The parties made it clear to the judge that each was involved in a race to get a final order in its favour.

75 All excluded from material scope of the Convention according to SCHLOSSER, 1979 OJ C.71 at paragraphs 64 and 65. There is no question as to the reliability of Professor SCHLOSSER's view on this.

76 But it is only a suggestion, derived from Van Uden, supra; and it may be reading too much into the decision.

of an injunction but giving it a reflexive effect, they will revert to an earlier and more robust view[77] of the judicial duty to enforce agreements to arbitrate by all means at the court's disposal, and will restrain by injunction those who deny the terms of an agreement by which they are, legally speaking, bound.

4. *Enforcement of jurisdiction agreements by other means*

But whatever one may do to restore sanity to the law on arbitration agreements, there is no realistic prospect of introducing the same measure of sanity to the law of jurisdiction agreements. If an anti-suit injunction, though founded on a jurisdiction agreement (say) for the English courts, may not be ordered against a respondent who has brought or who threatens to bring proceedings before the courts of another Contracting State,[78] and it is not open to the English court simply to entertain proceedings on the merits,[79] what else is left for a party who has bought and paid for an agreement on jurisdiction which is valid and binding, but which now appears to be being ignored?

The most recent answer to have found support before the English courts, though not in cases in which there was another Contracting State or Member State directly involved, is that the wronged party may in principle sue for damages for breach of contract. There have been two cases in particular in which this has been allowed. In *Union Discount Co v Zoller*[80] proceedings were commenced in New York in breach of an agreement for the English courts to have exclusive jurisdiction. The New York court dismissed the proceedings, but had no power to make an award of costs. The wronged party therefore brought proceedings in England for damages for breach of contract, and it was held by the Court of Appeal that it was entitled to do so. In *Donohue v Armco Inc*,[81] the House of Lords declined to order an injunction to restrain a respondent from bringing proceedings in the American courts in breach of an express contractual promise to sue only in England, the reason being that other entities, strangers to the agreement, were also bringing proceedings which could not be objected to, never mind restrained, by reference to an agreement by which they were not bound. But it accepted that if the respondent advanced claims in the United States based on causes of action which it could not have advanced in England, it would in principle be liable to be sued for damages for breach of contract. In both cases the judgment was

77 The Angelic Grace [1995] 1 Lloyd's Rep 87.
78 Turner *v* Grovit, supra.
79 Erich Gasser GmbH *v* MISAT srl, supra.
80 [2002] 1 WLR 1517.
81 [2002] 1 Lloyd's Rep 425.

one of principle; in neither case did the court go into the more complex question of how damages were to be assessed.

Could this be done if a case like *Erich Gasser* were to arise in England? If we examine the case as though the agreement were for the English, rather than the Austrian, courts, we can begin to construct the answer. If the Italian court were eventually to decide to dismiss the action for jurisdictional reasons, the loss which the claimant sustained would appear to be recoverable by reference to the principle in *Zoller*: it is hard to see how this could be inconsistent with anything which the Italian court had decided. But what if the Italian court were to rule that it had jurisdiction, and were to proceed to hear the case on the merits: what would the position be then? Would it be open to the supplier still to contend that it had been the victim of a breach of contract, and to claim damages for the losses caused, now in a rather larger amount?

On the face of it, this would be a surprising conclusion to reach. The main objection, apart from the surprise, is that if the Italian court has ruled that there is no such agreement on jurisdiction as serves to deny the right of the Italian court to adjudicate, and that is a judgment from a court in a Contracting State which is entitled and required to be recognised,[82] it is not easy to see how the claimant can frame a claim in which he asserts that he has been the victim of a breach of contract. But this conclusion need not be accepted, and it may indeed be wrong. The decision for the Italian court will have been whether there was shown a sufficient basis, in fact and law, for jurisdiction to be exercised. An English court in similar circumstances does not have to conclude that there is, on a balance of probability, a binding agreement for the jurisdiction of the court. It needs only decide that there is a «good arguable case» that there is.[83] And it not inconsistent with the conclusion that there is a good arguable case that there is no valid contractual agreement on jurisdiction to also hold that there is, on a balance or probability, a valid agreement on jurisdiction. Equally, it may still be said that even though a foreign court has concluded that the alleged agreement is not sufficient to deprive it of jurisdiction, this does not contradict the proposition that the contract-breaker promised not to invoke that jurisdiction. If this is correct, the conclusion of an Italian court that there is a basis for it to hear the case is not necessarily irreconcilable, inconsistent, with the conclusion that there was, on balance, a binding agreement, or an agreement between the parties, that the English court would alone exercise jurisdiction. And if that is so, once the parties have litigated in a non-chosen court, if one of them says that he has been the victim of a breach of contract, he has the basis for a claim. Whether it should succeed

---

82 In principle it must be; and see SCHLOSSER 1979 OJ C.71 at paragraph [191].

83 Canada Trust Co *v* Stolzenberg [2002] 1 AC 1. The question of the standard to be applied is for national law to determine: Case C-68/93 Shevill *v* Presse Alliance SA [1995] ECR I-415.

and will sound in damages will be a matter for the law which governs the substance of the agreement on jurisdiction,[84] but the breach is still a breach. And as far as English law is concerned, it may not be fatal to the claim that the victim of the breach appeared before and defended in the foreign court. Although this may look like acceptance and waiver of the breach, or a tacit variation of the contract,[85] it may also be seen as an act done in mitigation of loss liable to result from the breach. Acts done by way of mitigation are without prejudice to the right of the victim to claim that there has been a breach of contract.

If this much can be defended, it will then be necessary to ask whether there is any reason to distinguish between jurisdiction agreements for the courts of a Member State or a Contracting State, and such agreements for the courts of a non-Member State. If it were correct, as has been suggested above, that the rules of jurisdiction contained in the Convention cannot properly be understood as sources of private rights as distinct from public law, it may be contended that there can be no right to damages for their breach. But if this were accepted, then the acceptance by the court in *Donohue* that there was in principle a right to damages for breach could not be correct, for the claim in that case involved an agreement for the jurisdiction of the English courts. Likewise, in *Union Discount*, there was an agreement for the jurisdiction of the English courts, which was (for what it was worth) an agreement for the courts of a Contracting State. Yet it seems most improbable that an English court will allow itself to be pushed to such a conclusion. Even though an agreement on jurisdiction may not be interpreted as a contractual provision which creates private and enforceable rights to establish and to oppose the establishment of jurisdiction, it does not appear to be incompatible with this to accept that they may nevertheless give rise to a right to damages when they are broken. It will take a lot to persuade an English court that, weakened as they have been, jurisdiction agreements are reduced to a state of such insignificance. Moreover, one will now expect to see agreements on jurisdiction being drafted to include a specific promise to pay damages in the event of proceedings being brought by one party in a court other than that nominated by the contractual term. If there is a problem with *Union Discount*, *Donohue* and (probably) the economy of the Convention, which means that it is not always easy to construe a jurisdiction agreement as also involving an implied promise to pay damages if it is broken, the reaction of the well-informed draftsman will be to add an express promise to the jurisdiction agreement itself. It is very hard to see that this will not be effective. It may therefore be correct to say that the European

84 In England, it is the *lex contractus*, which conclusion is not affected by Art 1.2(d) of the Rome Convention.

85 Case 38/81 Effer SpA *v* Kantner [1982] ECR 825.

Court's refusal to allow that an English court is entitled to enforce these agreements by direct means will simply shift the ground on which the battle is fought, and there will be further litigation after the proceedings have ended in judgment. In other words, litigation about where to litigate will be replaced by litigation about where the litigation should have taken place.

It is likely also to mean that there will have to be an increase in the number of actions which are commenced, not because the plaintiff actually desires there to be any proceedings, but because it cannot now ask the English courts to enforce a jurisdiction agreement by anti-suit injunction, and had better start proceedings of its own, just to guard itself. The behaviour of the Italian distributor in *Erich Gasser* has produced, just as one knew it would, copycat behaviour by other parties, usually defaulting borrowers who see this as an almost sanction-free way to disregard their agreements on jurisdiction and to frustrate the unanswerable claims of their lenders. The European Court knew but did not care. When the point was made in *Erich Gasser*, it said:

> «Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call into question the interpretation of any provision of the Brussels Convention, as deduced from its wording and purpose.»

The Commercial Court in London has noted this with restrained disapproval, one of the first cases to have to put up with it being *JP Morgan Europe Ltd v Primacom AG*.[86] The German party, fearing that it was about to be sued for an order that it pay the huge sums of money which it owed, and sued in London where it had agreed that the proceedings were to be brought, instituted proceedings in Germany for some contrived form of declaratory relief. It knew perfectly well that this would prevent the bank suing for its money in the court in which it had been agreed that any action should be brought, and knew also (so the judge thought) that its seising the German courts was shameless and without a shred of legal justification. But it helped itself to a stay of the proceedings to which it had no answer, and would have the effect of preventing the bank suing the debtor for the money which it owed. From the perspective of an English lawyer, this is a disgraceful state of affairs, and for the Court of Justice to say that the German courts alone are entitled to decide what to do, when the very thing the parties have agreed upon is that the jurisdiction of the German courts will be invoked by neither of them, stands common sense on its head, and is inconsistent with the basic rule of *pacta sunt servanda*. If the English courts are to continue to obey the instruction in *Erich Gasser* and in *Turner*, it is almost inevitable that alternative means will

86 [2005] EWHC 508 (Comm).

be devised to give jurisdiction agreements the effect which the parties intended them to have. One such means will have to be to tolerate proceedings which are instituted in a nominated court, just to protect the position of the party who may yet wish to hold the other to the agreement on jurisdiction.

5. *Future legislation on uniform choice of law*

In *Owusu*, the question whether the doctrine of *forum non conveniens* was consistent with the Brussels Convention presupposed that the latter applied at all. But this was the biggest issue of all, and it drew a more direct attack from Jackson and the United Kingdom. They pointed out that the issue in *Owusu* had nothing to do with relations between Contracting States, and deduced that the Treaty of Rome did not therefore authorise a Convention to lay down the law for a case which was so irrelevant to the internal market. But the European Court saw perfectly clearly the nature of the iceberg being floated towards it, and pressed the nuclear button. It refused to accept that this made the Brussels Convention inapplicable, using language which meant that it was *never* inapplicable. Its astounding reasoning, at paragraphs [33] and [34] may be reformulated into five propositions. The Court (i) observed that the EC Treaty was designed to facilitate the working of the internal market, (ii) asserted in unconditional terms that the functioning of the internal market risked being obstructed by disparities which existed between national laws on jurisdiction and judgments, (iii) averred that the Convention was intended to eliminate obstacles to the functioning of the internal market, (iv) deduced that the Convention, whenever it applied, would inevitably contribute to the elimination of obstacles to the functioning of the internal market, and by saying so, (v) ensured that the uniform rules in the Convention were therefore not confined to those individual cases which exhibited a real and sufficient link with the working of the internal market.

If this hardens into law, it will mean that it will *never* be admissible to argue that an absence of actual connection to the internal market means that the Convention is inapplicable. This marking out of territory by the Court was deadly serious. It was intended to warn off those who might advance similar arguments about lack of connection to the internal market to trim or undermine the scope of the Council Regulation (EC) 44/2001. It will also serve to prevent those who may advance similar arguments to cast doubt on the treaty basis of Regulations, present and to come, governing choice of law in contract, tort and unjust enrichment, family law, *et cetera*. Disparities in any of these areas of national law may, just as speciously, be said to obstruct the internal market. Careful and precise legal arguments about the legal basis for such legislation will be impotent against a boilerplate paragraph, bolted into every judgment, which will say that *any* disparities between national legisla-

tion will impede the functioning of the internal market, and that legislation to eradicate such disparities is therefore within the competence of the organs of the European Union. Left unchallenged, this appalling claim removes every limitation on the extent to which English private international law may be crushed underfoot by European legislation. It was in this, rather than in its treatment of the doctrine of *forum non conveniens*, that the Court revealed its sense of its mission. Set against that, Mr Jackson's preference for defending himself in the natural forum simply did not register on the scale. And this may yet mean that the biggest impact of *Owusu* is to be seen, not in the effect it has on jurisdiction and civil procedure in English courts, but on rules for choice of law which are being hatched up even as we meet.

V. Conclusions

The English view of the new cases is one of puzzlement, and not just for the reasons indicated above. Throughout the development of the single market the theme has been that competition is a good thing which will improve the market, and as long as there is recognition of each other's acts and institutions, the market will evolve properly. But in legal services the philosophy is different: divergence in jurisdiction (and increasingly in choice of law) is not thought to improve the single market, but to do damage it; and as a result a pitiless Stalinist monoculture prevails. Nor is it to be supposed that the proscription of anti-suit injunctions and forum non conveniens will prevent an English court from giving effect to jurisdiction clauses, though it will make for a diminished and degraded level of efficiency in the provision of legal services to the individuals for whose benefit they exist: the law is made to serve man, not man to serve the law. In the end, one has to ask who gains from a rule which allows contract-breakers to get away with, either for long enough to put pressure on their co-contractors, or for ever, and which removes an English court's right to prevent it summarily. We would say that there was a balance to be struck, for sure, and that as between the interests of states, there may be little to choose. But once the interests of those who make contracts and then try to enforce them is concerned, it is hard to see why the balance should not have tipped in favour of allowing courts to enforce agreements to the maximum extent they can.

The loss of a right to apply a doctrine of forum non conveniens is less straightforward. If one examines the case of *Owusu* from the perspective of the five Jamaican defendants, it means that it is more likely that they will be joined to the proceedings in England as necessary or proper parties[87] to the

87 CPR r 6.20(3).

claim against Jackson. They saw this very well, and objected that it was unprincipled and wrong that the interpretation of the Convention preferred by the Court jeopardise them, Jamaicans, who had no connection with the European Union. Their plight was noticed by the European Court:

> «The defendants in the main proceedings emphasize the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from their geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.
>
> In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention for the reasons set out above.»

Some of us think that is unsatisfactory, but if that is the view of the European Court, it will presumably mean that the English courts will alter and restrict their practice of granting leave to serve out on this basis, and will therefore be less able to offer a single and efficient adjudication binding on all parties: how this will assist Mr Owusu is very hard to see. But more generally, where agreements on jurisdiction are concerned, it is to be supposed that the practice of the courts will be adapted, so far as it can, to provide secondary measures to do what primary measures are not now permitted to do. In that in general, and in the stirring up of defensive litigation in particular, the European Court has had an impact the law and practice of English courts which is very far from benign and which fully deserves the description of a menace to the morality of commercial litigation. It is difficult to avoid the sense that it should be ashamed of itself.