

The differing approach to commercial litigation in the European Court of Justice and the courts of England & Wales II

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THE RATIONALE BEHIND THE DECISIONS

The rationale underlying these decisions is stark in its simplicity: the Brussels-Lugano regime must be interpreted so as to further its three overarching aims, which I identified earlier, that is to say, it must be interpreted so as

- i. to promote legal certainty thereby enhancing legal protection for those domiciled in the member states;
- ii. to place proper weight on the doctrine of mutual trust between member states and their internal legal systems; and
- iii. thereby to enhance the development of the EU internal market.

Legal Certainty

The importance of legal certainty is emphasised throughout the three decisions. The court's rejection of a power to derogate from Article 21 was rejected in *Gasser* on two grounds.

The first was that there was no explicit power in the Convention to derogate: see paragraph 71. The absence of an explicit power of course does not necessarily mean that a power could not be implied into the Convention. Although the Court did not address the question of implication, the second reason for rejecting the derogation demonstrates why it would not have been able to do so: such a power would undermine the aim of ensuring the achievement of legal certainty which the Convention sought to ensure by creating a single, common jurisdictional regime: see paragraph 51. It is interesting to

note that the importance of this aim was one which the Court felt no need to expand on in great detail because its status and importance were accepted as common ground between the parties: see paragraph 72 and its importance is implicitly acknowledged at paragraphs 44–45 of Advocate-General Lèger's opinion.

The role that legal certainty plays in guiding the Court's interpretation of the regime is also inherent in Advocate-General Ruiz-Jarabo Colomer's opinion in *Turner*. He said in paragraph 33:

"The Convention seeks to provide a comprehensive system, for which reason it is appropriate to ask ourselves whether a measure which has an impact on its field of application is compatible with the common rules which it establishes. The question must be answered in the negative."

A comprehensive system is one which tends towards certainty: it is of the widest application. Equally, and obviously, the creation of common rules applicable to all, in this case Convention member states, fosters certainty. The ability of States to arrogate a power outwith that common regime to decide questions of jurisdiction by, for instance, issuing an anti-suit injunction would in the Advocate-General's words lead to "chaos." It would be wholly antipathetic to legal certainty because, although the Advocate-General does not put it in these terms, it would in effect permit individual States to reintroduce national rules governing jurisdiction, something which the Convention explicitly aims to remove.

The Advocate-General's opinion on this issue was approved by the ECJ in paragraphs 29 and 30 of its

judgment, where it clearly stresses that the regime's commitment to legal certainty must not be undermined by member states deploying any procedural mechanism in respect of litigation governed by the regime except those sanctioned by the regime itself. The regime is all-embracing.

Advocate-General Lèger's opinion in *Owusu* offers the most detailed exposition of the commitment to legal certainty. That aim is identified at paragraphs 159–62 of his opinion in these terms:

“(159) In the terms of its preamble, the Convention aims ‘to strengthen in the Community the legal protection of persons therein established’. Again according to the preamble, it is for that purpose that the Convention lays down, first, rules concerning the jurisdiction of courts common to the Contracting States and, second, rules to facilitate recognition of judgments and to establish an expeditious procedure for their enforcement.

(160) The Court has clarified the meaning of that aim of the Convention, in particular with regard to the common jurisdictional rules which it contains. It has taken the view that the strengthening of the legal protection of persons established in the Community involves ‘enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued’. The Court has also characterised those rules as ‘guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought’.

(161) Only jurisdictional rules meeting those requirements are capable of guaranteeing observance of the principle of legal certainty, which is also, according to settled case-law, one of the objectives of the Brussels Convention.

(162) In my view, those two aims of the Convention, both that of strengthening legal protection for people established in the Community and that of ensuring legal certainty, mean that the application of Article 2 of the Convention cannot be made conditional on the existence of a dispute displaying connections with different Contracting States.”

Those aims would be undermined by permitting an interpretation of Article 2 of the Convention which could give rise to litigation concerning the question of when it applied and when it did not. Most significantly, perhaps, the Advocate-General identified disputes as to intra-community jurisdiction as particularly problematic and such as would give rise to the greatest degree of legal uncertainty if such litigation were permitted: see paragraphs 164–68. To militate against such uncertainty he concluded that:

“(168) . . . in more general terms it is important to bear in mind that private international law is a discipline which it is far from easy to handle. The Brussels Convention is a specific response to a concern for simplification of the rules in force in the various Contracting States regarding jurisdiction of the

courts, as well as recognition and enforcement. That simplification contributes, in the interest of everybody, to promoting legal certainty. It is also intended to facilitate the work of national courts in dealing with proceedings. It is therefore preferable not to introduce into the system created by the Convention elements which are liable seriously to complicate its operation.”

Looking more specifically at the possible application of a *forum non conveniens* doctrine to the Brussels-Lugano regime, the Advocate-General concluded, with explicit reference to the ECJ's decision in *Turner*, that permitting its introduction into the regime would run counter to the aim of ensuring legal certainty and undermine its efficacy. He said at paragraphs 263–70:

“(263) . . . by allowing the court seised the opportunity to decline – in a purely discretionary manner – to exercise the jurisdiction which it derives from a provision of the Convention, such as Article 2, the doctrine of forum non conveniens seriously affects the predictability of the effects of the jurisdiction rules laid down by the Convention, in particular the rule in Article 2. . . . that predictability . . . constitutes the only way of ensuring observance of the principle of legal certainty and ensuring greater legal protection for people established in the Community, in accordance with the objectives pursued by the Convention. Any impact of that kind on the predictability of the jurisdiction rules . . . thus ultimately detracts from the effectiveness of the Convention.

(264) In that connection, it is important to bear in mind that the Convention is largely inspired within the civil law system, which attaches particular importance to the predictability and inviolability of rules on jurisdiction. That dimension has a lower profile in the common law system, since the application of the rules in force is approached in a somewhat more flexible manner and on a case-by-case basis. In that way, the forum non conveniens doctrine fits easily within the common law system, since it grants the court seised the power to exercise a discretion in considering whether or not it is appropriate to exercise the jurisdiction vested in it. It is therefore clear that that doctrine is hardly compatible with the spirit of the Convention.

(265) Quite apart from the foregoing general considerations, it is important to consider in greater detail the procedural consequences of implementing the forum non conveniens doctrine. In my view, such consequences would be difficult to reconcile with the objectives of the Convention which, let it be remembered, relate both to observance of the principle of legal certainty and to greater legal protection for people established in the Community.

(266) As we have seen, as English law stands at present, the application of that doctrine entails a stay of proceedings, that is to say suspension of an action, which may operate sine die. That situation is inherently unsatisfactory in terms of legal certainty.

(267) Moreover, in my view, instead of providing greater legal protection for people established in the Community, the *forum non conveniens* doctrine is more liable to undermine it. That is particularly true for claimants.

(268) It bears repeating that it is upon a claimant seeking to escape the effect of the procedural objection in question that it is incumbent to establish his inability to secure a just outcome in the foreign forum in question. Here too, that situation is not satisfactory, in view of the real fear that that procedural objection may be invoked by certain defendants for the sole purpose of delaying the progress of proceedings against them.

(269) Furthermore, where the court seised has finally decided to allow the plea of *forum non conveniens*, it is once again incumbent upon a claimant wishing to re-initiate proceedings to produce the evidence necessary for that purpose. Thus, it is for the claimant to establish that the foreign court does not ultimately have jurisdiction to hear the case or that he himself is not likely to secure a just outcome in that court or has not been able to do so. That burden of proof on the claimant may prove particularly heavy. In that respect, application of the *forum non conveniens* doctrine is therefore liable to have a considerable impact on the defence of his interests, so that it tends to detract from rather than reinforce the legal protection enjoyed by the claimant, contrary to the objective of the Convention.

(270) Finally, in the event of the claimant not succeeding in producing the evidence in question to oppose a stay of proceedings (which could be pronounced *sine die*) or to recommence proceedings already suspended, the only possibility that would remain if he sought to pursue his claims would be to take all the steps needed to commence a new suit before the foreign court. It goes without saying that those steps have a cost and are likely considerably to prolong the time spent in the conduct of proceedings before the claimant finally has his case heard. Moreover, in that respect, the mechanism associated with the *forum non conveniens* doctrine could be regarded as incompatible with the requirements of Article 6 of the European Convention on the protection of human rights and fundamental freedoms.”

The Advocate-General’s approach was, in a much pared down form, adopted by the Court in its judgment in *Owusu*. In doing so it emphasised, at paragraphs 38–43, that the achievement of legal certainty was one of the regime’s aims and that that would not be “fully guaranteed” if the doctrine of *forum non conveniens* was held to be compatible with the regime’s operation. It stressed once again that that doctrine would undermine “the predictability of the rules of jurisdiction laid down by the Brussels Convention . . . and consequently to undermine the principle of legal certainty, which is the basis of the Convention.”

It is more than apparent from the judgments and the opinions of the Advocates General in the three cases that the ECJ acknowledges the achievement of legal certainty as a fundamental instrument of interpretation. The

commitment to certainty brooks no exceptions and guides the regime’s interpretation and application. In so doing it has led the ECJ to accept an interpretation of the Convention which affords territorial range of very considerable scope. Its international jurisdiction now governs not only jurisdictional questions between the 29 member states but equally (one might say) their extra-member state relations.

Mutual Trust

The second element which guided the ECJ in this line of authorities is the doctrine of mutual trust. That is the idea that each member state must place trust in the courts of other member states properly to carry out their obligations under the Convention. While there is nothing new about this doctrine – indeed, as Blobel and Spath rightly note in *The Tale of Multilateral Trust and the European Law of Civil Procedure* (2005) *European Law Review*, 30 (4) at 528, it can be traced back to the earliest days of the European institutions – its importance as a guiding principle to the interpretation and application of EC law had not previously been stressed so clearly. Blobel and Spath again rightly note that both Gasser and Turner “stand out (as judgments) for the decisive weight . . .” the ECJ grants to the doctrine of mutual trust: *ibid* at 531. It played no part in *Owusu*.

Its importance is indeed emphasised in robust terms. Advocate-General Lèger relies on it in his opinion in *Gasser*, in rejecting the argument that Article 21 could be derogated from where the court first seised with a dispute is in a member state, such as those identified at paragraph 85 of his opinion i.e., “Italy, Greece and France”, whose courts are known for excessive delay. He makes the point as follows:

“(88) . . . It does not really seem conceivable that it should be possible to refrain from applying article 21 of the Convention on the ground that the court first seised is established in a member state in whose courts there are, in general, excessive delays in dealing with cases. That would be tantamount to saying that the rules on *lis pendens* do not apply where the court first seised is established in one of certain member states.

(89) Such an interpretation would be manifestly contrary to the scheme and the basis of the Brussels Convention. The Convention does not contain any provision to the effect that its rules, in particular those of article 21, should cease to apply because of the length of proceedings before the courts in another contracting state. Moreover . . . the Convention is based on the trust which the member states accord to each other’s legal systems and judicial institutions: see *R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd* (Case C-201/94) [1996] ECR I-581 . . . It is on the basis of that trust that the Convention establishes a compulsory system of jurisdiction which all the courts within its purview are required to observe. It is also that trust which enables the contracting states to

waive the right to apply their internal rules on the recognition and enforcement of foreign judgments in favour of a simplified mechanism for recognition and enforcement. It is therefore also the basis of the legal certainty which the Convention seeks to ensure by allowing the parties to foresee with certainty which court will have jurisdiction.”

The Advocate-General’s opinion was emphatically endorsed by the ECJ, which at paragraph 72 of its judgment attributes to mutual trust a key foundational role in the development of the Brussels-Lugano regime:

“... it must be borne in mind that the Brussels Convention is necessarily based on the trust which the contracting states accord to each other’s legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those states of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.”

That foundational role, in tandem with the need to ensure legal certainty and the absence of an explicit power of derogation, left the Court in no doubt that the procedural rule enunciated in Article 21 was not one which could be derogated from where the court first seised was one from a legal system characterised by delay. Derogation on such a basis would tend to undermine the requisite trust that all member states must repose in each other’s legal systems.

A more detailed examination of the doctrine’s importance is to be found in *Turner* at paragraphs 26–34. First, the Advocate-General reviewed the argument put forward by the UK government that anti-suit injunctions were aimed at protecting an individual claimant from being harassed by “obstructive procedural measures” arising from abusive litigation by defendants in other jurisdictions and thus protecting the integrity of UK proceedings and that their use would thereby achieve the regime aim of reducing the number of proceedings before the courts of various member states. In his opinion that argument failed because of the doctrine of mutual trust. He thought that anti-suit injunctions ‘cast doubt’ on the doctrine. That they did so was in his view “decisive.” It was impermissible to undermine the doctrine of mutual trust. He noted that the commitment to mutual trust had most recently been emphasised in Recitals 16 and 17 of the Regulation. The use of anti-suit injunctions, which either directly or indirectly undermined mutual trust, was impermissible because it would undermine European judicial co-operation, “which presupposes that each state recognises the capacity of other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration”. I pause here to note that mutual trust and judicial co-operation are viewed as facilitative of a wider aim, namely integration and a single internal market.

The Advocate-General’s rejection of the validity of anti-suit injunctions was again endorsed by the European Court. In its short judgment it highlighted the importance afforded to the doctrine of mutual trust by emphasising the rationale of the decision in *Gasser* and by concluding that:

“(25) It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the contracting states, may be interpreted and applied with the same authority by each of them: see, to that effect, Overseas Union Insurance Ltd v New Hampshire Insurance Co (Case C-351/89) [1992] QB 434, 458, para 23, and Gasser, para 48.”

It is perhaps unsurprising that with such a ringing endorsement of the doctrine the Court concluded that to permit the court of one member state to find that proceedings brought in another member state were abusively brought was impermissible. Assessing the appropriateness of proceeding in another member state undermines mutual trust as it effectively undermines first, the regime for such review put in place by the Convention, and secondly, the ability of the courts of other member states to assess for themselves the proceedings brought before them. Impinging on the jurisdiction of another court cannot but undermine trust between member states.

Development of the Single Internal Market

The third limb which has guided the ECJ’s interpretation of the regime is the aim to facilitate the growth of the single internal market. Of the three limbs it is the least developed in this field.

It is only implicitly referred to in the *Gasser* judgment, where the Court alludes to the Brussels-Lugano regime itself being an embodiment of the single market ideal by creating a common, uniform jurisdictional regime which all courts of all member states have equal authority to administer. The ECJ’s view is that to permit derogations from its rules, such as that embodied in Article 21, would run counter to that single juristic space: see paragraph 48. A similar point is made in the Advocate-General’s opinion in *Turner* at paragraph 37, where it is noted that while member states are autonomous insofar as their national civil procedural codes are concerned they must ensure that any such rules comply with the underlying the regime. The regime thus sets uniform, common standards with which all member states must comply. It thus facilitates the creation of a “true internal market” between the member states.

The creation of common rules governing the determination of issues of private international law by way of the Brussels-Lugano regime is further identified in the Advocate-General’s opinion in *Owusu*: see paragraphs 189–212. Rejecting the UK government’s argument that the Brussels Conventions sought to facilitate the growth of a common market only in respect of the recognition and

enforcement of judgments delivered in member states, he emphasised the content of the second and eighth recitals to the Regulation's preamble. As he put it at paragraph 196:

“(196) . . . as emphasised in the second and eighth recitals in the preamble to the regulation, the jurisdictional rules contained in it – in view of the diversity of the existing national rules in this area and the resulting difficulties for the proper functioning of the internal market – seek to ‘unify the rules of conflict of jurisdiction in civil and commercial matters’, so as to arrive at ‘common rules’ in the Member States. This exercise of unifying jurisdictional rules forms part of an approach comparable to that provided for in Article 94 EC for the adoption of directives, since the aim of that substantive legal basis is ‘the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market’.”

The Advocate-General drew further support for the importance of the need to interpret the regime compatibly with the aim of facilitating the growth of the single internal market by reference to the interpretation of Article 95 of the EC Treaty, Directive 95/46 and Regulation 1408/71. In arriving at its judgment the Court at paragraph 34 expressly referred to this discussion when it emphasised that the Brussels-Lugano regime was intended to facilitate the development of the internal market so that: “. . . there is a real and sufficient link with the working of the internal market, by definition involving a number of member states.”

CONCLUSIONS

Where are we now? It seems to me that a number of conclusions can be drawn from a contrast between the approach of the English court and of the ECJ on the other to two particular aspects of civil and commercial litigation. The first is the anti-suit injunction and the second is *forum non conveniens*. I take them in turn.

The anti-suit injunction

The contrast between the approaches can be seen from a comparison between the English approach exemplified by the judgment of Millett LJ in *The Angelic Grace*, which I quoted earlier and the approach of the ECJ in *Gasser* and *Turner*. The latter approach has been the subject of no little academic criticism. That criticism includes articles by Jonathan Mance (now of course Lord Mance) in LQR 2004, 120 (Jul), 357–65 and Adrian Briggs LQR 2004, 120 (Oct), 529–33.

Jonathan Mance recognises that the decision in *Gasser* is imbued with pure European principle but observes that it promises problems for legitimate claimants and opportunities for those unwilling to meet their obligations. Article 21 (now Art 27) adopts a simple test of chronological priority for the court first seised. The effect of *Gasser* is to give that court priority over the agreed jurisdiction, so that, until the court first seised has decided

that there is indeed a binding jurisdiction clause in favour of the courts of another member state, the latter must decline jurisdiction in favour of the former and the former must accept jurisdiction. He says:

“It is at the practical efficacy of Art. 17 (now Art. 23) that the European Court’s decision in Erich Gasser seriously strikes. London is one important elective jurisdiction. However, the decision is of far from parochial concern, and may even affect commercial parties’ willingness to agree to litigate (as distinct from arbitrate) in Europe.”

Jonathan Mance then contrasts the views of Advocate General Leger with those of the ECJ as follows:

“The Advocate General was M Philippe Léger. In a comprehensive and nuanced Opinion he drew the analogy between exclusive jurisdiction under Art 16 (now Art 22) and Art 17 (now Art 23). In paras [57], [62] and [66]–[68], he pointed out that, if Art 21 prevailed, it would “seriously compromise” the utility of Art 17 and the legal certainty to which it contributed. He went on:

“67... In effect, ... the party who, in violation of his obligations resulting from the agreed choice of jurisdiction, has first initiated proceedings before a tribunal which he knows to be incompetent could abusively delay the resolution of the dispute on the merits when he knows this would be unfavourable to him ...

68. This consequence is shocking as a matter of principle and risks encouraging delaying tactics...”

The Advocate General also noted that the basic problem was one of tactical manoeuvring, not simply delay in some judicial systems. A party commencing proceedings in a country (State A) other than the country agreed (State B) would “use every internal means to delay the moment when the decision that this jurisdiction is incompetent becomes definitive” (para [69]). The solution was to allow the court second seised to continue to exercise jurisdiction provided that it could establish the existence and application of the agreed choice of jurisdiction clause in a rigorous manner and beyond any possible doubt – any risk of contradictory decisions being thereby largely avoided) paras [81–83].

*The European Court reached very different conclusions: see [2004] 1 Lloyd’s Rep 222. As to question two, the court second seised must under Art 21 always defer to a court first seised, unless and until that court declares itself incompetent. There should be a clear and precise rule, in view of “the disputes which could arise as to the very existence of a genuine agreement between the parties” within Art 17. A court second seised is “in no case ... in a better position than the court first seised to *360 determine whether the latter has jurisdiction” (para. [48]). Practical implications were summarily dismissed:*

“53...the difficulties ... stemming from delaying tactics ... are not such as to call in question the interpretation

of any provision of the Brussels Convention as deducted from its wording and purpose”.

The court answered question three even more shortly, though with the Advocate General’s support. An exception to Art 21 based on excessive delay was contrary to the letter, spirit and aim of the Convention (para [70]). The Convention was necessarily based on mutual trust, and sought to ensure legal certainty (para. [72]). The court impliedly rejected the United Kingdom’s fall-back suggestion that the court of State B could determine jurisdiction under and exclusive clause where (i) suit was issued in state A in bad faith to block any suit in State B and (ii) the court in State A had failed to adjudicate upon its own jurisdiction within a reasonable time.

It may comfort theoreticians that the Community has rules of ideological purity and logical certainty. But the result can only be practical uncertainty with large scope for tactical manoeuvring. The irrebuttable assumption that all national systems operate for the best shows the barrier on the Rhine between Strasbourg and Luxembourg concerns and thinking.”

Jonathan Mance expresses the view that the reasoning of the ECJ is in five critical respects unpersuasive: see pages 360–2. I will refer briefly to only three. His first point is that the ECJ’s judgment seems ambivalent whether article 21 is subject to any exceptions. What about article 16? He asks the question:

“If Art. 16 is an exception, why should Art. 17, resting on party autonomy, be different? According to the Schlosser Report (para 22), not mentioned by the court, a court must ‘also of its own motion consider whether there exists an agreement on jurisdiction which excludes the court’s jurisdiction and which is valid in accordance with article 1.’”

His third point is that, whereas in some circumstances the court first seised may be better placed to rule on the question of jurisdiction, the reverse applies where the parties have chosen a jurisdiction. His fourth point (which is closely related to his third) is this:

“Fourthly, the ‘legal certainty’ so esteemed by the court consists apparently in knowing ‘clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention’ (paras 51 and 72). But the parties’ commitment, when contracting, was that the chosen court should assume its exclusive jurisdiction without delay and without either party having to engage in litigation elsewhere to achieve this.”

In conclusion Jonathan Mance suggests that in contrast to the ECJ’s absolutist approach, the Advocate General’s careful opinion offered a measured compromise. I must say that I agree with that.

In his article Adrian Briggs focused on *Turner*, in which the court simply held that an anti-suit injunction was incompatible with the Convention, even in a case in which the injunction was granted by the court first seised. He said

that “taken together with the court’s wilful weakening of jurisdiction agreements (noted by . . . Jonathan Mance . . .), an effective and sophisticated tool of English commercial litigation has been decommissioned.” Adrian Briggs expressed his views in strong terms. He referred to the *Continental Bank* case and observed that the effect of *Gasser* and *Turner* is that it cannot be reconciled with the Convention. He added:

“It is well known that many continental lawyers have a peculiar hostility to the anti-suit injunction. As an antidote to jurisdictional shenanigans its usefulness is second to none, but its roots did not lie in civilian legal systems. So it had to go, as the dullardism of the lowest common denominator asserted itself. In its place, we are to repose trust in the other states’ legal systems and judicial institutions. This pious substitute for adjudication may be all very well for judges and diplomats, but it was not much use to Gasser or Turner, and will doubtless be just as useless for future litigants who inhabit the real world. No doubt the enlargement of the European Union will bring even more opportunities to trust foreign legal systems, and make even more redundant the summary and direct enforcement of jurisdictional agreements and jurisdictional rules.”

I would not myself use such strong language but it does seem to me to be a pity that the ECJ has set itself against the anti-suit injunction with quite such determination. Why not adopt the sensible compromise suggested by Advocate General Leger quoted above (and not expressly commented upon by the ECJ), namely that the solution is to allow the court second seised to continue to exercise jurisdiction provided that it could establish the existence and application of the agreed choice of jurisdiction clause in a rigorous manner and beyond any possible doubt—any risk of contradictory decisions being thereby largely avoided?

I hope that one of these days the ECJ might be willing to consider some of these considerations. After all there is now a good deal of academic comment to the effect that its present approach can be said to legitimise the use of a procedural device whose purpose is to frustrate the proper determination of disputes. This is the device which has become known as “the Italian Torpedo”: see Delaygua, *Choice of Court Clauses: Two Recent Developments* [2004] ICCLR 15 (9) 288 at 295. It is an approach which can be compared with the French courts’ approval of their own use of anti-suit injunctions: see *Banque Worms v Brachot* (cass. 1re civ., November 11, 2002; 2003 Rev. Crit. 816).¹ The French introduction of the anti-suit injunction might be thought to support the conclusion that this type of injunction is not antipathetic to civilian jurisdictions. It might also help to persuade the ECJ to give serious consideration to its approval as part of the armoury of all member states’ courts as a necessary procedural device in

¹ Cited in Briggs LQR (2004) 120, Oct at 530.

order to ensure that the Brussels-Lugano regime is not abused.

However, until the ECJ is persuaded to change its view that anti-suit injunctions are impermissible, it must be recognised that the law applicable in England (as in other member states) is as stated in *Gasser and Turner*. Thus the *Continental Bank* case can no longer be regarded as good law.

The question remains whether the English court is now prevented from granting anti-suit injunctions in cases to which the Convention (or Regulation) does not apply. This is a point which I have had to consider in a judicial capacity in the comparatively recent past. This was in a case which we held was outside the Convention because it was within the arbitration exception in Article 1.2 (d) of the Regulation. The case was *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co. Ltd* [2005] 1 Lloyd's Rep 67 in the Court of Appeal.

The basis of the jurisdictional dispute before the court was relatively straightforward. Certain goods were to be transported by ship from Calcutta to Kotka in Finland. They were then to be transported to Moscow. They were however lost during the final leg of their journey. They were insured against loss and damage by the defendants, New India Assurance. The shipper claimed against that policy. That claim was subsequently compromised and the benefit of any action against the carrier was assigned to New India. The carrier and an associated company that was also involved in the shipment however declared bankruptcy. They were insured by the claimants, Through Transport. New India issued proceedings in Finland under a Finish third parties' rights against insurers statute against Through Transport. After the proceedings were served, Through Transport sought to contest jurisdiction and did so by way of issuing proceedings in England for a declaration that the parties were bound by an arbitration clause, which required the parties to arbitrate the dispute in England, and an anti-suit injunction. An issue arose between the parties as to whether the arbitration clause applied. The English High Court held that the Regulation did not apply as it did not apply to arbitration proceedings and it thus granted the sought for declaration and anti-suit injunction. New India appealed.

One of the issues the Court of Appeal had to decide was whether it was bound to apply the *Gasser* decision and hold that, as the court second seised, it must stay the proceedings before it pending the outcome of a jurisdictional challenge in Finland. It seemed to the Court that, at least as a matter of principle, there was an argument that the Regulation required the court first seised to determine the issue of jurisdiction i.e., whether the proceedings before it fell under the arbitration exception (see paragraph 24). It appeared to us however that such an approach was inconsistent with the ECJ's decision in *Marc Rich & Co AG v Societa Italiana PA (The Atlantic Emperor)* [1992] 1 Lloyd's Rep 342.

A strong argument was put to us that *The Atlantic Emperor* could not now be relied on to support the conclusion that the English court had the requisite jurisdiction. That argument was based on an application of *Gasser* to the effect that as the court first seised the Finnish court was the correct court to determine the issue of jurisdiction. We took the view that *Gasser* could be distinguished as in that case both parties accepted that both sets of proceedings in Italy and Austria fell within the regime. In contrast the question before the court here was whether the English proceedings fell within the regime at all. It was not therefore a question of how did the regime apply but whether it applied at all (paragraph 36). Given that distinction and the decision in *The Atlantic Emperor* we concluded that the correct approach would be for the English court, even as the court second seised, to determine whether the proceedings fell within the regime and then only if they did apply the regime's procedural rules.

Agreeing with the judge, we held on the facts that the proceedings were within the arbitration exception and thus outside the Brussels-Lugano regime. On that basis the question arose whether we should grant an injunction restraining the claimant from proceeding in Finland. That raised the question whether it would be wrong in principle to do so in the light of the decision in *Gasser and Turner*. Should the principle in those cases that no anti-suit injunction be granted in the interests of certainty and mutual trust equally be applied where proceedings are said to have been brought in one member state in breach of an arbitration clause?

We reached the conclusion that the answer to that question was no. The case was not like *Gasser* because there was no breach of an exclusive jurisdiction clause and the proceedings were outside the Convention because they were within the arbitration exception and it was not like *Turner* because it was not a case in which the sole question was whether the proceedings restrained were vexatious or oppressive and there was no breach of an arbitration agreement. We reached the conclusion, rightly or wrongly that, where proceedings are brought in breach of an arbitration clause the principles expressed by Millett LJ in *The Angelic Grace* remain applicable. I recognise that there is scope for argument as to whether that is correct or not. It appears that Adrian Briggs thinks that it is not. However, the view we took was that, once it is held that the proceedings are in breach of an arbitration agreement, there is nothing in the Convention to prevent the court from granting an injunction on the basis of Millett LJ's principles. It seemed to us that no question of mutual trust arose, there was no reason why the Finnish court should be offended by an injunction which would simply have enjoined the New India personally. We noted that, if the positions had been reversed, there would have been no question of the English courts being offended by an injunction granted elsewhere enjoining claimants from

continuing with proceedings in England in breach of an agreement to arbitrate. This approach was followed by Colman J in *The Front Comor* [2005] 2 Lloyd's Rep 257.

In the event, however, we allowed the appeal against the grant of an anti-suit injunction in that case because we formed the view that in the particular circumstances of the case the proceedings in Finland were not brought in breach of contract and that, applying *Turner*, it would not be appropriate to grant an injunction. Let it never be said that the English courts do not loyally apply the decisions of the ECJ to questions to which they are applicable. I should however add that in *The Front Comor* Colman J, following *The Jay Bola* [1997] 2 Lloyd's Rep 279 (a case not cited to us in *Through Transport*), granted an injunction in a case where the proceedings restrained were brought by subrogated underwriters. Neither side sought to appeal to the House of Lords in *Through Transport* but I understand that there is to be a leap frog appeal to the House of Lords in *The Front Coma*. Moreover I understand that the appeal is to be heard in the near future. I shall look forward with great interest to the result, especially to the speech of Lord Mance.

Forum non Conveniens

Owusu had also come in for some academic criticism, notably by Adrain Briggs in LQR 2005 121 (OCT) 535-540. He says that this was the third time in 15 months that the ECJ has struck a blow against international commercial litigation. As to *Owusu* he says:

“And now the court has ruled that though an English court has been satisfied, clearly and distinctly, that a court in a non-contracting state is more appropriate for the trial of the

action, and has further determined that no injustice would be done to the claimant if the English proceedings were stayed, a defendant domiciled in the United Kingdom may not seek, and a court may not grant, a stay on the ground of forum non conveniens.”

Adrian Briggs notes that the effect of *Owusu* is to overrule *Re Harrods (Buenos Aires) Ltd*, to which I referred earlier, and says that the real, if collateral, victims of the ruling were the five Jamaican defendants, who had no connection with any member state but found that they were in effect dragged to England to defend themselves. Briggs describes the ECJ as being ‘airily dismissive of their predicament’. As he puts it, the ECJ simply stated that such considerations were not such as to call into question the fundamental rule of jurisdiction contained in Article 2.

I must say that this does seem a startling result and appears to promote the principle of legal certainty above the more pragmatic and (it might be thought) just solution of arriving at a fair conclusion on the facts of a particular case. However, it is not perhaps for me to say. I leave you to judge.

POSTSCRIPT

I am sure that these three decisions have not provided a fatal blow to commercial litigation, whether in England or elsewhere but they have certainly not helped. I hope that the ECJ will bear some of these considerations in mind when deciding future questions of this kind. 🍷

The Rt Hon Sir Anthony Clarke

Master of the Rolls