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Forum Battles in International Maritime Litigation

The English Approach

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Introduction

The reach of the jurisdiction of the English Courts has changed substantially over recent years. Much of this has occurred by reason of statutory provisions derived largely from Europe. Case law also has contributed. This paper addresses both areas of development.

To assess the extent of the jurisdiction of the English Courts it is necessary to consider whether it is possible to commence and serve process in respect of the relevant dispute. Service of an *in personam* claim form outside England is allowed without the permission of the court where statute or rule permits and in particular, in respect of claims coming within the Civil Jurisdiction and Judgments Act 1982[1] (or as amended by the 1991 Act). Service outside England is allowed, with leave of the court, in any other case falling within one of the categories specified in CPR Rule 6 (derived from the former RSC[2] Order II to which much of the case law refers), the Admiralty Practice direction or, in the case of Arbitration, the Arbitration Practice Direction *and* the plaintiff persuades the Court to exercise its discretion to permit service.

CPR Rule 6 identifies cases that require leave for service outside the jurisdiction. These include circumstances in which a remedy is sought against an individual person domiciled within the jurisdiction, an injunction is sought ordering the defendant to do (or refrain from doing) anything within the jurisdiction, the claim is brought in respect of a breach of contract within the jurisdiction or the claim is founded on a tort and the damage was sustained or resulted from an act committed within the jurisdiction. Claims seeking to enforce, rescind, dissolve, annul or otherwise attach a contract or to recover damages in respect of the breach

[1] That is claims within the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988. In this paper referred to respectively as the Brussels Convention and the Lugano Convention.
[2] Rules of the Supreme Court.

of a contract made within the jurisdiction or made through an agent within the jurisdiction on behalf of a principal outside the jurisdiction, or a contract governed by English law or one governed by English jurisdiction are also included.

The key substantive regimes that apply in England are Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (The Regulation) and the Brussels Convention on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention) and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (the Lugano Convention). These regimes have had a considerable influence upon the attitude of the English Courts generally. Their application remains largely European but US parties may be affected by them.

Even where there is a clear general or specific jurisdictional basis for the Court to grant permission for the service of a claim form on a party outside the jurisdiction, however, there are restrictions on the jurisdiction of the English Courts. These may relate to the creation of jurisdiction in that they provide a further requirement that must be satisfied. Alternatively they may relate to the manner in which established jurisdiction is exercised. The distinction may only be significant where the matter is in the Court's discretion and the Court gives weight to the existence of jurisdiction when exercising the discretion.

This paper on maritime litigation considers, in particular, issues of the appropriate forum (or *forum conveniens*) and the principal considerations that apply. Amongst such considerations is that of the governing law. It is rare to find a choice of law rule in a statute and the rules governing conflict of laws in England are largely creatures of case law. Questions of governing law usually arise only after jurisdiction has been established. A dilemma exists, however, in some circumstances in that jurisdiction may itself depend upon the governing law. This paper looks at some of the issues that surround the English choice of law process with particular reference to maritime claims.

The English Court can prevent a party within its jurisdiction from starting or continuing proceedings in a foreign court through an "anti-suit" injunction. There had until recently been increased use of this remedy particularly to enforce express jurisdiction clauses or arbitration clauses regardless of whether the claim fell within the terms of the Brussels or

Lugano Conventions. Very recent authority however has caused the English Court to retreat somewhat from granting such injunctions in European cases. The situation elsewhere remains largely untouched.

Finally this paper considers English Rules in relation to Limitation Proceedings. Limitation of liability in the United Kingdom is now governed by the provisions of the Merchant Shipping Act 1995. These provide for both total exclusion of liability and limitation of liability.

The appendix to this paper considers some key or recent authorities on the subject, particularly some those that involve US parties or the US Courts.

The Admiralty Court

Location and Composition

The Admiralty Court is located in the High Court of Justice in the Strand, London. It has its own unique history distinguishing it from the other Courts located there. The Supreme Court Act 1981[3] stipulates that the full jurisdiction of the High Court belongs to all divisions alike and further provides[4] that all the Judges of the High Court have equal power, authority and jurisdiction. The Admiralty Court is designated[5] as part of the Queen's Bench Division and the Admiralty Judges are nominated from amongst the puisne judges by the Lord Chancellor. Most Admiralty actions in England are tried by the Admiralty Judge sitting in London.

Compulsory Admiralty process

Admiralty actions are conducted in a similar manner to Commercial Actions. The relatively new Civil Procedure Rules[6] contain a section governing Admiralty Claims[7]. The following actions are *required* to be brought before the Admiralty Court:-

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[3] S5(5).
[4] s4(3).
[5] S6(i)(b).
[6] Hereafter CPR - came into effect 26th April 1999.
[7] CPR Part 61 and its associated Practice Direction.

(i) A claim *in rem.*

(ii) A claim for damage done by a ship.

(iii) A claim concerning the ownership of a ship.

(iv) Any claim under the Merchant Shipping Act 1995.

(v) Any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment.

(vi) Any claim for loss of life or personal injury sustained in consequence of the wrongful act, neglect or default of:-

  a) The owners, charterers or persons in possession or control of a ship or

  b) the master or crew of a ship or any other person for whose wrongful acts, neglect or defaults the owners, charterers or persons in possession or control of a ship are responsible.

(vii) Any claim by a master or a member of a crew for wages.

(viii) Any claim in the nature of towage.

(ix) Any claim in the nature of pilotage.

(x) Any collision claim.

(xi) Any limitation claim.

(xii) Any salvage claim.

Wider Jurisdiction

The subject matter over which the Admiralty Court actually has jurisdiction is however considerably wider. It includes[8] loss or damage to goods carried on board a ship, claims under the Salvage Convention 1989 and actions to enforce claims for damage, loss of life and personal injury arising out of collisions[9]

While the jurisdiction of the Admiralty Court is therefore limited by subject matter, when its jurisdiction is invoked *in personam* the subject matter limitation is of technical importance only as the whole jurisdiction of the High Court is available to all divisions. All cases within the jurisdiction may be brought by an Admiralty action *in personam.*

[8] Under s20(1)(a) of the Supreme Court Act 1981.

[9] Under s20(1)(b) of the Supreme Court Act 1981.

The unique and most important feature of the Admiralty Court however is the ability, in certain cases and in certain circumstances, to bring an action *in rem*. Only the Admiralty Court may exercise jurisdiction *in rem* by way of an Admiralty claim *in rem.* Most kinds of jurisdiction are concerned with claims in connection with ships, the definition of which is, therefore, important.

The term "ship" is capable of both a narrow meaning and a much broader one and it is the wider meaning that applies. Unless the context otherwise requires, a "ship" includes[10] every description of a vessel used in navigation and will cover[11], for example, a hovercraft[12]. The term *vessel*, is itself not defined by the 1981 Act and it is now no longer defined by the Merchant Shipping Act 1995 either. In essence a ship is a seagoing vessel in the sense of being a navigable object but it need not actually go to sea to come within the definition.

The Brussels Convention, the Lugano Convention and the Regulation

The Purpose of the Conventions

The Brussels Convention was born out of the concept that the ideals of the European Economic Community would be better furthered by greater ease of enforcement of judgments between Member States. The Convention was signed in 1968 and entered into force in the original Member States in 1973 (and on subsequent dates for the later accession Countries). The purpose of the subsequent Lugano Convention was to strengthen the economic co-operation between the original and newer groupings of Member States. Its provisions are substantially the same as those of the Brussels Convention, as amended, but an important distinction is that the European Court has no jurisdiction to give preliminary rulings on the interpretation of the Lugano Convention.

National Courts

National courts must decide their own jurisdiction under the relevant Convention. The issue is whether the subject matter falls within the Convention (a contractual agreement to arbitrate

[10] S24(i) Supreme Court Act 1981.
[11] Except in the definition of "Port" in s22(2) of the Supreme Court Act 1981.
[12] Subject to the Hovercraft Act 1968.

may, for example, exclude the application of the Convention). If the claim is within the Convention, and is not subject to national law or another convention and it has not been previously litigated then the Court upon which jurisdiction is conferred first cannot decline to hear the case. One of the principal purposes of the two Conventions is to prevent inconsistent judgments between courts of contracting states. The overriding objective is to prevent re-litigation of disputes already decided, to allow for recognition and enforcement of judgments and to determine issues of jurisdiction where proceedings involving the same or related claims are concerned in courts of different contracting states.

Rules relating to multiple proceedings are necessary in relation to initial proceedings as there may be more than one Convention jurisdiction. This may occur, for example, where the domicile of the defendant provides jurisdiction and, simultaneously, the place of the damage in a tort action provides for a different jurisdiction. The principle of preventing inconsistent judgments extends to all disputes whether or not jurisdiction in a particular case was based on the Convention's substantive provisions. It encompasses initial jurisdiction rules of national law bearing in mind that the application of national law is itself through the Convention.

The Historical Position

The position in England was previously[13] that the English High Court had broad jurisdiction over a) persons who are present in England at the time of the service of process and b) in certain specified cases, persons who are outside England. In the former case the ability to stay proceedings was subject to the discretion of the Court. In the latter case it was generally necessary for the permission of the Court to be obtained for the issue of proceedings and its service outside the jurisdiction was the subject of the Court's discretion. That position has changed since the incorporation of the Brussels Convention and the Lugano Convention into English law by the Civil Jurisdiction and Judgment Act 1982. The mere presence of the defendant in England is no longer a sufficient basis of jurisdiction if he is domiciled in another part of the United Kingdom or in another contracting state. Where the Conventions confer jurisdiction on the English Court its discretion *not* to exercise that jurisdiction is now severely curtailed.

[13] Prior to the Civil Jurisdiction and Judgment Act 1982 which came into force 1.1.87.

The Conventions provide a detailed set of rules dealing with the circumstances in which the Courts of the contracting States may exercise jurisdiction in those matters that come within the Conventions. The Court in which the action is first brought must adhere to a strict system of direct rules of jurisdiction. The primary basis of jurisdiction under the Conventions over those "domiciled" in a contracting state is the "domicile" of the defendant. There are in addition other special foundations for jurisdiction such as the place of the performance of a contractual obligation and the place of the occurrence of a tort. There are also certain areas of exclusive jurisdiction which may displace the defendants domicile basis. Provision is also made for submission to the jurisdiction by contract or by appearance, and for certain procedural matters, including *lis alibi pendens* and jurisdiction in respect of other provisional measures.

The Regulation

The Brussels Convention has recently been replaced by Council Regulation (EC) 44/2001. This applies to all Member States of the European Union except Denmark which alone among the European Union States did not participate in the Regulation. The Lugano Convention will henceforth only be effective as regards three States.[14] Coming into force on 1st March 2002 the Regulation largely supersedes the two previous Conventions. It is directly applicable in the United Kingdom. The Regulation applies to the same matters as the Brussels Convention and the basic rules for jurisdiction are the same. Persons domiciled in the Regulation States shall, whatever their nationality, be sued in the Courts of that Regulation State. Persons domiciled in a Regulation State may be sued in the Courts of another Regulation State only by virtue of special provisions which relate to such matters as consumer contracts[15], employment[16] and, importantly, insurance[17]. If the defendant is not domiciled in a Regulation State (as with someone domiciled in the United States) the jurisdiction of the Courts of each Regulation State shall be determined by the Court of that State. As against such a defendant any person domiciled in a Regulation State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force in the same way as nationals of that State.

[14] Iceland, Norway and Switzerland.
[15] S. 4 Chapter II of the Regulation: Art 3(1)
[16] S. 5 Chapter II of the Regulation; Art 3(1)
[17] S. 3 Chapter II of the Regulation; Art. 3(1)

The provisions of the Regulation and the Brussels and Lugano Conventions have the same effect on Admiralty actions *in personam* as on any other High Court claim. More complex issues arise in relation to actions *in rem*.

The Appropriate Forum

The Historical Position

English Courts may refuse to exercise jurisdiction, even where established as of right, on the basis that England is an inappropriate forum for the dispute in question. This is the modern application of the doctrine of *forum conveniens* (or *forum non conveniens*). Until 1972 a defendant seeking a stay of proceedings had to prove that the continuance of the proceedings would be "vexatious and oppressive". This essentially involved demonstrating harassment of the defendant. The test would not be satisfied if the claimant was simply taking advantage of more favourable English procedural rules or, in commencing proceedings, merely caused the defendant extreme inconvenience. The "vexatious and oppressive" test would normally be satisfied, however, where there had been duplicate proceedings commenced by the claimants. More recently the approach is that, absent other relevant factors, the claimant must elect in which jurisdiction the suit is to be brought. The Court, at this stage, does not consider issues of *forum non conveniens* which may, nonetheless, subsequently be applied to the elected forum. In doing so the Court will now consider the "appropriateness" of process continuing in the elected Court.

The move away from the "vexatious and oppressive" test

Case law is particularly relevant to this issue. The *Atlantic Star*[18] decided by the House of Lords in 1972 moved thinking away from an approach that emphasised the availability of English process to any claimant who may succeed in catching his defendant within the territory. In 1978 *MacShannon v. Rockware Glass Ltd*[19] continued this process and laid down the principles to be followed by the English Courts. It was not however, entirely clear from that decision quite how far there had been a transition from the old "vexatious and oppressive test" towards the new standard of "appropriateness". Six years later in the *Abidin*

[18] [1974] AC 436.

Daver[20] (a case in which proceedings had also been commenced in Turkey) the Court of Appeal went back to the view held by the Court of Appeal in the *Atlantic Star* but which had, in that case, subsequently been rejected by the House of Lords. Sir John Donaldson in the Court of Appeal in *Abidin Daver* referred to the expertise of the English Admiralty Court and took a line effectively comparing English and foreign courts. The House of Lords in *Abidin Daver* finally rejected this approach and moved English law closer to a substantive doctrine of *forum non conveniens*.

But qualifications remained. Firstly the House of Lords in *MacShannon* made it quite clear that the "balance of convenience" was not enough. Secondly an attempt to stay proceedings could be defeated by proof that the claimant had a personal or juridical advantage in suing in England, a concept inconsistent with the idea of balancing one forum against another on the basis of links with the dispute. Finally the question of a stay remained a matter of discretion.

The Spiliada

These uncertainties were for the most part resolved in 1986 by the House of Lords in the *Spiliada*[21] (in particular in the Judgment of Lord Goff). This case is now the foundation of the principle of *"forum conveniens"*. It is clear that it applies both to the discretion to permit a claim form to be served out of the jurisdiction and to any application for a stay of proceedings in which jurisdiction has been established. The principle is further statutorily recognised by Section 49 of the Civil Jurisdiction and Judgments Act 1982[22]. Lord Goff in the *Spiliada* stressed that the principle was not one of convenience but of appropriateness and made it clear, in the application of the principle to the facts of the case, that it remains essentially a matter for the discretion of the trial judge. An appellate court will not interfere with the first instance decision simply because it disagrees.

For a stay of proceedings to be granted therefore the key elements of the principle are that:-

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[19] MacShannon v Rockware Glass Ltd [1978] AC 795; 1 ALL ER 625.
[20] [1983] 3 All ER 46.
[21] [1986] 3 All ER 843 (HL).
[22] **"Savings for powers to stay, sist, strike out or dismiss proceedings**. 49. Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention or as the case may be, the Lugano Convention".

(i) There must exist another available forum with competent jurisdiction *"in which the case may be tried more suitably for the interests of the parties and to the ends of justice"*.

(ii) The defendant must show that the stay should be granted but if the court is satisfied that, prima facie, there is a more appropriate forum it is for the plaintiff to show any special circumstances why a stay should not be granted.

(iii) The defendant must establish that the other forum is *"clearly or more distinctly appropriate"*. This standard assumes that jurisdiction in England has been founded as of right.

(iv) The Court will first investigate whether there are factors connecting the dispute to another forum making it the *"natural forum"* being that with which the action has the most real and substantial connection. Such factors may include matters affecting convenience, expense (such as availability of witnesses), place of parties residence or business and governing law.

(v) If no other natural forum is shown to exist the Court will ordinarily refuse a stay.

(vi) If a natural forum other than England is shown to exist, normally a stay will be granted unless, in the circumstances of the case, justice requires that it be not granted. A relevant consideration against a stay would be if it can be shown that the plaintiff will not obtain justice in the alternative forum.

As to consideration of the relative advantage and disadvantage to the parties in invoking jurisdiction, Lord Goff indicated a stay should not be refused simply because of such advantages as the availability in England of higher damages, more effective discovery, the power to award interest or a more generous limitation period. However a stay which resulted in the plaintiffs' claim being excluded in the foreign forum because of a time bar should not be granted if the plaintiff's failure to commence proceedings elsewhere was not unreasonable. A stay might, however, be granted on condition that any foreign time bar was waived. If a stay is granted a plaintiff may well be permitted to keep the benefit of security obtained in England through commencement of proceedings here.

The principles are intended to provide a balanced regime for determining the appropriate forum. The burden on the defendant takes into account the establishment of jurisdiction in this country by the claimant particularly if the basis of jurisdiction is a relatively slight connection. A non exclusive jurisdiction clause is a weighty factor. The role of the appellant court remains restricted to ensuring a correct approach in principle or that the Judge was not plainly wrong in applying the principle.

There are various factors relevant in assessing whether there is a natural forum. In the circumstances of the potentially lengthy and complex litigation in the *Spiliada* the Judge was entitled to treat the existence of a similar action concerning another vessel (*The Cambridgeshire*) involving the same legal advisers on both sides, as a crucial factor. Further relevant factors pointing to England were English insurers and governing law.

The Current Position

Relevant factors will vary case by case but the important test established by the *Spiliada* is to determine the appropriate forum based on the extent of the connection with the dispute. If it is established that there are connections to a foreign court which are of greater significance than those with the English Court a further investigation must take place as to the nature of the proceedings and other factors likely to affect the parties such as delay and the level of damages. If a natural foreign forum can be demonstrated it is for the claimants to demonstrate that factors other than “connection” establish grounds for refusal of stay. Where there is no natural forum, either in England or abroad, the same factors remain relevant but it is then for the defendant to make the case for a stay on those factors. Where a stay is granted it may be subject to conditions or undertakings such as refraining from taking time bar defences or matters relating to limitation or costs. Any comparison of procedures between courts of different countries is considered wrong, as is exercise of jurisdiction simply to identify particular issues, possibly with a view to retaining jurisdiction over some.

Jurisdiction Agreements

Forum non conveniens and jurisdiction agreements are both essentially matters of discretion for the Judge of first instance. It may be argued that a jurisdiction agreement is but an

additional factor in the overall consideration of appropriateness. Conversely it may be said that a jurisdiction agreement provides the opposite starting point for considering appropriateness. An agreement to a specific jurisdiction should be upheld. Where a stay is requested on grounds of appropriateness the onus is on the defendant to justify it. It has been held in the English High Court that where the parties have contractually agreed to litigate in England (whether exclusively or not) it is not open to one party to raise matters, foreseeable at the time of entry into the contract, in support of a stay. However, somewhat inconsistently, that view is not one universally adopted by the English Court to a foreign forum clause.

Choice of Law

Any foreign element involved in a dispute raises the possibility that the English Court may use a foreign rule to resolve the dispute. English law traditionally places claims into categories in order to decide which of a number of potentially applicable rules applies. It attaches to each of these categories choice of law rules. In addition it provides for rejection of a rule for reasons of public policy.

Statutory Provisions

Most English law on conflicts is derived from case law but there are a number of statutory provisions that are relevant. The Foreign Limitations Period Act 1984 was intended to ensure English law mirrored other systems and it recognised that the rules as to limitation of time applicable to a claim should be those of the law governing the claim rather than (as a matter of procedure) the forum. The Contracts (Applicable Law) Act 1990 implemented into English law the Rome Convention 1980 on the law applicable to contractual obligations. It provides rules for deciding the law applicable to contracts within its scope. The Private International Law (Miscellaneous Provisions) Act 1995 provides rules for the law applicable to substantive tort issues. Unless qualified, where statutory rules provide for choice of law these are mandatory in the sense that the parties are unable to contract out of them.

The Three Steps Process

Subject to statutory provisions as to choice of law the process under English law is in three stages:

i) The issue before the Court is first deemed to be either one of *"procedure"* or one of *"substance"*. If the former, the issue is referred to the law of the forum. If the latter, it will fall into one of a number of categories based on the legal concepts it embraces (e.g. contract, tort or property).

ii) Each *"substantive"* category then has attached to it selection rules which will automatically apply to the disposal of the issue. Matters relating to the validity and effect of the transfer of a tangible asset for example, will be referred to the law of the place where the party was at the time the issue arose. A contractual issue will be referred to the law applicable to the contract. A statute that creates a cause of action without containing its own choice of law provision may be classified within an established "substantive" category (such as tort) or simply as a statutory claim. Accordingly a claim under the Fatal Accidents Act 1976 could be viewed as a statutory claim or (if based on the defendant's negligence) a tortious claim. A wages claim within the Supreme Court Act 1981 could be regarded as a statutory claim (having its own choice of law rules) or a claim in contract in which case its resolution would depend on the law applicable to the contract.

iii) Finally, there may in some cases be a public policy consideration. This consideration may be applied primarily as a means to avoid an unpalatable result that may have been reached through the application of the first two stages. If public policy considerations render application of the chosen law unacceptable to the English court, English law will be applied.

Proof of Foreign Law

Foreign law must be proved as a matter of fact before the English Courts. If it is not proved (or pleaded) it is deemed to be identical with English law.

Maritime Claims

For maritime claims a choice of law rule that links a dispute to a legal system on the basis of locality or territory must be modified to accommodate events occurring at a place not within

the territory of any legal system. That need can be reduced by treating ships as territory thus limiting the area of uncertainty to events occurring otherwise than on board a ship.

The primary classification between "procedure" and "substance" applies to maritime claims as to other claims. Maritime claims as listed in the Supreme Court Act 1981 can, for the purpose of ascertaining "substance", be classified into such categories as contractual, tortious or proprietary claims. To be consistent with the general approach the classification should be based on the issue raised by a particular claim. In specifying for example any claim arising out of an agreement relating to the carriage of goods in a ship or the use of or hire of a ship the Act encompasses both claims in contract and in tort. Reference must be made to the actual claim.

So far as actions *in personam* are concerned there is no reason why the general choice of law process should not apply. Any claim falling within Admiralty jurisdiction would therefore be judged by the rules selected by the classification and selection rule process subject only to forum mandatory rules and public policy.

As far as actions *in rem* are concerned, whether an action can be brought based on foreign law turns entirely on the construction of the Supreme Court Act 1981[23]. Where foreign law has been applied it appears to be approached rather as a matter of jurisdiction (i.e. whether to admit the foreign law claim) than applicable law (i.e. a conscious assessment of the law to govern the validity of the claim). English Courts have admitted claims, the characterisation of which under foreign law matches those of similar claims in English law, within the *in rem* jurisdiction. Foreign law has, for example, been consulted to ascertain the rights of seamen. In particular, a payment of social security contributions under foreign law has been admitted as a wage claim just as a contribution under English law would be admitted. Further the Courts have suggested that the question of whether a claim fell within "necessaries" could be referred to foreign law. However in 1965 in the *Acrux*[24] it was held, with regard to provisions relating to the availability of an action *in rem* to enforce "a maritime lien or other charge", that reference to "a maritime lien" meant an English maritime lien. "Other charge" was restricted to a foreign claim having the characteristics of one of those attracting an English maritime lien.

[23] Sections 20 and 21

It does not necessarily follow from limiting maritime liens to English maritime liens that the ability to bring an action *in rem* is similarly limited. Because of the different legal consequences of maritime liens and actions *in rem* different issues of policy are involved. Further the issue in the *Acrux* went to the type of claim attracting a maritime lien while the issue in respect of the ability to bring an action *in rem* is restricted to whether claims within the statutory concept (e.g. of disbursements) can be admitted because of characteristics identical to those recognised within English domestic law as falling within the category. The analogy is more accurate with a mortgage. English law, having defined the term "mortgage", recognises foreign rights satisfying that definition.

Any statutory heads of claim should in all probability, be taken to encompass foreign claims falling within the concept reflected by that head of claim. There is no doubt, however, that a foreign claim not falling within any head would not be admitted as the basis of an action in an English Court.

Limitation Proceedings

The Convention

The Limitation of Liability Convention 1976 and the Protocol of 1996 is intended to replace earlier conventions on the same topic. The Convention came into force on 1st December 1986. The Protocol is not in force. All contracting States to the Brussels Convention are parties except Austria, Italy, Luxembourg and Portugal.

Jurisdiction

Neither the Convention nor the protocol have any express jurisdiction provisions. The Brussels Convention, however, provides specifically for jurisdiction in a Limitation Action in a court hearing a substantive claim in respect of which limitation of liability is claimed (Article 6A). The jurisdiction regime of the Brussels Convention therefore, would seem to apply without qualification to claims within the Limitation Convention.

[24] 1965 P 391.

Limitation Fund

There are nonetheless in the Limitation Convention provisions which affect jurisdiction. The setting up of a limitation fund is dependent on the existence of current liability proceedings. A limitation fund may therefore be constituted in any State party to the Limitation Convention in which proceedings relating to claims subject to limitation have been commenced. The Convention permits limitation claims even though no fund has been established but it allows national laws to provide that invoking the right to limit is dependent on the setting up of a fund. Such a restriction is regarded as being on the ability to make the claim and not on the jurisdiction to hear it. It therefore lies outside the Brussels Convention.

The 1976 Convention prohibits the bringing of a second action following any claim against the fund. It provides for the mandatory release from arrest of ships when a fund has been set up (Article 13).

The provision of the Convention does not select the forum. However it indirectly controls jurisdiction in so far as jurisdiction could be based on arrest. In proceedings within the Brussels Convention based on arrest either directly through Article 5(7) (salvage of cargo or freight) or indirectly through the Arrest Convention, a court of a contracting State would be obliged where appropriate to consider the effects of the 1976 Limitation Convention.

All matters of distribution of the limitation fund are governed by the law of the State in which the fund is constituted. Nevertheless the Limitation Convention provides no jurisdiction link between liability and limitation. Jurisdiction in liability proceedings is governed by the Brussels Convention and, where appropriate and through Article 57, the Arrest Convention or the Collision Jurisdiction Convention.

Limitation proceedings against a defendant are within the ambit of the Brussels Convention and jurisdiction is allocated by it. The power of the limitation plaintiff to bring the action in the court hearing liability proceedings is in addition to the generally applicable jurisdiction basis.

Anti-Suit Injunctions

The Purpose and Justification

This remedy relates to acts outside the jurisdiction of the English Courts. It requires, vitally, that the Defendant to any application is subject to that jurisdiction. It provides the party who obtains it no substantive remedy on the merits but is aimed at ensuring that a route to achieving a binding decision is, in English terms, blocked to the opponent.

Traditionally the Courts justified the power, and its exercise, on the grounds that it was directed *in personam* at a party. It did not therefore interfere with the jurisdiction of the foreign court. The principle of comity (the need to avoid conflict with, and to respect the jurisdiction of, other states) therefore was, at least on the surface, maintained. Judicial attitudes have, however, changed so that while indirect interference is recognised it is characterised as of little concern or weight.

The injunction is essentially a logical extension of the traditional English common law approach to jurisdiction based largely on having power over a person present in the country. Until the relatively recent development of *forum non conveniens* very little controlled the assertion of judicial power which was based largely on, often slim, contact between the defendant and England. The Brussels and Lugano Conventions introduced both the general principle of substantive contacts and, in respect of multiple proceedings, the obligation to decline to exercise the jurisdiction. This brought the focus onto the duty of the second court where there are proceedings elsewhere rather than on any attempt by the first court to prevent proceedings in the second. But the English Courts have until recently still seen the matter as one of the protection of its jurisdiction and, in terms of the Conventions, this inevitably has caused increased conflict. Questions of enforceability of any injunction in respect of and by the foreign court have arisen.

Common Law Approach

The jurisdiction of the English Court to grant anti-suit injunctions is based upon s37(1) of the Supreme Court Act 1981 which give the power to grant a final injunction "in all cases in

which it appears to the Court to be just and convenient to do so." The jurisdiction has been interpreted widely within four basic principles:-

a) The jurisdiction may be exercised when the ends of justice require it;
b) The injunction is directed not against the foreign court but against the parties;
c) An injunction will only be granted if in restraint of a person who is subject to the jurisdiction of the Court; and
d) In light of the fact that the jurisdiction affects the foreign court, it must be exercised with extreme caution.

The Brussels Convention

The approach under the Brussels Convention is a predominantly Civil Law approach. If the court of one Member State has jurisdiction, whether based upon domicile or under any of the special provisions, that court is *required* to hear the dispute unless proceedings in the same matter are already pending in the court of another Member State.

Practice of the English Courts

Notwithstanding the provisions of the Brussels Convention the English Courts continued to grant anti-suit injunctions restraining proceedings brought in EU Member States. This they did particularly where, in contractual disputes, the purpose was to support or uphold an exclusive jurisdiction clause. In one such action *Continental Bank N.A. v Aeakos Cia Naviera S.A*[25]. Steyn LJ stated *"... there is nothing in the Brussels Convention which is inconsistent with a power vesting in the English Court to grant an injunction, the objective of which is to secure enforcement of an exclusive jurisdiction clause"*. Such was the confidence of the Court in its position that there was considered to be no case for referring the point to the European Court of Justice (ECJ) for a preliminary reference.

[25] [1994] 1 WLR 588.

Recent Case Law

The recent cases, however, have totally changed the position. In the space of a few short months between the end of 2003 and the spring of 2004 the ECJ categorically condemned the making of anti-suit injunctions in matters involving Convention states, as being in breach of the Brussels Convention. By implication such injunctions must also be regarded as being in breach of the Regulation, the successor to the Brussels Convention.

Erich Gasser GmbH v MISAT Srl[26]

This case concerned the application for an injunction to restrain Italian proceedings brought in breach of an exclusive Austrian jurisdiction clause. The Austrian Court of First Instance considered that to grant the injunction would be in breach of the Brussels Convention and declined to grant it. Upon appeal the matter was referred to the ECJ which held that, where a court of a Brussels Convention State is seized second, it *must* stay its proceedings until the Court first seized has declared that it has no jurisdiction. This applies even where the court second seized has a jurisdiction clause in its favour and the court first seized has delayed in dealing with the issue of jurisdiction.

Turner v Grovit[27]

The English Court had granted an injunction restraining Spanish proceedings that the English Court considered to have been brought in bad faith. At all levels up to the House of Lords the English Court considered the anti-suit injunction to be compatible with the Brussels Convention. In the House of Lords a distinction was drawn between an injunction granted merely because a foreign court was thought not to have jurisdiction and one to restrain wrongful or unconscionable behaviour on the part of the respondent. Nonetheless they referred the matter to the ECJ which decided such injunctions were not reconcilable with the Brussels Convention. In their view the anti-suit injunction was a direct interference with the unfettered jurisdiction of the Spanish Court. It held that, save for exceptional circumstances,

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[26] Case C – 116/02 (9 Dec 2003)
[27] Case C – 159/02 (27 April 2004) [2004] All ER (EC) 485

the Brussels Convention did not allow the courts of one Convention State to review the jurisdiction of another Convention State.

The Current Position

The English Courts ability to grant anti-suit injunctions in order to restrain proceedings brought in courts outside the European Union remains intact. However, it is now clear that within the EU the Court first seized has the right to decide whether it has jurisdiction even where that Court has been seized in bad faith or in the face of an exclusive jurisdiction clause in favour of a second court.

These judgments are seen as strong and authoritative moves on the part of the ECJ in furthering the objective of harmonising rules on jurisdiction among the Member States so as to achieve certainty and avoid conflicting judgments. Considerable confidence is placed by the ECJ on the principals of "mutual confidence and trust" which Convention States offer to each others legal and judicial systems.

Subsequent to these decisions the English Court of Appeal decided that when the facts involve a London Arbitration clause an English Court still has jurisdiction to decide if a London Arbitration Clause is binding on the parties even if it is not the tribunal first seized. The Court stated *"there is nothing in the Convention to prevent the Court from granting an injunction to restrain a Claimant from beginning proceedings in a Convention State which would be in breach of an arbitration clause"*.

APPENDIX

Case Studies:

1. ***In Rem jurisdiction, arrest of vessel, German principal place of business jurisdiction clause, American claimants, whether English Court has jurisdiction.***

2. ***In Rem action, US Claimants, Italian Defendants, collision in Brazil, application for a stay on grounds of forum non conveniens and/or that Italian jurisdiction should apply.***

3. ***Marine Towage Insurance policy, English choice of law, English jurisdiction, anti-suit injunction against action by insured in Texas, injunction confirmed.***

4. ***Proceedings in New York, subsequent proceedings in England on basis of English jurisdiction clause, English action stayed in interests of single forum best suited to resolve matters.***

5. ***English retrocessionaires under English law contract, Swiss cedants with underlying contract subject to Texan law, US Service of Suit Clause, weight to be given to English law/US Service of Suit Clause.***

6. ***Accident in Jamaica, English Claimant, one English and six Jamaican Defendants, appropriate forum, Brussels Convention***

CASE STUDY 1[28]

In Rem jurisdiction, arrest of vessel, German principal place of business jurisdiction clause, American claimants, whether English Court has jurisdiction.

The competing jurisdictions were Germany and England. Wood pulp on board the vessel *Bergen*, loaded in Wilmington, United States, for carriage to Aberdeen, Scotland was damaged by fire during the voyage. Salvors were engaged under LOF to extinguish the fire and tow the vessel to Aberdeen. A general average bond and guarantee was provided by cargo interests in order to obtain delivery. Plaintiff cargo owners, P, claimed against the German owners of the *Bergen*, D, in respect of loss and damage to their cargo and their liability to salvors all of which they contended was caused by D's breach of the Hague Rules. D relied on an exclusive jurisdiction clause in the Bill of Lading which required disputes to be decided in the country where the carrier had his principal place of business, applying the law of that country. D's principal place of business was Germany. D submitted that the proceedings should be set aside as the English Court lacked jurisdiction by reason of Article 17[29] of the Brussels Convention. They also relied on Article 57[30] of the Brussels Convention. They further relied on Article 7[31] of the Arrest Convention. P argued that, were Article 17 applied, its effect was to deprive the Court of jurisdiction and if Article 17 was allowed to have this effect they would be deprived of their right to have their claims determined on the merits under Article 7 of the Arrest Convention. They asserted that right was expressly preserved by Article 57 of the Brussels Convention. It was common ground that under English law the Court had jurisdiction to hear and determine the Plaintiffs' claim and they were entitled to bring the action in England.

Held:-

- Article 7 of the Arrest Convention was preserved by Article 57 of the Brussels Convention. It conferred jurisdiction on the Courts of the state in which the arrest was made to determine the case upon its merits and in accordance with the domestic law of that state. The vessel was properly served and arrested in England and the English Courts had jurisdiction to determine P's claims on the merits.

- Under English domestic law the Court retained jurisdiction to determine P's claim on the merits even in a case where there was an exclusive jurisdiction clause. The Court had a discretion whether to stay the action which it would exercise unless strong cause why it should not do so was shown.

[28] *"The Bergen"* [1997] 1 LLLR 380

[29] Which requires that where the parties have agreed that a Court of a contracting state will have jurisdiction to settle a dispute, that Court shall have exclusive jurisdiction.

[30] Which provides that the Brussels Convention does not affect any conventions to which the contracting state are parties and which govern jurisdiction, further stating that the Convention will not prevent the Court of a contracting state which is a party to a convention, from assuming jurisdiction in accordance with that convention even where the Defendant is domiciled in another contracting state, not party to the Convention.

[31] Which provided that if the parties have agreed to submit a dispute to the jurisdiction of a particular Court, other than that within which the arrest is made, the Court within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

- There was, as asserted by P a conflict between Article 17 of the Brussels Convention and Article 7 of the Arrest Convention and, by reason of Article 57 of the Brussels Convention, Article 7 would prevail.

- Article 17 had no application to the facts of this case. The Court had, and retained, jurisdiction by reason of Article 7 of the Arrest Convention.

CASE STUDY 2[32]

In Rem action, US Claimants, Italian Defendants, collision in Brazil, application for a stay on grounds of forum non conveniens and/or that Italian jurisdiction should apply.

The competing jurisdictions were English and Brazil or Italy. The US vessel *Bowditch* collided with the Italian vessel *Po* in Rio de Janeiro following which the US Owners of the *Bowditch* sought damages against the *Po* in the English Courts. An ordinary Admiralty Writ *in rem* was served on the *Po* when the vessel visited Southampton and the P&I Club provided security to prevent arrest. The Owners of the *Po* appealed against a refusal to (i) grant a stay of an action *in rem* in the Admiralty Court on the ground that England was *forum non conveniens* and that proceedings should have been brought in Brazil or (ii) to decline jurisdiction altogether on the ground that the proceedings ought to have been brought in Italy.

Held:-

- Although the Brussels Convention (Article 2 and Article 3) would normally have had the effect of abrogating the Admiralty jurisdiction *in rem* with regard to defendants domiciled in other contracting states, Article 57 preserved the jurisdiction of contracting states to certain special conventions.

- Under the International Convention on Certain Rules Concerning Civil Jurisdiction in matters of Collision 1952, the UK was entitled to assume jurisdiction in the present case despite the fact that neither Italy nor the US was a party to the 1952 Convention.

- Since Article 57 was intended to enable EC Member States to fulfil their obligations to non-Member States under various conventions, it was sufficient that the UK was a contracting state and a party to the 1952 Convention. The fact that it was never implemented into English law did not prevent the operation of Article 57.

- The *in rem* writ was properly served and the fact that, for the purposes of the 1952 Convention, the vessel could have been arrested and security have been furnished, lent support to the argument relied upon by the Owners of *Bowditch* that the English Court had jurisdiction.

- Appeal dismissed.

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[32] Owners of the *Bowditch* v Owners of the *Po* [1991] 2 LLLR 206.

CASE STUDY 3[33]

Marine Towage Insurance policy, English choice of law, English jurisdiction, anti-suit injunction against action by insured in Texas, injunction confirmed.

The competing jurisdictions were England and Texas. The claimant, Lloyd's Underwriters C, applied for an anti suit injunction to restrain proceedings that the defendant barge owners. D, had brought against them in Texas. D was a Delaware Registered company trading in Texas that had taken out a Marine Towage insurance policy underwritten by C. The slip policy expressly stated the choice of law as "England" and the choice of jurisdiction was the "English Courts". While D's barge was under tow between Texas and Israel a fire broke out causing substantial damage. C purported to avoid the policy on grounds of misrepresentation and non-disclosure. D then sued underwriters in Texas claiming the loss of the barge as a constructive total loss and damages on the basis of failure to use reasonable care and breach of the duty of good faith in dealing with the claim. D argued, firstly, that the applicable jurisdiction clause was non-exclusive and did not preclude them from bringing the Texan proceedings; secondly, that logically there was a very strong connection with Texas which was the natural forum for any dispute and, finally, to restrain the Texan proceeding was contrary to the spirit of comity and unjust, especially in view of the fact that Texan law provided D with a tortious remedy that was not available in England.

Held:-

- The policy must be construed with proper regard to the desirability of all disputes being determined in the same forum and by reference to the actual words of the policy. Nothing was ambiguous in the wording the slip which made no allowance for proceedings other than before the English Courts. As a matter of contract, therefore, D had bound himself to litigate any disputes in respect of the insurance, whatever their nature, within English jurisdiction

- Where parties had freely agreed upon the place for the resolution of any disputes between them they had to be treated as having taken into consideration, in reaching that agreement, the difficulty that one or the other would have in coping with that situation. There was no reason to imply into that bargain some weighting factor that had the potential to negate the clause in the event of a real, but entirely foreseeable, difficulty.

- The policy was negotiated through brokers of great experience. The cover was for a voyage that was to cross international waters and end in another state. The enterprise was unequivocally international and commercial. The parties agreed that English law was to apply and that the jurisdiction was to be uniquely England. There was no reason why the grant of an anti-suit injunction in such circumstances should offend the sensibilities of a Texan Court or any other principle of comity. The existence of the torts and others like them was well known as was the potential in damages arising out of an adverse finding. The exclusive jurisdiction clause conferred upon C the agreed benefit of not having to face claims in tort in Texas. There was no injustice in holding D to its bargain because that was known at the time the bargain was made. To deny C the benefit of the bargain would have been an injustice. The proceedings in Texas in defiance of the Clause were oppressive and vexatious.

[33] Beazley v Horizon Off-Shore Contractors Inc [2004] EWHC2555.

- Judgment for C, the Underwriters.

CASE STUDY 4[34]

Proceedings in New York, subsequent proceedings in England on basis of English jurisdiction clause, English action stayed in interests of single forum best suited to resolve matters.

The competing jurisdictions were New York and London. Disputes arose between the parties concerning the circumstances surrounding the sale of a UK based insurance business and a debt collecting business. D and its various associated entities alleged *"an international fraud of immense proportions"* against P and a number of other individuals and the companies owned by them. D commenced proceedings in New York seeking, in addition to damages for fraud, punitive and triple damages under the Federal Racketeer Influenced and Corrupt Organisation Act 1962 (RICO) Statute. P and one of the other potential co-plaintiffs in England had begun negotiations for a Management Buy-Out (MBO) with two executives at D. D alleged there had been a conspiracy between this group of four people to fraudulently induce D to inject USD42.5m into the insurance group, being the entities subject to the sale. P was party to transfer agreements with some of the D entities which contained an exclusive jurisdiction clause providing *"The parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement"*. The action was brought by P subsequent to commencement of New York proceedings applying for an anti-suit injunction to prevent D from suing him in any jurisdiction other than England. P alleged the New York proceedings were vexatious and oppressive. At first instance the injunction was denied. The majority of the Court of Appeal reversed that decision. The House of Lords reversed the decision of the Court of Appeal.

Held:-

- The D companies were incorporated in Ohio, Delaware, Wisconsin and Singapore; two of the potential co-claimants (co-defendants in New York) and their companies had no English links. The dispute between them and the D companies concerned the alleged breach of the fiduciary duty they owed to their employers. It was plain that England was not the natural forum for the resolution of this dispute. The New York proceedings by the D companies against the potential co-claimants were neither "oppressive" nor "vexatious".

- The potential co-claimants could not have obtained leave to serve out of the jurisdiction on any of the D companies in independent proceedings. The potential co-claimants could not take advantage of P's relationship with the D entitles and prosecute a claim which could not otherwise be prosecuted in the forum.

[34] Donohue v Armco Inc [2001] UK HL 64.

- The majority of the Court of Appeal were wrong to allow the joinder of the four potential co-claimants and that order would be set aside and joinder refused.

- Weight was given to the consideration that if an injunction was granted litigation between the D companies and P and the potential co-claimants would continue partly in England and partly in New York. The interests of justice were best served by the submission of the whole dispute to a single tribunal which was best fitted to make a reliable comprehensive judgment on all the matters in issue. The only forum in which a single composite trial could be procured was New York. There were strong reasons for **not** giving effect to the exclusive jurisdiction clause in favour of P.

- The interests of justice were best served if an anti-suit injunction was denied to P but an undertaking proffered on behalf of the D companies regarding the RICO claims was accepted.

CASE STUDY 5[35]

English retrocessionaires under English law contract, Swiss cedants with underlying contract subject to Texan law, US Service of Suit Clause, weight to be given to English law/US Service of Suit Clause.

The competing jurisdictions were Texan and English. A Texan company N was insured by a fronting company S against loss and damage to oil rigs and installations in Saudi Arabia. S were reinsured by ZIC under a policy providing that all disputes were to be submitted to the exclusive jurisdiction of the Courts of Texas. The ZIC contract also contained a claims co-operation clause and a blow out preventer warranty stating that a blow out preventer would be installed and tested in accordance with usual practices. ZIC reinsured part of their liability with A. The A reinsurance was expressed to be as original and or following the original in all respects including claims settlement. It also incorporated a US Service of Suit Clause. The original insured suffered a blow out in Saudi Arabia. A claim was made by ZIC on A who commenced proceedings in England claiming a declaration that they had no liability to ZIC due to breach of warranty and a failure to comply with the claims co-operation clause. ZIC submitted to the jurisdiction of the English Courts and then asserted that they had assigned all rights to a US company ZAIC. They applied to set aside service of the English proceedings. ZIC/ZAIC submitted that Texas was the more appropriate jurisdiction because the reinsurance policy incorporated the exclusive Texan jurisdiction clause in the underlying policy, the Service of Suit Clause in the reinsurance entitled ZIC/ZAIC to bring proceedings in Texas and the proper law of the reinsurance policy was Texan. Finally Texas was the more appropriate forum on the facts as the direct claim was settled and paid there, the evidence as to whether the settlement was reasonable was largely there or in Saudi Arabia but not in London, the evidence as to breach of obligation to notify was largely with the brokers whose chain of communication commenced in Texas and witnesses of fact relating to the blow out preventer warranty were not in London. A submitted that England was the more appropriate jurisdiction because the proper law of the reinsurance was English law, the service of suit clause was permissive only, Texas was not an appropriate jurisdiction on the facts but England was because in relation to the blow out preventer warranty the critical issue was whether it had been installed in accordance with industry practice. The evidence for that was available in England and an English expert had been instructed by reinsurers, Failure to

[35] Ace Insurance SA-NV v Zurich Insurance Co LLR [2001] 1504

comply with the claims co-operation clause did not require evidence and there was an admitted breach in respect of the non-assignment clause of the policy. Reinsurers further argued that the English Court had no jurisdiction to stay the claim against ZIC who had already submitted to the jurisdiction.

Held:-

- At First Instance, that the critical feature of the reinsurance contract was the Service of Suit Clause with the other factors relied on by the parties having, relatively little weight.

- The proper law of the reinsurance contract was English law because the risk it was broked in London and the centre of gravity of the contract was there but the English Court would have regard to the law of Texas because the liability reinsured was a liability under Texan law. Whichever Court decided the case, would therefore have to be informed as to Texas law. The fact that the proper law of the reinsurance contract was English was not therefore of any significant weight in concluding where the case should be tried.

- Any evidence on factual issues concerning blow out preventers could equally conveniently be given in Texas as in England.

- Service of Suit Clauses were well known and were to be given a proper and sensible construction. It was inevitable that the Court's discretion would be exercised to set aside permission to serve out of the jurisdiction where proceedings had properly been started in another jurisdiction and were continuing. While the Court had no discretion to stay its own proceedings on the ground of *forum non conveniens* in favour of proceedings taking place in a second contracting state discretion to stay **could** be exercised in favour of the Courts of a non contracting state even thought the Defendant was domiciled in England or any other contracting state.

- Whilst this was a case in which two contracting states were engaged (UK and Switzerland) it would be odd if the law were to be that a stay was available to a United Kingdom Defendant but not to a Defendant domiciled in any other Convention state.

- The Court of Appeal dismissed the Defendant's appeal holding, inter alia, that English law did not have a qualitatively more significant role to play than Texan or New York law and the fact that the law applicable to the reinsurance contract was English law was not of any significance in concluding where the case was to be tried.

- The Service of Suit Clause was a critical factor and A's agreement to the Service of Suit Clause effectively reversed the burden of proof as, if a party agreed to submit to the jurisdiction of the Courts of a state it did not easily lie in their mouth to complain that it was inconvenient to conduct litigation there. It is necessary to point to some factor which could not have been foreseen in order to displace a non-exclusive jurisdiction clause or some good reason or special cause why that party should not be held to its agreement. There was no such consideration in this case.

CASE STUDY 6[36]

Accident in Jamaica, English Claimant, one English and six Jamaican Defendants, appropriate forum, Brussels Convention

The competing jurisdictions were England and Jamaica. The Claimant, C, domiciled in England, brought an action arising out of a serious accident suffered when bathing in the sea on holiday in Jamaica rendering him tetraplegic. The First Defendant, D, was domiciled in England and was sued in contract. The remaining defendants were all domiciled in Jamaica. D3, D4 and D6 applied for a declaration that the Court should not exercise its jurisdiction and that service of the claim form be set aside and the action against them be stayed. D3 made a similar application asserting that it had been prejudiced by the order for leave to serve out. On behalf of D4 and D6 it was suggested that Jamaica provided the natural and appropriate forum for the trial of C's action. The features which connected the action with Jamaica were principally that all of the Defendants save for D1 were resident in Jamaica and carried on business there. Apart from any contractual arrangement with D1 any other contractual arrangements involving the other Defendants were all made in Jamaica and subject to Jamaican law, any duty owed by the D4 or D6, whether as occupiers of the beach or any other capacity, would be imposed by Jamaican law, any question of breach of duties imposed by the Jamaican law would be considered by Jamaican Court with particular reference to, and knowledge of, the prevailing customs and standards applied to tourist resorts and beaches in Jamaica and under Jamaican conditions. All witnesses to the circumstances of the accident except for C were in Jamaica, information relating to a previous accident was likely to be in Jamaica, witnesses who would provide information as to the use and operation of the beach were likely to be in Jamaica and investigation into the precise circumstances of the accident and the topography of the beach can best be undertaken in Jamaica. D3 submitted that because the relevant events occurred in Jamaica and witnesses were resident there the Court ought not to exercise its jurisdiction to permit C to litigate in England. D1 asserted that the proceedings were most closely connected with Jamaica. He raised an issue arising out of his insurance cover which would only cover judgements of a court within Jamaica. The services that he employed in relation to the beach were exclusively in Jamaica and the contract itself was most closely connected with Jamaica. All the other Defendants were Jamaican and the witnesses that he would wish to call were also in Jamaica. C responded to this evidence challenging the suggestion that Jamaica was the most suitable place for the case to be tried. In particular, he referred to the fact that two important witnesses, namely himself and someone who had previously suffered similar injuries on the same beach, were both tetraplegics and it would be difficult for them to travel to Jamaica for the trial.

Held:-

- The first instance Judge referred to *UGIC v Group Josi Reinsurance Co SA*[37] where the ECJ held that the question whether the jurisdictional rules in the Brussels Convention applied to a dispute in principle depended upon whether the defendant had its seat or domicile in a Contracting State, and that the Convention applied to a dispute between a defendant domiciled in a Contracting State and a claimant domicile in a Non-Member

[36] Andrew Owusu v Nugent B Jackson (T/A Villa Holidays Ball-Inn Villas) & 5 Others [2002] EWCA Civ 877.
[37] [2001] QB 68.

State. The Judge stated he had no power to refer the question to the ECJ and felt bound to determine the question as to whether he had jurisdiction to stay the proceedings against D1 in accordance with the principles laid down by the Court in *Group Josi*. He was driven to the conclusion that it was not open to him to stay the action against D1.

- No Brussels Convention point, however, arose in relation to the remaining Defendants who all contended that Jamaica was the forum with which the action had the most real and substantial connection. But for the fact that the Judge was precluded by the Brussels Convention from staying the action against D1, he would have no hesitation in holding that Jamaica was a more appropriate forum than England. He concluded however that England and not Jamaica was the appropriate forum.

- The Judge could not stay the action against D1 and in those circumstances if he granted the other Defendants a stay the likelihood was that the two courts in the different jurisdictions would end up trying the same factual issues upon the same or similar evidence with the possibility that they might reach different conclusions. He therefore refused the applications of D3, D4 and D6.

- The Court of Appeal recognised there was a point on the proper interpretation of the Brussels Convention to be determined. They referred this to the ECJ in accordance with Articles 2(2) of the 1971 Protocol.

- Insofar as the issue of *forum non conveniens* is concerned, the Court of Appeal were satisfied that the Judge's conclusion on this point was well within the ambit of his discretion. C had submitted that the Judge ought to have given his reasons at greater length. The Court of Appeal disagreed. Referring to the Spiliada[38], Lord Templeman stated that appeals against decisions of this kind would be rare and that appellate courts should be slow to intervene. The Judge had made reference to C's points when he said that he would have no hesitation in identifying Jamaica as the more appropriate forum and the Court of Appeal did not find it necessary to decide whether the contract with D1 was governed by English or Jamaican law.

- On the issue as to joinder of the Jamaican Defendants the Court of Appeal decided that this was better deferred until after the decision of the ECJ was received. When the case was returned to them they would have to consider, in the light of the answers, whether there is between C and D1 a real issue which it is reasonable for the English court to try and if so, whether the remaining Defendants are necessary and proper parties to that claim.

- If the ECJ upheld C's submission as to the meaning of Article 2 and they were satisfied that C had raised a real issue in his claim against D1 they would then have to consider the effect of the Jamaican rules on reciprocal enforcement of judgments in deciding whether it was proper to join the Jamaican Defendants to English proceedings in circumstances in which an English Court would ordinarily have considered Jamaica to be the more appropriate forum.

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[38] Spiliada Maritime Corporation v Cansulex Limited [1987] 1 AC 460