ENFORCING ENGLISH JURISDICTION CLAUSES IN BILLS OF LADING

This article considers the differences of approach to exclusive court jurisdiction agreements in a bill of lading of the EC Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and the English common law rules. The situation where proceedings are commenced in breach of the agreement is considered under both, the first with its certain and more inflexible rules and the latter with the discretion of the doctrine of *forum non conveniens*. The scope of the EC Regulation rules is discussed.

Yvonne **BAATZ**
MA(Oxford); Solicitor (UK);
Senior Lecturer and Member of the Institute of Maritime Law, University of Southampton, UK.

1 A bill of lading contains an exclusive English jurisdiction clause and one of the parties is domiciled in Singapore. Is the English court bound to accept jurisdiction to hear a claim under the bill of lading, whether by the receiver for damages or by the carrier for a declaration of non-liability? Are there circumstances when it cannot hear the claim or might choose not to? The party domiciled in Singapore may be surprised to find that the answer will depend on the domicile of the other party to the bill of lading and on whether and where any other proceedings have already been commenced. This results from the application of the black and white rules of the EC Regulation on jurisdiction,[1] which seldom permit any discretion, in certain circumstances, and the more flexible common law rules (including the doctrine of *forum non conveniens* with

1 The Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the EC Regulation") entered into force in the UK on 1 March 2002 (see the Civil Jurisdiction and Judgments Order 2001), and replaced the latest accession Convention to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 ("the EC Jurisdiction Convention"), except in relation to Denmark. However, an agreement to apply the EC Regulation to Denmark has been signed and will come into force on the first day of the sixth month after the parties notify completion of its adoption in accordance with their respective procedures (Art 12): OJ L299/62 16.11.05. For current purposes the EC Regulation, the EC Jurisdiction Convention and the EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 ("the Lugano Convention") are treated as identical, unless expressly stated otherwise.

its wide discretion) in other circumstances. Although in all circumstances the principle of autonomy of the parties is very important, it is not always paramount. The EC Regulation favours the court first seised. At common law the English court would usually give effect to an exclusive English jurisdiction agreement. However, the court has a discretion and the agreement may give way to complex multiparty litigation elsewhere, which includes parties not bound by the jurisdiction clause. It may therefore be important to draw the line as to when *forum non conveniens* applies and when it does not.

2 The purpose of this article is to consider two issues which illustrate how the EC Regulation seeks to uphold party autonomy by enforcing the parties' choice of an English exclusive jurisdiction clause in a bill of lading and to compare the position at common law. The first issue is the problem that arises when one party commences proceedings in breach of an exclusive court jurisdiction agreement. The second issue concerns whether Art 23(1) of the EC Regulation[2] on jurisdiction agreements imposes mandatory jurisdiction on the court chosen only where two or more competing jurisdictions are all EC Member States or whether this is so, even where the conflict is between the court of a Member State and that of a non-Member State. This second issue raises

2 Article 23 provides:

> 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing; or
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
>
> 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.
>
> 3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

Articles 23(4) and 23(5) deal with trust instruments and are not quoted here. The equivalent provision to Art 23 in the EC Jurisdiction and Lugano Conventions is Art 17.

the question whether there is any room for the common law principle of *forum non conveniens*.

I. Introduction to the EC Regulation

3 The EC Regulation seeks to determine the international jurisdiction of the courts of the EC Member States so that all Member States are bound by the same rules and will recognise and enforce each other's judgments. It therefore provides for highly predictable rules, generally based on the domicile of the defendant, subject to a number of exceptions, including party autonomy.[3] It applies where the defendant is domiciled in a Member State no matter where the claimant is domiciled.[4] Thus if a Singapore claimant sues a defendant domiciled in France in the English court, the EC Regulation applies. Article 2[5] provides that the defendant must be sued where it is domiciled. The important exception of party autonomy[6] is addressed by Art 23 of the EC Regulation.

3 See Recital 11 of the EC Regulation which states:

> The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor …

4 Case C-421/98 *Societe Group Josi Reinsurance Company SA v Compagnie d'Assurances Universal General Insurance Company* [2000] 2 All ER (Comm) 467.

5 Article 2 provides:

> 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
>
> 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

6 Recital 14 states:

> The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

Article 23 is subject to limited exceptions in consumer, insurance and employment contracts due to the need to provide consumer protection, and to overriding considerations such as the exclusive jurisdiction provided for by Art 22; the variation of the agreement by the parties by submission to the jurisdiction of the court of another State (Art 24) or an international convention (Art 71). Autonomy in this context relates to a jurisdiction agreement. It is irrelevant that the parties have chosen the law applicable to the agreement as this does not found jurisdiction under the EC Regulation. *Cf* the position at common law under Pt 6 r 20(5)(c) of the Civil Procedure Rules (UK).

II. Article 23 of the EC Regulation: Is there a jurisdiction clause?

4 Article 23(1) of the EC Regulation provides that an agreement for a court or courts of a Member State to have jurisdiction must be either:

> (a) in writing or evidenced in writing, or
>
> (b) in a form which accords with practices which the parties have established between themselves, or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

5 Whether there is a jurisdiction clause that satisfies these requirements in a bill of lading may be a complex question. A bill of lading will often be on a standard form usually only signed by one party, *eg*, the master on behalf of the carrier, and there may be no signature by or on behalf of the shipper, let alone by the third party holder of the bill of lading to whom it has been delivered and indorsed. The master's signature is usually on the face of the bill of lading but the jurisdiction clause may be one of many printed conditions on the reverse of the bill. Alternatively in a charterparty bill of lading the jurisdiction clause is frequently incorporated into the contract by reference to the terms of the charterparty.[7]

6 To address these difficulties para (c) was added when the UK acceded to the EC Jurisdiction Convention. The reason that the UK wanted an amendment to the EC Jurisdiction Convention was to safeguard the jurisdiction of the High Court in London, which is chosen in many international standard form contracts, including bills of lading. The requirement to satisfy the formalities is to ensure that there is real consent on the part of the parties. However, consensus is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware.[8]

7 This will only be successful if the words of incorporation in the bill of lading specifically refer to the court jurisdiction clause in the charterparty: *Siboti K/S v BP France SA* [2003] 2 Lloyd's Rep 364. Note that in this case the exclusive jurisdiction clause formed part of the shipper's rather than the shipowner's standard terms.

8 Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes* [1997] All ER (EC) 385 ("*MSG*") and Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ILPr 492 ("*Castelletti*").

7 The European Court of Justice has held[9] that the validity of a jurisdiction clause must be assessed by reference to the relationship between the original parties to the contract, the shipper and the carrier. Furthermore, if the clause is effective as between the carrier and the shipper,[10] it is also effective between the carrier and a third party bill of lading holder who was not an original party to the bill of lading, provided that the third party holder of the bill of lading succeeded to the shipper's rights and obligations under the applicable national law when it acquired the bill of lading.[11] The question of which national law is applicable is not one of interpretation of the Convention. It falls within the jurisdiction of the national court which must apply its rules of private international law.[12]

8 If the third party bill of lading holder does not succeed to the rights and obligations of the shipper under the applicable national law when it acquired the bill of lading, it must be established whether it agreed to the jurisdiction clause in accordance with the requirements in the first paragraph of Art 23. In *Dresser UK v Falcongate Ltd (The Duke of Yare)*[13] the Court of Appeal held that, even where the doctrine of bailment on terms applied, it could not satisfy the requirements of Art 17 of the EC Jurisdiction Convention (now Art 23 of the EC Regulation).

9 The complexity of a dispute as to whether there is a valid jurisdiction agreement in a bill of lading and the length of time it takes to resolve is illustrated by *Castelletti*.[14] That case took some ten years to proceed through the Italian courts and to obtain a judgment from the European Court of Justice on the requirements that have to be satisfied under Art 17 of the EC Jurisdiction Convention. That would still not be the end of the matter as the European Court of Justice can only

9 Case-71/83 *Tilly Russ v Nova* [1984] ECR 2417 at [24]; Case C-159/97 *Castelletti*, *supra* n 8, at [41] and [42] and Case-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR 1-09337 at [27] ("*Coreck*").

10 The court chosen does not have to be determined on the wording of the jurisdiction clause alone. If the clause states the objective factors on the basis of which the parties have agreed to choose the court (*eg* the country of the carrier's principal place of business) sufficiently precisely, the court seised can determine jurisdiction by the particular circumstances of the case: *Coreck*, *supra* n 9 at [15].

11 Under English law the "lawful holder" of a transferable bill of lading does have transferred to it the rights and obligations under the bill of lading pursuant to ss 2(1) and 3 of the Carriage of Goods by Sea Act 1992 (c 50) (UK).

12 *Coreck*, *supra* n 9, at [30].

13 [1992] 1 QB 502 ("*The Duke of Yare*").

14 *Supra* n 8.

determine issues of interpretation. It cannot resolve issues of fact, which would have to go back to the national court.

10 In *Castelletti*, fruit was shipped in 1987 by Argentinian shippers under twenty-two bills of lading issued in Buenos Aires. The cargo was delivered in Italy to Trasporti Castelletti Spedizioni Internazionali SpA. The latter brought proceedings against Hugo Trumpy as agent of the ship and the carrier, Lauritzen Reefers A/S, in the court of Genoa, Italy, on the basis that Hugo Trumpy were domiciled there. The latter contested jurisdiction as the bill of lading contained an exclusive English High Court jurisdiction clause.[15]

11 The jurisdiction clause was the last on the back of a printed form bill of lading. The print was small but legible. The face of the bill had been signed by both the carrier's agent and the shipper. Beneath the shipper's signature, but in larger print than the other clauses, was a reference to the conditions set out on the reverse. The Court of Genoa held that the jurisdiction clause was valid in the light of the usages of international trade, although it had not been signed by the shipper. The Genoese Court of Appeal upheld that judgment but on the ground that the shipper's signature on the face of the bills of lading implied acceptance of all the clauses, including those on the reverse. Castelletti appealed on a point of law, arguing that the signature of the original shipper could not have constituted acceptance of all the clauses, but only those relating to the particulars of the cargo, as made clear by the position of the shipper's signature. The Italian Supreme Court of Cassation held that the signature of the original shipper could not imply consent to all the clauses of the bill of lading, and therefore resolution of the dispute depended on the interpretation of the provision concerning international usage in Art 17(c) of the EC Jurisdiction Convention. It referred fourteen questions to the European Court of Justice for a preliminary ruling. By the time the matter came before the European Court, the decisions in

15 Which read:

> The contract evidenced by this Bill of Lading shall be governed by English law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the Courts of any other country.

MSG[16] and *Francesco Benincasa v Dentalkit SRL*[17] had already answered some of the questions.

12 Although it is for the national court to decide whether it has been proved that commercial practices in the relevant trade or commerce exist, in *MSG*, the European Court of Justice indicated that a contract concluded between two companies established in different Contracting States covering a matter such as navigation on the Rhine comes under the head of international trade or commerce. Whether a practice exists must be determined not by reference to the law of one of the Contracting States, but by reference to the branch of the trade or commerce in which the parties to the contract are operating. There is a practice in the branch of trade or commerce in question where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

13 In *Castelletti*, the parties agreed that the contracts in question formed part of international trade or commerce. The European Court of Justice held that it is not necessary for a course of conduct to be established in specific countries or, in particular, in all the Contracting States. What is important is that the course of conduct is regularly followed by operators in the branch of international trade in which the parties to the contract operate. It may help to prove that a practice is generally and regularly observed by operators in the countries which play a prominent role in the branch of trade or commerce in question.

14 The court further held that there is no requirement for establishing the existence of a usage that there is any particular form of publicity. However, publicity which might be given by associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed.

16 *Supra* n 8.

17 Case C-269/95, [1998] All ER (EC) 135, noted by Andrew Waldron [1997] ITLQ 114. The court chosen by a valid jurisdiction clause also has exclusive jurisdiction where a party seeks a declaration that the contract containing that clause is void. In *Andromeda Marine SA v O W Bunker & Trading A/S (The Mana)* [2006] 2 All ER (Comm) 331, Morison J distinguished the situation where a shipowner asserted that it had never been a party to a bunker supply contract and therefore sought negative declaratory relief that they had no liability under the contract. The shipowner could not rely on the jurisdiction clause in the contract.

15 Furthermore, the fact that numerous shippers and/or indorsees of bills of lading have challenged the validity of a jurisdiction clause by bringing actions before courts other than those chosen by the clause would not cause the incorporation of the clause to cease to constitute a usage, provided that it is established that it amounts to a usage which is generally and regularly followed.

16 The answer to questions on the form of jurisdiction clauses such as whether the clause has to be in writing signed in any particular manner; whether it is necessary to draw particular attention to the clause; or whether it is sufficient for it to be inserted amongst numerous clauses; whether the language of the clause must be related to the nationality of the parties; whether there are circumstances in which the insertion of the clause in a standard form, which has not been signed by the party not involved in drawing up the clause, may be considered to be grossly unfair or even abusive and whether a usage can derogate from mandatory statutory provisions adopted by certain Contracting States, depends solely on what form is consistent with the commercial usages in the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions may lay down. Contracting States cannot impose formal requirements other than those set out in the EC Jurisdiction Convention.[18]

17 As the validity of the bill of lading must be assessed by reference to the relationship between the original parties, it is they who must be aware of the usage. The parties' nationality is irrelevant for the purposes of that investigation. Thus the shipper may have been aware of a usage in the country of shipment, whereas a third party on the other side of the world might have no knowledge of it but succeed to the rights and obligations of the shipper.

18 What degree of awareness should the original parties have of the usage and should any publicity be given to the standard forms containing jurisdiction clauses and, if so, in what form? In *Castelletti* the European Court relied on their earlier decision in *MSG* that actual or presumed awareness of a usage on the part of the parties to a contract can be made out, in particular, by showing either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, so that, in that sector, a particular course of conduct is sufficiently well known, because it is generally and

18 Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] ECR 1671.

regularly followed when a particular type of contract is concluded, that it may be regarded as being an established usage. As Art 17 is silent on the means by which awareness of a usage may be proved, it is not essential that any publicity has been given by associations or specialised bodies to the standard forms containing jurisdiction clauses, although such publicity would make proof easier.

19 The parties are not restricted in their choice of court. As the EC Jurisdiction Convention aims to achieve legal certainty by making it possible to predict which court will have jurisdiction by fixing strict conditions as to form, there is no requirement of any link between the relationship in dispute and the court chosen. Any further review of the validity of the clause and of the intention of the party which inserted it must be excluded and substantive rules of liability applicable in the chosen court which might tend to reduce that party's liability must not affect the validity of the jurisdiction clause. In other words, the parties are free to choose whichever jurisdiction they please. A jurisdiction which has no link at all with the dispute may be advantageous in that it offers the parties greater neutrality. Furthermore, if the substantive law of one Contracting State is more favourable than another, one party may choose the courts of the first State. It is permissible to forum shop either at the stage of choosing a jurisdiction clause or, where there is no jurisdiction clause, at the stage of choosing where to bring proceedings.[19] The desire to forum shop can only be eliminated if there were to be a "level playing field" on substantive law within the Contracting States and similar court systems.

20 Thus where the EC Regulation applies, the English courts could no longer apply the decision in *The Hollandia*[20] to knock out a jurisdiction clause in a bill of lading choosing the court of another

19 Case C-406/92 *The Maciej Rataj* [1995] 1 Lloyd's Rep 302.

20 [1983] 1 AC 565; [1983] 1 Lloyd's Rep 1. The House of Lords held that the English court should not stay its proceedings where jurisdiction was founded on the arrest of a sister ship within the jurisdiction, despite the fact that the bill of lading contained an Amsterdam court jurisdiction clause and Netherlands governing law clause. Both clauses sought to lessen the carrier's liability as the Amsterdam court would have applied the Hague Rules which have a lower package limitation. The clauses were therefore null and void pursuant to Art III r 8 of the Hague-Visby Rules, given effect to by the Carriage of Goods by Sea Act 1971. Where the EC Regulation rules do not apply, *The Hollandia* is still good law; see, *eg, Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229 and Nicholas Gaskell *et al*, *Bills of Lading: Law and Contracts* (LLP, 2000), at paras 20.74, 20.202 and 20.220.

Member State on the ground that it is null and void under Art III r 8 of the Hague-Visby Rules.[21]

III. Article 23 of the EC Regulation: The effect of a valid jurisdiction clause

21 Article 23 of the EC Regulation[22] deals with two different scenarios. The first is where at least one of the parties to the jurisdiction agreement is domiciled in a Member State. For example, a receiver domiciled in Italy sues a carrier domiciled in Singapore for damages for breach of a bill of lading. Article 23(1) provides that if either of the parties is domiciled in a Member State, and a court of a Member State has been chosen, *eg*, the English court, that court shall have exclusive jurisdiction, provided that the formalities of Art 23 have been satisfied. It is worth noting that Art 23(1) applies where one of the parties to an English jurisdiction agreement is domiciled in a Member State, even though that party is the claimant and not the defendant. Both parties are bound by the agreement so that it matters not who brought the proceedings and who is the defendant. Article 4[23] of the EC Regulation, which usually means that the English court applies its common law rules where the defendant is not domiciled in a Member State, has been amended to make it clear that it is subject to Art 23. Thus if the defendant is not domiciled in a Member State to the EC Regulation, Art 23(1) will still apply if the claimant is, and the English court is chosen. It follows that the English court would have no discretion to refuse to exercise jurisdiction as Art 23(1) is mandatory and Art 4 is subject to that provision. Thus the English court could not refuse jurisdiction in favour of the courts of another Member State. An issue which is not clear is whether the English court would have any discretion to refuse

21 Unless the Hague-Visby Rules fall within Art 71 of the EC Regulation. Article 71 provides that the EC Regulation does not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. The Hague-Visby Rules do not expressly do so.

22 *Supra* n 2.

23 Article 4(1) provides:

> If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

Article 22 provides for exclusive jurisdiction in proceedings for rights in immovable property, dissolution of companies *etc*. Article 4 of the EC Jurisdiction and Lugano Conventions refers to Art 16, now Art 22 of the EC Regulation, but not to Art 17, now Art 23 of the EC Regulation.

jurisdiction where the other potential forum is that of a non-Member State. That issue is considered further below.

22 The second scenario dealt with by Art 23 is where neither party is domiciled in a Member State. For example, a carrier domiciled in Singapore sues a shipper domiciled in a non-Member State for damage caused to the ship by dangerous goods and the parties have chosen an exclusive English jurisdiction clause. Article 23(3) of the EC Regulation applies. This provision, unlike Art 23(1), does not provide that the English court shall have jurisdiction, but provides that the courts of other Member States shall have no jurisdiction over the parties' disputes unless the English court has declined jurisdiction. Pursuant to Art 4 of the EC Regulation the English court has to apply its national law to determine its jurisdiction and may decline jurisdiction.[24] This is also considered further below.

IV. What happens if one party commences proceedings in a court of a Member State other than England?

23 A carrier domiciled in Singapore seeks a declaration of non-liability from the Italian court against a shipper domiciled in Italy. Can the shipper enforce the English jurisdiction clause, even though the Italian proceedings were commenced first?

24 It is possible for the courts of two or more Member States to have jurisdiction in the same dispute. For example, the courts of the State where the defendant is domiciled may have jurisdiction under Art 2 and the courts of the State where the obligation in question is to be performed may also have jurisdiction under Art 5(1). In that event s 9 of the EC Regulation (Arts 27 to 30)[25] contains provisions on *lis pendens* and related actions which seek to prevent multiple proceedings and thus avoid differing judgments being given in more than one jurisdiction, a situation which might lead to non-recognition of a judgment because it is irreconcilable with a judgment given in proceedings between the same parties in the State in which recognition is sought.[26]

24 See Jonathan Hill, *International Commercial Disputes in English Courts*, (Hart Publishing, 3rd Ed, 2005) at para 5.3.5 and fn 142.
25 Section 8 of the EC Jurisdiction and Lugano Conventions (Arts 21 to 23).
26 Article 34(3) of the EC Regulation or Art 27(3) of the EC Jurisdiction Convention.

25 Article 27 of the EC Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States,[27] any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Once the jurisdiction of the court first seised has been established, any court other than the court first seised shall decline jurisdiction in favour of the latter court. The courts must look to the substance of the matter and not simply to the form.[28] The French version of the same cause of action is "*la même objet et la même cause*". The "*objet*" is "the end the action has in view" and the "cause" comprises the facts and the rule of law relied on as the basis of the action. Thus if in one set of proceedings the carrier seeks a declaration that it has no liability under a bill of lading and in another the cargo interests seek damages for breach of the bill of lading contract, nevertheless the proceedings will involve the same cause of action if the subject matter is the same.[29] Article 27 applies where there are concurrent proceedings at the time that the court which was not first seised makes its determination and not by reference to the position when the proceedings were brought before the court second seised.[30] Article 27 has no application if the first set of proceedings has been discontinued or come to an end. Thus if the court first seised has given judgment the court second seised need not decline jurisdiction under Art 27.[31]

27 Where the States are not both Member States see the discussion on *forum non conveniens* below.

28 *Eg*, Case 144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR 4861; Case C-406/92 *The Maciej Rataj*, *supra* n 19; *Sarrio SA v Kuwait Investment Authority* [1997] 4 All ER 929 (HL); [1997] 1 Lloyd's Rep 113 (CA); [1996] 1 Lloyd's Rep 650 (HC); Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207 and Case C-39/02 *Maersk Olie & Gas A/S v Firma M deHaan en W de Boer* [2005] 1 Lloyd's Rep 210 ("*Maersk*").

29 *The Maciej Rataj*, *supra* n 19. Although the English courts were previously hostile to negative declarations of liability, they appear to have overcome their antipathy to this remedy: see *eg*, *Boss Group Ltd v Boss France SA* [1996] 4 All ER 970; *Maas Logistics (UK) Ltd v CDR Trucking BV* [1999] 2 Lloyd's Rep 179*; Messier-Dowty Ltd v Sabena SA* [2000] 1 Lloyd's Rep 428; *Phillips v Symes* [2001] CLC 1673 at [38] and *Bristow Helicopters Ltd v Sikorsky Aircraft Corporation* [2004] 2 Lloyd's Rep 150; Lawrence Collins, "Negative Declarations and the Brussels Convention" (1992) 108 LQR 545; Andrew Bell, "The Negative Declaration in Transnational Litigation" (1995) 111 LQR 674.

30 *Grupo Torras v Al-Sabah* [1995] 1 Lloyd's Rep 374 (on Arts 21 and 22 of the EC Jurisdiction Convention); and *Tavoulareas v Alexander G Tsavliris & Sons Maritime Co* [2005] 2 CLC 848 ("*Tavoulareas*") and *Winter Maritime Ltd v North End Oil Ltd (The Winter)* [2000] 2 Lloyd's Rep 298.

31 *Tavoulareas, supra* n 30.

26 Even if the requirements of Art 27 are not satisfied, Art 28 provides that any court other than the court first seised may stay its proceedings where related actions are brought in the courts of different Member States. Actions are "related" where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.[32] Article 29 further provides that where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court. Under Arts 27 and 29 a stay is mandatory, whereas under Art 28 it is discretionary. A new Art 30[33] provides when a court is seised.

27 There was a marked difference of approach amongst the Member States as to what the position should be where one party alleges that there is an exclusive English jurisdiction clause, but the other party denies this and commences proceedings in another jurisdiction which is first seised. Does the court first seised have jurisdiction to determine whether the jurisdiction clause is valid under Art 27 or does the court allegedly chosen have exclusive jurisdiction under Art 23? The English courts had decided in favour of the latter approach. Thus in *Continental Bank NA v Aeakos Compania Naviera SA*,[34] a case on the equivalent provisions of the EC Jurisdiction Convention, the Court of Appeal held that, although the Greek court was first seised, the English court had jurisdiction because there was an exclusive English jurisdiction clause. The wording of the EC Jurisdiction Convention itself did not clearly answer whether the Article on jurisdiction agreements was an exception to the *lis pendens* provision, but the Court of Appeal was so convinced that its interpretation of the issue was correct, that it refused to refer the issue as a preliminary matter

32 Article 28(3) of the EC Regulation. *The Maciej Rataj*, *supra* n 19; *Maersk*, *supra* n 28; *Bank of Tokyo-Mitsubishi Ltd v Baskan Gida Sanayi Ve Pazarlama* [2004] 2 Lloyd's Rep 395 ("*Tokyo-Mitsubishi*") and *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd's Rep 665 ("*Primacom*").

33 See *Tavoulareas v Tsaviliris* [2006] 1 All ER (Comm) 109 and *Royal & Sun Alliance v MK Digital FZE* [2005] 2 Lloyd's Rep 679. Article 30 was an amendment to the EC Jurisdiction and Lugano Conventions. Under those Conventions when a court is seised is a matter for the national law of each State: *Zelger v Salinitri (No 2)* [1984] ECR 2397. That led to different solutions in each Contracting State. In England the English court was seised when the claim form was served and not when it was issued: *The Freccia del Nord* [1989] 1 Lloyd's Rep 388; *The Duke of Yare*, *supra* n 13; *Neste Chemicals SA v D K Line SA (The Sargasso)* [1994] 2 Lloyd's Rep 6; *Internationale Nederlanden Aviation Lease BV v The Civil Aviation Authority* [1997] CLC 43; *Phillips v Symes* [2001] CLC 1673 and *Tavoulareas v Tsaviliris* [2004] 1 Lloyd's Rep 445.

34 [1994] 1 Lloyd's Rep 505 followed in *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76. See Adrian Briggs, "Anti-European Teeth for Choice of Court Clauses" [1994] LMCLQ 158.

to the European Court of Justice. Not only this, but the English court also granted an anti-suit injunction to restrain the Greek borrower from continuing the proceedings in Greece in breach of the English jurisdiction agreement. In *Evialis SA v SIAT*[35] Andrew Smith J refused to distinguish *Continental Bank v Aeakos* on the ground that the EC Regulation applied and not the EC Jurisdiction Convention.

28 Other Member States considered that the court first seised must always establish its jurisdiction first, including whether it must decline jurisdiction due to a jurisdiction agreement.[36] Attempts to clarify this issue by amending the EC Jurisdiction and Lugano Conventions foundered.

29 The European Court of Justice resolved this controversy in Case C-116/02 *Erich Gasser GmbH v MISAT SRL*.[37] It held that the court second seised, even if apparently chosen, must, of its own motion, stay its proceedings until the court first seised has established that it has jurisdiction or that there is a jurisdiction clause and that it does not have jurisdiction. Although the European Court of Justice decided these issues in *Gasser* in the context of Arts 17 and 21 of the EC Jurisdiction Convention, the decision will apply equally to Arts 23 and 27 of the EC Regulation and Arts 17 and 21 of the Lugano Convention.

30 In *Gasser*, MISAT brought proceedings in Rome against Gasser. Nearly eight months later Gasser brought proceedings which involved the same cause of action in Austria. Gasser relied on their invoices for childrens' clothing sold to MISAT which included a jurisdiction clause that had never been objected to. Gasser argued that in accordance with their practice and the usage prevailing in trade between Austria and Italy, the formalities of Art 17(c) had been satisfied. Thus the Landsgericht Feldkirch in Austria alone had jurisdiction to deal with the dispute. On appeal, the Oberlandesgericht Innsbruck, Austria referred issues of interpretation to the European Court of Justice. MISAT contested the existence of an agreement but not "in a specific or reasoned manner".[38] There was therefore no indication that the allegation that there was an

35 [2003] 2 Lloyd's Rep 377.

36 Case 7W 1461/98 *Re Lifting A Stay of Proceedings* [1999] ILPr 291, a decision of the Court of Appeal of Munich, Germany, and Case 7 0 22/02 *Re Claim for Payment for Machinery* [2004] ILPr 783 at [3], a decision of the District Court of Bonn, Germany, while *Gasser*, *infra* n 37, was pending before the European Court of Justice.

37 [2003] ECR I-14693; [2005] QB 1 ("*Gasser*").

38 The Opinion of Advocate General Léger, *ibid*, at [45].

agreement was clearly wrong. The trial judge in Austria had not determined whether there was a jurisdiction clause, which was a potentially costly exercise.

31 The European Court referred to the main aim of s 8 of the EC Jurisdiction Convention (now s 9 of the EC Regulation) to prevent parallel proceedings and to avoid irreconcilable judgments. Article 21 provides for a simple rule based on the chronological order in which proceedings are brought. The court limited the exception to that rule in *Overseas Union Insurance Ltd v New Hampshire Co*[39] to exclusive jurisdiction under Art 16.[40] The European Court rejected the UK government's argument that the court designated by the agreement conferring jurisdiction will, in general, be in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated.[41] The court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined by applying the requirements of Art 17 and only those requirements. Neither court may apply its national law or any other restrictions as to form, language, appearance or link with the dispute to determine whether there is a jurisdiction clause, as is clear from *Castelletti*. The merit of this decision is that the court second seised will only have jurisdiction if the court first seised declines jurisdiction because there is a jurisdiction clause. Otherwise one could find a situation of jurisdiction "ping pong" where the court second seised determined the issue as to whether there is a jurisdiction clause and concluded that there is not. The matter would then revert to the court first seised.

V. Tactical delay

32 It should be noted that it may take any court some time to determine the issue of whether a jurisdiction clause satisfies the requirements of *eg* Art 23(c) on trade usage. As Advocate General Léger said in his Opinion in *Gasser*:[42]

39 Case 351/89 [1992] 1 Lloyd's Rep 204.
40 See *supra* n 23.
41 *Denby v Hellenic Mediterranean Line Co Ltd* [1994] 1 Lloyd's Rep 320.
42 *Supra* n 37, at [38].

> I share the Commission's view that determining the existence in the particular trade or commerce concerned of a usage in international trade or commerce which is widely known to, and regularly observed by, parties to contracts of the type involved may indeed necessitate long and costly investigations.

33 However the decision in *Gasser* has grave disadvantages. An unscrupulous debtor who wishes to delay payment may benefit from the sluggish procedure of the court first seised. This tactic has been dubbed the "Italian torpedo",[43] although Adrian Briggs has likened it more to the "administration of a barbiturate than the firing of a torpedo",[44] for reasons which will soon become apparent from the sorry saga in *Re Lifting A Stay of Proceedings*.[45] In that case the Italian court was first seised of proceedings for a negative declaration. Therefore the Munich District Court had stayed its proceedings for damages for breach of contract under Art 21 of the EC Jurisdiction Convention, even though jurisdiction in Germany was founded on an agreement that the courts in Munich would have jurisdiction to hear disputes arising out of the contract. An appeal from that stay failed in December 1993. In January 1998 the plaintiff applied to the Munich District Court to lift the stay arguing that there could be no hope of any judgment in the Italian court proceedings within a time period that was consonant with the constitutional right to the protection of legal rights. The Court in Bergamo, Italy had not determined the challenge to its jurisdiction in the intervening five years, despite three hearings in 1993, 1994 and 1995. Two further hearings in 1996 and 1997 did not take place because of a change of judges. The Munich District Court refused to lift the stay. On appeal the German plaintiffs argued that the German Court was obliged to resume the proceedings despite the parallel proceedings in Italy, otherwise it would be in breach of its own obligation to protect legal rights in accordance with Art 6 of the European Convention on Human Rights; the proceedings in Bergamo had been commenced in bad faith and purely in order to block the German action and had made no progress; and a complete standstill for more than two years in proceedings that had lasted for six years in total, was unacceptable. The appeal was dismissed. The Court of Appeal of Munich held that Art 21 did not provide for lifting a

43 See Adrian Briggs, "The Impact of Recent Judgments of the European Court on English Procedural Law and Practice" (2005) *Zeitschrift fur Schweizerisches Recht* vol II 124 at 231–262, fn 24.

44 *Ibid*.

45 *Supra* n 36. See also *Tokyo-Mitsubishi*, *supra* n 32, at [49] where the claimants sought a declaration of non-liability in Italy and alleged an Italian jurisdiction clause.

stay except where the court first seised had determined its jurisdiction and the purpose was to avoid irreconcilable judgments. Although the court acknowledged a debate about the circumstances under which exceptionally a continuation of the proceedings in the court later seised could be possible before the court first seised has determined its jurisdiction, it was not permissible to have regard to considerations of reasonableness within the scope of the EC Jurisdiction Convention. Nor could the court later seised allow the duration of a stay to be connected to its assessment of the speed of the court first seised. The German plaintiff was therefore left to pursue the proceedings in Bergamo and combat delays with all procedural means and to pursue any remedy against the Italian court under Art 6 of the European Convention on Human Rights.

34 In *Gasser*, the European Court of Justice also considered whether Art 21 requiring a mandatory stay may be departed from where the proceedings in the court first seised have taken an excessively long time. It proceeded on the basis that the average duration of proceedings before the Italian courts is excessively long. Gasser argued that Art 21 must be interpreted as excluding excessively protracted proceedings *ie*, exceeding three years which are contrary to Art 6 of the European Convention on Human Rights. Thus where no decision on jurisdiction has been made within six months or no final decision on jurisdiction has been given within one year, Gasser argued that the court second seised would be entitled to rule both on the question of jurisdiction and, after slightly longer periods, on the substance of the case. The UK government argued that the court second seised should be able to determine jurisdiction in two situations: first, where the claimant had brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the EC Jurisdiction Convention and, secondly, where the court first seised has not decided the question of its jurisdiction within a reasonable time. The European Court of Justice rejected any such exception as there is no such provision in the EC Jurisdiction Convention and there must be certainty.

35 Thus *Gasser* ends the divergence of opinion amongst the EC Member States as to the supremacy of Art 21 over Art 17 of the EC Jurisdiction and Lugano Conventions and Art 27 over Art 23 of the EC Regulation. Article 27 provides for a simple and inflexible rule based on the chronological order in which proceedings were brought and the rule

does not bend for jurisdiction clauses or delays. It also ends the need for anti-suit injunctions to enforce jurisdiction agreements amongst the EC Member States.[46]

VI. The limits of *Gasser*

36 *Gasser* does however depend on all the proceedings in both the court first seised and second seised being for the same cause of action and between the same parties. Further complications arise where some are but others are not. This is amply illustrated in *Primacom*.[47] A number of banks entered into a loan agreement with the first defendant, PAG, and the second defendant, PMG, the guarantor of the loan. Both defendants were German companies and are hereafter referred to as Primacom. The agreement provided for English law and exclusive English court jurisdiction as follows,

> JURISDICTION English courts
>
> The courts of England have exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any dispute (a "Dispute"), which may arise out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity).
>
> Convenient Forum
>
> The parties agree that the courts of England are the most convenient and appropriate courts to settle Disputes between them and accordingly they will not agree to the contrary.

37 Primacom commenced proceedings in Germany for a declaration that no interest was due or that there was no claim for repayment until the expiry of the term of the loan. Although the German courts would apply English law, nevertheless Primacom argued that the German courts can disregard the law of another State if its application leads to a result that is manifestly irreconcilable with fundamental provisions of German

46 See the discussion on this below and *infra* n 99.

47 *Supra* n 32. Noted Richard Swallow & Richard Hornshaw, "Jurisdiction Clauses in Loan Agreements: Practical Considerations for Lenders" *Bankers' Law* vol 1 no 2 p 18. See also *Tokyo-Mitsubishi*, *supra* n 32, at [49], a case of multiparty litigation where two parties sought a declaration of non-liability in Italy and alleged an Italian jurisdiction clause. Lawrence Collins J stayed the English proceedings for contractual claims (but not for tortious claims) under Arts 27 and 28, until the Italian Court had determined whether it had jurisdiction.

law and that some of the provisions of the agreement, such as the interest rate, were, and were therefore unenforceable.

38 JP Morgan, as agent for the banks, commenced three sets of proceedings in England seeking different contractual remedies: first, an injunction preventing disposal of Primacom's assets without the contractual consent required; secondly, declarations that its notice of default and demand for repayment of the loan was valid; and thirdly, an order for specific performance of Primacom's obligations to provide accounting information under the express provisions of the loan agreement. Primacom sought a stay of the English proceedings under Arts 27 and 28.

39 Cooke J commented that as a matter of English law the proceedings in Germany were in clear breach of the exclusive jurisdiction agreement and the evidence suggested that this was done with the primary intention of frustrating any possible attempt by the claimant to seek appropriate relief in the English courts. The delay was advantageous to Primacom and appeared to be one of its objectives. It was not clear how the German courts could find that they were entitled to jurisdiction in the face of the exclusive jurisdiction clause.[48] Primacom accepted that issues relating to the unenforceability of the substantive provisions of the agreement do not affect the validity of the jurisdiction clause. Nevertheless Primacom maintained that it was clear they did contest the applicability of the jurisdiction clause from the very fact that they had commenced proceedings in Germany. There was no German law evidence suggesting that there was any public law argument against the effectiveness of the clause. The jurisdiction challenges in Germany might be heard in about four months but there was an unrestricted right of appeal which could cause considerable further delay.

40 Cooke J had to consider whether the German and English proceedings involved the same cause of action and were therefore subject to a compulsory stay under Art 27 until the German court decided on its own jurisdiction, which was the subject of challenge in those courts. An issue also arose as to the degree of interconnection between the German and English proceedings and whether they were related actions within Art 28 and as to the exercise of discretion whether or not to stay the English proceedings. Lastly, issues arose as to whether the English court

48 The German Court did subsequently decide that the case should be heard in England.

could grant protective measures such as injunctions should a stay be granted under either Art 27 or 28.

41 Cooke J held that Art 27 did apply to the claims for declarations and the German proceedings. What constituted the same cause of action must be seen broadly in terms of the judgment sought and not in terms of the issues raised *eg*, as to public policy in Germany. However, with regard to the claim for an injunction to prevent the sale of assets and the order for specific performance of the obligations to provide accounting information, neither the *cause* nor the *objet* was the same as the German proceedings and so there was no basis for a stay under Art 27. The end in view of the injunction proceedings was the enforcement of a contractual provision and the prevention of the sale of assets without the required consent, whereas in the German proceedings there was no specific challenge to that particular provision, but a challenge to the interest provisions. Furthermore the facts in issue in the English and German proceedings were different as the English proceedings involved the threat of a proposed sale and the absence of any request for consent. The end in view of the order for specific performance was not the same as the German proceedings which concerned the issue of interest and no more than that. The relevant facts in relation to the failure to provide information and the efforts to obtain it under the terms of the loan agreement did not feature in the German proceedings.

42 Cooke J then considered Art 28 on related actions. If he had not found that Art 27 applied to the claims for declarations and the German proceedings, he would have found that those two actions were connected, but not that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The proceedings for declarations would apply English law, whereas the German court would proceed on the basis of the validity of the loan agreement as a matter of English law but then seek to apply German public policy considerations. As regards the proceedings for the injunction and the order for specific performance, there was no possibility of inconsistent or irreconcilable judgments with the German proceedings. Moreover the degree of connection was much less, the German proceedings relating to the interest provisions and the injunction and the order for specific performance relating to different contractual provisions. Thus Art 28 did not apply to any of the English proceedings.

43 Furthermore as a matter of discretion, even if Art 28 had applied, Cooke J would not have been prepared to stay any of the English proceedings in any event. The judgments would not be irreconcilable. Furthermore, it was hard to see how the court could properly exercise its

discretion to stay proceeding which were brought in accordance with the law, jurisdiction and *forum conveniens* clauses which Primacom had agreed to. Even if he had found that the proceedings were related within Art 28, the presumption in favour of a stay was overridden by the terms of the agreement. Although *Gasser* made a stay mandatory where Art 27 applies, there was no reason why weight should be given to that decision in the context of Art 28, where a discretion is given to the court, the jurisdiction of which had been agreed as exclusive. Cooke J stated:[49]

> [T]he injustice of giving precedence to proceedings brought in breach of an exclusive jurisdiction clause where the parties have agreed that England is the appropriate forum is self-evident. To breach the clause and to gain the benefit of priority for the German courts by such breach offends justice, where the court has a discretionary decision to make.

44 Lastly, if the judge had granted a stay of the injunction proceedings and it had therefore been necessary to consider an order for a protective measure under Art 31,[50] Cooke J would have continued the injunctions already granted in respect of disposal of assets, until the determination by the German courts of their own jurisdiction. This would be on the ground that the English court had substantive jurisdiction by virtue of the English jurisdiction clause until it declined jurisdiction on the basis of the German court, first seised, deciding that it had jurisdiction, or that there was sufficient link to England.

45 In this case the English court proceeded with the injunction to restrain the sale of assets and the order for specific performance on the ground that it had jurisdiction because of the English jurisdiction clause. Thus it had determined that the jurisdiction clause was valid for those proceedings to which Arts 27 and 28 did not apply, or in order to exercise its discretion under Art 28. In other words the English court did not have to stay its proceedings in relation to certain claims but it still has to have jurisdiction to decide them. Thus both the English and the German courts determined whether the English jurisdiction clause was valid, albeit for different proceedings. If the German court alone could decide the validity of the English jurisdiction clause, that would block the

49 *Primacom*, *supra* n 32, at [65].

50 Article 31 provides:

> Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

English court from proceeding in matters which were not the same cause of action or related actions.

VII. Mutual trust

46 Cooke J was careful in *Primacom* not to suggest that the proceedings in Germany were an abuse, although he did remark ruefully that it was not clear how the German courts could find that they were entitled to jurisdiction in the face of the exclusive jurisdiction clause. Nevertheless that is a matter for the German courts to decide, as has been very clearly established by the European Court of Justice in *Turner v Grovit*.[51] That decision, which does not concern a jurisdiction clause, makes clear that the courts of a Member State cannot interfere with the court of another Member State but must trust them to decide whether they have jurisdiction. Thus there was no room to issue an anti-suit injunction even where it was alleged that the proceedings in the other Member State were abusive and were brought in bad faith with a view to frustrating existing proceedings. *Turner v Grovit* has been applied in *Tavoulareas v Tsavliris*[52] where the claimant accepted that a default judgment obtained in England should be set aside but he asked for it to be set aside only on condition that the defendant provided security for the claim, interest and costs. The claimant submitted that proceedings commenced in Greece were an abuse as they had been brought to frustrate the enforcement of any judgment obtained by the claimant in the English courts. Andrew Smith J refused the condition as he thought that it was not permissible to rely on any argument that the pursuit of the Greek proceedings was inappropriate or an abuse. Andrew Smith J stated:[53]

> In so far as criticism of the conduct of the party involves an assessment that his conduct is abusive and "implies an assessment of the appropriateness of bringing the proceedings before the court of another Member State", such an assessment would run contrary to the principle of mutual trust that underpins the Convention and should not be made: see para 28 of the Judgment [in *Turner v Grovit*].

51 Case C-159/02 [2004] ILPr 411.
52 *Supra* n 33. See also *Phillips v Symes* [2001] CLC 1,673 at [37] and [38].
53 *Tavoulareas v Tsavliris*, *supra* n 33, at [44].

VIII. The consequences of *Gasser*

47 It is still very important to advise a party to a contract to have an exclusive jurisdiction clause. Indeed it is even more important that the parties make a very clear choice, ideally in a written contract signed by both parties which falls within Art 23(a). The problem in a case such as *Gasser* was that there was a dispute between the parties as to the existence of the jurisdiction clause as it had only been inserted in invoices presumably sent after the contract had been concluded.[54] Situations such as these raise genuine disputes as to whether the jurisdiction clause forms part of the contract.[55] So do situations where there is a dispute as to whether a contract incorporates the terms of, for example, another contract[56] or a case of the battle of the forms.[57] The issues raised by whether a jurisdiction clause satisfies the requirements of Art 23(c) may require extensive evidence as to usage and be complex and therefore costly and time consuming to resolve. In order to avoid litigation about where to litigate, the parties have to help themselves and address the issue of jurisdiction up front, rather than trying to slip a jurisdiction clause into an invoice or bury it in standard terms incorporated by reference. In *Gasser* the UK government argued that the commercial practice of agreeing which courts are to have jurisdiction in the event of disputes, should be supported and encouraged, as it promotes legal certainty. This, however, assumes that the parties have made a clear agreement. The EC Jurisdiction and Lugano Conventions, and the EC Regulation in its turn, recognise party choice and will enforce it provided that choice satisfies the requirements of Art 17 or 23.

48 However, even if there is a clear jurisdiction clause, the party wishing to rely on the clause must seise the court chosen first. Fortunately the new Art 30 of the EC Regulation makes it easier to seise the English court first than was formerly the case under the EC Jurisdiction

54 See also *MSG*, *supra* n 8.

55 See *Gasser*, *supra* n 37, at [51].

56 See *AIG Europe (UK) v Ethniki* [1998] 4 All ER 301; *AIG Europe SA v QBE International Insurance Ltd* [2001] 2 Lloyd's Rep 268 at [17] and [26] on whether the words of incorporation in a reinsurance contract are clear enough to incorporate the jurisdiction clause from the insurance contract and *Siboti K/S v BP France SA* [2003] 2 Lloyd's Rep 364 on the incorporation of a charterparty jurisdiction clause into a bill of lading.

57 See G Dannemann, "The 'Battle of the Forms' and the Conflict of Laws", ch 11 in *Lex Mercatoria, Essays on International Commercial Law in Honour of Francis Reynolds* (F Rose ed) (LLP, 2000) at p 199 and in particular at pp 210–215.

Convention.[58] This does encourage litigation. This may be no bad thing as there is nothing like a claim form to focus the mind on settlement and the jurisdiction of the proceedings is a major tactic in achieving that goal.

49 *Gasser* is very tough where a party flagrantly breaches a clear English jurisdiction clause for the sole purpose of delay and it takes considerable time for the court first seised to decide that it has no jurisdiction. The claimant in the English proceedings may be able to recover its costs of successfully contesting the jurisdiction of the court first seised and interest for the whole of the period it has been kept out of its money. This will not help the small business which has foundered due to non-payment.

50 The costs involved in a dispute as to whether there is a jurisdiction clause and the delay in obtaining judgment in the court of one's choice may well outweigh the benefits of choice of jurisdiction. Thus a contracting party should do its utmost to prevent such a dispute arising by focusing on the jurisdiction clause at the negotiation stage and commencing proceedings promptly in the chosen court.

51 The current defects and delays in the courts of some Member States in determining the preliminary issue of jurisdiction are unacceptable. It is simply not good enough for a claimant with a clear jurisdiction agreement to have to wait many years for the court first seised to decide on its jurisdiction. This gives the unscrupulous debtor a wholly unfair advantage. It is clearly incumbent on the Member States to improve their procedures for determining the preliminary issue of jurisdiction, so that they deserve the trust that the European Court of Justice demands that all Member States accord each other. With the expansion of the European Union and further States waiting to join, it is important that this issue is addressed.[59] The system is only as good as its weakest link. The problem is not limited to jurisdiction clauses. In any case where the court second seised must stay its proceedings, whether there is a jurisdiction clause or not, the court first seised must determine the preliminary issue of jurisdiction swiftly. Indeed the issue of delays

58 See *supra* n 33.

59 See Andrew Dickinson, "A Charter for Tactical Litigation in Europe?" [2004] LMCLQ 273.

amongst the Member States only serves to highlight why litigants wish to include a jurisdiction clause.[60]

52 Although the decision in *Gasser* has been severely criticised,[61] the problem seems to be with the provisions of the EC Jurisdiction Convention and now the EC Regulation, rather than with the reasoning of the European Court of Justice. For many years before *Gasser* it was recognised that there was a divergence of opinion as to how the jurisdiction and the *lis pendens* provisions should be interpreted. Attempts to resolve the problem by amending the EC Jurisdiction Convention when it became the EC Regulation were dropped as the matter was too controversial.[62] It is not for the European Court of Justice to supply amendments to the EC Regulation where it is currently silent. The time has surely come, however, to resolve the current difficulties by amending the EC Regulation.

IX. Amendments to the EC Regulation

53 The EC Regulation provides that no later than five years after its entry into force the Commission will report on its application and if necessary submit proposals for amendments.[63] Its status as a Regulation, rather than a Convention, makes it easier to introduce amendments. An express new provision in the EC Regulation could provide a solution to the problem of multiple proceedings and jurisdiction agreements.

54 If party autonomy really is valued,[64] as it should be, the ideal solution would be for the jurisdiction agreement to override the *lis pendens* provisions. Thus where a party alleges a jurisdiction agreement, the court allegedly chosen should have exclusive jurisdiction to determine whether there is a jurisdiction agreement, and any court seised before it

60 See, for example, *Phillips v Symes*, *supra* n 33, where a final hearing in Greece might not take place for some seven years, whereas Hart J thought that a trial in England could be achieved within two years (at [53]).

61 A Briggs, "Anti-Suit Injunctions and Utopian Ideals" (2004) 120 LQR 530; Adrian Briggs & and Peter Rees, *Civil Jurisdiction and Judgments* (LLP, 4th Ed, 2005) paras 2.38, 2.198 and 2.207; A Briggs, *supra* n 43, at 231 and T Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) 54 ICLQ 813.

62 Other amendments were made, *eg* to Art 5(1), Art 6(1), the addition of Art 30 so as to iron out the procedural differences between Contracting States as to when a court was seised (see *supra* n 33); the test of domicile in Art 60.

63 Recital 28 and Art 73 of the EC Regulation.

64 See Recital 14 of the EC Regulation quoted at *supra* n 6.

must stay its proceedings, until it is established whether there is a jurisdiction agreement. If there is, any court not chosen must decline jurisdiction. A similar situation arises where the dispute concerns Art 22 of the EC Regulation.[65] This would also entail amendments to the provisions on recognition and enforcement, as Art 35 on recognition, makes express reference to Art 22, but makes no reference to Art 23. One reason for this conclusion is that there could be more than one court seised before the court chosen. Furthermore where each party alleges that there is a jurisdiction agreement in favour of the court in which they have commenced proceedings, *eg*, where there is a battle of the forms, pursuant to Art 29 the court first seised could decide whether Art 23 is satisfied. Alternatively both courts could determine their jurisdiction as discussed below.

55 It is not unsurprising that an English lawyer should prefer the jurisdiction agreement to take precedence over the *lis pendens* provisions. However, this solution is similar to that adopted by Art 6 of the 2005 Hague Convention on Choice of Court Agreements,[66] an initiative of the Hague Conference on Private International Law, an intergovernmental organisation whose members include all EU Member States. But even if the Convention comes into force,[67] it does not apply to the carriage of goods.[68]

56 An alternative solution would be that outlined by Advocate General Léger in his Opinion in *Gasser*. Bound as he was by the wording of the EC Jurisdiction Convention, he proposed that a court second seised which has exclusive jurisdiction under an agreement could, by way of derogation from Art 21 on *lis pendens*, give judgment in the case, without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for doubt as to the jurisdiction of the court second seised. He did not, however, accept the proposal of the UK government that a court first seised, whose jurisdiction is contested in reliance on a jurisdiction clause, must stay its proceedings until the court

65 Formerly Art 16 of the EC Jurisdiction and Lugano Conventions; See also n 23.

66 On 30 June 2005 the Final Act of the Twentieth Session of the Hague Conference on Private International Law was signed, including the Convention on Choice of Court Agreements. See <http://www.hcch.net/index_en.php?act=conventions.text&cid=98> (accessed 18 November 2006).

67 Article 31.

68 Article 2(f) excludes the carriage of passengers and goods and Art 2(g) excludes marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage. The Convention does, however, apply to contracts of insurance and reinsurance that relate to such matters (Art 17).

chosen by that clause has given a decision as to its jurisdiction. He thought that such a solution might encourage delaying tactics by an unscrupulous party by alleging the existence of an agreement and bringing an action before the court allegedly designated in order deliberately to delay judgment until that court had declared that it had no jurisdiction.[69] He was not overly concerned that irreconcilable decisions would result from both courts proceeding simultaneously, as both courts should apply the same criteria to determine whether the clause is valid *ie*, those set out in Art 23 of the EC Regulation or Art 17 of the Conventions, and no others. This was in fact the result in *Primacom*, but it may be rather optimistic and does not deal with the point that the party who has agreed to a jurisdiction agreement should not have to incur the cost of pursuing proceedings in two or more jurisdictions, even if it is only the cost in one set of proceedings of contesting jurisdiction. It is in effect, however, similar to the position at common law without the same criteria being applied to determine the validity of the jurisdiction clause. It also has the merit that the court chosen has every incentive to proceed apace. However, it defers the problems until after a judgment has been obtained. The party who has commenced proceedings in breach of the jurisdiction clause, probably for negative declaratory relief, is most likely to have commenced proceedings in the courts of the State where it is domiciled and that is the State where it is most likely to have assets and where the claimant in the court chosen most needs to be able to enforce.

57 A point that arises from Advocate General Léger's proposal is the standard of proof. He states that the court second seised could not proceed "until it has made absolutely sure that it does have exclusive jurisdiction under an agreement conferring jurisdiction … If there were any doubt as to the validity of the agreement conferring jurisdiction or its scope, the court second seised would have to stay proceedings".[70] This seems to be a hefty standard of proof. There has been some debate about the standard of proof that applies when a party alleges a jurisdiction agreement within Art 23. It is generally accepted under English law that the party relying on the clause must show a good arguable case that there is such a clause rather than establish this on a balance of probabilities – see Waller LJ in *Canada Trust Co v Stolzenberg & Co KG (No 2)*.[71] However that case concerned the issue of domicile and was not a case on a jurisdiction clause. The issue of domicile simply went to jurisdiction and

69 *Supra* n 37, at [74].
70 *Id*, at [81].
71 [1998] 1 WLR 547.

not to the merits of the dispute at trial. Waller LJ specifically highlighted the difficulties that can arise where the question on jurisdiction as to whether there is a jurisdiction clause also goes to the heart of the ultimate merits of the case *eg*, whether there is a contract at all. There the court will not wish to give "even the appearance of pre-trying the central issue" while scrutinising "most jealously" the factor which provides jurisdiction. Waller LJ thought that in that context good arguable case reflects that one side has a much better argument on the material available.[72] He thought that he had probably been wrong in his earlier judgment in *IP Metal Ltd v Ruote O Z SpA*[73] where he had adopted a higher test than that of good arguable case of "highly likely".[74] In that case he was deciding whether Art 17 overrode Art 21 of the EC Jurisdiction Convention and thus another court was already seised. The Privy Council has just confirmed the good arguable case test in *Bols Distilleries (t/a Bols Royal Distilleries) v Superior Yacht Services Limited*,[75] a case on appeal from the Supreme Court of Gibraltar on Art 23 of the EC Regulation. The Privy Council agreed with Lord Steyn in the House of Lords in *Canada Trust Co v Stolzenberg & Co KG (No 2)*.[76] Lord Steyn, affirming the decision of Waller LJ, had rejected the argument that the more stringent test of a balance of probabilities should apply because:[77]

> The adoption of such a test would sometimes require the trial of an issue or at least cross examination of deponents to affidavits. It would involve great expense and delay. While it is true that the jurisdictional issues under the Conventions are very important, they ought generally to be decided with due despatch without hearing oral evidence.

58 Further as Lord Rodger of Earlsferry stated in the Privy Council in the *Bols* decision:[78]

> [I]f the standard of "a good arguable case" is properly understood and applied, there is no risk that the effectiveness of the Regulation will be impaired. The rule is that the court must be satisfied, or as satisfied as it

72 It appears to have been common ground in *eg*, *Carnoustie Universal SA v International Transport Workers' Federation* [2002] 2 All ER (Comm) 657 at [38]; *Provimi Ltd v Roche Products Ltd* [2003] 2 All ER 683 (Comm); *Tokyo-Mitsubishi Ltd supra* n 32, at [193] and [194].

73 [1993] 2 Lloyd's Rep 60 at 63–64.

74 A more stringent test was rejected in *Lafarge Plasterboard Ltd v Fritz Peters & Co KG* [2000] 2 Lloyd's Rep 689 and the good arguable case test applied. However, Rix LJ expressed some doubts *obiter* in *Konkola Copper Mines PLC v Coromin Ltd* [2006] 1 Lloyd's Rep 410 at [74] to [87] and, in particular, [84].

75 [2007] 1 WLR 12 ("*Bols*").

76 [2002] 1 AC 1.

77 *Ibid,* at 13.

78 *Supra* n 75, at [28].

> can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate "clearly and precisely" that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the "good arguable case" standard, the claimants must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in article 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties.

59 If neither of the above proposals were accepted, one cannot really relish the solution, proposed by the UK government, that the court second seised could examine the jurisdiction of the court first seised where the proceedings were commenced in the court first seised in bad faith to block proceedings in the court second seised, or if the court first seised has not determined its own jurisdiction within a reasonable time. What is reasonable in all the circumstances in the opinion of one court may differ somewhat from the opinion of another court. Even once the issue has been decided it may be subject to appeal or appeals.

60 It may be suggested the problem has been exacerbated by the acceptance of negative declaratory relief.[79] However, the availability of that remedy may assist a party seeking to enforce a jurisdiction clause. Although it is usually the debtor who will seek such a remedy, this is not always the case. What cannot be permitted is the situation such as *Primacom* where the debtor brings proceedings in breach of the English jurisdiction clause purely to buy time and is unable to give any reason for the invalidity of the clause, so that there may be no dispute that there is a jurisdiction clause.

X. The position at common law

61 As seen above, the common law rules will apply where neither party to the English jurisdiction clause is domiciled in a Member State and proceedings have been commenced in the courts of a non-Member

79 See *supra* n 29.

State in breach of the jurisdiction clause. This is as a result of the application of Arts 4 and 23(3) of the EC Regulation. Thus if, for example, a Receiver domiciled in Singapore wishes to rely on an English jurisdiction clause in a bill of lading with a Carrier domiciled in a non-Member State, and the Carrier has commenced proceedings in the court of its domicile, the English court will apply the common law rules.

62 The decisions in *Gasser* and *Primacom* may be contrasted sharply with the position at English common law, where the English court has adopted a robust defence of English jurisdiction clauses in most circumstances. Thus the English court will uphold an English jurisdiction clause unless there is strong cause not to.[80] This is the case even though proceedings have already been commenced elsewhere, as the court chosen would be the appropriate forum, unless there are multiple proceedings (*lis alibi pendens*) between multiple parties in the other forum, some of whom have not agreed to English jurisdiction.[81]

63 Two recent decisions on bills of lading illustrate this, even in the face of legislation in the other jurisdiction which would make the English jurisdiction clause invalid. In *Magic Sportswear*,[82] O T Africa Line Ltd (OTAL), an English company which also had offices in Toronto, carried goods from New York on their vessel *Mathilde Maersk* to Monrovia. OTAL issued a bill of lading in Toronto where the ocean freight was payable. The bill of lading named Magic Sportswear Corporation ("Magic"), a Delaware corporation with business interests in New York, as the shippers and the intended receivers were Blue Banana, a Liberian corporation. It was alleged that the goods were short delivered and Magic and Blue Banana commenced proceedings in Toronto in August 2003.

80 *Du Pont de Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 585, *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 noted in F M B Reynolds, "Overriding Policy of the Forum: the Other Side of the Coin" [1998] LMCLQ 1; *UBS AG v Omni Holding AG* [2000] 1 WLR 916, *obiter* on the assumption that the Lugano Convention did not apply; *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425; *Import Export Metro Ltd v Compania Sud Americana De Vapores SA* [2003] 1 Lloyd's Rep 405; *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170 (CA); [2005] 1 Lloyd's Rep 252 (HC) ("*Magic Sportswear*") and *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA (The Hornbay)* [2006] 2 Lloyd's Rep 44.

81 *Bouygues Offshore SA v Caspian Shipping Co (Nos 1, 3, 4, 5)* [1998] 2 Lloyd's Rep 461 ("*Bouygues v Caspian Shipping*") and *Donohue v Armco Inc*, *supra* n 80. For the converse situation where the English court refuses to enforce a foreign jurisdiction agreement because of multiple proceedings see *Citi-March Ltd v Neptune Orient Lines Ltd* [1996] 2 All ER 545; [1997] 1 Lloyd's Rep 72; *The MC Pearl* [1997] 1 Lloyd's Rep 566; and *obiter*, *Konkola Copper Mines Plc v Coromin Ltd* [2006] 1 Lloyd's Rep 410 and Gaskell, *supra* n 20, at paras 20.213 to 20.219.

82 *Supra* n 80.

The instigators of those proceedings were the Canadian cargo insurers exercising their subrogated rights to bring the claims in the name of the insured, as Magic and Blue Banana were dormant.

64 The bill of lading provided for the US Carriage of Goods by Sea Act 1936 to apply to the bill of lading and contained an English law and exclusive English court jurisdiction clause.[83] The basis on which the jurisdiction of the Canadian courts was invoked was ss 46(1)(b) and 46(1)(c) of the Canadian Marine Liability Act 2001.[84] Although Canada does not give the force of law to the Hamburg Rules,[85] this section is a similar jurisdiction provision to Art 21 of the Hamburg Rules, which provides that the cargo claimant has an option to bring proceedings in a number of places including the place designated by the contract of carriage. The Canadian legislation is more favourable to the cargo claimant in that it permits an action to be brought if the defendant has *a* place of business, branch or agency in Canada, rather than *the* principal place of business or the habitual residence of the carrier provided for by the Hamburg Rules. The rationale for s 46 included giving Canadian importers and exporters the right to pursue cargo claims in Canada and an attack on what was perceived to be a monopoly of the British courts over such claims. The Canadian court retained a discretion to refuse

83 Clause 25. Clause 25(2) further provided:

> In the event that anything herein contained is inconsistent with any applicable international convention or national law which cannot be departed for [*sic*] private contract, the provisions hereof shall to the extent of such inconsistency but no further be null and void.

It was accepted that this provision did not apply as s 46 of the Canadian Marine Liability Act (see *infra* n 84) was not mandatory but permissive.

84 Section 46(1) provides:

> If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada where:
>
> (a) the actual port of loading or discharge under the contract, is in Canada;
>
> (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
>
> (c) the contract was made in Canada.

85 UN Convention on the Carriage of Goods by Sea 1978 in force in Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, the Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Saint Vincent and the Grenadines, Syria, Tanzania, Tunisia, Uganda and Zambia as at May 2006. The Convention will enter into force in Liberia on 1.10.2006 and Paraguay on 1.8.2006. See *The Ratification of Maritime Conventions* (LLP, 2005).

jurisdiction on grounds of *forum non conveniens* and the choice of law provision remained effective. The Hamburg Rules are not in force in England and Wales and there are no current plans to change this. The case therefore challenged the principle of the supremacy of party autonomy, long recognised by the English courts.

65 A month after the commencement of the Canadian proceedings, OTAL commenced proceedings in England against Magic and Blue Banana claiming a declaration that there was no short delivery and an injunction restraining the defendants from pursuing the proceedings in Canada. Gross J granted permission to serve out of the jurisdiction and an anti-suit injunction. Although Magic and Blue Banana filed an acknowledgment of service indicating an intention to contest the jurisdiction, again at the instigation of the insurers, no application to contest jurisdiction was ever made and therefore both Magic and Blue Banana were to be treated as having accepted the jurisdiction of the English court.

66 Despite the anti-suit injunction, the Canadian proceedings continued. OTAL contested the jurisdiction of the Canadian court but was unsuccessful as it was held that s 46 removed the binding effect of the English jurisdiction clause and Canada was the appropriate forum. OTAL's appeal to the Federal Court Judge was dismissed and OTAL appealed to the Canadian Federal Court of Appeal. Before the hearing of that appeal, OTAL was granted permission to join the insurers as a defendant to the English action and to serve on the insurers out of the jurisdiction in Canada. The defendants sought orders that service on the insurers be set aside; the proceedings against Magic and Blue Banana be stayed and the anti-suit injunction be discharged. OTAL sought an anti-suit injunction against the insurers.

67 At first instance Langley J refused the defendants' three applications,[86] and granted OTAL's application for an anti-suit injunction against the defendant insurers. The key question was whether the "clash of jurisdictions, with the appalling prospect of an apparent challenge from this Court to Canadian legislation and the cost and disruption of the same claims proceeding in two jurisdictions with the added risk of

86 Save for setting aside service on the insurers on the ground of CPR 6.20(8)(a) that a claim was made in tort where damage was sustained within the jurisdiction. Service was upheld on the grounds of CPR Rule 6.20(17) for the purpose of seeking a costs order against a third party and CPR Rule 6.20(3) that the insurers were necessary or proper parties to the claim against Magic and Blue Banana.

different outcomes"[87] was sufficiently exceptional to justify the English court not upholding the English jurisdiction agreement. Langley J held that that issue had to be decided in favour of OTAL as the parties should abide by the agreement that they had made.

68 The Court of Appeal considered two issues: first, whether the proceedings against Magic and Blue Banana should be stayed and the proceedings against the insurers set aside and second, if either or both proceedings should continue, whether they should be enforced by continuing the anti-suit injunctions.

69 As regards the stay of the proceedings against Magic and Blue Banana and the application to set aside the proceedings as against the insurers, the critical issue was the extent to which, if at all, it is appropriate for the English court to have regard to s 46(1) of the Marine Liability Act 2001, an equivalent of the Hamburg Rules in relation to jurisdiction in Canadian domestic law. The Court of Appeal restated the principle governing the exercise of the court's discretion to stay an action brought in the country which has been agreed by the parties as set out in *The Eleftheria,*[88] *The El Amria*[89] and *Donohue v Armco Inc*[90] that strong reasons are required for staying the proceedings in the forum in which the parties have agreed that they will be litigated.

70 The conflict between the provisions of the Canadian legislation and the agreed jurisdiction of England was to be resolved by the rules of private international law of the court in which the question has to be resolved, *ie*, the English court. One of those rules is that questions of interpretation and enforcement of contracts are resolved by reference to the proper law of the contract, which was English law. Although there was no direct authority on how to resolve such a conflict, the Court relied on the decision of Thomas J in *Akai Pty Ltd v People's Insurance Co Ltd*.[91] In that case an insurance policy between a Singapore insurer and an Australian subsidiary of a multi national company provided for English governing law and English court jurisdiction and contained a twelve month time bar. Under s 8 of the Australian Insurance Contracts Act 1984, if the proper law of the contract would be the law of an Australian

87 *Supra* n 80, at [38].
88 [1970] P 94.
89 [1981] 2 Lloyd's Rep 119.
90 *Supra* n 80, applied in *Import Export Metro Ltd v Compania Sud Americana De Vapores SA*, *supra* n 80.
91 *Supra* n 80, noted in Reynolds, *supra* n 80.

state but for an express provision to the contrary included in the contract, then, notwithstanding that provision, the proper law of the contract was to be the law of that state. The Act forbade contracting out. Section 52 rendered any provision void if it had the effect of modifying the operation of the provision of the Act to the prejudice of the insured. The reason that the insurers were anxious to have the case determined in England was twofold: the law in Australia was more favourable to the insured as it restricted the insurers' right to decline to pay a claim in the event of a breach of a policy term. The knock-out blow, however, was that if English law applied to the policy, it was common ground that the claim was time barred pursuant to the express twelve month time bar in the policy.

71 On appeal the High Court of Australia refused a stay of the proceedings in New South Wales. It upheld the policy of Australian law and the Australian Constitution rather than the parties' agreement as "the policy of the Act, evinced by s 8, is against the use of private engagements to circumvent its remedial provisions."[92] Secondly the English jurisdiction clause was rendered void. In England the insurers sought a declaration of non-liability and summary judgment in reliance on the time bar. The insured sought a stay of the English proceedings and the insurer sought an anti-suit injunction. Thomas J dismissed the argument that the Australian High Court had applied the same principles as were followed by the House of Lords in *The Hollandia* (*sub nom The Morviken*).[93] The real question was whether the English court should give effect to public policy as set out in an Australian statute as determined by the Court of Australia. He upheld the English jurisdiction agreement and held that there were no strong reasons for deciding not to hold the parties to their bargain. He also granted an anti-suit injunction.

72 In *Magic Sportswear* the Court of Appeal approved the decision in *Akai* and concluded that there was no strong reason not to hold the parties to the English jurisdiction clause. Furthermore the Court of Appeal upheld the anti-suit injunctions.

73 *Magic Sportswear* has been followed in *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA, Ace Seguros SA (The Hornbay)*.[94] The claimants, a German ship owning company that operated a liner service

92 (1996) 188 CLR 418.
93 *Supra* n 20.
94 *Supra* n 80.

to South America, loaded a cargo of printing machinery on board the *Hornbay*. The cargo was shipped on board at Hamburg for delivery in Cartagena, Colombia. Due to bad weather it was necessary to land the goods at Le Havre where they were found to be a constructive total loss. The bill of lading evidencing the contract of carriage between the claimants and the consignees of the cargo referred to a jurisdiction clause on its reverse which provided as follows:

> The contract evidenced by this bill of lading shall be governed by English law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the Courts of any other country.

74 The bill of lading also expressly incorporated the Hague-Visby Rules and a Himalaya clause.

75 The second defendants were the cargo insurers, ACE, who had procured proceedings to be issued in Colombia against Maritrans, the claimants' agents in Colombia, seeking judgment for the full value of the cargo. The claim was founded upon the contract of carriage and provisions of the Colombian Code of Commerce which the defendants argued imposed liability on Maritrans as agent of the shipowners. The defendants challenged the jurisdiction of the English court in the proceedings for a negative declaration brought by the claimants contemporaneously with the commencement of the Colombian proceedings. The claimants sought an anti-suit injunction against the defendants in respect of the Colombian proceedings. The commercial significance of the dispute on jurisdiction was that, if it remained in England, the cargo interests would be likely to recover nothing because of the one year time bar. Morison J held that there was no exceptional reason why the English court would not exercise the jurisdiction conferred on it and granted an anti-suit injunction. He joined ACE as a necessary and proper party to the proceedings pursuant to CPR 6.20(3)(c) and (d), as an injunction against them would be more effective than against the first defendants alone. The claimants were also permitted to join Maritrans as a party and to amend their claim for a negative injunction to plead the time bar point.

76 Thus where the English courts apply their common law rules, a litigant will usually be able to rely on an exclusive English jurisdiction clause, even if proceedings have already been commenced in a non-

Member State. This would also be the situation where there is a London arbitration clause where the London arbitrators would have jurisdiction to determine their own jurisdiction.[95] If the EC Regulation applies, however, the litigant can only rely on the exclusive English jurisdiction clause or indeed an exclusive jurisdiction clause choosing the courts of any Member State, if the court chosen is also first seised, or once the court first seised, but not chosen, declines jurisdiction.

XI. Anti-suit injunctions

77 The English court can no longer grant an anti-suit injunction to restrain a defendant from pursuing proceedings in a Member State of the EC Regulation or Contracting State of the EC Jurisdiction or Lugano Conventions.[96] However, the use of anti-suit injunctions to restrain a defendant from pursuing proceedings elsewhere is still permissible, as seen in *Magic Sportswear* and *The Hornbay*. Different considerations apply where there is no mutual agreement as to jurisdiction between two States.[97] Furthermore, it has been held that an anti-suit injunction to enforce an arbitration agreement may still be granted as arbitration falls outside the scope of the EC Regulation,[98] although an appeal to the House of Lords is pending.[99]

95 Arbitration Act 1996 (c 23) (UK), s 30.

96 *Gasser*, *supra* n 37; noted Yvonne Baatz, "Who Decides on Jurisdiction Clauses?", [2004] LMCLQ 25; Jonathan Mance, "Exclusive Jurisdiction Agreements and European Ideals" [2004] 120 LQR 357; Dickinson, *supra* n 59; *Turner v Grovit*, *supra* n 51. Even before these decisions, the Dusseldorf Court of Appeal held that an English anti-suit injunction could not be served on the ground that it was unconstitutional and interfered with its sovereignty: *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320.

97 See *eg* A Briggs in ch 12, "Anti-Suit Injunctions in a Complex World" in *Lex Mercatoria, Essays on International Commercial Law in Honour of Francis Reynolds*, *supra* n 57.

98 Despite a note of caution by the Court of Appeal in *Phillip Alexander Securities & Futures Ltd v Bamberger* [1996] CLC 1757 at 1789; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1)* [2005] 1 Lloyd's Rep 67 (CA) noted in Jonathan Harris, "Arbitration Clauses and the Restraint of Proceedings in Another Member State of the European Union" [2005] LMCLQ 159; *West Tankers Inc v RAS Riunione Adriatica di Sicurta (The Front Comor)* [2005] 2 Lloyd's Rep 257; Sir Peter Gross, "Anti-Suit Injunctions and Arbitration" [2005] LMCLQ 10.

99 *The Front Comor*, *supra* n 98. Colman J certified the point for a leapfrog appeal to the House of Lords. Permission to appeal was granted and the appeal was listed for hearing in December 2006.

XII. Damages for breach of the jurisdiction agreement

78 Where the common law rules apply, a party to an exclusive jurisdiction agreement which has been breached may be able to recover damages for breach of contract[100] or for the tort of procuring a breach of contract.[101] Where the EC Regulation rules apply, the claimant in the English proceedings will seek to recover its costs of successfully contesting the jurisdiction of the court first seised from the court first seised. However, recovery of costs in full or in part may not be possible and the claimant may seek damages in the English proceedings. If the claimant in the English proceedings is not successful in contesting the jurisdiction of the court first seised, it may seek to recover damages from the English court representing the difference between what it recovers in the court first seised and what it would have recovered in England. However, there are great difficulties in seeing how the English court could award damages for breach of contract if a court first seised in a Member State has determined that there was no English jurisdiction clause.[102]

XIII. Does Article 23(1) of the EC Regulation apply mandatorily where the other State is a non-Member State? The impact of *Owusu*.

79 It was seen above that if at least one of the parties to an English jurisdiction clause is domiciled in a Member State, the English court must accept jurisdiction and cannot refuse jurisdiction in favour of another Member State. The effect of Art 23(1) of the EC Regulation may go further, with the result that the English court has no discretion to stay its jurisdiction in favour of a non-Member State such as Singapore.

80 The issue was considered in the context of the EC Jurisdiction Convention in *Ultisol Transport Contractors v Bouygues Offshore SA*.[103] In that case the defendant was domiciled in France and the jurisdiction chosen was that of a Contracting State, *ie*, England. At first instance Clarke J, as he then was, held that the application of Art 17 of the EC Jurisdiction Convention did not exclude the jurisdiction of the courts of a non-Contracting State, South Africa, even where one of the parties

100 *Union Discount Co v Zoller* [2002] 1 WLR 1517; *Donohue v Armco Inc*, *supra* n 80 at [36], [48] and [75].
101 See Morison J in *The Hornbay*, *supra* n 80, at [26].
102 See Briggs, *supra* n 43 and Swallow & Hornshaw, *supra* n 47, at p 21.
103 [1996] 2 Lloyd's Rep 140 ("*Ultisol v Bouygues*") at 146–148.

proceeds in the courts of such State in breach of an exclusive jurisdiction agreement for the courts of a Contracting State. In other words, the English court still has a discretion at common law to determine whether a party should be permitted to proceed in a non-Contracting State in breach of its exclusive jurisdiction clause in favour of the English courts because the Convention is not concerned with the jurisdiction of non-Contracting States. It is noteworthy that Clarke J thought that the purpose of Art 17 was to exclude the jurisdiction of the courts of the other Contracting States where parties (whether domiciled in a Contracting State or not) have agreed to the exclusive or non-exclusive jurisdiction of the courts of a Contracting State. His judgment is couched in terms of not excluding the jurisdiction of a non-Contracting State rather than whether Art 17 imposes an obligation on the court chosen to exercise jurisdiction. Although the case went to the Court of Appeal,[104] it did not consider this issue. In a brief judgment in *Eli Lilly and Co v Novo Nordisk A/S*[105] the Court of Appeal, without referring to *Ultisol v Bouygues*, reached the same conclusion as Clarke J. Morritt LJ thought the position "straightforward".[106]

81 *Dicey & Morris* state that whether the English court can stay in favour of a non-Member State is a point that "has little practical significance since it will be a very rare case in which an English court will not give effect to a valid English jurisdiction clause".[107] However, *Bouygues v Caspian Shipping* was just such a rare case.[108] There, despite the exclusive English jurisdiction agreement, the Court of Appeal stayed English liability, but not limitation, proceedings in favour of a non-Contracting State, South Africa, due to multiple proceedings in South Africa. The practical significance would be to have a simple rule and thus avoid the legal costs of a hearing on discretion. At first instance in *Magic Sportswear*, Langley J commented that the scale of the litigation was out of all proportion to the sum concerned.

104 *Bouygues v Caspian Shipping*, *supra* n 81.

105 [2000] ILPr 73. The issue was not decided by the Court of Appeal in *DSM Anti-Infectives BV v Smith Kline Beecham Plc* [2004] EWCA Civ 1199; [2004] 2 CLC 900 as Peter Gibson LJ thought that a decision should await a case where the court would be minded to grant a stay on *forum non conveniens* grounds: at [46].

106 *Supra* n 105, at [17]. See also *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corporation (No 2)* [2000] 1 Lloyd's Rep 670 at [47] and [48]. In neither of these cases was a stay granted.

107 *Dicey & Morris on The Conflict of Laws*, (C G J Morse, Adrian Briggs & Lawrence Collins eds) (Sweet & Maxwell, 13th Ed, 2000) at para 12-090 fn 66 (the last two sentences) (not in the 14th edition, 2006 (Sir Lawrence Collins gen ed): see para 12-103).

108 *Supra* n 81. See also *Donohue v Armco Inc*, *supra* n 80.

82 It is now necessary to review the decisions in *Ultisol v Bouygues* and *Eli Lilly and Co v Novo Nordisk A/S* in the light of the recent decision of the European Court of Justice in Case C-281/02 *Owusu v Jackson*.[109] That case did not concern a jurisdiction clause but Art 2 of the EC Jurisdiction Convention requiring that a defendant domiciled in a Member State be sued in that State. However, the basic principles underlying that Article may be equally applicable to the EC Regulation and jurisdiction agreements.[110]

83 In *Owusu*, proceedings were brought by Mr Owusu, domiciled in the UK, against Mr Jackson, a defendant also domiciled in the UK, for damages in respect of a terrible injury suffered by the claimant in Jamaica. Mr Owusu also sued various Jamaican companies in tort in the same proceedings. Mr Jackson and three other defendants applied for a declaration that the English court should not exercise its jurisdiction as the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice. The Court of Appeal referred issues of interpretation to the European Court of Justice as to whether it is inconsistent with the EC Jurisdiction Convention where domicile is founded on Art 2, *ie*, the defendant's domicile, to decline to hear proceedings in favour of the courts of a non-Contracting State where the jurisdiction of no other Contracting State is in issue and there is no connecting factor to any other Contracting State.

109 [2005] 1 Lloyd's Rep 452 (ECJ); [2002] ILPr 45 (CA) ("*Owusu*"), applied in *Konkola Copper Mines Plc v Coromin* [2006] 1 Lloyd's Rep 410 (CA); [2005] ILPr 39 (HC); *CNA Insurance Company Limted v Office Depot International (UK) Ltd* [2005] EWHC 456 and *Koshy v DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH* [2006] EWHC 17. Noted by Edwin Peel, "*Forum Non Conveniens* and European Ideals" [2005] LMCLQ 363 and A Briggs, "*Forum Non Conveniens* and Ideal Europeans" [2005] LMCLQ 378; A Briggs, "The Death of *Harrods*: *Forum Non Conveniens* and the European Court" (2005) 121 LQR 535; David Jackson, "Jurisdiction in Europe – and *Forum Non Conveniens*" in *Shipping and Transport Lawyer International* vol 5 no 2 at p 33 and Chris Hare, "*Forum Non Conveniens* in Europe: Game Over or Time for Reflexion" [2006] JBL 157. This decision overturns the earlier decision in *Re Harrods (Buenos Aires) Ltd (No 2)* [1992] Ch 72 applied in *The Po* [1991] 2 Lloyd's Rep 206. Although the House of Lords in *Re Harrods* referred this issue to the European Court of Justice, the case settled.

110 See Recital 11 of the EC Regulation quoted at *supra* n 3 and Recital 14 quoted at *supra* n 6. For a contrary view see A Briggs in "Recent Cases in the English Courts: Private International Law" (2002) 73 BYBIL 439 at 457 before the decision of the European Court of Justice in *Owusu*. In the light of the reasoning in *Owusu* this view is not accepted by the present writer.

84 The European Court of Justice stated that there is no condition for the application of the EC Jurisdiction Convention that there should be a legal relationship involving a number of Contracting States. Although there must be an international element for the jurisdiction rules of the Convention to apply, this could be derived from the involvement of a Contracting State and a non-Contracting State. It specifically remarked that the rules on express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States.[111] Article 2 is a fundamental rule of jurisdiction of a mandatory nature and there can be no derogation from the principle that it lays down, except in the cases expressly provided for by the Convention. Respect for the principle of certainty was stressed. Certainty could not be fully guaranteed if the court having jurisdiction was allowed to apply the principle of *forum non conveniens*. Application of the doctrine would undermine the predictability of the rules laid down by the Convention, in particular that of Art 2, and therefore undermine the principle of legal certainty. It would also affect the uniform application of the Rules. Thus the European Court of Justice concluded that the Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Art 2 on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other Contracting State is in issue, or the proceedings have no connecting factors to any other Contracting State.

85 If Art 23(1) is also mandatory in nature, by analogy with *Owusu*, a party domiciled in a Member State to the EC Regulation is entitled to the legal certainty and predictability of jurisdiction in the court of the Member State it has chosen, and the English court cannot decline jurisdiction in favour of a non-Member State.[112] This issue came before Gloster J in *Antec International Ltd v Biosafety USA Inc*[113] but in view of the decision that no stay of the English proceedings would be given, the judge thought it unnecessary to express a view on "what is an extremely difficult question of European law, and where it is highly likely that, for the issue to be resolved, it would be necessary for there to be a reference to the European Court of Justice".[114]

111 *Supra* n 109, at [28].
112 See Hill, *supra* n 24, at paras 5.3.6 and 9.5.10 and fn 417 and Hare, *supra* n 109, at fn 98.
113 [2006] EWHC 47 (Comm).
114 *Ibid*, at [19].

86 If the English court no longer has a discretion under Art 23(1) wherever the other proceedings are, the English court would reach the same conclusion in *Magic Sportswear* and *The Hornbay* but by a different route. In *Magic Sportswear* the EC Regulation was not mentioned but OTAL, an English company, was presumably domiciled[115] in England, a Member State, and it commenced proceedings in England in September 2003 after the EC Regulation came into force. The parties had chosen the courts of a Member State, *ie*, England. Therefore Art 23(1) would apply. In *The Hornbay*, the proceedings were between German shipowners and a Colombian consignee with an English jurisdiction clause and again Art 23(1) would apply. If the claim was between ACE and Maritrans, assuming both parties were domiciled in a non-Member State, Art 23(3) would apply, and then the English court would still have a discretion to decline jurisdiction. In both cases the result would have been the same, subject to any argument that the English court should stay because the Canadian or Colombian court was first seised, which is considered under the next two headings. Whether the EC Regulation rules applied or not, the national legislation of any State, non-Member or Member State, would be irrelevant to the validity of the jurisdiction agreement.[116]

XIV. Exceptions to *Owusu* – a limited discretion?

87 In *Owusu*, the European Court of Justice did not decide the second question referred to it: whether there are any limits to their decision, for example, if there were "identical or related proceedings pending before a court of a non-Contracting State; a convention[117] granting jurisdiction to such a court or a connection with that State of the same type as those referred to in art. 16 of the Brussels Convention",[118] as none of these circumstances arose in that case. Articles 16, 17,[119] 21 and

115 See Art 60 of the EC Regulation.

116 *Castelletti*, *supra* n 8. See Gaskell, *supra* n 20, at para 20.74 and Section 20C7, in particular, para 20.124.

117 Where the European Court refers to "convention" in this quote it must mean a jurisdiction agreement as this is what the English Court of Appeal referred to – [2002] ILPr 45 at [48] no (5); [55] and [56] as did Advocate General Léger in his Opinion in the case at [63], [69], [77] and [80]. See also Peel, *supra* n 109, at 375 fn 75.

118 *Supra* n 109, at [48].

119 See *Coreck, supra* n 9, at [19], where the European Court of Justice said that Art 17 does not apply to a clause designating a court in a non-Contracting State. A Contracting State court must assess the validity of such a clause "according to the applicable law, including conflict of laws rules, where it sits". Thus the formalities of Art 17 would not apply.

22 of the EC Jurisdiction and Lugano Conventions and Arts 22, 23, 27 and 28 of the EC Regulation do not apply to non-Contracting or non-Member States. Both Edwin Peel and Adrian Briggs[120] argue very compellingly that the courts of a Member State should still have a limited discretion to stay proceedings even where a defendant is domiciled in a Member State in these three circumstances, not as a result of a reflexive effect. It would be very odd if, for example, the principle of legal certainty based on the defendant's domicile were to override the autonomy of the parties who have clearly elected to have their disputes determined in the courts of a non-Member State, such as Singapore.[121]

88 In *Konkola Copper Mines Plc v Coromin*,[122] Colman J stated that, if a reinsurance contract contained an exclusive Zambian jurisdiction clause,[123] the English court still had a discretion even though the English court's jurisdiction was founded on the defendant's domicile under Art 2 in the case of the English reinsurers, and on the domicile of one of the defendants under Art 6(1) in the case of the other EU and Swiss reinsurers. However, in view of the multiparty litigation, he would not have stayed the English proceedings. The Court of Appeal upheld his decision, but there was no appeal on this point and the court neither approved nor disapproved it.[124] The full ramifications of the *Owusu* decision have yet to be worked out.

XV. *Lis alibi pendens* and a jurisdiction agreement

89 The exception of *lis alibi pendens* arose in *Magic Sportswear* because the Canadian court was first seised. The English court would probably still have a discretion to stay its proceedings where the court of a non-Member State was first seised. It is important that the *lis pendens*

120 Edwin Peel, "*Forum Non Conveniens* and European Ideals" [2005] LMCLQ 363; A Briggs, "*Forum Non Conveniens* and Ideal Europeans" [2005] LMCLQ 378 and Briggs & Rees, *Civil Jurisdiction and Judgments*, *supra* n 61, at paras 2.219–2.230. See also Hill, *supra* n 24, at paras 9.5.13–9.5.18 and 9.5.23.

121 Thus in *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382, the Court of Appeal declined to refer the question whether an English court still retains the power to stay proceedings in a case where there was an exclusive Egyptian jurisdiction clause or on *forum conveniens* grounds to the European Court. See *per* Neill LJ at 391–392. See also the Opinion of the Advocate General C Darmon in Case C-318/93 *Brenner* v *Dean Witter Reynolds* [1994] ECR I-4275 and *American Motorists Insurance Co v Cellstar Corp* [2003] Lloyd's IR 295.

122 *Supra* n 109.

123 Colman J held that the reinsurers had not shown a good arguable case that there was such a clause.

124 [2006] 1 Lloyd's Rep 410 at [46], [47] and [71].

provision in Art 27 of the EC Regulation should not have a reflexive effect, as this would require the English court to stay its proceedings in favour of the court first seised, until that court had established its jurisdiction. There is no reciprocal agreement between England and Canada that the court second seised must stay its proceedings until the court first seised has established its jurisdiction. Due to this lack of reciprocity, the decision in *Gasser*[125] would not apply in this situation and the English court would no doubt give effect to the English jurisdiction agreement, unless there were multi-party litigation.[126]

XVI. International conventions

90 In *Owusu* the European Court of Justice did not mention the position where the other State applies an international Convention. Article 71 of the EC Regulation provides that the EC Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction. Where another Member State gives effect to the Hamburg Rules,[127] then the jurisdiction agreement may be overridden as a result of Art 71.[128] Where another non-Member State is a party to the Hamburg Rules, Art 71 would not apply, but *Owusu* does not decide whether the English court has a discretion to consider the issue of the international convention.

91 An international convention was not in issue in *Magic Sportswear* as Canada has not given the force of law to the Hamburg Rules. As Rix LJ said in that case, "England and Canada are not part of a club, who have agreed to be bound by its rules. They have been offered the chance to join, but have declined".[129] This is important as other Member States to the EC Regulation or Contracting States to the EC Jurisdiction and Lugano Conventions also have jurisdiction rules similar to those of the Hamburg Rules, although they have not ratified the Hamburg Rules.[130]

125 *Supra* n 37.
126 See *supra* n 81.
127 Such as Austria. See *supra* n 85.
128 See *eg The Bergen (No 1)* [1997] 1 Lloyd's Rep 380 for the effect of the Arrest Convention on a German jurisdiction agreement. See Gaskell, *supra* n 20, Section 20C7 in particular para 20.128. Case C-148/03 *Nurnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* [2004] ECR I-10327 considers Arts 20 and 57(2).
129 *Supra* n 80, at [75].
130 *Eg* Denmark, Finland, Norway and Sweden. See *eg* P Wetterstein, "Jurisdiction and Conflict of Laws under the New Rules on Carriage of Goods by Sea", *New Carriage of Goods by Sea: The Nordic Approach Including Comparisons with some Other*

XVII. Conclusion

92 The effectiveness of an exclusive English jurisdiction clause agreed by a party domiciled in Singapore may depend on whether the other party to the agreement is domiciled in a Member State of the EC Regulation, and on whether the competing jurisdiction is that of another Member State or a non-Member State. If the other party is domiciled in a Member State and the competing jurisdiction is that of another Member State, the English court must accept jurisdiction, provided that another court of a Member State is not first seised of the same cause of action. If the other party is not domiciled in a Member State, the English court will apply its common law principles of *forum non conveniens* and will usually uphold the jurisdiction clause even if proceedings have been commenced elsewhere, but it still has a discretion if the proceedings elsewhere are too complex. The situation which is not clear is where the other party is domiciled in a Member State but the competing jurisdiction is that of a non-Member State.

93 It is to be hoped that the European Commission will consider the difficulties which the *Gasser* decision gives rise to and add a new provision to the EC Regulation to deal with them. The Member States of the European Union must be careful not to deter litigants from choosing their courts because of the fear their choice may be undermined by the unscrupulous actions of debtors whose interests it suits to drag out the proceedings as long as possible by commencing proceedings in breach of the agreement in a slow jurisdiction. If there is to be no change to the Rules, it is incumbent on all the Member States to adopt much speedier and safe procedures to determine jurisdiction, so that they deserve the trust from other States which the European Court of Justice demands. The alternative is that parties are driven to choose arbitration clauses. Furthermore it would be helpful if the implications of the *Owusu* decision could be provided for, in particular in relation to jurisdiction clauses. This could avoid many further years of uncertainty and unnecessary legal costs.

Jurisdictions (Hannu Honka gen ed) (Institute of Maritime and Commercial Law Abo Akademi University, 1997) and Thor Falkanger, Hans Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (Universitetsforlaget, 2nd Ed, 2004) at paras 1.52 and 14.31 on the Maritime Code of 1994.