proceedings. It is the everyday task of courts to find and analyse legal obscurities and to resolve them. The time must come when national courts simply treat Community law as an integral part of national law and do their best to interpret it, unless, in a particular case, the task seems to exceed the limits of their normal interpretative practices and competence. To refer questions of interpretation routinely to the European Court is to alienate the Community legal system from the national systems.

It is possible to hope that preliminary rulings may also wither away, or even be abolished so far as the older member States are concerned, leaving the possibility for the European Court to review exceptionally important or dubious national court decisions, using a sifting process similar to the *certiorari* system of the US Supreme Court, and leaving national courts under the obligation, in the excellent wording of section 3(1) of the European Communities Act 1972, to apply "the principles laid down by and any relevant decision of the European Court".

PHILIP ALLOTT

STAYS AND THE EUROPEAN CONVENTIONS—END-GAME?

MAY an English court, having jurisdiction under the Brussels or Lugano Convention, decline to entertain proceedings on the basis that a court in a non-Contracting State is the *forum conveniens*? Many would doubt it—can national law oust jurisdiction conferred by the Conventions? But the Court of Appeal famously decided otherwise in *Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72. The Conventions, it concluded, are designed to harmonise the jurisdictional rules of Contracting States only to the extent necessary to facilitate the enforcement of judgments between such States, their primary concern. That objective is unaffected if a case is eventually tried in a non-Contracting State, so stays in such cases are permitted. The House of Lords in *Harrods* referred the point to the European Court of Justice, but the case was settled, creating uncertainty about the correct solution, yet leaving all courts but the House of Lords bound by the Court of Appeal's decision.

Hints of unease have occasionally surfaced (see *Haji-Ioannou* v. *Frangos* [1999] 2 Lloyd's Rep. 337). But, despite its unpromising provenance, English courts have seldom questioned the *Harrods* principle, nor sought to cabin its scope. A recent example of such deference is *Ace Insurance SA* v. *Zurich Insurance Co.* [2000] 2 Lloyd's Rep. 423, where the defendant sought a stay of English

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proceedings on the basis that the courts of Texas were more appropriate. Longmore J. granted a stay, and resisted the attempt by the claimant's counsel to distinguish *Harrods*. It was irrelevant that the defendant was domiciled in Switzerland, a Lugano Convention State, and not in England, as the defendant had been in *Harrods*. The Convention could not have contemplated any discrimination between defendants according to their origin.

Nor was Longmore J. convinced by counsel's ingenious attempt to demonstrate that a stay was impossible in such a case because a conflict between Contracting States might ensue. Switzerland, counsel argued, had an interest in the outcome, because the Swiss authorities would prefer to apply the straightforward provisions of the Lugano Convention to the enforcement of any foreign judgment eventually obtained against the defendant. Longmore J. apparently treated this argument as one of fact, not principle, never addressing whether the Lugano Convention could have contemplated such a potential conflict. Robustly, he found no evidence that difficulties would actually arise were the Swiss courts eventually required to enforce a Texas judgment under their traditional rules (if a stay was permitted), rather than an English judgment under the Lugano Convention (if it was not).

Given the difficulty of discerning the elusive requirements of the European Conventions, it is unsurprising that courts should cleave so readily to the compelling logic of the *Harrods* principle, at the risk of oversimplifying matters of somewhat greater complexity. But two recent decisions suggest that the decision in *Harrods* may soon be reconsidered, and the controversy surrounding it finally resolved.

In *Lubbe* v. *Cape plc* [2000] 1 W.L.R. 1545, the defendant, domiciled in England under Article 2 of the Brussels Convention, argued that proceedings in the South African courts would be more appropriate. The House of Lords held that England was the *forum conveniens*, making it irrelevant to enquire whether a stay was compatible with the Convention. But, significantly, as Lord Bingham indicated, they would certainly have referred the point to the Court of Justice, had it affected the outcome. The matter was not *acte clair, Harrods* notwithstanding.

Lubbe makes *Harrods* insecure. But the challenge posed by *Group Josi Reinsurance Company SA* v. *UGIC* [2000] 3 W.L.R. 1625 is potentially more direct. There the Court of Justice held that a court has jurisdiction under Article 2, notwithstanding that the claimant is domiciled in a non-Contracting State. Although at first sight innocuous (even obvious), this proposition may perhaps be read as implicitly hostile to the *Harrods* principle. Arguably, it embraces the wider proposition that the courts of Contracting

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States may not surrender their competence under the Convention on the ground that the case lacks an appropriate connection with the forum. It may suggest that the Convention's provisions concerning jurisdiction must be understood literally, not to be qualified save as the Convention expressly permits, a position fatal to the *Harrods* approach since stays in favour of non-Contracting States are not provided for.

It is doubtful, however, whether *Group Josi* establishes so broad a principle, however elastic the language of the Court of Justice. The question, restricted in scope, was whether a court has jurisdiction if a claimant is domiciled in a non-Contracting State, not (as in *Harrods*) whether proceedings may be stayed where jurisdiction exists. Nor were the arguments of principle and policy central to the *Harrods* problem considered—unsurprisingly if they were irrelevant to the issues involved. Nor need the arguments underlying *Group Josi* have wider implications. No doubt a claimant's origins are irrelevant to a court's competence, an uncontroversial conclusion readily discernible from the terms of the Convention itself. But such straightforward textual considerations have no bearing on whether the Convention prevents a stay in cases resembling *Harrods*, on which the Convention is notoriously silent.

Even champions of the *Harrods* principle might thus endorse *Group Josi*. Indeed, so far from suggesting a solution to the *Harrods* problem, the decision merely begs the question—a court might have jurisdiction over local domiciliaries whatever the claimant's origins, but is it compelled to entertain proceedings if a trial in a non-Contracting State is more appropriate?

Whether *Harrods* was correctly decided is an intractable question, the answer depending as much on policy as on doctrine—does the decision subvert the objectives of the Conventions; what are those objectives? Many would agree with the position adopted in *Harrods*, the purpose of the Conventions being unaffected by granting a stay. Others would contend that the Conventions govern exclusively once they confer jurisdiction, which makes *Harrods* illegitimate since they provide no mechanism for declining proceedings in favour of non-Contracting States. Others would favour an intermediate position. One possibility is that stays should not be granted against claimants domiciled in Contracting States. The Preamble to both Conventions provides that those established in such States should be protected, perhaps entitling them to sue thereunder without obstacle. Moreover, for EU countries, bound by the Brussels Convention, disputes involving EU domiciliaries arguably concern the regulation of the internal market, involving

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clear community interests—in a way in which disputes involving non-EU claimants do not.

Which solution is correct remains unclear. But *Group Josi* may offer guidance as to the fate of the third, intermediate option. Although the issue was not directly in point, the Court of Justice was apparently hostile to any attempt to define the scope of the Brussels Convention by reference to the claimant's origins. Jurisdiction is conferred under the Brussels Convention notwithstanding that the claimant is domiciled in a non-Contracting State. Awkwardly, perhaps, this may have the effect of sharpening the terms of the *Harrods* debate, forcing a stark choice between the two more extreme solutions to the problem. Certainly, this may be the case if Longmore J. was correct to conclude in *Ace* that the defendant's domicile is equally irrelevant.

Whatever the doubt about *Group Josi*'s true import, the decision in *Harrods* has clearly become vulnerable since *Lubbe* and *Group Josi*. *Group Josi* may warrant a re-examination of the *Harrods* principle, even presumably at first instance, for how could any court defer to the authority of a decision whose basis in principle may have been undermined? Together with *Lubbe* it may prompt not only the House of Lords, but also the Court of Appeal, to refer the issue to the Court of Justice when it next arises.

But this forensic framework is itself problematic. It was assumed in *Lubbe* that the *Harrods* question only arises once a court concludes that the *forum conveniens* is abroad. If a trial in England is appropriate it becomes unnecessary to ask whether a stay is legitimate in principle because the outcome would be unaffected; whatever the answer the case would proceed. Such an approach is attractively pragmatic, but conceptually unsatisfying—how can a court properly ask whether it should stay its proceedings when it is unclear whether the question is even permissible? Intriguingly, the House of Lords in *Harrods* endorsed the opposite approach, referring the question of principle to the Court of Justice before enquiring as to the *forum conveniens*. Given this conflict of procedural strategies at the highest level, the problem of when the *Harrods* question arises may itself become a feature of future proceedings.

However the debate unfolds, *Lubbe* and *Group Josi* have significant practical implications. Defendants can no longer rely with confidence upon *Harrods* to preserve the doctrine of *forum non conveniens*, while claimants may now commence English proceedings with enhanced prospects of success. More importantly, prospective litigants must now reflect on the perils of launching (or defending) proceedings in cases such as *Harrods*, which may well

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progress to the Court of Justice, and which promise to be costly, complex, and profoundly unpredictable in their outcome.

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CHOICE OF LAW—NOTICE OF ASSIGNMENT

IT is not often that those of us who toil in one of the remotest vineyards of legal academe are rewarded. Choice of law questions over intangible property rarely seem to trouble the courts, though there are many issues of considerable intellectual interest which also raise hugely important practical implications. Maybe the area is just too difficult or perhaps all concerned are crossing their fingers that the harsh winds of a judgment will not rock the vine and bruise their fine crop (illustrated by angst following *Macmillan Inc.* v. *Bishopsgate Investment Trust plc (No. 3)* [1996] 1 W.L.R. 387). Questions such as the way in which notice must be given to an insurer when the benefit of the policy is assigned must be an everyday practicality. The consequences of giving notice improperly ought to keep some people awake at night. When so much business is done cross-border it seems astounding that the choice of law rule is almost untouched by judicial pronouncement since *Le Feuvre* v. *Sullivan* (1855) 10 Moo. P.C. 1; 14 Eng. Rep. 389, *Lee* v. *Abdy* (1886) 17 Q.B.D. 309 and the like over one hundred years ago. *Raiffeisen Zentralbank Osterreich AG* v. *Five Star General Trading LLC* [2000] 1 All E.R. (Comm) 897 raised precisely this issue. Is the notice to be given in the manner required by: (i) the *lex fori*; (ii) the law of the contract of assignment of the benefit of the insurance; (iii) the *lex situs* of the policy; or (iv) the law of the contract of insurance? Is this question proprietary or contractual?

This latter question confuses the matter rather than clarifies it. An answer is necessary, apparently because the choice of law rule differs. If the issue is proprietary then we use the proprietary choice of law rule. If it is contractual then the contractual choice of law applies. Where there are two contracts in point (the original one of insurance and the contract of assignment of that original contract), there is a temptation to muddle them. We should use a "proprietary" classification to remind us that there are some issues about the assignment which are more like real property questions. So the proprietary classification merely distinguishes the issues (a) relating to the effect of the assignment on the insurer's obligations and (b) which affect other persons not party to either the original contract or the contract of assignment—third parties in

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