ARTICLE 6(1) of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters set out in Schedule 3C to the Civil Jurisdiction and Judgments Act 1982[1] provides that "[a] person domiciled in a Contracting State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled". The House of Lords in *Canada Trust Company* v. *Stolzenberg (No. 2)*[2] decided that first, in an action where jurisdiction is asserted under Article 6(1), the relevant standard of proof on the domicile issue is that of a "good arguable case"; second, the correct date for determining if the anchor defendant[3] is domiciled in England is the date of the issue of proceedings against the anchor defendant; and third, Article 6(1) does not require service on the anchor defendant prior to issue or service of proceedings against other defendants.

THE FACTS

The claimants are Canadian trustees of a number of Canadian pension funds who contend that they have been victims of numerous international frauds perpetuated over many years by 37 defendants. They claimed that the first defendant, Mr Stolzenberg, was the individual primarily liable for defrauding them. The claimants alleged that Mr Stolzenberg had at all material times been domiciled in England, and it is on this basis that they asserted that the English court had jurisdiction over the other defendants. However, for various reasons, the appeal before the House of Lords concerned only six defendants who could be divided into two categories, those domiciled in Convention countries and those domiciled in non-Convention countries. Jurisdiction over the former was asserted on the basis of Article 6(1) and the latter under Ord. 11, r.1(1)(c) of the Rules of the Supreme Court.[4] The existence of these jurisdictions depends on whether jurisdiction over Mr Stolzenberg is valid.

An interesting feature, which was not made entirely clear from the facts stated in their Lordships' speeches, is that Mr Stolzenberg was merely a jurisdictional figurehead who never appeared in person or by counsel. It was left to counsel for the other defendants, led by the second defendant, Mr Gambazzi, to challenge the

1. It is to be noted that the European Court of Justice (ECJ) has no jurisdiction to interpret the Lugano Convention. In order to achieve uniformity, Protocol 2 on the Uniform Interpretation of the Lugano Convention provides that the courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any relevant decision delivered by the courts of other Contracting States concerning provisions of the Convention. Furthermore the cases interpreting the Brussels Convention set out in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 are highly relevant to the interpretation of the Lugano Convention, as the two Conventions are to all intents and purposes identical in terms.

2. [2000] 3 W.L.R. 1376.

3. For the purposes of this note, "anchor defendant" is taken to mean the defendant domiciled in the State of the courts in which the proceedings are brought and on whose domicile the jurisdiction under Art. 6(1) over other foreign defendants depends.

4. Now CPR, r.6.20(3).

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jurisdiction over Mr Stolzenberg. The appeal proceeded on the premise that Mr Stolzenberg was domiciled in England at the date of the issue of the claim form but might not have been domiciled in England after that date. Rattee J at first instance dismissed the defendants' application for a declaration that the English court did not have jurisdiction over Mr Stolzenberg because he was not domiciled in England at the material time. The Court of Appeal affirmed Rattee J's decision.[5]

FIRST QUESTION: STANDARD OF PROOF

With regard to the question of standard of proof on the domicile issue, the House of Lords held tersely that the test of a good arguable case applied, relying on another House of Lords decision in *Seaconsar Far East Ltd* v. *Bank Markazi Jomhouri Islami Iran*[6] which held that, in determining whether a case was a proper one for service out of the jurisdiction under one or more of the heads of Ord. 11, r.1(1),[7] there had merely to be a "good arguable case" that the claim came within one of the heads. The House of Lords rejected the test of a balance of probabilities on the pragmatic ground that it would involve great expense and delay.

One objection to this ruling might be that since Article 6(1) brings in foreign defendants who would not otherwise be subject to English jurisdiction, and the issue of domicile which founds the court's jurisdiction will not be examined again at trial, this jurisdictional issue ought to be treated with more scrutiny by the court. Article 6(1) should be interpreted restrictively, according to the ECJ's decision in *Kalfelis* v. *Schroder*.[8] But this is not supported by the authorities. Lord Goff in *Seaconsar* certainly made no distinction between issues which would and would not feature again at trial.[9] Furthermore, even before the *Seaconsar* decision, under English procedural law the standard of proof in matters of jurisdictional boundaries under the Convention had never been pitched at the "balance of probabilities" level.[10]

The main concern in locating the proper standard of proof in the jurisdictional context is the fact that it is unrealistic to expect the court to resolve disputed questions of fact on affidavit evidence alone. The civil standard of proof would do just that and would turn a jurisdictional battle into a full scale trial on affidavits. No doubt this decision has not given foreign defendants' interests the primary importance in interpreting Article 6, but it must not be forgotten that the court has to strike a balance in accommodating conflicting litigational interests. On one

5. [1998] 1 W.L.R. 547.
6. [1994] 1 A.C. 438.
7. Now CPR, r.6.20.
8. [1988] E.C.R. 5565.
9. See also *Dubai Bank Ltd* v. *Abbas* [1998] Lloyd's Rep. Bank 230 where the Court of Appeal applied the "good arguable case" standard to the question whether at the relevant time the defendant was domiciled in England so that the matter came within Ord. 11, r.1(1)(a). Similarly in *Haji-Ioannou* v. *Frangos* [1999] 2 Lloyd's Rep. 337 the Court of Appeal applied the "good arguable case" standard to the concept of domicile in Arts 2 and 4 of the Convention.
10. See, for example, *Tesam Distribution Ltd* v. *Schuh Mode Team GmbH* [1990] I.L.Pr. 149 and *Molnlycke AB* v. *Procter & Gamble Ltd (No. 4)* [1992] 1 W.L.R. 1112.

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side, some showing of proof is necessary in order to rid the legal system of spurious jurisdictional claims. On the other, jurisdictional rules must also strive to avoid uncertainty and prolix litigation over the preliminary issue of the forum's competence. The defendants' argument for the "balance of probabilities" standard would further add to the complexities of modern transnational litigation: it not only conflicts with both past and current practice, but would also upset the delicate balance which the court has been trying to maintain. As has been settled since *Seaconsar*, and as the House of Lords has reaffirmed here, a "good arguable case" standard maintains that delicate balance.

The decision on this point is also interesting for another reason. In transplanting the standard of proof in *Seaconsar* to Article 6(1), the House of Lords has given its sanction to the drawing of a parallel between CPR, r.6.20 and the special jurisdiction provisions under the Convention. This parallel is amply supported by the authorities. For example, Ord. 11 r.(1)(d)[11] provides for service out of the jurisdiction if the claim is brought to enforce a contract where that contract was made within the jurisdiction or is governed by English law, etc. It was held in *Bank of Baroda* v. *Vysya Bank Ltd*[12] that the standard of proof in considering whether jurisdiction has been made out under any of the heads of Ord. 11, r.1(1)(d) is that of a "good arguable case". Similarly, Article 5(1) of the Convention provides that a person domiciled in a Contracting State may be sued in another Contracting State in matters relating to a contract in the courts for the place of performance. It was held in *Boss Group Ltd* v. *Boss France SA*[13] that the claimant must satisfy the court that there was a good arguable case that the prerequisites existed for jurisdiction under Article 5(1).

It can now safely be said that the jurisdictional prerequisites of English courts are to be judged by the "good arguable case" standard, whether or not they arise in a Convention context. This must be correct for if a different standard of proof were to be applied to the Convention, English courts could be accused of practising double standards and it is hard to see any good policy reason why the Convention should require a different standard of proof.

SECOND QUESTION: TIMING

The House of Lords held that the date of the initiation of the proceedings, i.e. the date of the issue of the claim form, determined the anchor defendant's domicile. Lord Steyn, who gave the leading speech, held that the word "sued" in Articles 2 and 6 must bear the same meaning. In fact this much was conceded by the defendants.[14] However, the defendants argued that the word "sued" in Article 6 should be equated with the concept of seisin in Article 21.[15] Under English law it is settled that a court is seised of proceedings not when the proceedings are issued

11. Now CPR, r.6.20(5).
12. [1994] 2 Lloyd's Rep. 87.
13. [1997] 1 W.L.R. 351.
14. See the Court of Appeal decision, [1998] 1 W.L.R. 547, 562.
15. Art. 21 provides that "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, 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".

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but when they are served on the defendant.[16] The defendants therefore argued that the proper time for determining the anchor defendant's domicile was the time of service of the claim form. The House of Lords rejected this analogical argument on the grounds that there is a fundamental difference between a jurisdictional rule (contained in Articles 2 and 6) which determines when a court has jurisdiction and a tie-break rule (contained in Articles 21 and 22) which governs when two courts are in the process of proceedings.

Lord Steyn thought that date of service of process as the operative date would enable some defendants to evade service when they become aware of the incipient proceedings. This risk is particularly significant in a claim against a multiplicity of defendants. The idea that the domicile of Mr Stolzenberg would have to be checked up on every occasion when it was sought to serve a Convention-defendant is singularly unattractive.

Lord Hoffmann, who delivered a concurring opinion, embarked on an extended analysis of *Zelger* v. *Salinitri (No. 2)*[17] and German civil procedure to defeat the defendants' argument that a court cannot have jurisdiction for the purposes of Articles 2 and 6 unless it is seised for the purposes of Article 21. His Lordship also relied on the pragmatism of a date of issue rule. That a defendant who leaves the jurisdiction for good reasons and yet finds himself having to defend proceedings which were issued before he left could be a misfortune, but this misfortune would be countered by the fact that it would be the claimant who would rely on the defendant's apparent domicile in deciding whether to sue, thereby incurring considerable expense. This balance of advantage led his Lordship to favour the traditional English rule.

From the standpoint of pragmatism, this decision is unassailable. Under the Civil Procedure Rules 1998, a claim form which is to be served out of the jurisdiction must be endorsed with a statement that the court has power under the Convention to deal with the claim, and that no proceedings based on the same cause of action are pending between the parties in another Convention territory.[18] The date of issue is the last opportunity for the claimant to make sure that it is jurisdictionally justifiable to issue the claim form. As the claim form must be endorsed with the statement of the court's competence prior to issue, there would be real practical difficulties for a claimant if events taking place after issue but before service could invalidate it, not to mention the time and expense wasted.

Lord Steyn believed that the *Dresser* date of service rule was inapplicable to the present case because there is a fundamental difference between a jurisdictional rule (for instance, Article 6) which determines when a court has jurisdiction and a tie-break rule (for example, Article 21). This must be correct and is in fact also the implication of *Seaconsar* and *Airbus Industrie GIE* v. *Patel*.[19] In order to constitute a proper case for service out of the jurisdiction under Ord. 11,[20] the

16. See *Dresser UK Ltd* v. *Falcongate Freight Management Ltd, The Duke of Yare* [1992] Q.B. 502 and *Neste Chemicals SA* v. *DK Line SA, The Sargasso* [1994] 3 All E.R. 180.

17. [1984] E.C.R. 2397.

18. CPR, 7PD—003.

19. [1999] 1 A.C. 119.

20. Although the wording of CPR, rr.6.20 and 6.21, which now govern the principles on service out of the jurisdiction, differs slightly from Ord. 11, it is safe to assume that the principles established by the case-law interpreting Ord. 11 will remain the same.

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court has to be satisfied that the claimant's case falls within one or more of the heads of Ord. 11, r.1(1), that the case meets the *forum conveniens* test enunciated in *Spiliada Maritime Corporation* v. *Cansulex Ltd*[21] and that the case on merits is of some plausibility. *Seaconsar* has made it clear that each of these three elements must be separately satisfied. A particularly strong case on the merits could not compensate for a weak case on *forum conveniens*, and vice versa. In applying the *forum conveniens* test the court would take into account the general undesirability of having concurrent proceedings.[22] Similarly the question whether the jurisdictional facts of Ord. 11, r.1(1) are established has nothing to do with the *forum conveniens* inquiry.

In the same vein, while Article 6 performs essentially the function of Ord. 11, r.1(1) (as confirmed by Lord Steyn),[23] Article 21 takes the place of *forum conveniens* in regulating *lis alibi pendens*, except that the operation of Article 21 is inflexible. As aptly pointed out by Lord Goff in *Airbus Industrie GIE* v. *Patel*:

> Two different approaches to the problem of [resolution of clashes between jurisdictions] have emerged in the world today, one associated with the civil law jurisdictions of continental Europe, and the other with the common law world . . . On the continent of Europe . . . the essential need was seen to be to avoid any such clash between member states of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention . . . under which jurisdiction is allocated on the basis of well-defined rules. This system achieves its purpose, but at a price. The price is rigidity. . . . In the common law world, the situation is precisely the opposite. There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world. In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and in certain specified (but widely drawn) circumstances on a power to serve the defendant with process outside the jurisdiction. But the potential excesses of common law jurisdictions are generally curtailed by the adoption of the principle of forum non conveniens—a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum. . . . The purpose of the principle is therefore different from that which underlies the Brussels Convention. It cannot, and does not aim to, avoid all clashes between jurisdictions; indeed parallel proceedings in different jurisdictions are not of themselves regarded as unacceptable.[24]

It is vitally important to appreciate that Article 21 is simply doing in a European manner what the *forum conveniens* principle does in the common law world. Articles 6 and 21 are disparate in both design and operation. One is to set out jurisdiction and the other to regulate clashes. As such, there is no inherent reason why the concept of seisin in Article 21 should be transplanted to Article 6(1). If anything, there is every reason why Article 6(1) and Ord. 11, r.1(1) should be treated alike; the analogy between them is all the more real, exact and plausible. The House of Lords decision in the present case should not therefore be viewed with surprise. It is merely an express confirmation of the combined effect of *Seaconsar* and *Airbus Industrie*.

21. [1987] A.C. 460.
22. See *Cleveland Museum of Art* v. *Capricorn Art International SA* [1990] 2 Lloyd's Rep. 166 and *E I Du Pont de Nemours & Co* v. *Agnew and Kerr* [1987] 2 Lloyd's Rep. 585.
23. At p.1386.
24. [1999] 1 A.C. 119, 131–132.

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There is one remaining point which can be handily disposed of. Lord Hoffmann asked, "[i]f the court is seised when the proceedings are definitively brought, why should it have jurisdiction when they have been less than definitively brought?"[25] Indeed, in the Court of Appeal, Pill LJ in his dissenting judgment said, "[w]hile conceptually possible it would be an odd result if a defendant is held to be 'sued' in England by virtue of Article 6 without the English court being seised of the action under Articles 21 to 23".[26] As already mentioned, Lord Hoffmann dealt with this point by relying on the German practice.

There is a more straightforward answer to this apparent conundrum. The oddness that Pill LJ saw is premised upon the assumption that Articles 6 and 21 are dealing with the same thing, which, as explained above, is plainly not the case. In fact the operation of Article 21 puts this beyond doubt. Article 21 provides that "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". This means that the court second seised must stay its proceedings while the court first seised determines whether it has jurisdiction. The court first seised may of course ultimately decide that it has no jurisdiction, in which case the court has nevertheless been seised all along although it has never had jurisdiction to hear the case. In other words, a court can be seised even if it decides that it has no jurisdiction to begin with.

Perhaps Pill LJ would say that this result is odd too. Odd or not, this is the operation of the Convention. Seisin is conceptually distinct from jurisdiction. If the whole concern is about oddness, one may wonder why forcing two incompatible concepts into the same pigeonhole is any less odd. The point is that lumping together two disparate concepts meant to perform different functions in order to reverse the perceived oddness is unwarranted.

THIRD QUESTION: PRIOR SERVICE ON THE ANCHOR DEFENDANT

The third question in this appeal is whether Article 6 requires prior service on the anchor defendant domiciled in the State in which the proceedings have been brought. Their Lordships answered in the negative which means that an English court may maintain jurisdiction under Article 6(1) over other defendants from Contracting States, even if the anchor defendant is never served with the claim form. The decision that an English court may proceed to hear a case involving only foreign defendants, even if the English defendant is never served, is, on the face of it, counter-intuitive. Indeed it is so counter-intuitive that it led Pill LJ to say "[a] result which, as in the present case, would involve defendants coming to England, a country with which they have no connection, to defend a claim in which no English defendant had been served would defeat the purpose of Article 2".[27] This statement, however, only highlights a serious problem with Article 6(1) which cannot be solved by insisting on service on the anchor defendant.

The serious problem is that there is no requirement in Article 6(1) that the action against the first defendant be pursued to its conclusion, nor that the anchor

25. At p.1390.
26. [1998] 1 W.L.R. 547, 571.
27. [1998] 1 W.L.R. 547, 572.

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defendant should be the main or principal defendant. In a sense, the anchor defendant only serves as a conduit through which other foreign defendants may be drawn in. Once the foreign defendants have been brought into the local court, the conduit purpose has been accomplished and the action against the anchor defendant can be abandoned. Henceforth the litigation would be purely between the claimant and those foreign defendants in a court which would not otherwise have jurisdiction over them.

The potential for misuse of Article 6(1) cannot be denied. This is demonstrated by the present case. It will be recalled that the anchor defendant, Mr Stolzenberg, was merely a jurisdictional figurehead who never appeared in person or by counsel. The case all along was between the claimants and foreign defendants who would not otherwise be subject to English jurisdiction. Mr Stolzenberg has been domiciled in Germany since he left England in August 1996. The claimants could easily have sued Mr Stolzenberg and the other Convention defendants in Germany by relying on Article 6(1). The claimants chose England as their forum mainly because Ord. 11, r.1(1)(c) allowed them to bring in the non-Convention defendants and as a result the claimants had to rely on Mr Stolzenberg's quite tenuous connection with England to be able to bring in the Convention defendants. Yet Lord Steyn said that "[i]t is not suggested that in this case there has been an abusive resort to Article 6".[28] It is unclear what would amount to an abusive use but what is clear is that the court is pretty tolerant of the use of Article 6(1).

But the requirement of service on the anchor defendant is too blunt an instrument to solve this problem. For even on Pill LJ's approach, once the English defendant has been served, Article 6(1) is fulfilled. Once Article 6(1) is properly invoked, there is nothing to stop the claimant from releasing the anchor defendant. If the claimant is bent on using the anchor defendant merely as a conduit to force the foreign defendants to litigate in the English court, the requirement of service on the anchor defendant is not a deterrent at all. Being simply a procedural step in the litigation process, service of proceedings cannot stop the claimant from unscrupulously improving his litigational position. After all, the claimants were abiding by Article 6(1) to the letter.

In order to curb this potential abuse, perhaps what is needed is a caveat along the lines of Article 6(2), that is, unless the action against the anchor defendant was brought solely with the object of removing the foreign defendants from the jurisdiction of the courts otherwise competent over them. But this was not the contention in the present case. In any event, the court would not be justified in reading a caveat of this sort into Article 6(1), no matter how desirable it might seem on a policy rationale for the most telling fact remains that the drafters of the Convention obviously knew how to, could have, but did not provide for such a caveat in Article 6(1). If an English court would not be justified in reading a caveat into Article 6(1) similar to that in Article 6(2), it is equally not justified in reading a requirement of service into Article 6(1). However, it must not be forgotten that the requirement of service is not a cure for the problem which Pill LJ indicated. Put simply, Article 6(1) jurisdiction hinges solely on the anchor defendant's

28. At p.1381.

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domicile, and once that jurisdictional hinge is sealed, jurisdiction cannot be unhinged.

SEISIN IN A MULTI-DEFENDANT CASE

This case also implicitly answers an unsettled question as to when an English court is seised in a multi-defendant case. The House of Lords seems to have supported the view which has been expressed that, in a multi-defendant case, an English court is seised in relation to all the defendants only when all of them have been served, rather than when any one of the defendants is served.[29]

Even if the House of Lords were to have decided that the time to determine the anchor defendant's domicile was upon service of the claim form, thus openly[30] assimilating the concept of "suing" to "seisin", logically there would still be a further question as to whether that time was when any of the defendants was first served, or when all the defendants had been served. It seems that the House of Lords would have chosen the latter option. Lord Steyn, as mentioned above in rejecting the date of service rule, said that "the idea that the domicile of Mr Stolzenberg would have to be checked upon every occasion when it was sought to serve a Convention-defendant is singularly unattractive".[31] This amounts to saying that, if the date of service rule were chosen in order that Article 6(1) applied to all the defendants, the time to determine the anchor defendant's domicile was when all the defendants had been served. For if the time to determine the anchor defendant's domicile was when any of the defendants was first served, the domicile of Mr Stolzenberg would *not* have to be checked upon every occasion when it was sought to serve a Convention-defendant. The claimants would only need to check Mr Stolzenberg's domicile on the very first service, not on every subsequent service. In other words the House of Lords seemed to be saying that if suing were equivalent to seisin (which entailed the date of service rule), in order that all the defendants be sued under Article 6(1), all the defendants must have been served at the relevant time. Therefore, taken to its logical conclusion, the House of Lords also seemed to be saying that, in a multi-defendant litigation, in order to seise an English court in relation to all the defendants, all the defendants must have been served. Indeed a strong case can be made for this view by relying on the ECJ's decision in *The Tatry*.[32] The ECJ there held that, in a multi-party litigation, Article 21 applies as between pairs of claimants and defendants. Thus, by adopting a party by party approach, each *lis* between a claimant and a defendant has to be considered individually to determine which court is first seised, and Article 21 applies accordingly. It is submitted, however, that this argument, though logical, is lacking in merit.

Mance J at first instance in *Grupo Torras SA* v. *Sheikh Fahad Mohammed al-Sabah*[33] held that as soon as service had been made on any defendant, the action

29. *Cheshire and North's Private International Law* (13th ed., 1999), pp.254–255.

30. "[O]penly" because, as pointed out above, the House of Lords' rejection of the date of service rule was based on the express premise that "seisin" is conceptually distinct from "suing".

31. At p.1385.

32. [1994] E.C.R. I–5439.

33. [1995] 1 Lloyd's Rep. 374.

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was definitively pending in relation to all defendants. But the Court of Appeal decided the case on other grounds, thus leaving the issue open.[34] However the decision of Mance J has not found favour in subsequent judicial pronouncements.[35] It was thought that the decision of Mance J would run counter to the guidance given by the ECJ in *The Tatry*, but it must not be forgotten that the ECJ in that instance was only interpreting the phrase in Article 21 "between the same parties". "The ECJ was not as such asked, and therefore did not express a view about, how the question which court was first seised was to be answered under Article 21 when there were multiple parties."[36] There is an essential distinction to be drawn between the two issues. On the one hand, the issue of whether proceedings between the same parties are brought in the courts of different Contracting States is a Convention matter which thus has a uniform meaning and an autonomous interpretation; on the other hand, the issue of whether a court is seised of the proceedings is a procedural matter which has been expressly left up to the national procedural law.[37] Therefore the party by party approach in *The Tatry* does not necessarily mean that the same approach should be adopted in deciding when proceedings in a multiparty action are definitively pending before a court.

The decision of Mance J makes obvious pragmatic sense. Adopting the *Tatry* approach would split proceedings which ought rationally to be tried together in one forum. The Convention is concerned to promote the efficacious conduct of proceedings and to avoid a multiplicity of closely related proceedings in different Contracting States.[38] "[T]he framers of the Convention put their faith in the simplicity, certainty and predictability of a rule of chronological priority."[39] The pragmatic approach of Mance J certainly advances toward this aim. The following remarks of Steyn LJ are also apt here:

> [T]he words "definitively brought before a court" (as "seised" was interpreted in *Zelger* v. *Salinitri*) are not terms of art in English law. No English decisions had occasion to address such questions. Only after the accession of the United Kingdom in 1987 to the 1968 convention did such questions become relevant. It follows that when the matter first came before an English court it was unconstrained by authority. Instead it was faced with a new problem and a choice of solutions. This does not answer the question before us. But it does underline the importance of competing policy considerations and the need to adopt an interpretation which best matches the context and purpose of this multi-lateral convention.[40]

Thus in considering when an English court is seised in a multipartite litigation, it is perfectly legitimate to have regard to the undesirable practical implications of a defendant by defendant approach which leads to unseemly and unnecessary fragmentation of proceedings.

34. [1996] 1 Lloyd's Rep. 7.
35. See *Fox* v. *Taher* [1999] I.L.Pr. 441, 445, *per* Brooke LJ, and *Glencore International AG* v. *Metro Trading International Inc* [1999] 2 Lloyd's Rep. 632.
36. *Grupo Torras* [1996] 1 Lloyd's Rep. 7,21, *per* Stuart-Smith LJ.
37. See *Zelger* v. *Salinitri (No. 2)*, [1984] E.C.R. 2397.
38. *Kleinwort Benson Ltd* v. *Glasgow City Council* [1997] 3 W.L.R. 923, 938, *per* Lord Nicholls.
39. *The Sargasso* [1994] 2 Lloyd's Rep. 6,9, *per* Steyn LJ.
40. *Ibid*. at pp.9–10.

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The potential for abuse on a defendant by defendant approach is considerable. Immediately after the first defendant has been served with proceedings in a country in which other defendants do not wish to litigate, one or more of them, assuming they become aware of the initiation of the proceedings, may have the opportunity to commence counter-proceedings in their home country or some other country in which they prefer to litigate. This is indeed what a number of Spanish defendants were apparently trying to do in *Grupo Torras*.

This potential for abuse is all the more palpable in view of the availability of negative declaratory relief. So long as a defendant has not been served, he may begin an action in the court of his choice for a negative declaration. This would trigger the special rules for *lis alibi pendens* in Articles 21 to 23 because the proceedings involve the same cause of action.[41] Indeed, allowing negative declarations to come within Article 21 allows pre-emptive forum shopping by a party who fears that proceedings are going to be commenced against him.

Therefore, in a multiparty litigation, the court should be seised when the claim form is first served on any of the defendants. It is unfortunate that the House of Lords' decision in this case can be inferred as endorsing the view that an English court is seised in relation to all the defendants only when all of them have been served. Any temptation to draw such an inference must be firmly resisted. Holding that an English court is seised in relation to all the defendants at the time when any of the defendants is first served is demanded by the sound pragmatic spirit, if not the precise letter, of the present House of Lords decision.

This view might be inconsistent with the reasoning behind *Dresser*. The *Dresser* date of service rule was based mainly on fairness to the defendant. "[T]he defendant is usually unaware of the issue of proceedings and, if unaware, is unable to call on the plaintiff to serve the writ or discontinue the action . . ."[42] In a multiparty litigation, if a court were seised in relation to all the defendants when only one of them has been served, the same *Dresser* objection would apply because the other defendants might well be unaware of the issue of proceedings. Service on only one defendant would probably not mean anything to the other defendants.

Again neither choice can be wholly satisfactory. The court must consider the balance of advantage and disadvantage. For the reasons given above, it is submitted that the balance of advantage is in favour of treating an English court as seised in a multi-defendant litigation when any of the defendants is first served. Perhaps the *Dresser* rule ought to be revisited one day.[43]

CONCLUSION

In sum, the House of Lords' decision in this case is certainly to be commended. If one may attempt a criticism, the reasons given by their Lordships for their

41. See *Gubisch Maschinenfabrik KG* v. *Palumbo* [1987] E.C.R. 4861 and *The Tatry* [1994] E.C.R. I–5439.

42. *Dresser UK Ltd* v. *Falcongate Freight Management Ltd, The Duke of Yare* [1992] Q.B. 502, 523, *per* Bingham LJ.

43. It is interesting to note that Professor Kaye in his *Law of the European Judgments Convention* (1999) referred to the position in France where "date of seisin of French courts for Article 21 is the date when a copy of the writ is filed at the court's registry under Article 857 New Code of Civil Procedure, not date of service of writ", at p.2795.

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response to the first and third questions outlined above are rather terse. It is encouraging that this decision is largely based on pragmatism, which arguably is the most important consideration when confronted with jurisdictional issues in transnational litigations.

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