CURRENT DEVELOPMENTS

Edited by Wendy Kennett and Peter McEleavy

I. CIVIL AND COMMERCIAL LITIGATION

There continues to be a steady stream of cases, particularly those raising questions of interpretation of international instruments. Many nevertheless involve the application of those instruments to particular facts, rather than fundamental points of principle. The following are among the more significant.

JURISDICTION

On 13 December 2001 the House of Lords referred a preliminary question to the European Court of Justice in the case *Turner v Grovit*.[1] The question of interpretation is:

> Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) for the courts of the United Kingdom to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?

The judgment of Lord Hobhouse of Woodborough also provides a summary of the relevant English law and the state of argument relating to its compatibility with the Brussels Convention. Unfortunately it will now be necessary to wait for a couple of years to ascertain the response of the European Court. The attitude of lawyers from other jurisdictions towards anti-suit injunctions do not give much cause for optimism that the approach of English law will be vindicated.

The complex litigation in *Donohue v Armco* also resulted in a judgment of the House of Lords on 13 December 2001. The leading judgment was given by Lord Bingham of Cornhill, with whom the other Law Lords expressed their agreement. The case arose out of an alleged fraudulent conspiracy. Companies in the Armco group (the Armco companies) brought proceedings in New York against a number of companies and individuals in different jurisdictions. These included Mr Donohue (Donohue), who then commenced proceedings in England, in reliance on an exclusive jurisdiction agreement in his contracts with some of the Armco companies. Other defendants in the New York action were also lined up as potential co-claimants (PCCs) in England.

The Armco companies' case was that the group had sold several insurance companies to Donohue and another party (Atkins). Negotiations were conducted by senior Armco executives. The negotiators on both sides in setting up the arrangements for the transfer of the business had conspired to ensure that the Armco companies injected

[1] The Court of Appeal decision is included in an earlier Current Developments section: (1999) 48 *ICLQ* 9966 at 969.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

more money into the business before its transfer than was necessary. This extra money was then siphoned off and dissipated by the conspirators. There were further allegations that the conspirators arranged further debt collection and consultancy agreements under which Armco companies were obliged to pay excessive amounts for the services they obtained from companies under the control of the conspirators.

Although many facts remained to be established in the course of the litigation, two important issues were not in dispute. First, the only parties to the various contracts through which the alleged fraud was effected were three of the Armco companies on the one side, and Donohue, Atkins and two of the companies they controlled on the other. The other Armco companies affected by the transactions and several of the PCCs were not parties to any of the three contracts. Secondly, each of the three contracts provided for the exclusive jurisdiction of the English court.

All the PCCs moved to dismiss the New York proceedings against them on various grounds, a motion denied by the New York Judge. Mr Donohue did not take part in those proceeding, but instead issued a summons in England applying for an injunction against all the Armco companies. Application was also made in the action to join the PCCs as claimants. The Armco companies that were not parties to the exclusive jurisdiction agreements applied to set aside service upon them.

At first instance Aikens J rejected the application for an anti-suit injunction on the basis that the Armco companies' claims in New York did not 'arise out of' the contracts containing exclusive jurisdiction clauses. He also denied the PCCs applications to be joined as claimants in the English action, and granted the applications for service to be set aside.

On appeal it was held that the PCCs should be joined to the action, and that the exclusive jurisdiction agreements covered the New York action, with the result that an anti-suit injunction was granted in respect of the Armco companies that were parties to the contracts, restraining them from bringing proceedings against Donohue and the PCCs in relation to the transfer of the insurance business other than in England and Wales.

The issues raised before the House of Lords were, first, whether Donohue was entitled to an anti-suit injunction on the basis of the exclusive jurisdiction agreement, and second, if so, whether the PCCs could piggyback on Donohue's cause of action to enjoy the benefit of an anti-suit injunction against the Armco companies.

Lord Bingham took the latter question first. Since England was not a natural forum for the actions of the PCCs (and in fact they had no independent basis for the assertion of jurisdiction over the Armco companies but were entirely parasitic on Donohue's claim) they did not meet one of the essential criteria for the grant of an anti-suit injunction as established in *SNI Aerospatiale v Lee Kui Jak*.[2] The New York proceedings could not be regarded as vexatious or oppressive to them.

As to the grant of an injunction in favour of Donohue, Lord Bingham surveyed the existing English law on the approach of the courts to exclusive jurisdiction agreements. He noted that the English courts might well decline to grant an injunction or a stay of proceedings (depending on whether the exclusive jurisdiction agreement was in favour of the English court or a foreign court) 'where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions'.

[2] [1987] AC 871.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

The evaluation of such situations involved the balancing of the relevant interests. On the present facts Donohue had a prima facie right not to be sued other than in England by the companies bound by the exclusive jurisdictions agreements. To release those companies from their bargain exposed Donohue to an obvious risk of injustice—particularly in the form of the greater expense of the litigation and the possible award of inflated damages against him under US anti-corruption legislation. On the other hand, the Armco companies had a prima facie right to sue the PCCs in any convenient forum where they could found jurisdiction, and they had founded jurisdiction in New York. They could also sue Donohue there in relation to any claims not covered by the exclusive jurisdiction agreement. Furthermore the Armco companies that were not bound by the exclusive jurisdiction agreement had a right to sue Donohue in any convenient jurisdiction and had also brought proceedings in New York. The question for the House of Lords was therefore whether on the facts of the case the Armco companies could show strong reasons why the court should displace Donohue's prima facie entitlement. Such reasons could only lie in the prospect, if an injunction was granted, of litigation continuing partly in England and partly in New York.

Lord Bingham concluded that great weight should be given to this consideration. 'It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue.' On the facts, the only forum in which a single composite trial could take place was New York. The application for an anti-suit injunction was therefore refused, but on the basis that the Armco companies proffered an undertaking not to enforce against Donohue and the PCCs that were parties to the exclusive jurisdiction agreements any multiple or punitive damages awarded in the New York proceedings.

In *Casio Computer Co Ltd v Sayo*[3] the Court of Appeal was called upon to consider the application of Article 5(3) of the Brussels Convention 1968 to a constructive trust. The claimant alleged that one of its employees and his associates conspired to obtain control over millions of dollars of the claimant's assets. One of the associates, Tsuru, arranged the transfer of these assets, after various intervening transactions, to a bank account in London in the claimant's name. Money was then transferred from this account to another account at the same branch in Tsuru's name. It was alleged that Tsuru thereby became a constructive trustee of the assets and owed the claimant fiduciary duties.

Shortly thereafter Tsuru entered into an agreement with Ocean View Marketing Ltd (OVM) to invest the money in a development project in Spain. In a series of transactions the money was moved to an account under the joint control of Tsuru and OVM in London and then an account under the sole control of OVM in the Isle of Man. It later passed into further accounts and was eventually dissipated.

The claimant brought proceedings in London against many of those involved in this chain of transactions for equitable damages and/or equitable compensation for breach of trust and/or fiduciary duty. The claims against some of the defendants were based on knowing assistance and/or knowing receipt. The jurisdiction of the English courts was contested by Mr Kaiser, the President of OVM, who was domiciled in Spain.

The Court found that jurisdiction in relation to a claim for knowing assistance could be based on Article 5(3) of the 1968 Brussels Convention. While it was true that in a

[3] [2001] EWCA Civ 661.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

claim based on knowing assistance, the nature of the defendant's liability was accessory and that the breach of trust committed by another person could be characterised as the harmful event, it did not follow that the defendant's unlawful act of assistance could not also be characterised as a harmful event. Just as a principal and his accessory may both be guilty of criminal offences, so in the context of breach of trust the accessory's dishonest act of assistance can be a harmful event.

Furthermore the Court noted that in a claim for dishonest assistance it was not necessary to show a precise causal link between the assistance and the loss. Loss caused by the breach of fiduciary duty was recoverable from the accessory. That constituted the relevant causal connection. In the absence of such a connection the accessory would be under no liability.

On the facts the event occurred within the jurisdiction when money was moved between bank accounts in London. There remained a question as to whether claims based on knowing receipt also fell within Article 5(3). The Court did not find it necessary to decide this point, however. Article 6(1) was found to be applicable because a director of one of the companies through whose accounts the assets passed, and who was a defendant to the proceedings, was domiciled in England.

A couple of first instance decisions may also be of interest for the points that they raise. In *Kenburn Waste Management Ltd v Bergman*[4] Pumfrey J. had to identify the place of performance of a negative obligation for the purposes of Article 5(1) of the Brussels Convention. The obligation was an undertaking on the part of the Germany domiciled defendant not to send letters threatening action for a breach of patent to customers of the claimant in the United Kingdom. English law was found to apply to the obligation. (This is one of several recent cases in which the English courts have shown a preference for Article 4(5) of the Rome Convention over Article 4(2)).

Pumfrey J went on to identify the place of performance. Where a negative obligation requires a person to undertake a number of ancillary positive steps (contact with employees, lawyers, etc) to achieve a negative result (not sending threatening letters) in the United Kingdom, the purpose of the obligation is to achieve a particular result. The substantial performance sought is the achievement of a state of affairs in the United Kingdom, which must therefore be the place of performance. Incidental or ancillary performance is not relevant to the interpretation of Article 5(1).

Philips v Symes[5] raised a point of construction of Article 16(2) of the Brussels Convention. A claim was brought in London by administrators of the estate of a deceased art dealer. It was alleged that the relationship between the deceased and the defendant was a partnership under English law and that various assets in the defendant's possession therefore formed part of the deceased's estate. Claims were also brought by one of the deceased's heirs, his sister. The defendant commenced proceedings for negative declaratory relief in Greece. These proceedings became pending before the English action. At first sight, therefore, it appeared that Article 21 of the 1968 Brussels Convention required the English court to decline jurisdiction. Among various arguments for allowing the English action to proceed it was submitted that the English courts had exclusive jurisdiction under Article 16(2) because the claim was a matter relating to the dissolution of a partnership with its seat in England.[6]

[4] Chancery Division, 11 May 2001.
[5] Ibid, 9 July 2001.
[6] In the light of the known and disputed facts, there were various ways in which the adminis-

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

The partnership, if it had existed, was one to be inferred from conduct, rather than being formally constituted. Hart J noted the doubts expressed in the legal literature as to whether Article 16(2) should be interpreted as extending to this type of relationship, but found 'no basis in English law for distinguishing a partnership which is "formally" constituted from one which is not.' He therefore found Article 16(2) to be applicable. The English court had jurisdiction in relation to the partnership issues in the case. The question of the extent to which the basis of their claims could be the subject of later amendment was raised, but not addressed.

Among the various cases concerning *lis pendens*, *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH*[7] is of particular note. The case involved a consideration of the provisions for the avoidance of conflicting decisions under the Convention for the International Carriage of Goods by Road.

The dispute between the parties arose out of a carriage of whisky from Scotland to Austria. The consignment was stolen before leaving the United Kingdom. The claimant had subcontracted the carriage to the defendant and, after making a payment to the shipper in relation to the loss of the whisky, it sought to recover an indemnity or contribution from the defendant under the Convention. For this purpose it brought proceedings in England. The defendant had, however, already initiated proceedings for a negative declaration in Austria. Service of the English proceedings on the defendant nevertheless took place before the Austrian proceedings had been served.

Both countries could in principle claim jurisdiction under the Convention, but the Convention sought to avoid duplication of litigation. Article 31(2) stated that where an action is pending before a competent court, 'no new action shall be started between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought'.

The Court of Appeal decided unanimously that for the purposes of Article 31(2) of the Convention for the International Carriage of Goods by Road an action in England becomes pending after service of the claim form on the defendant. The time at which an action becomes pending in another Contracting State to the Convention is, however, a matter for the law of that state.

The Court then gave detailed consideration to the position of negative declarations under the Convention. By a majority (The Vice Chancellor and Chadwick LJ, Rix LJ dissenting) they concluded that Article 31(2) was intended to prevent parallel claims arising out of the same set of facts whether those claims were for substantive relief or for negative declaratory relief.

Finally in this section on jurisdiction, *Ace Insurance SA-NV v Zurich Insurance Co*[8] clarifies the position of English law in the case of service of suit clauses.

The defendants were parties to a reinsurance agreement with the claimants incorporating the terms of the original insurance contract. It included the 1998 Non Marine Association service of suit clause in favour of the United States courts and a claims co-operation clause.

trators' claims could have been formulated. A partnership argument was one of those. Hart J considered that the administrators faced some difficulty in establishing their claim on the merits, but thought that the claim was at least arguable in that form.

[7] [2001] EWCA Civ 61 [2001] 1 Lloyd's Rep 490.

[8] [2001] EWCA Civ 173 [2001] 1 Lloyd's Rep 618.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

A claim was settled under the policy. It was then sought to rely on the reinsurance agreement. There was a dispute as to whether the reinsurers had been informed about the original claim in accordance with the claims co-operation clause, and about whether the original claim was in fact justified in the circumstances. The claimants therefore brought proceedings in London seeking a declaration of non-liability. The defendants commenced proceedings in Texas and contested the jurisdiction of the English courts relying on the service of suit clause and *forum non conveniens* principles.

The Court of Appeal considered the applicability of *forum non conveniens* principles given that the first defendant was domiciled in a Contracting State to the Lugano Convention. It found itself bound by its earlier rulings in *Re Harrods (Buenos Aires) Ltd*[9] and in *Eli Lilley and Company* v. *Novo Nordisk A/S*[10] to hold that the application of *forum non conveniens* principles was not inconsistent with that Convention.

The Court then turned to the application of those principles. It confirmed that the service of suit clause was a critical factor in the court's exercise of its discretion and the appeal was dismissed. The Court noted, *obiter*, that the service of suit clause could not be relied on in the context of *forum non conveniens* until service of the foreign proceedings had taken place. It also commented that the length of time that proceedings had been pending in England prior to service of the foreign proceedings was a relevant consideration in the exercise of the court's discretion.

Adopting the language also used in cases concerning exclusive jurisdiction[11] agreements the Court noted that

> Although by reason of acceptance of jurisdiction in England a defendant has the burden of persuasion for forum non conveniens purposes, a claimant's agreement in a service of suit clause to submit itself to the jurisdiction of foreign court effectively reverses the burden of persuasion once again. If a party agrees to submit to the jurisdiction of the courts of a state, it does not easily lie in its mouth to complain that it is inconvenient to conduct its litigation there. It is necessary to point to some factor which could not have been foreseen in order to displace the bargain which has been agreed.

Finally, the service of suit clause did not seek to establish the competence of a court that would not have jurisdiction under the normally applicable procedural rules. In principle, therefore, the jurisdiction of a foreign court seized pursuant to such a clause remained open to challenge.

SECURITY FOR COSTS

Although straying somewhat from the core of private international law, two recent decisions on security for costs against persons resident outside the jurisdiction are of interest. In *De Beer v Kanaar & Co*[12] the claimant, a Florida resident, brought proceedings against an English firm of solicitors (Kanaar) in London. A former solicitor and former consultant to Kanaar was added as a second defendant. The claimant alleged that money due to him as a result of a transaction conducted through Kanaar had been fraudulently misappropriated. Kanaar's response was that in so far as there had been

[9] [1992] Ch 72.
[10] [2000] 1 L Pr 73.
[11] eg British Aerospace Plc *v* Dee Howard Co [1993] 1 Lloyd's Rep 368.
[12] [2001] EWCA Civ 1318.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

misconduct it was the misconduct of the second defendant, who did not have authority to bind Kanaar at the material time. Alternatively, Kanaar alleged that the claimant was involved in the fraudulent transaction in question.

Kanaar sought security for costs. This gave rise to a question of interpretation of Part 25.13 of the Civil Procedure Rules (CPR). CPR Part 25.13 provides that the court may make an order for security for costs if it is just to do so in all the circumstances, but only if one of a number of specific conditions is satisfied. These conditions are listed in CPR Part 25.13(2). The first condition is that the claimant is an individual who is ordinarily resident out of the jurisdiction and 'is not a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention . . .' It was this provision on which Kanaar sought to rely. The claimant was resident in Florida. The claimant countered this argument, however, by saying that the claim for costs could be enforced under the 1988 Lugano Convention, since he had assets in Switzerland, so that Part 25.13(2)(a)(ii) did not apply.

The Court of Appeal found the wording of Part 25.13(2)(a)(ii) to be most unsatisfactory. It was unclear whether the provision meant that the claimant must not be a person against whom a claim could be brought under the Brussels and Lugano Conventions, or whether it meant that the claimant must not be a person in relation to whom a judgment could be enforced under the Conventions (ie someone with assets in a Convention State). It considered the purpose of the change in the rules relating to security for costs, and concluded that the change was introduced to avoid discrimination against residents of other EU and EFTA Member States. On that basis the rule should be interpreted as referring to claimants who could not themselves be sued under the Brussels and Lugano Conventions. 'CPR Rule 25.13(2) is directed at the juridical characteristics of the particular individual claimant, irrespective of what assets he may currently own or where those assets may currently be situated.'

If jurisdiction to make an order for security for costs existed in principle, the Court of Appeal then had to consider whether to exercise its discretion in favour of making such an order. It concluded that the claimant had demonstrated a want of probity in his witness statements concerning his assets, and that there was reason to doubt whether an order for costs could easily be enforced in Switzerland or in Florida. In those circumstances an order for security for costs should be made.

Nasser v United Bank of Kuwait,[13] on the other hand, finds the distinction in CPR 25 13(2) between EC and EFTA domiciled claimants and claimants domiciled in other jurisdictions problematic from the point of view of the right of access to justice and the freedom from discrimination guaranteed by the ECHR. The facts of the case relate to security for an appeal, but under CPR 25.15 the criteria for the grant of security in relation to an appellant are the same as those applying to claimants.

The Court noted that the change in the rules arose from the recognition by the Court of Appeal in *Fitzgerald v Williams*[14] that as a result of the principle enunciated by the European Court's in *Mund & Fester v Hatrex Internationaal Transport*[15] any automatic provision for security for costs against a person resident in another Member State of the EU would be covertly discriminatory on grounds of nationality.

> There was no suggestion in Fitzgerald v Williams that the traditional practice of the English

[13] [2001] EWCA Civ 556.
[14] [1996] QB 657.
[15] Case C-398/92, [1994] ECR I-467.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

> court required any modification where a plaintiff was ordinarily resident in a country not a member of the European Union. But the introduction of Part 25.15, the incorporation into English law of the European Convention on Human Rights and the provisions of ss 6(1) and 3(a) of the Human Rights Act 1998, making it unlawful for the court as a public authority to act in a way which is incompatible with a Convention right, require us to address the possibility that it now is.

Under the ECHR rules on security for costs are an aspect of the right to a fair trial.[16] Therefore Article 14 of the ECHR requires that the UK must exercise its discretion in granting orders for security for costs in a way that does not discriminate under Article 14. Discrimination occurs when a person is treated less favourably than others who are in a 'relevantly similar or analogous situation'[17] on the basis of a 'prohibited ground' such as, inter alia, sex, race, national or social origin.

Although Article 6 EC refers simply to discrimination on grounds of nationality, the Court did not considered that the differences in wording between that provision and Article 14 ECHR entailed any significant difference in the protection they offered.

The respondent argued that the claimant was in an 'analogous or relevantly similar situation' to all other foreign residents in states not party to the Brussels or Lugano Convention, and that she was treated alike with them. The Court found that although there was a distinction between residents within and outside Brussels and Lugano states, that distinction could not be regarded as unduly discriminatory. First, the recognition of separate categories made sense as a broad rule of thumb, defining when any question of discretion could arise (rather than how it would be exercised). Secondly, the distinction drawn was in that context reasonable and objectively justifiable. The single legal market of the Brussels and Lugano Conventions was a significant achievement on the road to easy and automatic recognition and enforcement of judgments, as recognised by the decision in *Mund*.

The exercise of the discretion conferred by Part 23.13(1) and 2(a)(i) and (b)(i) raised different considerations, however. That discretion must itself be exercised by the courts in a non-discriminatory manner. For that purpose all personal claimants (or appellants) before the English courts must be regarded as the relevant class. The appropriate criterion for the exercise of the discretion was the likelihood of substantial obstacles to recognition or substantial extra cost.

The Court specifically noted that impecuniosity as a basis for ordering security cannot survive in relation to individuals. The position is different for companies. The power to order security under CRP Part 25.13(2)(c) applies to companies wherever incorporated and resident, and is not discriminatory.

ENFORCEMENT

The English courts have jurisdiction to grant a garnishee order if the garnishee is resident in England. It was established in *SCF Finance Co Ltd v Masri*[18] that the situs of the debt was not a factor relevant to jurisdiction, but that it was relevant to the exercise of the discretion. A concern of the courts in exercising their discretion is the desire to avoid exposing the garnishee to the risk of double jeopardy. In *Deutsche Schachtbau-*

[16] As indicated by the reasoning in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 and *Federal Bank v Hadkinson* (CA) 27 Oct1999.

[17] *Stubbings v UK* (1996) 23 EHRR 213.

[18] [1987] 1 QB 1028 [1987] 1 All ER 194.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd[19] (*DST*) Lord Goff stated that the English courts would consider their decision to be one to which foreign courts might be expected to give effect if

(1) the underlying judgment was entered by a court of competent jurisdiction
(2) the situs of the attached debt was England, and
(3) payment of the attached debt by the garnishee pursuant to the garnishee order absolute had the effect of discharging the debt

He then posed the question whether if one of these criteria was not met, the English court would automatically decline to make the garnishee order absolute on the basis that there was a real risk that a foreign court might still enforce the attached debt against the garnishee overseas. In *DST* it was not necessary to answer that question, and Lord Goff dealt with the issue only in passing—noting that in *Martin v Nadel*[20] the question whether there was a real risk of the garnishee being compelled to pay twice over was answered by reference to the factual situation and not to formal rules.

This question arose for consideration in *Societe Eram Shipping Company Ltd v Compagnie Internationale de Navigation*.[21] A garnishee order was sought by the judgment creditor against HSBC, a bank resident in England, in relation to an account in Hong Kong. At first instance Tomlinson J adopted a 'bright line' rule that a garnishee order should not be made absolute unless it brought about a virtually automatic discharge of liability as between garnishee and judgment debtor in the relevant foreign jurisdiction. The Court of Appeal allowed the judgment creditor's appeal, using a 'pragmatic test, based on the reality of any risk of injustice, rather than a more formalistic approach based on the effect of a garnishee order as such, ignoring the effect of payment under it.'

On the particular facts, payment of the debt by the garnishee would give rise to a restitutionary claim by the garnishee against the judgment debtor, which would be recognised by Hong Kong law and would protect the garnishee against the risk of double jeopardy. In addition, the conditions of the contract governing the relationship between the garnishee and the judgment debtor were drawn in such a way that the judgment debtor's obligation to compensate the garnishee for any liabilities incurred was clear. There was therefore no real risk of double jeopardy and the garnishee order was accordingly made absolute.

In the course of his judgment Mance LJ raised the possibility of modifying the wording of a garnishee order to show cause relating to a foreign debt in line with the approach adopted for freezing injunctions. In the absence of argument on this point, however, he did not pursue the issue. He also distinguished between the jurisdiction to grant a garnishee order and the jurisdiction to make an order for the production of evidence as in *Mackinnon v Donaldson, Lufkin and Jenrette*.[22] The latter case dealt with the use of the state's sovereign power over someone within its jurisdiction to compel them to undertake a particular course of action *in that jurisdiction*. By contrast the real aim of garnishee relief is to obtain an order requiring the garnishee to meet the judgment debt *in England*. Although there is still a need for caution in making an order which affects assets held abroad, there is no precise analogy between the two situations.

[19] [1990] 1 AC 295. [20] [1906] 2 KB 26 [1904–7] All ER Rep 827, CA.
[21] [2001] EWCA Civ 1317. [22] [1986] 1 Ch 482 [1986] 1 All ER 653.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

Recent case law involving questions of choice of law will be considered in a later issue.

II. FAMILY LAW DEVELOPMENTS

On 1 January 2002 the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* entered into force, following its ratification by three States: Monaco, the Czech Republic and Slovakia. It is anticipated that several other States will follow suit in the near future, with implementation legislation having been introduced in Australia and federal legislation to allow ratification being prepared in Canada. In December 2000 the Lord Chancellor's Department and the Scottish Executive Justice Department issued a Consultation Paper to gather views on whether the United Kingdom should ratify the instrument. However, that process has been somewhat overshadowed by the subsequent finding that European Union Member States are no longer free to ratify the instrument on their own.[23] Since the Community has already implemented a common policy with respect to some of the issues covered by the Convention, namely in the parental responsibility provisions contained in the Brussels II Regulation, it has thereby acquired shared competence with the Member States in any decision to ratify. Consequently this step can only be taken by the Community and the Member States together. While there have been some positive signs that this might be realised, it is a highly politicised issue and is inextricably linked to the future progress of two proposed Council Regulations which have been put forward following the completion of work on Brussels II. In July 2000 France submitted a proposal with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children.[24] This proposal seeks to make access rights directly enforceable in all Member States, through limiting the grounds on which the enforcement of such decisions might be suspended, by providing for the automatic return of children at the end of a period of contact and by instituting measures for cooperation between Member States. The scope of the original proposal was extremely narrow, being limited to relevant judgments given in a Member State in proceedings referred to in Article 1(1)(b) of the Brussels II Regulation, i.e. parental responsibility proceedings at the time of divorce or separation. Criticism of the scope prompted a decision at the Justice and Home Affairs Council meeting of 30 November/1 December 2000 to prepare a much wider instrument in parallel with the French initiative.[25] In September 2001 the Commission issued a proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility.[26] While it is still at an early stage of development this aims to complete Brussels II by facilitating the free circulation of all decisions on parental responsibility emanating from civil law proceedings.

The significant activity in the family law field is not limited to the European Union. The Council of Europe has also prepared a draft Convention on contact concerning

[23] Commission Working Document, 'Mutual Recognition of Decisions on Parental Responsibility', 27/3/2001, COM (2001) 166 final p. 9.
[24] OJ 2000 C 234/07.
[25] Council Press Release 13865/00 (Presse 457).
[26] COM(2001) 505 final.

https://doi.org/10.1093/iclq/51.2.463 Published online by Cambridge University Press

children.[27] It is somewhat different to the draft regulations in that it deals in part with substantive law issues, outlining a series of general principles to be applied when a court is making or amending contact orders or agreements. It further provides for co-operation between the authorities concerned with contact orders, and for safeguards to ensure the proper exercise of contact and the return of children after a period of contact. In the light of these various initiatives dealing with contact it is perhaps not surprising that it was decided at Commission 1 (General Affairs and Policy) of the 19th Diplomatic Session of the Hague Conference in June 2001 that it would be premature for that organisation also to commence legislative work in this field.

[27] CJ-FA (2001) RAP 34, see the Council of Europe website: <http://www.legal.coe.int/family>.

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