CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

Edited by Wendy Kennett

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I. FAMILY LAW

Once again cases concerned with the threshold questions of private international law, such as characterisation and jurisdiction, have dominated the scene.

Characterisation

AT the beginning of the year the House of Lords was faced with a question of interpretation of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction. The objectives of the Convention are to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure respect for the custody and access rights provided under the law of a Contracting State. According to Article 3 "the removal or the retention of a child is considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention, and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

In *Re H*,[1] the child was born to an unmarried couple habitually resident in the Republic of Ireland. After her birth the couple separated. There were some problems over the father's rights of access. He applied to his local district court in Ireland, seeking joint custody of the child. An initial hearing was adjourned by consent to a later date after agreement had been reached on access rights. In June 1998, shortly prior to the rearranged hearing date, the mother moved to England, taking the child with her. The father was not informed of her new address. In the mother's absence, the Irish court ruled on the question of guardianship and access. The father was made a guardian of the child. Contact with the mother and child was re-established in May 1999. The father then made an application to the English court for an order for the return of his daughter to Ireland pursuant to the Convention.

For the Convention to provide the father with the desired remedy, it was necessary for the removal of the child to England to be wrongful—in breach of

1. [2000] 1 F.C.R. 225; [2000] 2 All E.R. 1.

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rights of custody under the law of Ireland as the State in which the child was habitually resident immediately before removal to England. At the time the child was removed to England, the father had no custody rights. Hence the question arose whether the Irish court itself could have custody rights as an "institution or other body" within the meaning of Article 3. If it could, further questions arose as to whether those rights should in fact be attributed to the Irish district court on the facts of the case, and whether they were being exercised at the time the child was removed to England. It also became necessary to consider whether the father could rely on the district court's custody rights to bring proceedings in England under the Child Abduction and Custody Act 1985.

Lord Mackay of Clashfern, in a speech in which the other members of the House of Lords concurred, concluded that the Irish court could be an institution or other body exercising custody rights within the meaning of Article 3. The Convention was phrased in wide terms and intended to be given effect under a variety of different legal systems. It was right that it should be given a purposive construction in order to make as effective as possible the machinery set up under it. There was English, Scottish, Irish and Canadian authority in support of the same interpretation, and no conflicting cases had been cited. That being so, it was held that custody rights were conferred on a court when an application raising such rights was made. It was not necessary for their Lordships to determine the precise time at which an application conferred those rights, and in particular whether service on the respondent to those proceedings was required—since at the time of removal of the child to England, both parties had already been represented before the Irish court. On the facts, the Irish court was exercising custody rights at the time the child was removed to England, and so the removal was wrongful under the Convention.

On the final question as to whether the father could rely on the custody rights of the Irish court in bringing proceedings in England, Lord Mackay stated:

> I see no reason in terms of the Convention or otherwise why a person who has invoked the jurisdiction of the court as a result of which the court has rights of custody in respect of a child should not be entitled to apply to the courts of the country to which the child has been wrongfully removed for the restoration of the child to the jurisdiction of his or her habitual residence. It would seem to me an unnecessary obstacle to the smooth working of the Convention to hold otherwise.

A recent Family Division case[2] also deals with the subsumption of a foreign institution within a statutory framework applicable in England. For the purposes of the Adoption Act 1976, Cazalet J found that a Romanian orphanage could constitute a guardian within the meaning of s. 16(1)(b) of that Act.

Connecting factors

Black J in the Family Division was also faced with a problem of interpretation of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction. In *N.* v. *N.*[3] the judge had to determine whether the children concerned were habitually resident in England or Spain at the time they were

2. *Re N* [2000] 2 F.C.R. 512.
3. [2000] 3 F.C.R. 84.

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removed from Spain by the mother. The unusual feature of the case was that the parents, a married couple who had long been habitually resident in England, had moved to Spain only three months before the mother returned to England. The father sought to establish that they had an habitual residence in Spain, while the mother argued that she and the children had retained their habitual residence in England.

Black J discounted any argument that habitual residence should in such circumstances be treated like domicile and made dependent on the father. The courts had made it clear that a different test applied to habitual residence. Nevertheless previous authority was limited and not directly in point. There was Court of Appeal authority to the effect that "in the ordinary case of a married couple … it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights."[4]

This had been relied on by Wall J in a later case[5] to reach the conclusion that

> where both parents have equal rights of custody, no unilateral action by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody

a statement which had later been approved by the Court of Appeal.[6]

On the facts Black J found that although the mother had moved to Spain, the move was exploratory and conditional. She had not lost her habitual residence in England. That being so, a unilateral transfer of habitual residence on the part of the father to Spain was inadequate to modify the habitual residence of the children, who also remained habitually resident in England. Their return to England with their mother was not, therefore, a wrongful removal for the purposes of the Convention.

Jurisdiction

European legislation

Brussels II, the main lines of which were set out in this subject section at (1999) 48 I.C.L.Q. 467 has now been adopted as an EC Regulation. The Treaty of Amsterdam amending the EU and EC Treaties provided the authority for this move, by giving the EC competence in the field of civil judicial co-operation. Council Regulation (EC) 1347/2000[7] was adopted on 29 May 2000 and is due to enter into force on 1 March 2001. The text of the Regulation is similar to that of the original Convention, but amendments have been made to bring some of the procedural arrangements into line with those proposed in relation to Brussels I. In particular there is regulation of the time at which a court becomes seised of proceedings, and a simplification of the application for an enforcement order has been introduced. Member States are required to identify their competent

4. *Re J* (a minor) (abduction: custody rights) [1991] F.C.R. 129; [1990] 2 A.C. 562.
5. *Re S* [1994] 1 F.C.R. 83.
6. *Re KM* [1996] 2 F.C.R. 333.
7. O.J. 2000 L160/19.

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authority or authorities for the grant of an enforcement order, and the (*ex parte*) application is to be dealt with on an administrative rather than a judicial basis. A purely formal check is to be made on the (standardised) documentation to be provided by the applicant. Any substantive objections to the grant of an order must be raised by the defendant after the order has been granted. In principle this should lead to much more rapid and cost effective enforcement procedures, but it remains to be seen how Member States implement the Regulation.

II. CIVIL AND COMMERCIAL MATTERS

European legislation

Among the package of measures adopted on 29 May 2000 was a Regulation on Insolvency Proceedings.[8] The Regulation was proposed on the joint initiative of Germany and Finland under the new provisions on judicial co-operation in civil matters in Article 61 EC.[9] It transforms into a Regulation the text of the draft Convention on Insolvency Proceedings which was drawn up by the Member States in 1995 but was not signed as a result of the U.K.'s policy of non-co-operation with other Member States arising from the BSE crisis.

The Regulation complements the 1968 Brussels Convention by regulating jurisdiction and the recognition and enforcement of judgments in insolvency proceedings, but it also regulates choice of law issues. According to Article 4 "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings' ". Article 4 goes on to provide an indicative list of matters to which the law of the State of the opening of proceedings applies, while Articles 5 to 15 identify certain exceptions to that general rule. Given the considerable divergencies between national laws on certain fundamental issues such as security rights, the exceptions are designed in particular to protect the position of creditors or third parties who have relied on the applicability of a different law. They cover *inter alia* rights *in rem* (Article 5), set-off (Article 6), reservations of title (Article 7), registered rights (Articles 11 and 14) and employment contracts (Article 10).

The types of proceedings included within the scope of the regulation are listed in annexes thereto. They are defined in Article 1(1) as "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator". The insolvency of insurance, credit and investment undertakings is nevertheless excluded in recognition of the special regimes that apply in such cases. Furthermore the Regulation applies only when the centre of the debtor's main interests is situated in a Member State (Article 3).

The regulation seeks to find an intermediate position between the universal and territorial principles currently applied by Member States. Article 3 requires the main insolvency proceedings to be opened in the Member State where the debtor

8. Council Regulation 1346/2000, O.J. 2000 L160/1.

9. The Commission shares the right of initiative of legislation with the Member States during the first five years after entry into force of the Treaty of Amsterdam.

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has the centre of his main interests (presumed in the case of a legal person to be the place of the registered office in the absence of proof to the contrary). These proceedings have universal scope and aim at encompassing all the debtor's assets. Secondary ("territorial") proceedings may nevertheless be opened in a Member State where the debtor has an establishment to ensure that differences of national approach to creditors' interests can be respected—particularly in respect of security and preferential rights. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of co-ordination with the main proceedings then serve to achieve the degree of harmony required in a Single Market.

The rules in the Regulation only establish the Member State having jurisdiction. Territorial competence within that State is a matter for domestic law. Furthermore insolvency proceedings do not necessarily involve the intervention of a judicial authority. Although the Regulation refers to the opening of proceedings by a court, this expression is defined to include any competent body empowered by national law to open insolvency proceedings or to take decisions in the course of such proceedings (Article 2(d)).

There are restrictions on the opening of secondary proceedings prior to the opening of the main insolvency proceedings. Article 3 provides that this may only be done if the law of the Member State where the debtor has the centre of his main interests prevents the opening of the main insolvency proceedings, or if "the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment".

Once the main proceedings have been opened, however, the liquidator can determine whether or not it is expedient to open secondary proceedings, and in such proceedings it will not be necessary for the question of the debtor's insolvency to be re-examined (Article 27). The opening of secondary proceedings may also be requested by any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested (Article 29). The law applicable to such proceedings will normally be the law of the State in which the secondary proceedings are opened (Article 28). Article 31 establishes duties of communication and co-operation as between the liquidator in the main proceedings and the liquidator(s) in the secondary proceedings.

The Regulation contains a number of provisions concerning the rights and duties of the liquidator(s) and creditors and makes it clear than creditors in any Member State can in principle lodge claims in either the main or the secondary proceedings. The liquidator in the main proceedings is given various opportunities to intervene in any secondary proceedings, to ensure the primacy of the main proceedings.

The decision to open insolvency proceedings in a Member State "which has jurisdiction pursuant to Article 3" must be recognised in all the other Member States from the time that it becomes effective in the State of origin. The reference to Article 3 might be taken to indicate that the jurisdiction of the State of origin can be examined in the State addressed, but this is not the intention of the drafters of the Regulation. Paragraph 22 of the Preamble states that recognition

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> should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

This seems to presuppose that the court or other body opening proceedings will expressly state that they are the main proceedings. Otherwise a court in another Member State claiming jurisdiction might interpret those proceedings as (prior opened) secondary proceedings. The relevant point in time for this tie-break is the time at which the proceedings are opened, rather than the time at which the court is seised. Furthermore there is no requirement that the second court should stay its proceedings, since they can operate as secondary proceedings.

The judgment opening the proceedings "shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings" (Article 17), unless the Regulation provides otherwise, or secondary proceedings are opened in that other Member State. With similar limited restrictions a liquidator in the main proceedings "may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another State" (Article 18). Article 19 deals with proof of the liquidator's appointment.

Other decisions arising out of the insolvency proceedings are also to be recognised without further formalities, and enforced under the provisions of Brussels I (Article 25). The only ground of non-recognition provided is public policy. The Regulation does not cross-refer to the grounds of non-recognition referred to in Brussels I.[10]

Measures to preserve assets both prior to and during insolvency proceedings are recognised as important to guarantee the effectiveness of the proceedings. The Regulation therefore includes two provisions which ensure the utility of protective measures. According to Article 25 of the Regulation, the provisions Article 25(1) concerning the recognition and enforcement of judgments arising out of the insolvency shall also apply to "judgments relating to preservation measures taken after the request for the opening of insolvency proceedings". It is not necessary that the proceedings should have been opened, but the request for opening must have been made. Enforcement of any such judgment is to take place under Articles 31–51 of Brussels I. Legal cultures differ in the role played by insolvency proceedings as an encouragement to debt collection, and in their use of protective measures for that purpose. Protective measures are a common litigation device in some jurisdictions. In principle Article 25 could result in a large number of applications for transfrontier protective measures, but the likelihood is that a lack of transparency and high legal costs will act as a stern restraint. If the revisions of Brussels I have their intended effect in simplifying the procedures for enforcement, however, the situation might nevertheless change.

The second provision dealing with preventive measures is Article 38 which ensures that a temporary administrator in the main proceedings is empowered to

10. The published draft of the Brussels I Regulation moves non-recognition grounds to a position among the provisions on enforcement. Amendment of the Insolvency Regulation to fit in with the Brussels I Regulation when adopted will need to take account of this.

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make applications in other Member States for the preservation of assets there pending the opening of the insolvency proceedings.

The Regulation also deals with a number of issues concerning publicity of the insolvency proceedings and information to creditors (Articles 21–22 and 40 ff.) Creditors in a Member State other than the State where the proceedings were opened, who make payment to the debtor rather than the liquidator will, in the absence of proof to the contrary, be deemed to have been unaware of the insolvency proceedings before publication of the required notice of those proceedings, and be deemed to have been aware of the proceedings after publication of the notice. If the creditor was unaware of the opening of the proceedings, the payment to the debtor will discharge the debt (Article 24).

As a result of the co-ordination of insolvency proceedings under the Regulation it is anticipated that creditors will be treated equally as far as possible – subject to unavoidable differences in national systems of secured and preferential rights. This aim is advanced by Article 20(2), which provides that a creditor who has obtained a dividend on his claim can share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

The Insolvency Regulation will come into force on 31 May 2002. It remains to be seen how successful it is in promoting co-ordination of insolvency proceedings in Europe in the absence of further supporting measures.

The Regulation on Service of Documents was also among those adopted on 29 May 2000.[11] It will enter into force on 31 May 2001.

Policy in relation to the resolution of e-commerce disputes has been the main stumbling block to the finalisation of the Brussels I Regulation. This has resulted in a flurry of activity to shape and give effect to an appropriate policy, which can both encourage e-commerce and ensure that consumers are adequately protected in the case of internet purchases. The main lines of the new policy are to be found in European Parliament and Council Directive 2000/31/EC of 8 June 2000 at Articles 16 ff.[12] On the one hand it is intended to encourage the use of quality marks to give consumers confidence in relation to distance purchases. On the other hand, better provision for the out of court settlement of disputes is sought, with commercial pressure and publicity being used as ways to encourage defaulters to comply with their obligations. A European Extra-Judicial Network (EEJ-Net) is to be established to ensure that consumers in one Member State can identify the information, advice and procedures available to them in another. Previous legislation to improve the access to justice of consumers can be found in European Parliament and Council Directive 98/27/EC[13] on consumer injunctions, which aims to ensure that a consumer protection organisation from one Member State can bring an action in another Member State where there has been a breach of European consumer protection legislation. Further initiatives for consumer protection purposes can certainly be anticipated. As a result, political agreement

11. Council Regulation 1348/2000/EC, O.J. 2000 L160/37, considered previously in (1999) 48 I.C.L.Q. 466.

12. O.J. 2000 L178/1. See also Commission Recommendation 98/257/EC 1998 O.J. L115/31.

13. O.J. 1998 L166/51.

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has been reached on Brussels I with a text to be finalised by the end of December 2000.

Turning to the wider Europe, there has been an welcome development in relation to the Lugano Convention. On 1 February 2000, Poland became the first non-EFTA signatory to the Convention. The U.K. has made the necessary legislative amendments to allow ratification of the accession agreement.[14]

Jurisdiction

European Court

In March the European Court delivered a rare judgment on the interpretation of the provisions of the Brussels Convention relating to public policy (Article 27(1)). The context was a *partie civile* claim in criminal proceedings. The daughter of the French domiciled claimant had been killed in Germany, and the German domiciled defendant was investigated in France—jurisdiction being based on the nationality of the victim. The defendant was ordered to appear in the French criminal court, but did not do so. He was found to be in contempt of court and was not permitted to make any representations through defence counsel. At the end of the proceedings a custodial sentence was imposed in the defendant's absence and compensation was awarded to the claimant.

The claimant sought to enforce the award of compensation in Germany. The case came before the German Federal Supreme Court which referred several questions of interpretation of Article 27(1) of the Convention to the European Court. The Court noted that, as an obstacle to recognition and enforcement of judgments, Article 27(1) was to be interpreted strictly. Public policy was a matter for individual Contracting States but the Court was "none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept". Stressing the link between the Brussels Convention and the EC Treaty through Article 220 [now Article 293] the Court then observed that "fundamental rights form an integral part of the general principles of law whose observance the Court ensures" and that one of the sources of those fundamental rights was the ECHR. It cited its previous case law on the right to a fair legal process, and the reference to the ECHR in Article 6(2) EU. These considerations formed the background against which any interpretation of Article 27(1) of the Brussels Convention must be undertaken.

The mere fact that the jurisdiction of the French court had been based on the victim's nationality, and not on one of the bases of jurisdiction authorised by the Brussels Convention, was not a ground for non-recognition of the resulting judgment under Article 27(1)—since the court in the State addressed was not entitled to review the jurisdiction of the court in the State of origin (Article 28).

The fact that the defendant had not been allowed to present a defence did, however, raise issues of public policy. The Court stated that

> [r]ecourse to the public policy clause in Article 27(1) of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in

14. Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000 (SI 2000 No. 1824).

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> another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

It was apparent from the constitutional traditions of the Member States and the rulings of the European Court of Human Rights that the right to present an effective defence in criminal proceedings was such a fundamental right, which should not be forfeited merely because the defendant was not present in person.

There was, however, a textual argument against this interpretation of the Brussels Convention. Article II of the Protocol to the Convention made provision for *partie civile* proceedings, but only recognised the right to be defended without appearing in person (for persons who were neither nationals of nor domiciled in the prosecuting State) in so far as the prosecution was for an unintentional offence. In an earlier decision of the European Court, Case 157/80, *Rinkau*[15] the Court had found that this provision recognised the right for a State to deny a defendant the right to a defence in the case of a particularly serious offence. In response to this argument, the Court noted that recent developments in its case law had emphasised the fundamental nature of the right to a fair hearing. It concluded that Article II of the Protocol could not be used to prevent a court in the State addressed from relying on public policy to deny recognition to a judgment, if the court in the State of origin had denied the defendant the opportunity to present a defence.

In Case C–412/98, *Société Group Josi Reinsurance Co SA* v. *Universal General Insurance Co*,[16] the European Court confirmed that "as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the Convention, since that application is, in principle, dependent solely on the criterion of the defendant's domicile being in a Contracting State."

In the same case the Court also confirmed that the special rules on jurisdiction in insurance matters contained in section 3 of Title II of the Convention do not apply to reinsurance contracts, since the protective purpose of those rules is not appropriate to the reinsurance context. Nevertheless those rules are applicable when under the law of a Contracting State the policy holder, the insured or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer in order to assert his rights under that contract as against that reinsurer. "In such a situation, the plaintiff is in a weak position compared with the professional reinsurer, so that the objective of special protection inherent in Article 7 ff of the Convention justifies the application of the special rules which it lays down".

Finally, the Court has been required to reconsider the application of Article 17 of the Convention to a jurisdiction agreement in a bill of lading. The bill of lading was issued by the German domiciled charterer of the ship. The jurisdiction

15. [1981] E.C.R. 1391.
16. [2000] All E.R. (E.C.) 653.

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agreement was to the effect that disputes were to be settled in the "country where the carrier has his principal place of business". The carrier was identified in the contract as the owner of the vessel, but the same provision also contained a proviso for the case where it was adjudged that any other party was the carrier. The charterer's name appeared on the face of the bill of lading.

The goods shipped under the bill of lading were delivered to a consignee in the Netherlands. It was alleged that they had sustained damage during transportation, and an action was commenced in the Netherlands against the German charterer and the shipowner, a Russian company. The charterer contested the jurisdiction of the Dutch courts, and the Dutch Supreme Court referred points of interpretation of the Convention to the European Court.

A first problem raised by Case C–387/98, *Coreck Maritime* v. *Handels Veem* was the fact that the wording of the bill of lading alone was insufficient to determine which court was to have jurisdiction. It was a matter of interpretation as to who was the carrier under the bill and where they had their principal place of business. The European Court was asked whether a clause which must be interpreted in the light of the circumstances of the case satisfied the requirement that the agreement of the parties on a choice of court must be "clearly and precisely demonstrated".[17] It noted that the purpose of Article 17 was to give effect to the will of the parties, and concluded that the jurisdiction clause did not need to be formulated in such a way that the competent court could be determined on its wording alone. The clause could state objective factors on the basis of which the competent court could be determined—provided that those factors were sufficiently precise to enable the court seised to determine whether it had jurisdiction.

A further problem for the Dutch court was the fact that the principal place of business of the carrier was not proven. It was therefore not yet clear whether that place of business was in a Contracting State. The Court simply emphasised the connecting factors used by the Convention to determine its application to jurisdiction agreements. The domicile of at least of one of the original parties to the contract must be in a Contracting State, and the parties must have chosen the court or courts of a Contracting State. The question of domicile was referred by Article 53 of the Convention to the private international law rules of the court seised. Those rules, not rules of European law, would determine what significance, if any, should be attributed to the location of a party's principal place of business. Furthermore, if the chosen court was not a court of a Contracting State, the validity of the jurisdiction agreement fell to be assessed in accordance with the private international law rules of the court seised, and not in accordance with Article 17.

Previous case law of the European Court indicated that a jurisdiction agreement in a bill of lading was binding on a third party holder of the bill if under the applicable law the latter succeeded to the rights and obligations of the shipper.[18] In the case before the Dutch courts, however, there was a problem in determining whether the consignee did indeed succeed to the shipper's rights and

17. To be found in Case 24/76, *Salotti* v. *RUWA* [1976] E.C.R. 1831; Case 25/76, *Segoura* v. *Bonakdarian* [1976] E.C.R. 1851; Case C–106/95, *MSG* v. *Gravières Rhénanes* [1997] E.C.R. I–911.

18. Case 71/83, *Tilly Russ* v. *Nova* [1984] E.C.R. 2417.

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obligations. The European Court was therefore asked whether a third party holder of the bill might be bound by the jurisdiction agreement even if they did not succeed to the shipper's rights and obligations under the bill. If an alternative ground for the binding effect of the jurisdiction agreement did not exist, the Dutch court wanted to know what rules should be applied to determine whether the third party holder of the bill did succeed to the shipper's rights and obligations.

The European Court confirmed that the reason for giving the jurisdiction agreement binding effect in relation to a third party holder of a bill of lading was that they should not succeed to the shipper's rights without also assuming the corresponding obligations. If the consignee did not assume the shipper's rights and obligations under the applicable national law, then the usual strict requirements of Article 17 would have their full effect. The question whether a third party holder of a bill of lading succeeded to the shipper's rights and obligations was a matter for national law, including national private international law rules. It was not a question of interpretation of the Brussels Convention.

Courts in the UK

In recent months the House of Lords has twice been taxed with the problem of determining the *forum conveniens* for an action. *Lubbe* v. *Cape Industries plc*[19] was an action brought by South African victims of asbestosis against the English parent company of the mining organisations that had caused the damage to them, and raised in particular issues about the relevance of access to justice in the foreign more appropriate forum. It is considered in detail elsewhere in this issue. The other decision, *Berezovsky* v. *Michaels*,[20] dealt with the application of *forum non conveniens* principles in a defamation case. Such cases have provided plenty of scope for jurisdictional disputes in the last few years, and it seems unlikely that the decision of the House of Lords will have a restraining effect.

The claimants were well known business and political figures in Russia. An American business magazine published an article alleging that they were leading figures in organised crime and corruption. The magazine had by far its largest circulation in the United States, but about 2,000 copies were also sold in England. Circulation in Russia was negligible. The claimants regularly visited England, and Berezovsky also had family in England. They brought defamation proceedings against the editor and publishers of the magazine in the High Court in London. The defendants sought to have the actions dismissed or stayed under RSC Ord. 12, r. 8 on the basis that England was not the most appropriate forum for the trial.

Popplewell J at first instance granted a stay on *Spiliada*[21] principles, finding that the case was a "peculiarly Russian" one, involving issues of fact over events and personalities in Russia. The Court of Appeal allowed the claimants to produce new evidence relating to their reputation in England in the form of affidavits from business colleagues attesting to the impact of the magazine article on their willingness to deal with the claimants. There was also evidence of Berezovsky's family connections in England. The Court took the view that Popplewell J had

19. [2000] 4 All E.R. 268, [2000] 1 W.L.R. 1545.
20. [2000] 1 W.L.R. 1004.
21. [1987] A.C. 460.

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erred in two ways. He had underestimated the strength of the claimants' connections with England, and he had failed to take proper account of the line of authority that identifies the place where a tort was committed as the natural forum for disputes arising out of that tort.

In the House of Lords, counsel for the defendants tried to argue that a libel claim should be approached on a global basis: that in respect of transnational libels the principles enunciated by the House of Lords in *The Spiliada* should be recast to proceed on the assumption that there was really only one cause of action. This argument, which was variously formulated during the evolution of the proceedings, was rejected. Lord Steyn, with whom the other members of the Appellate Committee agreed on this point, referred to the "long established principle of English libel law that each publication is a separate tort".

The question was also raised as to the significance of the fact that the substance of the tort arose in England. It was suggested that the proposition in *The Albaforth*[22] that the jurisdiction in which a tort has been committed is *prima facie* the natural forum for the determination of the dispute was inconsistent with *The Spiliada* which did not admit of any presumptions. Lord Steyn noted that the context of each line of authority was different. The reasoning in *The Spiliada* was pitched at a much higher level of generality than in *The Albaforth*. The cases were not in conflict.

By a majority the House of Lords concluded that England was the appropriate forum in which to hear the action based on the English libel. The claimants had "significant connections with England and reputations to protect here". Their connections with the United States were minimal and they could not realistacally claim to have reputations needing protection there. Conversely, although the events described in the magazine article took place in Russia which was the centre of the claimants' sphere of operations, the circulation of the magazine there was minimal, and "it is clear that a judgment in favour of the plaintiffs in Russia will not be seen to redress the damage to the reputations of the plaintiffs in England". Russia could not therefore realistically be treated as an appropriate forum where the ends of justice could be achieved.

Not for the first time in cases concerning *forum non conveniens*, the dissenting judgment of Lord Hoffman is altogether more rational and persuasive than the opinion espoused by the majority. He and Lord Hope of Craighead were not convinced that there were any grounds to interfere with the exercise of discretion by the first instance court. The evidence adduced in the Court of Appeal, which was much relied on in the Court of Appeal and the House of Lords to demonstrate the strength of the claimants' connections with England, did no more than provide specific instances of business connections which were in principle known to exist at the time the case was heard by Popplewell J, and from the tone of his judgment could be assumed to have been taken into consideration. Furthermore his judgment, read as a whole, indicated that he had given proper consideration to *The Albaforth* and other cases on the appropriate forum in tort cases.

Lord Hoffman continued:

> The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided

22. [1984] 2 Lloyd's Rep. 91.

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> that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action. . . .
>
> I would not deny that in some respects an English court would be admirably suitable for this purpose. But that does not mean that we should always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this country, or whose publications have been downloaded here from the Internet, can be required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England. In *Airbus Industrie GIE* v. *Patel*[23] your Lordships' House declined the role of "international policeman" in adjudicating upon jurisdictional disputes between foreign countries. Likewise in this case, the judge was in my view entitled to decide that the English court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country.

It is one of the strengths of the English judicial system that the High Court has wide experience of international litigation and of the games that litigants play, and is well placed to recognise and resist unjustifiable tactical manoeuvring. Indeed the absence of a similar concentration of expertise in other EU jurisdictions is probably a significant cause of the frustration felt by English practitioners with the Brussels Convention system. There is no framework within which a concept of legitimate and illegitimate litigation tactics can be developed. In an age when businesses and the media have a global reach, the localisation of reputation is a precarious exercise. Lord Hoffman's arguments have considerable force and highlight the fact that the judgment of the majority in the House of Lords was based on the contrary view they had formed as to the strength of the applicants' connections with England.

Tactical manoeuvring is also in the foreground of two further recent decisions. In *Canada Trust Company* v. *Stolzenberg*[24] the claimants brought proceedings against Stolzenberg and a number of co-defendants to recover money allegedly obtained by fraud. The proceedings were commenced in England as the domicile of the defendant. Jurisdiction over the co-defendants could then be asserted on the basis of Article 6(1) of the Lugano Convention (according to which a person domiciled in a Contracting State may be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled") or on the basis of RSC Ord. 11, r. 1(1)(c) (according to which service out of the jurisdiction is permissible if "the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto"). An attraction of England as a forum for the claimants was no doubt the opportunity it afforded of obtaining a worldwide Mareva injunction, although there was no other forum which was obviously appropriate for an action against all the defendants.

An injunction was obtained, and service of the writ on Stolzenberg was delayed until the steps necessary to freeze assets in several jurisdictions had been co-ordinated. This took several months. During that time Stolzenberg became aware of the threat of proceedings and adopted an avoidance strategy. He sold his house in London and moved to a new residence nearby, then later moved to

23. [1999] 1 A.C. 119.
24. 12 Oct. 2000.

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Germany. At the time that the writ in the English proceedings was issued he certainly still owned the London house. The exact point in time at which he changed his domicile had not been established, but by the time the writ was served at his London address he was no longer there. Stolzenberg allowed a judgment to be entered against him by default. He brought proceedings for a declaration of non-liability in Germany. Some of his co-defendants did however contest the jurisdiction of the English courts. Those domiciled in Switzerland, a Contracting State to the Lugano Convention, argued that Stolzenberg was not domiciled in England at the time the writ was served, so that the English courts had no jurisdiction over them under Article 6(1). Those domiciled in a non-Contracting State argued that Stolzenberg had not been duly served, so that reliance could not be placed on RSC Ord. 11, r. 1(1)(c).

The House of Lords confirmed the approach adopted in the courts below. The relevant test for establishing that a defendant was domiciled within the jurisdiction was a "good arguable case". The case turned on what it meant for a defendant to be "sued", since that was the term used in Articles 2 and 6(1) of the Brussels Convention to identify the point in time at which the defendant must be domiciled within the jurisdiction. There was Court of Appeal authority that a court was only seised of an action after the defendant had been served with the document instituting the proceedings, but the House of Lords found that there was no necessary relationship between a defendant being "sued" and a court being "seised" and did not address the correctness of the decision in *Dresser UK Ltd* v. *Falcongate Freight Management Ltd*.[25] Drawing on the fact that the Convention was intended to promote certainty and predictability of jurisdiction, as well as on the principles underlying the English rules of court, their Lordships concluded that a person was "sued" at the point in time when the writ or claim form was issued—that was the time when an action was commenced under English law. Stolzenberg was domiciled in England at the time the writ was issued, and so the action against him was properly brought. Lord Hope of Craighead drew attention to the contrasting approach of Scots law, under which an action is commenced at the time of service on the defendant. This fact should be taken in context with the further fact that Scots law has a different regime for asset freezing measures.

It was not found necessary for the purposes of Article 6(1) that the "anchor" defendant—domiciled in the forum State—should have been served with the document instituting the proceedings before the co-defendants. That being so, the Swiss defendants were subject to the jurisdiction of the English courts. The non-Contracting State defendants must be necessary and proper parties to a claim brought against someone who had already been "duly served", but it was possible to identify a defendant other than Stolzenberg who had been duly served before the non-Contracting State defendants, thus satisfying this requirement. The actions were therefore entitled to proceed.

Trying to ensure that your preferred court is the one first seised of an action is a standard feature of litigation under the Brussels Convention, and where better for a potential defendant to make a pre-emptive strike than in Italy, where long

25. [1992] Q.B. 502; [1992] 2 All E.R. 450.

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delays can be guaranteed. So it was that the Italian defendant in *Molins* v. *GD SpA*,[26] having received a letter before action in relation to unpaid royalties, took steps to delay the commencement of proceedings in England in order to make arrangements to claim a declaration of non-liability in Italy. Molins, who had been dealing with the defendant through the latter's London solicitor, wished to serve the claim form on the defendant at the offices of the solicitor. A clear statement one way or the other as to whether this was acceptable was not forthcoming from the defendant until after it had commenced proceedings in Italy and served process on Molins by fax.

Molins nevertheless started proceedings in the High Court. The defendant sought to have the proceedings dismissed on the basis that the Italian court was first seised. Neither Pumfrey J at first instance nor the Court of Appeal was persuaded that the service by fax was valid.

The defendant relied first on Article 15 of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters. According to that provision service would be effective if the document in question was served by a "method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory". Aldous LJ, giving judgment for the Court, noted that CPR Part 6 para. 3.1(1) set out the requirements for service by fax under English law, as the law of the State addressed. It must be read together with para. 3.1(3)(a) which specified when the use of a fax number could be taken as a sufficient written indication of willingness to accept service by fax for the purposes of para. 3.1(1). The party served must have indicated in writing that he was willing to accept service by fax. The Court concluded the mere inclusion of a fax number in a heading on writing paper was not sufficient. There must be something more. This interpretation of para. 3.1.(1) was also confirmed by para. 3.1.(3) which expressly provided that the inclusion of a fax number on the writing paper of a party's legal representative was sufficient. Arguing *a contrario*, if that were to be the case for the party itself, then there would be no need to make such specific provision in the case of a legal representative.

A second argument was that service was valid under the 1930 UK–Italy Convention on Legal Proceedings in Civil and Criminal Matters. Article 4 of the Convention permits service by a diplomatic or consular officer or an agent appointed by the judicial authority from which the document emanates. It was suggested that the person responsible for sending the fax was an agent appointed by the Italian court. Aldous LJ pointed out that the Convention did not purport to lay down how that service was to be effected. It could not sensibly be read as allowing any means of service, including means which would be insufficient in the country in which service was effected. Thus the document to be served must, if it was served under Article 4, be served in accordance with the rules for service in England at the relevant time.

This was also the line of reasoning that had been adopted by Pumfrey J at first instance, but the defendant also had a further argument in favour of a stay of the English proceedings, to which Pumfrey J had acceded. It was said that the Italian

26. [2000] 1 W.L.R. 1741; [2000] 2 Lloyd's Rep. 234.

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court was first seised of the dispute, that any defect in service was a matter for that court and was capable of being cured, and that the English court should stay its proceedings under Article 21 of the Brussels Convention and wait for the Italian court to decide issues relating to its own jurisdiction. The Court of Appeal on the other hand was not persuaded by this approach. Aldous LJ found that service was a requirement of Italian law before proceedings could become definitively pending before an Italian court. Under Italian law irregular service could be validated either by appearance or by court order, and such validation would be retrospective; but until such validation had taken place the proceedings could not be described as definitively pending before the Italian court, and therefore the Italian court could not be seised. The English court was in a position to assess whether valid service had taken place, since service must be effected as required by Article IV of the Protocol to the Brussels Convention. In other words, it had to be effected in accordance with the procedures laid down in conventions and agreements between the Contracting States—conventions and agreements which the Court had just found did not authorise service by fax.

The position will not change under the new Service Regulation. The Regulation makes provision for e-mail and fax transmission of documents between competent authorities described as "transmitting" and "receiving" agencies, but not for direct service on an addressee in another Member State by fax or e-mail.

Characterisation

Choice of law issues continue to play a minor role in comparison with the battles waged over jurisdiction. Where they arise they are often resolved by brief reference to the relevant rules in Dicey & Morris. The points of greatest interest that have arisen concern characterisation.

In *Kuwait Oil Tanker Company SAK and another* v. *Al Bader and others*[27], the Court was faced with claims in conspiracy and for breach of trust arising out of actions in England and Kuwait. Since the facts relied on occurred at the latest in 1992, the relevant choice of law rules were those of the common law, rather than the Private International Law (Miscellaneous Provisions) Act 1995, including the double actionability rule. The Court found that the tort was in substance committed in Kuwait, a country which did not have any direct equivalent of claims in conspiracy and for breach of trust. It emphasised the broad approach to be adopted to the requirement that a claim should be civilly actionable under the relevant foreign law, and found that the Kuwaiti law of obligations contained provisions that were appropriate to impose liability on the defendants.

It then turned to the question of the interest to be awarded. Compound interest was claimed on the basis that the defendants (as directors/managers of the claimant companies) were in the position of trustees. It was argued on their behalf that the double actionability test applied, and that interest could not be awarded under the Kuwaiti Civil Code. Moore-Bick J at first instance had concluded that an award of interest was a matter of procedure rather than substance and a question for the *lex fori*. In the alternative, however, he found that interest could be recovered by virtue of the Kuwaiti rules on restitution which provided that a

27. 18 May 2000 C.A.

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recipient in bad faith of "that which is not due" should be liable to restore "the fruits he has obtained or which he has failed to obtain". This was apt to cover the generation of interest.

The Court of Appeal noted that the characterisation of interest claims was a matter of dispute. It summarised the debate surrounding the characterisation of claims for the purpose of s. 35A of the Supreme Court Act, in which context there was authority suggesting that the matter was a procedural one,[28]but did not express any conclusions on the point since it had not been the subject of full debate. Instead the Court noted that the claim for interest in the present case was made on the basis of trusteeship.

> In such a case, the award of compound interest is made on the basis that a trustee misapplying monies for his own benefit, and a person obtaining or retaining money by fraud who is to be similarly treated, should be obliged either to account in full for the benefit he has unjustly derived or, in lieu of such account, to pay compound interest when the circumstances justify an award on that basis. The rationale is historically and essentially that of restitution i.e. that a fiduciary should not be permitted to make a profit from his trust .... The court's power in such circumstances to award compound interest (although discretionary in the sense that it will be exercised in accordance with established equitable principles) is not only distinct, but different in character, from its broad powers under s. 35A, being a necessary adjunct of the claimant's substantive right to restitution. An award of compound interest upon that basis is thus itself substantive rather than merely procedural in nature.

Finally, in *Raiffeisen Zentralbank Osterreich AG* v. *Five Star General Trading LLC*,[29] Longmore J was faced with a texbook conflict of laws question on characterisation. A marine insurance policy governed by English law had been made with French insurers. It was later purportedly assigned to the claimants, who had lent the money needed to purchase the insured vessel. Notice of the assignment was not served on the insurers in France by a bailiff as was apparently mandatory under French law. The vessel was involved in a collision and in litigation arising therefrom was arrested and sold in Malaysia. Certain cargo owners who had lost their cargo in the collision found that they were unlikely to recover the value of it from the sale of the vessel, and attached the marine insurance policy and its proceeds in France. The claimants sought declarations that they were the ones entitled to the proceeds of the insurance policy.

If the validity of the assignment was a contractual matter, it was governed by Article 12 of the Rome Convention, according to which "the law governing the right to which the assignment relates shall determine ... the conditions under which the assignment can be invoked against the debtor ...". The law governing the assigned insurance policy was English law, under which the assignment was valid and effective. If, on the other hand, the claim was proprietary—a claim that the contract and the rights arising therefrom were now vested in the claimants—the *lex situs* was applicable. The *situs* of a debt was the domicile of the debtor i.e. the insurer in France.

Longmore J found assistance in the approach adopted in Dicey & Morris to the effect that, "In relation to the assignment of rights which arise under a contract, such as a single contractual debt, assignment may be seen as an aspect of the

28. Hobhouse J in *Midland International Trade Services Ltd* v. *Al Sudairy* 11 Apr. 1990.
29. 26 May 2000.

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purely contractual question of who is presently entitled, as against the debtor, to enforce the right to payment. Such cases may belong, for the purpose of the conflict of laws, within the rubric of contract, rather than property, on the ground that though there may be contexts (such as insolvency) in which it is appropriate to treat the question as one of property, the question of who is now entitled to sue the debtor is a matter for the law which governs all the other aspects of the contract which created the obligation which the debtor owes". He concluded that, as a matter of English law, the Rome Convention should apply to any assignment of a contract unless, on its wording, such application was inappropriate.

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