ACCESS TO JUSTICE AND PARALLEL PROCEEDINGS IN EUROPE

THE avoidance of parallel litigation is a primary purpose of the European jurisdiction regime, embodied principally in the Brussels I Regulation on jurisdiction and the enforcement of judgments. Normally, the court first seised has priority (under Articles 27 and 28). But even the court first seised must decline jurisdiction where a contractual agreement confers exclusive jurisdiction upon another court under Article 23. What, however, if a court asserts jurisdiction despite a contrary jurisdiction agreement? What if it misapplies Article 23; what if Article 23 is never considered; what if it believes the jurisdiction agreement to be invalid, or non-exclusive? Any judgment obtained in such proceedings is enforceable in another Member State, even if jurisdiction was asserted mistakenly (Article 35). But what if the agreed court purports to assert exclusive jurisdiction notwithstanding that another court is first seised? Which has precedence, the *prior* jurisdiction of the first court, or the *exclusive* jurisdiction of the second court? Does the existence of exclusive jurisdiction justify parallel proceedings?

These complex issues were addressed by the Court of Justice in Case C-116/02 *Erich Gasser GmbH* v. *MISAT Srl* (judgment, 9 December 2003). MISAT sued in Italy for a declaration that its contract with Gasser had terminated. Gasser subsequently sued MISAT in Austria under the contract, relying partly upon a contractual agreement to the Austrian court's jurisdiction. The case squarely raised the tension between Articles 17 and 21 of the 1968 Brussels Convention (Articles 23 and 27 of the Brussels Regulation), and the Austrian court referred the issue to the Court of Justice. The Court readily found that Article 21 prevailed, ousting the Austrian court's jurisdiction despite Article 17.

Everything turned upon whether exclusive jurisdiction under Article 17 differs in effect from exclusive jurisdiction under Article 16 (concerning, for example, jurisdiction over title to land). In Case C-351/89 *Overseas Union Insurance* [1991] E.C.R. I-3317, the Court of Justice held that a court cannot review the jurisdiction of a court already seised, save where the second court has jurisdiction under Article 16. But nothing was said of Article 17. In *Gasser* the Court confirmed that Articles 16 and 17 operate differently. Both remove jurisdiction from any other court. But, unlike Article 16, Article 17 does not trump Article 21 if another court has accepted jurisdiction. This was supported by the scheme of the Convention. Under Article 28 (Article 35 of the Regulation), judgments obtained in breach of Article 16 (now Article 22) are unenforceable,

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suggesting that the jurisdiction of the court first seised is vitiated. But judgments contrary to Article 17 remain enforceable, implying that the first court is entitled to proceed to judgment regardless. If the first court's jurisdiction is thus unimpeachable, how can a second court be allowed to embark upon parallel proceedings?

This textual argument proved decisive in *Gasser*. But the outcome might have been different had the Court attended to the procedural rights of the defendant. Any jurisdictional regime should respect the rights of claimant and defendant alike. It should uphold a defendant's right to be sued in accordance with a previous agreement, and protect defendants from the unjust consequence of tactical litigation. This implements the right of access to justice, articulated in Article 6 of the European Convention on Human Rights, which the European jurisdiction regime is surely intended to defend.

Concern for procedural justice might have supported two more radical solutions to the problem in *Gasser*. Arguably, the second court should be entitled to disregard proceedings in the first court where they are tactical, and unjust to the defendant—subordinating Article 21 to higher considerations of justice. More persuasively, a party to a jurisdiction agreement might be seen as having a right to have the agreement's effect determined in the nominated court. The first court might thus be required to discontinue proceedings once the second, agreed court is seised, but permitted to resume should the second court decline jurisdiction. This differs from saying that a defendant has a right to have the agreement enforced, which begs the question which court should do so. Nor does it imply that the second court is best placed to enforce the jurisdiction agreement, on grounds of expertise or efficiency, which controversially undermines the assumption that all national courts are equally proficient. It merely enforces the defendant's right to have the issue determined in the agreed court.

Such an argument is sustainable if the value of access to justice is regarded as superior to the goal of avoiding parallel proceedings in the scheme of the European regime. But, as *Gasser* confirms, the Court of Justice has a narrower vision. Promoting predictability, efficiency, and simplicity in adjudication are its overriding goals. But these are the values of process, not outcome; to prize them subordinates ends to means. Certainly it is striking that a regime of jurisdictional rights should be read as expressing such a narrow, inflexible and formulaic theory of procedural justice—one in which the European regime becomes a self-sufficient measure of justice; one which denies equal access to justice by favouring claimants at the expense of defendants.

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But *Gasser* also implies an answer to a different question: may a court restrain by injunction proceedings in another Member State which infringe a jurisdiction agreement? The Court of Justice recently held that proceedings in other Member States can never be restrained, in Case C-159/02 *Turner* v. *Grovit*. But *Gasser* foreshadows that decision. Superficially the issue in *Gasser* looks distinct. Where antisuit relief is sought to enforce a jurisdiction agreement, Article 27 is irrelevant. Substantive proceedings elsewhere do not involve the same "cause of action", as Article 27 requires. But, even if an injunction remains available, *Gasser* now prevents the second court from entertaining substantive proceedings. So in a practical sense *Gasser* makes such relief pointless. Again, the restraint of foreign proceedings is designed to prevent injustice to the defendant in foreign proceedings, even if access to jurisdiction asserted by the foreign court is thereby prevented. But, if such jurisdiction derives from the European jurisdiction regime, *Gasser* implies that it must be respected whatever the prejudice to a defendant. Certainly (like *Turner*), it suggests that strict adherence to the European regime must be prized above broader considerations of procedural justice.

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JURIES: THE FREEDOM TO ACT IRRESPONSIBLY

IF the jury that convicted you behaved improperly—reaching its verdict by spinning a coin, for example, or basing it not on the evidence but on the colour of your face—can you appeal? The answer, you might think, is "Yes, of course!" (see this commentator's notes on *Young* [1995] C.L.J. 519 and on *Quereshi* [2002] C.L.J. 291). In *R.* v. *Mirza* [2004] 2 W.L.R. 201, however, a majority of the House of Lords has ruled that investigating alleged misbehaviour of this sort would break the secrecy of the jury-room, a value it is essential to maintain: so the defendant, if convicted wrongly in these circumstances, must put up with it.

The most convincing argument in favour of this position is that, if the jury are to do their job properly, they must know that they are completely free to speak their minds, which they would not be if their remarks could be the subject of public scrutiny by the legal system afterwards (or harassing enquiries by defendants or the lawyers as a preliminary step). It seems to have been this that convinced the majority; but in course of being convinced by it, they threw in some unconvincing arguments for good measure.

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