Brussels regime: Case C-365/88 *Kongress Agentur Hagen GmbH* v. *Zeehaghe BV* [1990] E.C.R. I-1845. To restrain proceedings in another Member State has this effect, as *Turner* confirms. So an English court could doubtless compel a recalcitrant party to appoint an arbitrator in an English arbitration. But it could not restrain civil proceedings elsewhere in the Community.

Such doctrinal arguments may be less impressive, however, than two arguments of principle, which buttress the position of the House of Lords. First, the injunction in *Turner* conflicted with the Brussels regime because (so the ECJ apparently thought) it purported to determine which of two national courts should exercise jurisdiction in judicial proceedings, a matter governed by the regime. By contrast, *West Tankers* involves arbitration in England, and judicial proceedings in Italy, a case of competing proceedings unregulated by the Regulation, jurisdiction in arbitral proceedings clearly being an excluded matter. To restrain foreign proceedings is no challenge to the Regulation's machinery for allocating jurisdiction in such cases, because there is none.

Secondly, what remedies national courts deploy ancillary to arbitration is a matter concerning, not merely the scope of the Regulation, but the conduct of arbitration in the Community. To restrict those remedies is to control the arbitral practice of Member States. It also cabins the parties' choice of arbitral regime, by controlling a decisive element in their choice of venue. It is not, however, the Regulation's purpose to regulate arbitration in Europe, and the Community market for arbitral services. Nor would this be coherent. Article 1(2)(d), by privileging arbitration, implies a commitment to the principles of choice, privacy and deregulation which animate the arbitral process. Restricting the range of ancillary remedies available in national law subverts those principles. To ask if the European arbitration market needs regulating is a legitimate (if surprising) question. But this is neither the Regulation's role, nor consistent with Article 1's objective of exempting arbitration.

RICHARD FENTIMAN

WORLDWIDE FREEZING ORDERS IN EUROPE

THE worldwide freezing order has been described as one of the two "nuclear weapons" in the commercial court's armoury. In conjunction with a worldwide disclosure order it can provide a claimant with essential protection and reassurance that he will not obtain a judgment which will turn out to be worthless. Whether this weapon is still

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available against European defendants is a matter of some doubt. Put simply, the issue is as to the implications of the well-known European Court of Justice decision in *Van Uden Maritime BV* v. *Firma Deco-Line* Case C-391/95 [1998] E.C.R. I-7091. But the question raises important and fundamental issues about the nature of such relief. Some of these issues were considered by the Court of Appeal in *Banco Nacional de Comercio Exterior SNC* v. *Empresa de Telecomunicationes de Cuba SA* [2007] EWCA Civ 622. Whilst this decision clarifies some points, and hints at the answer to others, it leaves what many see as the crucial question unanswered.

The applicant, a state owned Mexican bank, had obtained an Italian judgment against the defendant, a state controlled Cuban telecommunications company. The bank wished to enforce the judgment in England. It obtained an order registering the judgment pursuant to the Brussels Regulation ('BR'), and it also obtained a domestic freezing and disclosure order. Following disclosure and fearing that the defendant would attempt to dissipate its worldwide assets, the bank applied for a worldwide freezing order. Mr Justice David Steel made the order pursuant to Article 47 BR which specifically provides for the granting of provisional, including protective, measures after judgment. He held that Article 47 provides an unrestricted and discrete code post-judgment and that there was no reason to restrict the order to domestic assets.

The Court of Appeal disagreed. It was common ground that Articles 47(2) and (3) gave the applicant the right to take protective measures only against property in England. The Court of Appeal held that as Article 47(1) also concerned enforcement (Article 47(1) dealing with the position before a declaration of enforceability/registration has taken place) the position was the same. As the only purpose of registration was to enforce the judgment against assets in England, it followed that there was no basis for granting worldwide relief as this would extend to assets which would not be the subject of enforcement within the jurisdiction.

The argument at first instance was limited to Article 47. But before the Court of Appeal the applicant was allowed to raise a new, wider argument, namely that jurisdiction could be founded on section 25 (1) Civil Jurisdiction and Judgments Act 1982. Section 25(1) gives the English court jurisdiction to grant interim relief where proceedings have been started abroad unless, under section 25(2), the fact that the court has no jurisdiction in relation to the subject matter of the proceedings "makes it inexpedient" to grant relief. Article 31 BR enables an applicant to avail himself of this provision in a case to which the Regulation applies where substantive proceedings have been commenced in another Member State. But in *Van Uden* the ECJ

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imposed an important restriction, namely that "the granting of provisional or protective measures on the basis of Article 24 [now Article 31 BR] is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought."

The question which has been much debated since *Van Uden* is whether the real connecting link test limits the granting of freezing orders under section 25 to assets within the jurisdiction. English lawyers argue that as a freezing order is an equitable interim injunction which operates *in personam,* there is in principle no difference between domestic and worldwide relief, both are inter-territorial since they operate against the defendant not against the assets themselves. Provided the order can be enforced, usually because the defendant is in the jurisdiction, it will not be inexpedient to grant relief (*Crédit Suisse Fides Trust SA* v. *Cuoghi* [1998] Q.B. 818 (CA) and *Motorola Credit Corporation* v. *Uzan* [2004] 1 W.L.R. 113 (CA)). It follows that, applying the European test in such cases, there will also be a real connecting link justifying the granting of relief. The question is whether this arguably peculiarly English approach will persuade the Court of Justice.

The interrelationship between the inexpediency test under section 25, as interpreted in the English case law, and the real connecting link test in *Van Uden*, is raised directly by the facts of *Banco Nacional* v. *Empresa*. The Court of Appeal held (at [29]):

> There can be no doubt that it would be inexpedient to grant [the applicant] a worldwide freezing order. [The defendant] is not resident here. Any assets here are protected by the domestic order. The worldwide order is only directed at assets outside the jurisdiction. There is therefore no connecting link at all…

Crucially the defendant was not resident in England. Therefore, the most important question of whether residence in the jurisdiction is a real connecting link justifying worldwide relief in the case of *in personam* freezing orders remains unanswered. But there are hints that *Van Uden* may require a stricter view. In particular, the defendant had assets within the jurisdiction but this was not enough. Previously, the Court of Appeal in *Motorola*, which was not a BR case, had indicated that provided a defendant had assets in the jurisdiction it was not inexpedient to grant relief even if he was not resident here since the order could be enforced by contempt proceedings made effective against those assets. In this respect, at least, it appears that the real connecting link test is stricter than the test of expediency developed by the English courts under section 25. Furthermore, the strict view taken

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on Article 47 may also be instructive. An argument can be made more generally that, as the BR is intended to facilitate the enforcement of judgments, all provisional and protective measures made under the regime should be limited to assets in the state which might be the subject of enforcement proceedings. Accordingly, whilst some rather discouraging hints might be taken from the general approach of the Court of Appeal, we still have no answer to the fundamental question and in principle we will not have until a further reference is made to the ECJ.

LOUISE MERRETT

REPAIRS, REFUSALS AND REJECTIONS

IN *J & H Ritchie Ltd.* v. *Lloyd Ltd.* [2007] UKHL 9, [2007] 1 W. L. R. 670, the House of Lords was required to solve a problem stemming from section 35 (6) (a) of the Sale of Goods Act 1979, by providing limited guidance on the question whether a buyer is bound to accept goods alleged to have been repaired. The subsection provides that the buyer of goods is not deemed to have accepted goods merely because he asks for, or agrees to, their repair by or under an agreement with the seller. However, the statutory provisions provide no guidance with respect to the continued availability of a right to reject if the buyer agrees to repairs; nor do they provide when, in relation to the stage of repair, the right to reject will be available.

In *J & H Ritchie*, the appellants purchased agricultural equipment from the respondents. On the first day of its use the machine emitted a noticeable vibration; however, the absence of a defect on visual inspection meant the machine was used in this condition for a further two days. The defective harrow was identified and removed to the respondents' premises for an inspection, which revealed missing bearings, the absence of which amounted to a major defect. The respondents fitted the missing bearings, and informed the appellants that the harrow was repaired and ready for collection. Mr Ritchie, one of the appellants' directors, attempted, not unreasonably, to ascertain what had been wrong with the harrow initially. The respondents' employees refused to say, merely saying that the harrow was now of "factory gate specification". However, Mr Ritchie learned informally that the cause of the fault was the missing bearings, which were omitted on manufacture. Therefore, concerned about the potential wider damage to the machine, Mr Ritchie intimated to the respondents that he was rejecting the equipment as a result of their refusal to explain the fault.

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