THE EUROPEAN UNION AND THE SYSTEMATIC DISMANTLING OF THE COMMON LAW OF CONFLICT OF LAWS

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English conflict of laws is the creation of the common law. Prior to Britain's entry into the European Union, legislation played only a limited role. The few legislative measures concerning choice of law were narrowly targeted to remedy specific problems—for example the formal validity of wills,[1] or torts.[2] The rules for service outside the jurisdiction[3] were a more important exception, but their practical operation largely depended on judge-made concepts and remedies, such as *forum non conveniens* and antisuit injunctions. The common law also provided a complete system for the recognition of foreign judgments that operated untrammelled with regard to judgments from many countries, including some of the most important,[4] while the relevant legislation, where applicable, did little more than provide a simpler procedure.[5]

It is not the purpose of this article to decry legislative intervention in conflict of laws; where the law has taken a wrong turn, legislation is both necessary and desirable. However, its purpose and function have traditionally been remedial: the legislature provides a statute in the same way that a doctor provides a brace or other surgical appliance to correct some defect in the body. In time, the common law grows round the legislation and absorbs it, so that judge-made law and legislation eventually become a homogeneous blend.

On the Continent, they do things differently.[6] They regard a legislative code as inherently superior to, and more desirable than, judge-made law. Codes of law are thought to represent a higher stage of civilization—a better way of doing things—than the systems that were in force in those countries

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[1] The Wills Act 1963, replacing the Wills Act 1861.

[2] The Private International Law (Miscellaneous Provisions) Act 1995.

[3] This is now governed by Rules 6.17 et seq of the Civil Procedure Rules. For the original provisions, see the Common Law Procedure Act 1852, ss 18 and 19, subsequently replaced by Order 11 of the Rules of the Supreme Court.

[4] eg the United States and Japan.

[5] See the Administration of Justice Act 1920, Part II, and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

[6] The next six paragraphs highlight differences between the common law and the civil law. They are necessarily expressed at a high level of generalization. Some comparative lawyers might object to this and point to contrary examples. However, if one avoids generalizations, one can miss important truths. It is also possible that the decisions of the European Court discussed below owe as much to the make-up of the ECJ and the attitudes of its members as to any general civil-law mind-set.

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before the codes. Continentals regard a code of civil law as a necessary badge of statehood that any self-respecting country should want.

It is important to realize that a code is not simply a wide-ranging piece of legislation. A true code, as understood by continental lawyers, is much more than that: it embodies a different *attitude* towards the law, an attitude that tries to systematize the law through a hierarchy of principles that fit together to form a coherent whole. A limited number of generalized and abstract principles provide the foundation for a second level of more concrete principles. These in turn give rise to the legal rules applicable to individual cases. This system is aesthetically pleasing; it is also easier to understand and explain. Moreover, gaps in the law can be filled by deriving new rules from existing principles, thus making the law more predictable.

The concept of a code provides a clue to the fundamental difference of attitude between common lawyers and civil lawyers, a difference that becomes apparent to anyone who takes part in international negotiations where lawyers from different parts of the world come together to hammer out international conventions on matters of private law, including private international law (conflict of laws). This difference is not simply a matter of wanting a rational, systematic structure to legislative instruments. It is one in which this element is regarded as more important than practicality and policy. Of course, civil lawyers are concerned with practicality and policy, just as common lawyers appreciate a systematic structure to legislation. The difference is one of priorities: civil lawyers are more concerned with the *structure* of the law, common lawyers with its *operation*.

This difference of attitude feeds into the approach taken by civilian courts in the interpretation and application of private law. They often seem to regard fidelity to principle as more important than a just and satisfactory result in the case at hand. One could say that the civilian approach is theory-driven, while the common-law approach is practice-driven. This attitude is apparent in the judgments of the European Court of Justice (ECJ), a predominantly civilian court, in the field of conflict of laws (though not in those areas of public law, such as free movement of goods and services, that directly concern the goals and interests of the EU). In the long run, the theory-driven approach of the European Court will have much more impact on private law in England, as we become further integrated into the European Union, than differences stemming from the origins of our respective systems.

Another difference of attitude, which is specific to conflict of laws, is the relative weight given to the interests of the parties (who will invariably be private persons) and the interests of States. By its very nature, conflict of laws involves foreign States: the question before the court is whether it has jurisdiction to hear a case involving foreign persons or foreign facts; whether foreign law or local law should govern; or whether a foreign judgment should be recognized and enforced. The foreign State could be regarded as having an interest in the outcome of the proceedings, though in most cases this interest

will be more theoretical than real. There is therefore a possible conflict between the interests of the parties and the interests of the States involved. English courts tend to give priority to doing justice to the parties, unless State interests (whether those of a foreign State or of the United Kingdom) are extremely pressing. The European Court, being more oriented towards public law, often gives more weight to State interests.

The purpose of this article is to illustrate these ideas and to give an indication of what is to come. Examples will be taken from judgments of the European Court under the Brussels Convention, since this was the first area of conflict of laws to be Europeanized. The Convention was originally signed in1968.[7] It was part of the Community system, being adopted under Article 293 EC (previously Article 220), and all EU Member States had to sign up to it. A Protocol[8] gave the European Court jurisdiction to interpret its provisions when a reference was made to it from a court of a Member State. The Convention and Protocol became applicable in the United Kingdom when the Civil Jurisdiction and Judgments Act 1982 came into force.[9] Today, the Convention applies only with regard to Denmark. In the other Member States, it has been replaced by a Community measure, Regulation 44/2001[10] (the 'Brussels Regulation'), which applies a similar system.[11] The cases we are going to discuss, however, were all decided under the Convention.

I. THE 'ITALIAN TORPEDO'

The first problem to consider is what happens when the same case is brought before the courts of two different countries. The traditional common-law view is that a court is not automatically barred from hearing a case just because it is already pending before a court in a foreign country. It is of course unsatisfactory that a case should be decided twice over, possibly with different results.[12] For this reason a common-law court will consider whether it, or the other court, is the more appropriate forum. If it considers that the other court is more appropriate, it will stay the proceedings before it.[13] If it considers that it is the

[7] Convention of 27 Sept 1968 on jurisdiction and enforcement of judgments in civil and commercial matters, OJ 1978, L 304/77. It came into force among the original six Contracting States on 1 Feb 1973.

[8] Protocol of 3 June 1975, OJ 1978, L 304/97. It came into force among the original six Contracting States on 1 Sept 1975.

[9] This was on 1 Jan 1987.

[10] OJ 2001, L 12/1. It came into force on 1 Mar 2002.

[11] A few small amendments have been made. Previously, small amendments were made by the various accession conventions, under which new Member States (including the United Kingdom) acceded to the Convention.

[12] In some cases, a judgment given by one court (the one that gives judgment first) will constitute *res judicata* in the other, thus ensuring that the outcomes are the same.

[13] The leading English case is *Spiliada Maritime Corporation v Cansulex* [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843.

more appropriate forum, it may consider granting an antisuit injunction (an injunction ordering the party who is claimant before the foreign court to discontinue the proceedings there), but it will not do so just because it has decided not to stay the proceedings before it.[14]

The approach adopted by the Brussels Convention is different. It applies the continental doctrine of *lis pendens* (or *lis alibi pendens*), under which the court first seised hears the case, and the other court gives it up; Article 21 of the Convention[15] provides that where proceedings involving the same cause of action are pending between the same parties in two different Contracting States, the court seised second must of its own motion stay the proceedings before it, until the jurisdiction of the other court is established. Once this happens, it must decline jurisdiction.

The Convention system has the advantage of simplicity. Subject to possible problems as to exactly when a court is 'seised',[16] it eliminates the possibility of the two courts reaching different conclusions as to which of them ought to hear the case, a possibility that is an inherent drawback of the common-law system. However, the Convention system makes no attempt to decide which of the two courts is the more appropriate. The arbitrary criterion of being first seised decides the whole issue. The Convention system therefore encourages well-advised, but unscrupulous, parties to win the race to the court house by commencing proceedings at the first hint of a dispute, often choosing a court precisely because it is *inappropriate*, though inappropriate in a way that advantages them. For example, if a party fears that it will lose in the end but wants to put the evil day off as long as possible, it might bring proceedings (perhaps for a declaration of non-liability) in a country where the courts are slow-moving. It could then invoke the *lis pendens* rule to block proceedings in any other Contracting State.

There are a number of countries, both in Europe and the world, in which legal proceedings move extremely slowly. In the European Union, the most notorious example is Italy. The case of *Trasporti Castelletti v Hugo Trumpy*[17] provides an example. In this case, a Danish shipping company delivered bills of lading to an Argentinian shipper for a voyage from Argentina to Italy. The bills of lading contained a choice-of-court clause in favour of England. There was nothing at all unusual about the terms of this clause, it was exactly the same as similar clauses contained in hundreds of other bills of lading issued every day in different countries around the world. Nevertheless, when the

[14] The leading case on antisuit injunctions is *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871; [1987] 3 WLR.59; [1987] 3 All ER 510 (PC).

[15] Art 27 of the Brussels Regulation.

[16] The original rule was that the law of the country in which proceedings were pending decided when that court was seised: *Zelger v Salinitri (No 2)*, Case 129/83, [1984] ECR 2397; for the position in England, see *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502 (CA). The Brussels Regulation now provides a uniform rule: see Art 30.

[17] Case C-159/97, [1999] ECR I-1597 (ECJ).

receiver of the cargo brought proceedings in Italy, it took ten years for it to be decided that the Italian courts had no jurisdiction. Admittedly, two years of this were taken up by a reference to the European Court, a court itself not renowned for speediness; nevertheless, for the Italian courts to take eight years to decide such a simple issue was grossly excessive.

This raises the question of human rights. Article 6(1) of the European Convention on Human Rights ('ECHR') grants everyone the right to a fair hearing within a reasonable period of time to determine his civil rights and obligations. The Italian court system has been held in massive breach of this requirement. The (old) European Commission of Human Rights condemned Italy in over 1,400 reports on this count, and by 1999 the European Court of Human Rights had given more than 65 judgments against it.[18] Since then proceedings against Italy have continued apace: in the year 2000, more judgments were given against Italy on this one question than the combined total of all other judgments against all other Contracting States on all questions. It is indisputable, therefore, that the Italian court system is woefully slow-moving.

In 1997 an Italian *avvocato*, Mario Franzosi, indicated how litigants could turn this to their advantage: persons facing possible patent-infringement actions in other EU States could protect themselves by bringing proceedings in Italy for a declaration of non-liability.[19] Even if they lost in the end, they could keep the proceedings going for many years, thus blocking infringement actions in other Member States.[20] Franzosi called this device the 'Italian torpedo'.[21] The *Trasporti Castelletti* case shows that it would work even if the Italian courts lacked jurisdiction, since it would take many years to obtain a definitive ruling to this effect.[22] Franzosi's advice to patent-holders was to sue first and write letters afterwards.

The effectiveness of the Italian 'torpedo' came before the European Court of Justice in *Gasser v MISRAT*,[23] decided in 2003. This was not an intellectual property case, but a case involving a choice-of-court agreement. Choice-of-court agreements (agreements by which the parties to a contract agree that specified disputes will be subject to the jurisdiction (usually exclusive) of the courts of a specified country) constitute one of the most important jurisdictional advances of recent times, since they provide a way of obtaining a significant measure of

[18] See the judgment of the European Court of Human Rights in *Ferrari v Italy*, 28 July 1999, available at <www.echr.coe.int/hudoc>. According to the Human Rights Court, such breaches 'reflect a continuing situation that has not yet been remedied': ibid at 5 (para 21).

[19] M Franzosi 'Worldwide Patent Litigation and the Italian Torpedo' [1997] 7 EIPRev 382.

[20] He said the Italian proceedings would take an 'outrageous' period of time.

[21] Franzosi stressed that he was not inviting litigants to launch 'torpedoes' to block justified infringement actions, only *unjustified* ones. No doubt his law firm would not want to help unscrupulous litigants, though they might obtain the services of other firms.

[22] The grounds on which the Italian courts might assume jurisdiction are discussed by Franzosi (n 19) pp 383–4.

[23] Case C-116/02, 9 Dec 2003 (all recent decisions of the European Court of Justice are available on <http://www.curia.eu.int/en>). For a comment, see J Mance (2004) 120 LQR 357.

jurisdictional predictability in international commercial transactions. Their main defect is that economically stronger parties may impose unfair choices on economically weaker parties, sometimes in ways in which it is not immediately apparent what is happening.

The approach of the Brussels Convention to this matter is, at first sight, admirable.[24] It carves out the main instances in which there is likely to be unequal bargaining power—such as consumer contracts[25]—for separate treatment; otherwise it makes choice-of-court agreements absolutely binding, provided certain formal requirements (designed to ensure that the parties know what they are agreeing to) are met.[26] It also provides that choice-of-court agreements are deemed to be exclusive, unless the parties agree otherwise.[27] At least until the chosen court has decided not to hear the case, all other courts are precluded from taking jurisdiction.[28]

This seems an excellent arrangement, but what happens if the agreement is the target of a 'torpedo'? This occurred in the *Gasser* case. Gasser was an Austrian firm that entered into a contract with MISRAT, an Italian company, under which Gasser sold children's clothing to MISRAT. The original contract contained no choice-of-court agreement, but a statement granting jurisdiction to an Austrian court appeared in all the invoices sent by Gasser to MISRAT. The latter paid the invoices without protest. This probably constituted a valid and exclusive choice-of-court agreement under Article 17 of the Brussels Convention, as it stood at the relevant time.[29] When a dispute arose, however, MISRAT brought proceedings before a court in Italy, claiming that the

[24] The relevant provision in the Brussels Convention is Art 17; in the Brussels Regulation it is Art 23.

[25] Originally, under the Convention, these were insurance (Art 12) and consumer contracts (Art 15); but an amendment (Spanish and Portuguese Accession Convention of 1989 (Convention of San Sebastian) OJ 1989, L 285/1) added employment contracts: see what is now the last paragraph of Art 17. The rules on exclusive jurisdiction (rights *in rem* in land, for example) are also an exception.

[26] The precise nature of these requirements has been changed several times by successive amendments. At the time of the *Gasser* case, the agreement had to be either (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

[27] This is clearly stated in the Regulation. In the Convention, it is simply said that the chosen court has exclusive jurisdiction, without specifying what happens if the agreement expressly says that the jurisdiction conferred on it is not exclusive. On the position taken on this by the English courts, see *Kurz v Stella Musical* [1992] Ch. 196; [1991] 3 WLR 1046; [1992] 1 All ER 630; *Gamelstaden v Casa de Suecia SA* [1994] 1 Lloyd's Rep 433.

[28] If at least one of the parties is domiciled in a Contracting State, the court chosen *must* hear the case and all other courts are prohibited from doing so; if none of the parties is so domiciled, the chosen court is not obliged to hear the case: other courts are precluded from hearing it unless and until the chosen court has declined jurisdiction.

[29] The Austrian appeal court, the *Oberlandesgericht* Innsbruck, took the view that it was valid under sub-paragraph (c) of Art 17, set out in n 26 above.

contract had been terminated and that it was not guilty of breaching it.[30] After the Italian court was seised, Gasser brought proceedings before the Austrian court specified in the choice-of-court agreement. MISRAT claimed that these proceedings were barred by its prior action in Italy: the 'torpedo' had been launched.

The case eventually found its way to the European Court on a reference from an appeal court in Austria, the *Oberlandesgericht* Innsbruck. One of the questions asked by the latter was whether the *lis pendens* rule applies even when proceedings in the court first seised take an unreasonably long period of time. It also asked whether the court seised second is entitled to consider whether the court seised first actually had jurisdiction under the Convention. In the case, if the choice-of-court agreement was valid, the Italian court clearly did not have jurisdiction.

The United Kingdom intervened in these proceedings (as it was entitled to do) to put submissions before the European Court. It argued that where there is a choice-of-court agreement giving exclusive jurisdiction to the court seised second, that court should be entitled to determine the validity of the agreement, and, if it holds it valid and applicable to the case, it should be allowed to continue with the proceedings. It argued that otherwise dishonest parties would be encouraged to start proceedings before courts other than that chosen, simply as a delaying tactic. This argument was curtly rejected by the European Court: it held that this consideration is 'not such as to call into question the interpretation of any provision of the Brussels Convention, as deduced from its wording and purpose'.[31] In other words, practical considerations cannot affect an interpretation based on system and theory.

The United Kingdom also argued that, even if in general the chosen court must stay the proceedings before it, there should be an exception in the case of a 'torpedo'. It invoked the European Convention on Human Rights. As summarized by the European Court, the United Kingdom's proposal was as follows:[32]

> 61. The United Kingdom Government also considers that Article 21 of the Brussels Convention must be interpreted in conformity with Article 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years.
> 62. The automatic application of Article 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable

[30] For good measure, it also asked for damages against Gasser for failure to fulfil the obligations of fairness, diligence, and good faith.

[31] Para 53 of the judgment.

[32] The paragraph numbers in the quotations are those of the original judgment.

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him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings.

63. In those circumstances, the United Kingdom Government suggests that the Court should recognize an exception to Article 21 whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where
    (1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and
    (2) the court first seised has not decided the question of its jurisdiction within a reasonable time.
64. The United Kingdom Government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances.

The European Court rejected these arguments. It ruled:

71. First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.
72. Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

This judgment constitutes a blank refusal, despite the abundant evidence to the contrary, to contemplate that the Italian legal system might be anything other than perfect. Contracting States must trust one another.

The judgment illustrates two of the contentions outlined above. First, it shows that the European Court puts the desirability of maintaining good relations among the Contracting States—not offending the Italians—above that of doing justice to the parties. Secondly, it shows that it considers that the systematic method of interpretation should prevail over practical considerations.

This case gives the green light to Italian 'torpedoes'.[33] Franzosi's ideas have been vindicated. While Italian lawyers (and litigants) will be jubilant,

[33] See, eg, the article by Pierre Véron entitled 'ECJ Restores Torpedo Power' in the *International Review of Industrial Property and Copyright Law* (2004).

honest businessmen in other countries will be dismayed.[34] Thanks to the European Court, a litigant can now bring proceedings in bad faith in Italy simply to prevent himself from being sued elsewhere. *Pacta servanda sunt* no longer appears to apply to choice-of-court agreements. A party can violate his agreement and then block proceedings against him by launching a 'torpedo'.[35]

II. PAUL TURNER'S CASE

Paul Turner was a young solicitor who worked for a company, Harada Ltd, that came under the control of a certain Mr Grovit. Turner's contract of employment as group solicitor stated that he would be based in London or 'as you may be directed'. In 1997, he was moved to Madrid, where he worked at the office of a Spanish company called Changepoint SA. It was the Spanish member of the same group of companies as Harada Ltd. The move was intended to be merely temporary: he was still employed by Harada Ltd, which continued to pay his salary. The Spanish company paid Harada Ltd for his services.

A few months after arriving in Madrid, Turner found that the whole group of companies was involved in a tax fraud. Money deducted for tax from the salaries of employees was being used to pay creditors. Turner was expected to justify and defend this. Since he could not do so, he resigned and returned home. He brought proceedings against Harada Ltd before an English employment tribunal. The tribunal held that it had jurisdiction under the Convention,[36] and found for Turner on the merits: it ruled that he had been unfairly and wrongfully dismissed.

[34] Efforts will now have to be made to find ways of destroying 'torpedoes', or at least countering their effects. Provisional measures are the most fruitful avenue to explore, since they are not subject to the *lis pendens* rule: see Art 24 of the Convention (Art 31 of the Regulation). See also the decision of the European Court in *Van Uden Maritime v Deco-Line*, Case C-391/95, [1998] ECR I-7091; [1999] 2 WLR 1181.

[35] The European Court's judgment could give rise to a clash between the Brussels Convention and the European Convention on Human Rights. If the Italian proceedings were to drag on so long that Art 6 ECHR was infringed, Gasser could arguably bring proceedings against Austria (as well as Italy) before the European Court of Human Rights. It could be argued, therefore, that, by staying the proceedings out of deference to Art 21 of the Brussels Convention, the Austrian courts might be violating Art 6 ECHR. For a discussion of the legal issues involved in such a clash, see Hartley, 'International Law and the Law of the European Union—A Reassessment' (2001) 72 BYBIL 1 at 22–35.

[36] The employment tribunal found that no less than three provisions of the Convention gave it jurisdiction. The first was Art 2, which confers jurisdiction on the courts of the defendant's domicile: although Harada Ltd was incorporated in Ireland, its central management and control were in England and it was therefore domiciled there: Civil Jurisdiction and Judgments Act 1982, s 42(1) and (3)(b). The second was Art 5(1), which provides that, in employment cases, the courts of the State in which the employee habitually carries out his work have jurisdiction. Turner habitually worked in England; his employment in Spain was only temporary. The third provision was Art 5(5), which provides that a dispute arising out of the operations of a branch, agency or other establishment of the defendant is subject to the jurisdiction of the courts of the place in which the branch, agency or establishment is located.

Grovit responded to this by bringing proceedings against Turner in Spain in the name of the Spanish company where Turner had worked (Changepoint SA). Damages were claimed against Turner for his 'unjustified departure' from the company's Madrid office and for bringing a 'baseless' claim in England. This was an attempt to re-litigate the issues already decided by the employment tribunal in England. Moreover, the sum claimed, some 85 million pesetas (almost £500,000), was ridiculously large. Since Turner was a man of limited means, there was a real danger that he would run out of money and be unable to retain Spanish lawyers to defend the claim. He would then be forced to settle on Grovit's terms. This, no doubt, was what Grovit hoped.

Turner brought proceedings before the English courts for an antisuit injunction. The Court of Appeal found that the Spanish proceedings had been brought in bad faith. Their sole purpose was to vex and oppress Turner. It therefore granted the injunction.[37] Grovit appealed to the House of Lords.[38]At this point Turner ran out of funds, and was unable to defend the case, but the House of Lords appointed an *amicus curiae* to ensure that his case did not go by default. A reference was made to the European Court.

The case came before an eleven-judge court which was remarkable for not containing a single common lawyer or Scots lawyer.[39] The judgment was given in the European Court's usual formalistic style, which gives the impression that the interpretation of the law is a mechanical process that can admit of only one conclusion. The question asked by the House of Lords was whether the Convention precludes the grant of an antisuit injunction with regard to proceedings in another Contracting State where those proceedings are brought in bad faith in order to frustrate existing proceedings in the Contracting State in which the injunction has been requested.

The European Court held that, even in cases of bad faith, an antisuit injunction cannot be granted with regard to proceedings in another Contracting State. In such a case, an injunction constitutes an interference with the jurisdiction of the other court, which is incompatible with the system of the Convention.[40] Contracting States must trust one another.[41] Again 'system' prevails over practicality. Protecting the interests of States prevails over doing justice to individuals. Thanks to the European Court, bad-faith litigants can now go about their business without fear of antisuit injunctions, at least as long as they do not stray beyond the confines of the European Union.

As an example of the value of antisuit injunctions, it is worth considering

[37] *Turner v Grovit* [1999] 3 WLR 794 (CA). The defendants were Grovit, Harada Ltd, and Changepoint SA.

[38] Leave to appeal was granted on special terms: if the appeal was successful, Turner would not be liable for his opponents' costs; if the appeal failed, Turner could recover his costs.

[39] *Turner v Grovit*, Case C-159/02, 27 Apr 2004, available at <http://www.curia.eu.int/en>. For a comment, see A Briggs (2004) 120 LQR 529.

[40] Para 27 of the judgment.

[41] Paras 24–6 and 28 of the judgment.

an earlier case, *Continental Bank v Aeakos SA*.[42] In that case, the Athens branch of an American bank lent a large sum of money to a group of Greek-owned companies. The loan agreement, which was guaranteed by a number of Greek individuals, contained an English choice-of-law clause and an English choice-of-court clause. The borrowers defaulted and the bank accelerated the loan. The Greeks responded by bringing proceedings in a Greek court, claiming that the manner in which the bank had exercised its rights under the loan agreement was contrary to business morality, and therefore a tort under Greek law.[43] Damages were claimed in the sum of $63 million, approximately twice what was owed under the loan agreement. The action also had a contractual aspect, and the Greek court was asked to make a declaration that the guarantors had been released. It is not entirely clear what the bank was supposed to have done, but it seems that the essence of its wrongdoing was that it had demanded its money back according to the terms of the contract, even though it was inconvenient for the borrowers to repay it. The bank went to the Greek court and invoked the choice-of-court agreement. However, the court seemed disinclined to stay the proceedings.

The bank then brought proceedings in England for an antisuit injunction. The Court of Appeal held that the choice-of-court clause (which was governed by English law) was wide enough to cover proceedings in tort arising out of the loan. It also held that it was exclusive. Counsel for the Greeks asked the Court to trust the Greek court. It pointedly refused to do so. An antisuit injunction was granted. We now know that this was wrong: the Greeks should have been allowed to continue their proceedings in Greece for as long as the Greek courts were willing to entertain them. If damages had eventually been awarded against the bank, English courts would have been required to enforce them. Under the Convention, the fact that a judgment was given in breach of a choice-of-court agreement is not a reason for refusing to enforce it.[44] We must trust other courts.

In view of these cases, businessmen may no longer want to choose the courts of England as the forum for litigation under international contracts. The European Court has succeeded in making them unattractive. New York might now appear a better alternative, since it is outside the reach of the ECJ.[45]

[42] [1994] 1 WLR 588 (CA).

[43] Art 919 of the Greek Civil Code states: 'Whoever intentionally, in a manner which violates the commands of morality, causes damages to another is bound to make reparation to the other for any damage thus caused.'

[44] There are only a limited number of grounds for non-recognition and this is not one of them: see Arts 27 and 28 of the Convention (Arts 34 and 35 of the Regulation).

[45] If the Convention on Choice of Court Agreements opened for signature in The Hague on 30 June 2005 is ratified by the United States and the European Union, New York judgments given in proceedings brought under choice-of-court agreements will benefit from all the advantages given by the Brussels Convention (and Brussels Regulation), without suffering any of the drawbacks. The Hague Convention does not apply the doctrine of *lis pendens* and there is no provision prohibiting antisuit injunctions. Most important of all, in so far as it applies in New York, it will not be subject to the jurisdiction of the European Court. For details of the Hague Convention, see the website of the Hague Conference on Private International Law, <http://www.hcch.net>.

III. *FORUM NON CONVENIENS*

As was said above, English courts will stay the proceedings before them if they consider that the courts of another country are clearly more appropriate to hear the case. Continental lawyers disapprove of this. They think that a judge has a duty to do justice to the parties whenever he has jurisdiction to do so: whatever is not prohibited is compulsory. The Brussels Convention has nothing in it that expressly deals with *forum non conveniens*; nevertheless, it is accepted by English lawyers that, where the Convention applies, *forum non conveniens* is barred. The question is: when is a case covered by the Convention so that the ban on *forum non conveniens* applies?

In this connection it should be said that most of the jurisdictional provisions of the Convention depend on the domicile of the defendant.[46] In general,[47] a court has jurisdiction over a defendant if he is domiciled in the Contracting State in which it sits. If he is not domiciled in that Contracting State but is domiciled in another Contracting State,[48] the court cannot take jurisdiction over him, unless this is specifically authorized by the Convention.[49] If, on the other hand, he is not domiciled in any Contracting State, Member State law determines whether the court has jurisdiction;[50] the Convention is not concerned with protecting such a defendant.[51]

It seems fairly clear (though one never knows with the ECJ) that *forum non conveniens* can always operate in this last case. If the jurisdiction of the English court is based on English law, it should be subject to the rules of English law. Where the defendant is domiciled in a Contracting State (whether the United Kingdom or another EC State) the position is more complicated. Here the court has jurisdiction under Convention rules. Does this mean that *forum non conveniens* can never apply? In *Re Harrods (Buenos Aires) Ltd*;[52] the Court of Appeal held that it all depends on the location of the court in whose favour the proceedings are stayed. If it is in a Contracting State, *forum non conveniens* cannot apply: the *lis pendens* principle applies instead. If, on the other hand, it is in a non-contracting State, *forum non conveniens* can apply. The Court of Appeal considered that such a case would (for this purpose) be outside the scope of the Convention. Thus, if an English-domiciled

[46] For this purpose 'domicile' has a special meaning: see ss 41 et seq of the Civil Jurisdiction and Judgments Act 1982 and Arts 52 and 53 of the Convention. See now Arts 59 and 60 of the Regulation.

[47] The main exceptions are exclusive jurisdiction under Art 16 of the Convention (Art 22 of the Regulation), choice-of-court agreements and the *lis pendens* rule (both discussed above).

[48] The rule is formulated in this way because it is possible for a person to be domiciled in more than one State for the purposes of the Convention.

[49] Art 3 of the Convention and Regulation.

[50] Art 4 of the Convention and Regulation.

[51] Convention (and Regulation) provisions concerning exclusive jurisdiction, *lis pendens* and choice-of-court agreements can still apply to such a defendant, but they serve purposes other than that of protecting the defendant.

[52] [1992] Ch 72; [1991] 3 WLR 397; [1991] 4 All ER 334.

company is sued in England, the proceedings can be stayed in favour of the courts of Argentina.[53]

The foundation of the Court of Appeal's judgment in *Re Harrods* was the contention that the Convention should apply only if there is some Community interest in the case. If there is none, why should the rules of English law not operate in the normal way? One could regard this as a sort of rule of reason, under which Community law would not want to interfere with the law of a Member State, unless some Community interest was at stake. The purpose of the *lis pendens* rule is to regulate relations between the courts of the different Contracting States.[54] Where these are not involved, English courts should be allowed to apply *forum non conveniens*.

The position is actually a little more complicated than this, since regulating the relations between courts of the different Contracting States might not be the only purpose of the ban on *forum non conveniens*. Another purpose might be to protect the claimant by ensuring that he can always find a forum in a Contracting State, where the Convention so provides.[55] However, this objective would be relevant only if the claimant was domiciled in a Contracting State other than that of the forum. It is only to such persons that the Convention extends its concern. If the claimant is domiciled in a non-contracting State (as was the case in *Re Harrods*) [56] or in the State of the forum, the Community has no interest in his protection.

In *Owusu v Jackson*[57] the correctness of this analysis arose for decision before the European Court. Mr Owusu was domiciled in England. He made a contract with Mr Jackson, who was also domiciled in England, under which the latter rented him a holiday villa in Jamaica. The contract contained a provision that Owusu would have access to a private beach nearby. He maintained that this included an implied term that the beach would be safe for bathing. He went on the holiday and swam from the beach. Unfortunately he struck a hidden obstacle and seriously injured himself.

In addition to suing Jackson, he also brought proceedings against a number of Jamaican companies, including the company that owned the beach and the

[53] This was the situation in *Re Harrods*.

[54] The *lis pendens* rule does not apply if the court seised first is in a non-contracting State: see Art 21 of the Convention (Art 27 of the Regulation).

[55] This argument is supported by the terms of Art 4 (second paragraph) of the Convention (and Regulation), which states that a person domiciled in a Contracting State must be given the same rights as nationals of that State to bring proceedings against persons not domiciled in any Contracting State. The main purpose of this is to extend to persons domiciled in France who are not French citizens the same rights as are given to French citizens by Art 14 of the French Civil Code. This notorious provision provides that anyone in the world can be sued in France for obligations contracted anywhere in the world, provided the claimant is a French citizen. This rule cannot be used against a defendant domiciled in another Contracting State, but the Convention (and Regulation) extend it to non-citizens domiciled in France.

[56] The claimant was domiciled in Switzerland. At the relevant time, the Lugano Convention (which applies similar provisions to persons domiciled in certain non-EC States, including Switzerland) was not in force.

[57] Case C-281/02, 1 Mar 2005, available at <http://www.curia.eu.int/en>.

company that was responsible for its management and upkeep. All the Jamaican defendants were sued in tort. The court had jurisdiction against Jackson under the Convention, since Jackson was domiciled in England. The other defendants were not domiciled in any Contracting State, so jurisdiction over them depended on English law. Owusu claimed that the court had jurisdiction over them as necessary or proper parties, under CPR 6.20(3).[58]

The defendants claimed that Jamaica was a more appropriate forum and asked the English court to stay the proceedings before it. The accident had occurred in Jamaica, and almost all the evidence was there.[59] It would certainly be easier for the defendants to defend the case in Jamaica, since the court would be able to view the beach and see whether a reasonable person would have known that he should take care. Moreover, a judgment by an English court against the Jamaican companies would probably not be enforced in Jamaica, unless they voluntarily submitted to the jurisdiction of the English court. One might say that this was Owusu's problem. However, if Jackson were held liable to Owusu but was entitled to an indemnity from the Jamaican defendants, he would have to bring new proceedings in Jamaica, with the possibility of a different outcome, in order to enforce the indemnity. If the proceedings were stayed in favour of Jamaica, on the other hand, all the claims could be disposed of in one set of proceedings.[60]

The trial judge decided that Jamaica was the more appropriate forum. However, he considered that an earlier decision of the European Court[61] precluded him from staying the proceedings against Jackson. Since he could not send the whole case to Jamaica, he decided not to stay the proceedings against any of the defendants. The latter appealed, and the Court of Appeal made a reference to the European Court, asking whether a stay was permissible against Jackson.[62]

The case was heard by a Grand Chamber of the European Court, composed of nine judges. Again, none of them was from a common law country or Scotland. In a judgment based on *ex cathedra* statements and assertions of abstract principles, the European Court held that the ban on *forum non conveniens* applies whenever the defendant is domiciled in the State of the forum, even if there is no connection with any other Contracting State. The Court said that respect for the principle of legal certainty—in its view, one of the objectives of the Convention—would not be fully guaranteed if a court having jurisdiction under the Convention could apply the *forum non conveniens* doctrine.

[58] The Court of Appeal reserved judgment on the correctness of this claim until it had obtained a ruling from the European Court on the question of *forum non conveniens*.

[59] It also seems that Jackson's insurance would cover a judgment given by a Jamaican court but not by an English one.

[60] If necessary, the English court could grant Jackson's application for a stay on condition that he submitted to the jurisdiction of the Jamaican courts, thus ensuring that the resulting judgment would be recognized and enforced in England.

[61] *Group Josi Reinsurance Company v Universal General Insurance Company*, Case C-412/98, [2000] I-ECR 5925.

[62] *Owusu v Jackson* [2002] EWCA Civ 877; [2003] 1 CLC 246; [2002] ILPr 45 (CA).

No attempt was made to consider for whose benefit this principle of legal certainty was intended to operate.

The only attempt to set out any specific objections to *forum non conveniens* was made in paragraphs 42 and 43 of the judgment. The first argument was that a defendant (who is generally better placed to conduct his defence before the courts of his domicile) would not, under the doctrine of *forum non conveniens*, be able to foresee in which other courts he will be sued. This suggests that the purpose of the ban on *forum non conveniens* is to protect the defendant. The glaring fallacy of this argument is that it is the defendant who applies for a stay: if he wants to be sued in his own courts, all he has to do is not to apply for a stay.[63] Moreover, since the defendant is by definition a domiciliary of the State of the forum, it is hard to see what interest the Community would have in protecting him from his own law.

The second argument put forward by the Court was that, in objecting to an application for a stay, the onus is on the claimant to establish that he will not obtain justice in the foreign court, or that the foreign court does not have jurisdiction, or that he does not in practice have effective access to justice in that court. These arguments are all based on the idea that the Convention is intended to protect the claimant. However, if the claimant is domiciled in the Contracting State of the forum (or in a non-contracting State), it is hard to see what interest the Community has in his protection.

It should also be pointed out that these arguments can never be raised with regard to a court in a Contracting State. In a *lis pendens* situation, the claimant can never argue that he will not obtain justice in such a court, that it does not have jurisdiction, or that he would not in practice have access to justice in it. This is clearly shown by the *Gasser* and *Turner* cases. We must trust the courts of other Contracting States.

The final argument was that, since most EC States do not have the doctrine of *forum non conveniens*, allowing those that do to apply it would affect the uniform application of the rules of jurisdiction in the Convention. No attempt was made to explain why this was necessarily a bad thing. Uniformity for the sake of uniformity seems to be the rule.

The various difficulties that would ensue in the *Owusu* case if the English court were not allowed to stay the proceedings were dismissed on the grounds that they were 'not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention.'[64] This was said to be for the reasons set out above.

This judgment is remarkable for its absolute refusal to consider the requirements of reasonableness. If the United Kingdom is a member of the European Union, we obviously have to make adjustments, just like everyone else. In the

[63] The only exception might be if there were several defendants and some of them wanted a stay and others did not. This was not, however, the case in *Owusu*, where it was Jackson himself who applied for the stay.

[64] Para 45 of the judgment.

legal area, this includes giving up our traditional rules in favour of continental-style rules that we may regard as inferior. However, while we have to make sacrifices in order to protect the interests of our continental partners, they should allow us to go our own way where their interests are not affected. This is what was meant above by 'the rule of reason'. The crass insistence that common law rules must be abolished even where no Community interest is at stake is the feature of this judgment that will cause most difficulty for lawyers in England. It seems that the continental judges on the European Court want to dismantle the common law as an objective in its own right. The brushing aside of all practical considerations is also disturbing.[65]

IV. CONCLUSIONS

It will be seen from what was said above that one enters a new world once an area of private law becomes Europeanized. This is not so much because of the legal rules themselves—some of them are good, some not so good—but because of the way they are interpreted by the European Court. It is not always appreciated that Europeanization has this effect. The cases considered above were all concerned with jurisdiction. However, other areas of conflict of laws are, or soon will be, brought under the control of the European Court. These include jurisdiction and recognition of judgments in family law matters;[66] choice of law in contract;[67] choice of law in tort and restitution;[68] choice of law in divorce;[69] and choice of law in succession.[70] Soon there will be little left to the common law.

[65] This attitude by the European Court is possibly explained by the fact that most of its members have had careers in academia, the judiciary or the civil service, often moving effortlessly between the three. Few seem to have had experience of private practice. (On the Continent, would-be judges usually enter the judicial service immediately on graduating from law school. It is not usual for practitioners to be appointed as judges.) The attitude of the European Court to the interests of private parties is further exemplified by the fact that they took two and three-quarter years to give judgment—this despite the fact that the English Court of Appeal expressly asked them to expedite matters so that Owusu, a tetraplegic as a result of his accident, could get compensation reasonably quickly.

[66] Regulation 2201/2003, OJ 2003 L338 (replacing Regulation 1347/2000, OJ 2000 L160) ('Brussels II').

[67] This was Europeanized many years ago by the Rome Convention (Convention on the law applicable to contractual obligations 1980), which became applicable in the United Kingdom under the Contracts (Applicable Law) Act 1990. It was only recently, however, that the European Court obtained jurisdiction in the area, when a protocol attached to the Convention (the Brussels Protocol, contained in Schedule 3 to the 1990 Act) finally came into force. There is now a plan to replace the Convention with a Community regulation: see the Commission Green Paper on the conversion of the Rome Convention into a Regulation (COM (2002) 654 final.

[68] This will take the form of a Community regulation: see Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM (2003) 0427 final.

[69] See the Commission Green Paper on this: COM (2005) 82 final.

[70] ibid 65 final.