THE ENFORCEMENT OF JURISDICTION AGREEMENTS WITHIN THE BRUSSELS REGIME

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Abstract Until relatively recently the question of whether it is possible to get damages for breach of an exclusive jurisdiction clause was very rarely considered by the courts and had attracted little academic interest. But when considered alongside recent developments in cases covered by the Brussels regime, the subject becomes of potentially much greater practical significance. The main purpose of this article is to consider how the newly developing common law principles might apply in that context.

I. INTRODUCTION

Until relatively recently the question of whether it is possible to get damages for breach of an exclusive jurisdiction clause was very rarely considered by the courts and had attracted little academic interest. But that has changed; a possible claim for damages has been considered, albeit indirectly, in three important recent cases, namely *Donohue* v *Armco*[1], *Union Discount Co Ltd* v *Zoller*[2] and *S/S D/S Svendborg D/S of 1912 A/S Bodeis Corporate trading in partnership as 'Maersk Sealand'* v Akar,[3] and the issue has been the subject of considerable recent academic comment.[4] This is a topic which is interesting in its own right and one purpose of this article is to review this case law and compare the different approaches advocated by the commentators. However, when considered alongside recent developments in cases covered by the Brussels regime, the subject becomes even more challenging and of potentially much greater practical significance. The awarding of damages in cases covered by the Brussels regime remains a topic not yet considered by the courts and the main purpose of this article is to consider how the newly developing common law principles might apply in that context.

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[1] [2002] 1 Lloyd's Rep 425.

[2] [2002] 1 WLR 1517.

[3] [2003] EWHC 797 (Comm).

[4] See, in particular, D Tan and N Yeo 'Breaking Promises to Litigate in a Particular Forum: Are Damages an appropriate remedy?' [2004] LMCLQ 435; C Tham 'Damages for breach of English jurisdiction clauses: more than meets the eye' [2004] LMCLQ 46.

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There are, of course, radical differences between the English discretionary approach to jurisdiction and the Brussels rule-based approach. This different in approach is particularly apparent in the context of the enforcement of jurisdiction agreements, as seen in the recent ECJ decisions in *Erich Gasser* C-116/02, *Turner v Grovit* C-159/02 and *Owusu v Jackson* C-281/02.

This article will first consider the juridical nature of such clauses and the common law's traditional treatment of them (Section II below). It will be seen that at common law, whilst the court retains a discretion, the prima facie remedy is the granting of a stay or anti-suit injunction. In other words, the courts usually specifically enforce such clauses. However, although this is the remedy usually granted by the courts at common law, recent developments have made it clear that in appropriate circumstances damages will also be available for breach of such a clause (Section III). Having considered the position at common law, the article will then turn to the approach under the Brussels regime (Section IV). It will be seen that although in some respects the force given to an exclusive jurisdiction clause is greater than at common law, very significant limitations apply when proceedings have been commenced first in another Contracting State. Those limitations on the ability of the courts specifically to enforce jurisdiction agreements under the Brussels regime may well lead to parties seeking damages for breach of such clauses. The final part of the article (Section V) explains that there are grave doubts as to whether damages will be available in cases covered by the Brussels regime leading to further inroads on the effect given to party autonomy in this area.

II. THE JURIDICAL NATURE OF JURISDICTION CLAUSES AND THE COMMON LAW'S TRADITIONAL TREATMENT OF THEM

A. The difference between exclusive and non-exclusive jurisdiction clauses

Jurisdiction clauses can be exclusive or non-exclusive.

In a non-exclusive jurisdiction clause, the parties seek to give a particular court jurisdiction when that court would not otherwise have jurisdiction.[5] They are enabling clauses, allowing the parties to nominate a court that would not otherwise have jurisdiction. But the parties are not completely in control: they cannot *force* the court they have enabled to accept jurisdiction, even if they want it to.

Non-exclusive jurisdiction clauses are, for present purposes, not a difficult case because they are primarily enabling in their effect. If the parties agree that the English court can have jurisdiction, but not sole jurisdiction, there is no contractual obligation to sue *only* in England. There may be a limited positive aspect in that the parties are agreeing on trial in the chosen forum and *may* also

[5] It would, of course, be possible for the parties to confer on the court a jurisdiction it already has—but the clause is, in such a case, effectively pointless.

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thereby implicitly be agreeing not to object to the jurisdiction of that forum,[6] but it has no negative effect. By agreeing a non-exclusive clause, the parties are implicitly agreeing that either of them has the right to invoke another jurisdiction. As they impose no obligation on the parties not to sue elsewhere the question of damages for bringing proceedings in a non-contractual forum simply does not arise.

Turning to exclusive jurisdiction clauses, they could have an enabling element themselves. There are also other potential complications: several jurisdictions could be chosen (either as alternatives or to govern different aspects of the relationship between the parties).[7] But these points are not central to the essence of an exclusive jurisdiction clause. The essence of an exclusive jurisdiction clause is that, whilst it *may* seek to enable a court, it *certainly* seeks to prescribe the parties' conduct by requiring them to sue in a particular forum. Again, the parties cannot *force* that court to accept jurisdiction; there is nevertheless subsisting between the parties an *obligation* not to sue elsewhere. The question arises as to whether this promise or obligation is (eg because of the 'wild card' of the court's own right not to accept jurisdiction in all cases merely because the parties have selected it) to be treated differently from other promises.[8] We need to take this question in stages.

B. The traditional approach to the enforcement of exclusive jurisdiction clauses: specific enforcement through stays and anti-suit injunctions

In terms of enforcement, it is certainly the case that exclusive jurisdiction promises have been treated differently from other types of promise. Damages are not the prima facie remedy. The prima facie remedy is either the granting of a stay or an anti-suit injunction (the former in the case of proceedings begun in England in breach of a clause giving exclusive jurisdiction elsewhere; the latter in the case of the converse situation). This is partly because this form of enforcement is such a good remedy and no doubt partly because damages are such a bad remedy.[9]

[6] See J Fawcett 'Non-exclusive jurisdiction agreements in private international law' [2001] LMCLQ 234, 235; C Tham (n 4) 58. This may be true of an argument denying that the chosen court has jurisdiction at all, but whether there is a positive obligation not to apply for a stay of proceedings in the chosen forum must be a more difficult question.

[7] Such clauses can raise interesting issues of their own (see J Fawcett (n 6) 239–40) but for the purposes of this article they raise the same issues as 'exclusive' jurisdiction agreements in the traditional sense.

[8] cf L Ho 'Anti-suit Injunctions in Cross-Border Insolvency: A Restatement' [2003] 52 ICLQ 697, who suggests that a jurisdiction clause is not an ordinary contract creating an independently enforceable obligation. Cf the critique of that view in C Tham (n 4). He accepts that the clause creates a binding promise but doubts whether it is a promise which sounds in damages.

[9] See *Continental Bank v Aekeos* [1994] 1 WLR 588: 'a claim for damages for breach of contract would be a relatively ineffective remedy'; 'the bank's legal rights will prove to be valueless unless the injunction is granted'; *The Jay Bola* [1997] 2 Lloyd's Rep 79: the usual remedy is a stay (if proceedings are commenced in England) or an anti-suit injunction if commenced abroad. 'The aggrieved party also has the option to sue for damages for breach of contract though this is rarely a satisfactory remedy.'

Although an anti-suit injunction is not an order directed to the foreign court, it clearly has the effect of interfering with those foreign proceedings.[10] Traditionally, therefore, at common law, such injunctions have been granted sparingly and with due regard to comity and respect for the courts of other states. However, where the parties have agreed not to sue in that state and the English court is being asked to enforce a contractual right, it need feel no diffidence in granting an injunction restraining the foreign proceedings on the clear and simple ground that the defendant has promised not to bring them. The justification for the grant of the injunction is that without it the claimant will be deprived of its contractual rights. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.[11]

Similarly, where English proceedings are commenced or continued in breach of an exclusive jurisdiction clause in favour of another state, the English court is again being asked to hold the parties to their promise not to sue elsewhere. In both situations, the party with the benefit of an exclusive jurisdiction clause is relying on the other party's promise not to sue elsewhere. His right specifically to enforce that promise can only be displaced by strong reasons being shown by the opposite party why an injunction or stay should *not* be granted.[12]

A strong reason why a stay or injunction should not be granted is most likely to arise in cases where the interests of parties who are not bound by the jurisdiction clause are involved. For example, in *Donahue v Armco*, there was a strong reason not to restrain the New York proceedings because not all parties were bound by the jurisdiction agreement and there was a risk of parallel proceedings and inconsistent decisions unless the entire claim was heard in New York.[13]

Thus, at common law, two principles are clear. The common law approach is *discretionary*. But a stay or anti-suit injunction *will be granted* unless there are strong reasons not to. So, the jurisdiction clause creates an enforceable promise and that promise is usually specifically enforced by way of injunction or a stay. Thus, damages cases have been extremely rare. But the next question is whether, if such primary enforcement fails, breach of that promise potentially gives rise to a claim for damages.

[10] An argument to the contrary (that is, that an anti-suit injunction was directed only at the person and therefore could not be inconsistent with the Brussels regulation scheme for allocating jurisdiction between contracting states) was understandably given short shrift by the ECJ in *Turner v Grovit,* para 28.

[11] *Aggeliki Charis Campania Maritima v Pagnan Spa* 'The Angelic Grace' [1995] 1 Lloyd's Rep 87, 96 per Millet LJ.

[12] *Donohue v Armco* 439 per Lord Hobouse. A fuller explanation of the position at common law can be found in E Peel 'Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws' [1998] LMCLQ 182.

[13] Another possible situation is referred to in *The Lisboa* [1980] 2 Lloyd's Rep 546. The Court of Appeal indicated that even if an exclusive jurisdiction clause in favour of the English court covered the arrest of a vessel in Italy, an injunction should not be granted to enforce that clause. The court relied, inter alia, on the delay in bringing the claim for an injunction and the commercial purpose and importance within maritime law of the arrest procedure.

III. DAMAGES FOR BREACH OF JURISDICTION CLAUSES

A. Introduction and preliminary matters

A party may claim that he has suffered financial loss through being sued in breach of an exclusive jurisdiction clause. He may incur costs in the non-contractual forum or, in cases where the non-contractual proceedings continue until judgment and he loses through the enforcement or recognition of that judgment.

Cases on stays and anti-suit injunctions show that an exclusive jurisdiction clause contains an enforceable promise. Absent specific performance, breach of an enforceable contractual promise resulting in loss will usually give rise to a claim for damages. However, two objections to a claim for damages are commonly raised in relation to breach of an exclusive jurisdiction clause: first, the undesirability of such a claim as it is based on the non-contractual forum getting the case wrong ('*the unseemly spectacle* argument'); and secondly, the rule against *the recovery of costs* incurred in other proceedings.

Before turning to these two objections, a preliminary point must be dealt with. These objections assume (rightly) that it is open to the contractual forum to hear a claim for damages based on the applicability of the jurisdiction clause despite the finding of the foreign court (whether express or implied), which has given judgment that the clause does not apply. The reasons why that is the case merit further explanation. At common law, a foreign judgment which decides a procedural or jurisdictional question including the applicability of an exclusive jurisdiction clause, may be regarded as determining those issues 'on the merits' such that it creates an *issue estoppel* on those points.[14] However, section 32 of the Civil Jurisdiction and Judgements Act 1982, provides that a judgment given in breach of an exclusive jurisdiction clause will not be recognised or enforced. Thus, at common law, no issue estoppel, in particular, as to the scope or applicability of an exclusive jurisdiction clause, can arise from a judgement given in breach of that clause.

B. The arguments traditionally relied on against a claim for damages

1. The 'unseemly spectacle' argument

A party who has lost substantive proceedings in the non-contractual forum may well argue that he has suffered loss because he has lost proceedings which should never have been brought in that jurisdiction. However, if he would have lost even if the proceedings had been brought in the agreed forum his claim for damages should fail. The aim of contractual damages is to put the innocent party in the position he would have been in if the contract had been performed. If the result would have been the same in the agreed forum, he

[14] *The Sennar* [1982] 2 All ER 104.

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would have been in exactly the same position even if the contract had been complied with. Contractual damages should therefore not be available. Accordingly, in such a case, the court awarding damages would have to assess what the decision of the chosen forum would have been and compare that to the judgement given in the non-contractual forum. Is that an assessment which the courts would or should be prepared to carry out? The Court of Appeal in *Tracomin SA v Sudan Oil Seeds*[15] thought not. The buyer commenced a claim in Switzerland in breach of a London arbitration clause. The seller then requested arbitration in London and sought an injunction restraining the buyer from continuing with the Swiss action. Sir John Donaldson MR held that if the Swiss court gave judgment, the sellers would have an unanswerable claim against the buyers in the arbitration that the judgment had been obtained in breach of contract. The question, which would then arise, would be whether they were entitled to more than nominal damages. That would depend on whether the Swiss court had reached the same conclusion as would the arbitrators if it had been submitted to arbitration. If the arbitrators would have reached a different conclusion less adverse to the sellers then the award would have to be the difference between the two. He then referred to the undesirability of this result as being a reason in favour of the granting of the anti-suit injunction, commenting that the courts would not consider this with 'any degree of equanimity' and that the Swiss court would not be perturbed by the English court intervening to avoid the 'rather unseemly spectacle' of the arbitrators considering the Swiss judgment and deciding whether it was right or wrong.

This comment was reiterated by the Court of Appeal in *The Angelic Grace*:[16] 'in the absence of submission, the undesirable process would then occur envisaged by this court in *Tracomin* and the arbitrators award would have to be for any damages held by them to have been suffered by the owners in excess of any sum found due from them by the Italian court'.

The first point to note is that in both cases the court appeared to acknowledge that damages would be available, albeit that the inadequacy and/or undesirability of such a claim was a reason for specifically enforcing the agreement. Indeed, in the analogous case of breach of a promise to arbitrate, it has long been established that damages are available.[17]

Secondly, the 'undesirability' referred to is that the court awarding damages has to consider whether the judgement of the non-contractual forum is wrong'. There is, of course, nothing unusual in requiring a court to make an

[15] [1983] 3 All ER 140.
[16] [1995] 1 Lloyd's Rep 87.
[17] See *Doleman & Sons v Osset Corporation* [1912] 3 KB 257; *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375. The extent to which arbitration clauses can be equated with exclusive jurisdiction clauses is disputed by some (see C Tham 'Damages for Breach of English Jurisdiction clauses: more than meets the eye' (n 4), and referred to in n 8 above) but was relied on by the Court of Appeal in *The Lisboa*.

assessment of what decision a different court would have reached had proceedings gone to trial. A court assessing damages in negligence claims against solicitors often has to assess the potential value of a claim in this way. The additional problem that seemed to trouble the court in *Tracomin* is that the assumption that this assessment is being carried out to see if the foreign court got it 'wrong'. But that is not, in fact, the basis for the award of damages for breach of an exclusive jurisdiction clause. Damages are awarded on the basis that the innocent party would have been in a better position if the contract had been complied with and the claim brought in the agreed forum. The claim for damages will *not* necessarily or even generally be based on the non-contractual forum having got it wrong;[18] rather the innocent party is relying on the contractual right not to be sued in that jurisdiction and the loss is suffered because that court has reached a *different* conclusion (eg due to applying different law, different procedural rules, etc) than the chosen forum would have done.[19] Damages will be the difference between what the foreign court found (for *whatever* reason) and what the English court *would have* found.

2. Other possible comity/policy arguments against the award of damages in more complicated factual situations

Although the policy or comity arguments are potentially more complex, there is no reason why damages should not be paid even if the English court has in its discretion refused a stay or anti-suit injunction, that is, it has refused specifically to enforce the jurisdiction agreement.

Consider, for example, parties X and Y who have agreed that the English court is to have exclusive jurisdiction over all disputes between them. X sues Y in New York. Y challenges the jurisdiction of the New York court, but the New York court takes the view that the claim does not fall within the exclusive jurisdiction clause. The claim proceeds and the court gives judgment for X. If the English court a) would have held that the clause applied and b) would have found for Y on the merits, for the reasons just discussed, there appears to be no reason why Y cannot claim damages for breach of the jurisdiction agreement, because the New York court has reached a different conclusion than that which would have been reached by the English court in a case which should have been brought in England.

[18] Indeed, the court hearing the claim for damages, does not re-hear evidence so as to decide the case again on the merits, rather it hears evidence as to why the result may have been different: see D Tan and N Yeo (n 4) n 17.

[19] cf S Males 'Comity and anti-suit injunctions' [1998] LMCLQ 543, 549. When considering anti-suit injunctions he takes a different view stating that if the foreign court accepts jurisdiction in situations where there is alleged to be an exclusive jurisdiction agreement in favour of England it would be 'patronising, invidious and the reverse of comity for the English court then to grant an injunction, directly conflicting with the decision of the foreign court on the ground that the foreign court arrived at the wrong decision'.

It should not make any difference that Y had applied to the English court for an anti-suit injunction but the court had refused to restrain X from continuing with the New York proceedings because, for example, of the interests of other parties not subject to the exclusive jurisdiction agreement who could only be sued in New York.[20] Prima facie X's conduct is equally blameworthy. Furthermore, the fact that the English court has not granted the injunction is not necessarily because it condones X's conduct. Rather, it recognizes that there are reasons, not connected with the parties to the agreement, but connected with the interests of justice or other parties, why the proceedings in the non-contractual forum should be allowed to continue. Whilst there may be some overwhelming public interest against the granting of an injunction, that is not necessarily inconsistent with awarding damages to Y for breach of his private law right not to be sued in New York. The same arguments would apply where a party was sued in England in breach of an exclusive jurisdiction agreement in favour of New York. If the English court had refused to stay the English proceedings because, although it accepted that the clause applied, the interests of justice favoured a trial in England that would not prevent the English court from awarding damages for breach of the clause.[21] The discretion not to grant a stay is not undermined, the decision was taken on wider public interest grounds and it is right that the private interests of the parties themselves can be compensated in damages. Furthermore, the cause of the loss remains the decision to sue in England in the first place.[22]

That is not to say that damages will *always* be available. For example, in *The Lisboa*[23] Lord Denning MR indicated that even if the arrest of a ship in Italy was in breach of an exclusive jurisdiction agreement in favour of the English courts, no damages should be awarded. Whatever the wording of the clause, by the maritime law of the world, the power of arrest is available to a creditor wherever the ship is found even though the merits of the dispute have to be decided in another country.[24]

A more difficult question arises in a case where the chosen forum itself declines jurisdiction. This may happen because the English court in its discretion accedes to an application to stay its own proceedings in spite of an exclusive jurisdiction clause in favour of the English courts. This is unlikely to happen very often but a more common situation is where, under the Brussels

[20] This was, in essence, the reason why relief was refused in *Donohue v Armco*.

[21] See E Peel (n 12) 226 and D Tan and N Yeo (n 4), both of whom envisage an award of damages being made in this situation.

[22] cf the provisional view Clarke J (as he then was) in *Banco de Honduras v East West Insurance Co Ltd* [1996] 1 Lloyd's Rep 74. In *Svenborg v Wensa* [1996] 2 Lloyd's Rep 559, 574 he repeated that this was his 'provisional view' but recognized that the contrary is also arguable.

[23] [1980] 2 Lloyd's Rep 546.

[24] The same result can be achieved as a matter of contractual construction. Lord Denning had already held as the primary ground for his decision that the clause in question could be construed in a way which did not extend to claims for security. It is also possible to see his dicta as indicating that there will be a condition in every jurisdiction agreement that it does not preclude security claims in this situation.

Regulation, the English court *cannot* take jurisdiction (eg where the dispute falls within the exclusive jurisdiction provisions in Article 22).

For example, X and Y have agreed that the English court is to have exclusive jurisdiction over all disputes between them but one of the disputes relates to rights in rem respecting land in France (a claim over which the French courts have exclusive jurisdiction under Article 22 of the Brussels Regulation). Even if either party brought proceedings in England, the court of its own motion will be required to decline jurisdiction.[25]

It would be possible for X to bring proceedings in France, but the important question for these purposes is whether X would be in breach and, if so, liable to pay damages for doing so. A number of possible solutions have been proposed. One suggestion is that this is an attempt to agree to do the impossible and that therefore the question is whether the original contractual promise was originally illegal or alternatively later frustrated.[26] But that seems to beg the fundamental question which is whether X promised, *regardless* of whether it was possible or not, to sue only in England or whether the promise to sue in England was *conditional* on it being possible for the English court to take jurisdiction.

This is really a matter of ascertaining the intention of the parties through construction of the clause. The options are as follows:

X can bring no claim elsewhere;
X can bring the claim elsewhere, and do so without sanction; and
X can bring the claim elsewhere, but will be liable in damages.

If the intention of the parties was that proceedings would be heard in England or nowhere, X would be in breach if he brought proceedings in France (ie options (1) or (3) above). There is nothing in the policy of the Regulation that would prevent the clause taking effect if that was the intention of the parties. Article 22 provides that *if* a claim is to be heard in any court, it must be in the courts where the land is situated. It does not prevent the parties agreeing not to bring a claim to court at all any more than it prevents the parties agreeing to arbitration in respect of foreign land. But this result is unlikely to have been the intention of the parties and an English court faced with such an argument may well even strike such a clause down as a matter of English law for a variety of reasons: exclusion clause, penalty, forfeiture etc.

If, however, it was *not* the intention of the parties to prevent a claim from being brought at all, how can result (2) be achieved? There are a number of ways of reaching this result, depending partly on the how the exclusive jurisdiction clause is drafted, but all depend ultimately on the construction of the clause.

[25] Art 25 of the Brussels Regulation.
[26] A Briggs 'Anti-European teeth for choice of court clauses' [1994] LMCLQ 158, 162.

Sometimes a clause provides that parties are required to submit all disputes to a particular forum.[27] Where a clause is so worded, it might be arguable that if the claim has been submitted first to the English court, which has declined jurisdiction of its own motion, the parties have fulfilled their promise under the clause and would therefore not be in breach in suing elsewhere. In other words, this would be to construe clauses drafted in this way as giving the English court a right of first refusal over the claim but nothing else. Furthermore, even if X did not sue in England first but went straight to France, no loss would be caused by breach of a clause construed in this way because it could be established that even if the dispute had been submitted to the English court first it would, of its own motion, have declined jurisdiction.

Clauses purporting to give the English court 'exclusive jurisdiction' may require a different solution. The court may be prepared to imply into the clause a condition that it is possible for the English court to hear the case so that if it cannot the clause will be without effect. [28] Alternatively, the condition may be that the English court once seised agrees to take jurisdiction, if it declines again the clause does not take effect and the parties can sue elsewhere.[29] On similar grounds, the court may decide that the parties were operating under a common mistake that the English court could have jurisdiction, meaning the performance of the clause is impossible.[30] But the important thing to note about this problem is that it is a question of construction. *If* the clause is construed as preventing X from suing in France, there is no reason why that promise should not sound in damages.

Thus, there seems to be no reason policy reason why the promise contained in an exclusive jurisdiction clause should not sound in damages. But the next question is whether there is any special rule which applies to the recovery of costs incurred in other proceedings?

3. The rule against the recovery of costs by way of damages

In *Quartz Hill Consolidated Gold Mining Co v Eyre*[31] the defendant presented a petition to wind up the claimant company. He later gave notice that the petition would be withdrawn and it was ultimately dismissed without costs. The company brought an action for falsely and maliciously presenting the petition.

[27] This is probably the best construction of the clause in the *Continental Bank* case.

[28] *Couturier v Hastie* (1856) 5 HLC 673; and generally *Chitty on Contracts* 29th edn ISBN 5-033-5-035.

[29] See *Montovani* per Megaw LJ. If a party is sued in England in breach of an arbitration clause, the proper remedy is to apply for a stay under s 4 of the Arbitration Act. If the court refuses a stay because the case is not a proper one for arbitration, the contract by inference includes the provision that if the court holds that the case is not suitable for arbitration there is no breach in not arbitrating.

[30] Ultimately, both common mistake and the implication of conditions into the contract depend on an analysis of the parties intentions and which label is applied should not matter (see Chitty ISBN 5-039–5-041).

[31] (1883) QBD 674.

The only damage proved was the liability of the company to pay its costs of defending itself against the petition. The Court of Appeal allowed the claim to go the jury on the basis that bringing the petition was necessarily injurious to the credit of the company. But it held that the liability to pay 'extra costs' was not in itself a ground of legal damage. The reason for the rule was said to be as follows: when costs are taxed as against the losing party in the litigation, he is bound to pay only costs which were necessarily incurred by the successful party (referred to technically as 'party and party costs'). He is not obliged to pay 'extra costs' incurred by the successful party which were not necessary for the maintenance of the case and were therefore not incurred by reason of the unjust litigation. Or as it was succinctly put by Bowen LJ: 'If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action.'[32]

The question is whether this is a *rule*, which *prevents* a claim for damages where there has been breach of an exclusive clause. The answer must be that it is not. An innocent party who has obtained a stay or anti-suit injunction may well wish to claim damages for costs incurred in obtaining that relief. The loss he has suffered is any costs reasonably incurred in preventing the breach of contract. Only if costs have in fact already been awarded on exactly that basis in the non-contractual forum should he be prevented from recovering such expenses as damages. Similarly, the innocent party who has won the proceedings and defeated the claim, albeit in the non-contractual forum, has suffered loss if there is a difference between what it cost him to defend the claim in that jurisdiction compared to what it would have cost him to defend it in the chosen forum. Again, it is only if costs have been awarded in the non-contractual forum on exactly the same basis as would have been awarded in the chosen forum, that he will be unable to establish that he has suffered any loss. In either case, if there was no jurisdiction to award costs in the non-contractual forum any costs incurred should be capable of being the subject of a claim for damages. As was acknowledged in a different context in *Berry v British Transport*[33] it is a fiction that costs taxed between party and party are the same as costs reasonably incurred and the law should recognize that an assessment of damages and a taxation of party and party costs are two different things.

The limited scope of the supposed rule in the context of breach of an exclusive jurisdiction clause has been confirmed by the Court of Appeal in *Union Discount v Zoller*. The defendant brought proceedings in New York in breach of an exclusive jurisdiction agreement in favour of the English courts. The proceedings in New York were struck out but the claimant made no application for costs. The claimant's claim to recover the costs of the New York action in English proceedings was struck out and he appealed. The Court of Appeal held that the rule in *Quartz Hill* did not apply and costs could

[32] [1883] QBD 674, 690. [33] [1962] 1 QB 306.

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be recovered as damages where there was no prospect of obtaining costs in the earlier action.[34]

It is clear, therefore, that the rule in *Quartz Hill* does not apply where the innocent party is unable to recover costs in the non-contractual forum. But the analysis suggested above is not limited to cases where costs *could not be* awarded by the original court. The fact that some costs may have already been awarded (if that is the case) is simply relevant to the assessment of loss. This analysis was adopted, obiter, by Julian Flaux QC sitting as a Deputy Judge in *A/S D/S Svenborg D/S v Akar*. Proceedings were commenced in Hong Kong and Guinea in breach of an exclusive jurisdiction clause in favour of the English courts. The claimant claimed damages for deceit and for breach of the jurisdiction clause, those damages being costs and expenses incurred in the proceedings in Hong Kong and Guinea. The evidence suggested that the costs regime, in Hong Kong at least, was similar to that in England. The judge commented that:

> Any doubts there might have been as to the recoverability of costs in foreign proceedings taken in breach of an exclusive jurisdiction clause as damages for that breach have been laid to rest by the recent decision of the Court of Appeal in *Union Discount v Zoller*. . . . It does not seem to me that the application of that principle is dependent upon the claimant showing that the relevant expenses are irrecoverable in the foreign proceedings and, in any event, in the present case they have not been recovered in the foreign proceedings and [the claimant's solicitor] confirmed that if is clients recovered damages and an indemnity in these proceedings, they would not seek to recover sums twice over in Hong Kong or Guinea.[35]

C. The current position on the availability of damages at common law

As we have seen, provided the claimant is not seeking to make double recovery, there appears to be no problem with a claim for damages being based on loss suffered through costs incurred in the non-contractual forum. Nor does there seem to be any policy or comity reasons why such a claim cannot be made. The costs cases themselves (in particular, *Donohue v* Armco, *Union Discount v Zoller*, and *Svendbord v Akar*) confirm the availability of damages for breach of an exclusive jurisdiction clause. Thus it now appears to be established that as a matter of English common law damages are available for breach of an exclusive jurisdiction agreement.[36]

[34] See also Lord Scott in *Donohue v Armco* and *Oft Africa Line Ltd v Magic Sportswear Corp* [2005] 1 Lloyd's Rep 252.

[35] para 37. No question seems to have been raised as to whether a claim for costs *should* have been made in the Hong Kong proceedings. Usually it will not make any difference whether the contract breaker pays by way of costs or damages but, if necessary, it seems arguable that the failure to claim costs in that forum could amount to a failure to mitigate.

[36] The views of some authors to the contrary, in particular Ho and Tham, have already been mentioned.

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It is now necessary to consider how the radically different approach to the enforcement of exclusive jurisdiction agreements in Brussels regime cases affects this analysis.

IV. ENFORCEMENT OF JURISIDCTION CLAUSES UNDER THE BRUSSELS REGIME

A. The general approach: upholding party autonomy

Under Article 23 of the Brussels Regulation[37] if the parties (one or more of whom is domiciled in a Contracting State) have agreed (in accordance with the requirements set out in the article) that the court of another Contracting State shall have jurisdiction, that court will have exclusive jurisdiction unless the parties have agreed otherwise.

On the face of it, Article 23 recognizes the policy of party autonomy, respecting the parties' choice of court and providing that any other court *must* decline jurisdiction in favour of the chosen court. This recognition is apparently stronger than at common law where the court retains discretion, although the burden is on the party in breach to show why the jurisdiction clause should not be specifically enforced.

Thus, by virtue of Article 23, if proceedings are commenced in England, despite the existence of an exclusive jurisdiction agreement in favour of the courts of another Contracting State, the English court *must* decline jurisdiction. However, the converse situation is more complicated. If proceedings are commenced in another Contracting State, despite the existence of an exclusive jurisdiction agreement in favour of the English court, what can the English court do? At common law, the English court would normally grant an injunction restraining the party in breach from continuing with those proceedings. However, under the Brussels Regulation, the fact that proceedings have been commenced abroad brings into play the *lis pendens* provisions of the Regulation in Article 27.

B. Proceedings commenced in another Contracting State in breach of an exclusive jurisdiction agreement in favour of the English court: the lis pendens *provisions*

1. Introduction: the basic problem

Article 27 of the Regulation provides that if proceedings involving the same cause of action and between the same parties are brought in two Contracting

[37] The Brussels Convention has been replaced from 1 Mar 2002 by Council Regulation (EC) No 44/2001 ('The Brussels Regulation'). As between the original MS's, except Denmark, the position is now regulated by the Brussels Regulation. The Lugano Convention still applies to EFTA states. The differences between the various regimes are not material for the issues discussed in this article and the discussion will be based on the provisions of the Brussels Regulation.

States, any court other than that first seised must stay its proceedings until such time as the jurisdiction of the first court is established, when it must decline jurisdiction in favour of that court.

If proceedings have been commenced abroad, say in Germany, in breach of an exclusive jurisdiction agreement in favour of the English courts, and proceedings are subsequently commenced in England, can the claimant in the English proceedings obtain an anti-suit injunction or must the German proceedings prevail as those commenced first? Essentially the question is which takes precedence, Article 23 or Article 27?

2. *The view of the English courts: the* Continental Bank *case*

The question of which takes precedence, Article 23 or Article 27, arose directly before the English Court of Appeal in *Continental Bank v Aekeos*.[38] The Court of Appeal held that on the true construction of the relevant jurisdiction agreement the defendant was obliged to submit disputes to the English court and that by virtue of Article 17 (now Article 23) of the Convention, the English court therefore had exclusive jurisdiction. It further followed that because Article 23 is mandatory; if Article 23 applies it takes precedence over Articles 27 and 28. Thus, the Court of Appeal upheld the grant of an injunction against proceedings in Greece. The Court of Appeal concluded optimistically by stating that this was so obviously the answer that it did not need a reference to the ECJ. Unfortunately that has not proved to be the case. The decision in *Continental Bank* attracted considerable academic criticism.[39] When the question finally arose before the ECJ in *Erich Gasser* its effect was reversed.

3. *The view of the ECJ: Erich Gasser and Turner v Grovit*

In *Erich Gasser*, proceedings were commenced by the defendant in Italy. The claimant then brought an action before the Austrian court contending that the Austrian court was the court designated by a choice of court, which it was further contended amounted to an exclusive jurisdiction agreement within Article 23 of the Regulation. The Austrian court referred to the ECJ the question of whether a court other than the court first seised may review the court first seised's jurisdiction, if the second court has exclusive jurisdiction under an exclusive jurisdiction agreement within Article 23 of the Regulation.

Advocate General Leger (confirming the result, if not necessarily the reasoning, of the English Court of Appeal in *Continental Bank*) was of the view that it could. He agreed with the English Court of Appeal that this

[38] [1994] 1 WLR 588.

[39] See A Briggs (n 26) 159; Dicey & Morris *The Conflict of Laws* (13th edn Sweet & Maxwell London 2002) paras 12–122.

construction is necessary for the effectiveness of Article 23. Article 23 upholds the autonomy of the consensus formed between the parties and thus seeks to secure legal certainty by enabling the parties to determine which court shall have jurisdiction. If, under Article 27, the chosen court is obliged to stay, the party who commenced proceedings before a court, which he knew had no jurisdiction, could unreasonably delay judgment on the substance of the case.

The ECJ, however, came to the opposite view. The ECJ held that in any case where there is a dispute as to whether an agreement valid under Article 23 had been concluded, it was conducive to the legal certainty sought by Article 27 of the Regulation that the court first seised (rather than the chosen forum) must pronounce as to its own jurisdiction.

According to the ECJ, the difficulties of the kind referred to by the UK Government (and relied on by Advocate General Leger) stemming from delaying tactics are not such as to call into question the interpretation of any provision of the Brussels Regulation as deduced from its wording and its purpose.

The decision in *Erich Gasser* has since been reinforced by the decision of the ECJ *Turner v Grovit*. Although the latter case did not deal directly with exclusive jurisdiction clauses (the argument was whether the English court could injunct Spanish proceedings alleged to constitute an abuse of the process of the English court)[40] two points made by the ECJ seem to be the final nails in the coffin for the reasoning in the *Continental Bank* case. The ECJ in the course of its judgment:

> (a.) rejected the argument that because an anti-suit injunction is personal it does not interfere with the jurisdiction of the foreign court; and
>
> (b.) emphasized the basis of trust which is the foundation of the Brussels regime. The enforcement provisions (which reflect the fundamental purpose behind the Regulation) depend on mutual trust that each jurisdiction will faithfully apply the Regulation rules on jurisdiction. The court first seised must therefore be trusted to decide on its own jurisdiction. If that argument applies to abuse of process, which arguably has a national character, *a fortiori*, it applies to exclusive jurisdiction clauses which are themselves regulated under the Brussels Regulation.

4. The consequences of the Gasser approach

Thus, where proceedings have been commenced in another Contracting State in breach of an exclusive jurisdiction agreement, it is not open to the English court to restrain those proceedings. As Advocate General Leger noted, this could encourage a party who has reluctantly agreed to a jurisdiction clause pre-emptively to set the forum by suing first in a non-contractual forum. One of the reasons why this prospect seemed not unduly to worry the ECJ in *Erich*

[40] See further on this aspect of the case: T Kruger 'The Anti-Suit Injunction in the European Judicial Space: *Turner v Grovit*' [2004] ICLQ 1030.

Gasser was the ECJ's view that the other Contracting State should reach the same conclusion as to the applicability of the exclusive jurisdiction clause as the English court and therefore would itself decline jurisdiction. Of course, even if that is right, the innocent party may well still suffer loss (through additional delay and costs) from having to fight proceedings in the non-contractual forum, the very thing it was promised it would not have to do. But is it in fact inevitable that the non-contractual forum first seised will reach the same view as the chosen forum would have done as to the applicability of the clause?

Article 23 lays down certain formal requirements for exclusive jurisdiction agreements. Therefore, the reasoning goes, whichever court hears the dispute it will reach the same conclusion as to the applicability of the clause. Thus, the ECJ reasoned, the prejudice caused to the innocent party by the fact that that court is not the chosen court is minimal. It is true that some formal requirements are set out in Article 23 (and indeed more importantly that the ECJ has said that Contracting States are not entitled to set their own additional requirements).[41] But the procedural rules for proving whether those requirements have been met may differ (those rules being determined by the *lex fori*).[42] Furthermore, assuming the exclusive jurisdiction agreement has been incorporated in the contract, how does the court interpret the scope of that clause? Questions of interpretation are governed by the applicable law of the contract. In most cases, applicable law is now determined by the Rome Convention. Where the Rome Convention applies, Contracting States will be applying the same rules of private international law to determine what the applicable law is. But agreements on choice of court are expressly excluded from the scope of the Rome Convention (Article1(2)(d)). Thus, the forum court will apply its own private international law rules to determine the applicable law of the jurisdiction agreement. If the court first seised reaches a different conclusion as to what law should apply a different result may be reached as to the interpretation of the clause.[43] Other connected questions may arise which could affect the conclusion; for example, whether a party has submitted to the jurisdiction of the court under Article 24. The fact that a party may or may not have submitted to proceedings in the non-contractual forum will clearly be relevant to a claim for damages. Submission may affect whether there has been a breach of contract and/or potentially raises questions of waiver and/or estoppel.[44] Again the provisions of Article 24 will be applied by the court hearing

[41] *Elefanten Schu GmbH v Jacqmain* [1981] ECR 1671.

[42] In *Tracomin SA v Sudan Oil Seeds* [1983] 3 All ER 140, for example, an action was brought in Switzerland in breach of a London arbitration clause. An application was brought to stay the Swiss proceedings but it was dismissed because the seller negligently failed to plead relevant English law relating to incorporation of the arbitration clause. Hence the Swiss court held that the arbitration clause was not applicable in a situation where it was clear that the English court would have reached the opposite view.

[43] eg in English law a clause does not need to provide *expressly* that it is exclusive. This is not necessarily the case in the rest of Western Europe, see E Peel (n 12) n 9.

[44] See generally *The Angelic Grace* (n 11) and *The Eastern Trader* [1996] 2 Lloyd's Rep where

the dispute in accordance with its own procedural rules and the relevance of any submission if established will then have to be determined by that court.

One solution might be that the rules of the *lex fori* in the non-chosen forum must be withheld where their effect is to prevent the assertion of rights under Article 23 and Article 27. But unless such an approach is adopted (and there seems to be no suggestion from the reasoning in *Erich Gasser* that such an approach would find favour with the ECJ), there may well be cases where the non-contractual forum reaches a different view as to the applicability or scope of a clause than the chosen forum would have done. The problem with the approach adopted by the ECJ in *Erich Gasser* is that the decision of the court first seised is preferred whereas, for the reasons explored further below, the parties will almost certainly have intended such questions to be determined by the chosen court. The decision in *Erich Gasser* therefore undermines party autonomy by giving that decision to another court. Whether damages would be available to compensate the innocent party in such a situation is considered in the next section.

V. THE AVAILABILITY OF DAMAGES UNDER THE BRUSSELS REGIME

A. The issue and when a claim is likely to arise

As we have seen, at common law, the prima facie remedy for breach of an exclusive jurisdiction clause is a stay or an injunction; but damages will be available if this primary remedy is not available. Given the constraints on the direct enforcement, through stays or anti-suit injunctions, in Brussels cases, the question of whether damages are available instead is likely to become more significant.[45]

It is important to start with an example of how such a claim might arise. Going back to the situation considered above, in a contract of sale between X and Y there is an exclusive jurisdiction clause in favour of the English court. The contract of sale is governed by French law. X sues Y in France for damages for breach of the contract of sale. Obedient to the ECJ's interpretation of the Regulation, the French court takes upon itself the decision of whether the clause applies, it being the court first seised, and decides:

the court assumed, without detailed analysis, that if there had been submission that would have prevented a claim for damages being made. In *DVA v Voest* [1997] 1 Lloyd's Rep 179 Morison J commented that submission to the jurisdiction was tantamount to a waiver of the contractual provision on the basis of which the anti-suit injunction is founded. The Court of Appeal [1997] 2 Lloyd's Rep 279 confirmed that on the facts there was no waiver or acquiescence. Cf *Svendbourg v Wansa* [1996] 2 Lloyd's Rep 559, where submission was treated as being relevant only to delay in applying for the injunction.

[45] For example, Lord Justice Mance 'Exclusive Jurisdiction Agreements and European Ideas' [2004] LQR 357, 363, writing on the decision in *Eric Gasser*, concludes that the result can only be practical uncertainty with large scope for tactical manoeuvrings, and notes that the question of whether a claim for damages might offer redress is a matter for speculation.

(a) that according to French private international law the exclusive jurisdiction clause is governed by French law;
(b) that the clause is not incorporated into the contract;
(c) that, in any event, according to French law the clause is non-exclusive;
(d) Y has submitted to the jurisdiction of the French court;

The French court goes on to hear the case and awards X damages of 5,000 euros.

The evidence establishes that if the case had been heard in England, the English court would have held:

(a) that the exclusive jurisdiction clause is governed by English law;
(b) the clause was incorporated into the contract;
(c) according to English law the clause is exclusive;
(d) Y had not submitted to the jurisdiction of the French courts.

The evidence further establishes that if the case had been heard in England the court would have given judgment for Y. Can Y claim as damages the 5,000 euros (assuming the judgment has been paid)?

B. Policy considerations

Again, a possible claim for damages must be considered in stages. First, it seems clear that X is in breach of the promise not to sue in any jurisdiction other than England. In particular, given that the parties have agreed that all disputes will be submitted to the English court, there seems to be no reason why that would not include any dispute as to what the agreement itself means, what it covers or indeed whether an agreement has been reached at all. Therefore, the agreement is likely to be construed as an agreement to submit all disputes which the *English court* considers come within the scope of the clause to the English court.[46] The conduct of X in commencing proceedings other than in the chosen forum is in breach of this promise not to do so.

Secondly, and more controversially, there is nothing in the wording or policy behind the Regulation, as interpreted by the ECJ, that is inconsistent with the grant of damages for that breach. The fact that the Brussels regime compels certain consequences *after* X has made the decision to sue in France in breach of his promise makes no difference to his obligation to pay damages for his breach of that promise. The fact that under European law the consequence of such behaviour has particular potence makes no difference. Nor is an award of damages inconsistent with the underlying approach in *Erich Gasser*. The ECJ, on the basis of wider considerations of policy and the efficacy of the Brussels regime generally, decided that the *lis pendens* provisions had to assume paramount importance. The ECJ simply does not see questions of jurisdiction as being concerned with private rights at all. The decision of the French

[46] See Fentiman [2004] CLJ 312.

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court to proceed with the case does not condone or validate X's initial decision to sue in the non-contractual forum; it merely attaches certain consequences to that decision. Prima facie, therefore, damages appear to be available or more accurately are left as a matter for the private law of the chosen forum. As we have seen, in English law, it seems clear that damages would now be available.

Thirdly, however, it is also necessary to consider the effect, if any, of the enforceability of judgments given under the Brussels regime.

C. The enforceability of judgments given in breach of an exclusive jurisdiction agreement

At common law, as we have seen, section 32 of the Civil Jurisdiction and Judgments Act 1982, provides that a judgment given in breach of an agreement not to sue in the country giving judgment will not be recognized or enforceable. Accordingly, at common law (which in this context means in any case where proceedings are pursued to judgment in a non-Contracting State) any judgment obtained in breach of contract will not be enforceable in the UK. The innocent party may still suffer loss, for example, through costs or, more significantly, if he has assets in the judgment country through enforcement in that country. But he receives some measure of protection in that he cannot be sued on that judgment in England (or any other State which has a provision similar to section 32). Furthermore, because the judgment is not entitled to recognition no issue estoppel arises in relation to any of the issues determined by the foreign court; including the applicability of the jurisdiction clause.

But section 32 does not apply to judgments subject to the Brussels Regulation[47] and there is no equivalent to section 32 under the Brussels Regulation itself.[48] The consequences of this must be considered in stages.

First, does that mean that a judgment of a Contracting State given in breach of an exclusive jurisdiction agreement is always enforceable? Although there is no section 32, could it be argued that the judgment is not enforceable on any other ground?

Although the problem no longer arises in the case of arbitration agreements,[49] it had been argued that a judgment given in breach of an arbitration agreement would be contrary to public policy and not enforceable on that ground.[50] Can the same reasoning apply to judgments given in breach of an exclusive jurisdiction agreement? It would of course have been open to the drafters of the Regulation expressly to provide that judgments given in breach

[47] Section 32(4)(b).

[48] Article 35 provides that a judgment shall not be recognized if it conflicts with ss 3 (insurance), 4 (consumer contracts) or 6 (Art 22 exclusive jurisdiction). Thus, it does not apply to judgments given in conflict with an exclusive jurisdiction agreement under Art 23.

[49] Which are excluded from the scope of the Brussels Regulation. See *Through Transport Mutual Insurance Association v New India Assurance Co* [2004] EWCA CIV 1598.

[50] Art 34(1) of the Regulation. See CMV Clarkson and J Hill (eds) *Jaffey on the Conflict of Laws* (2nd edn Reed Elsevier 1999 184–5.

of an exclusive jurisdiction clause valid under Article 23 are not to be recognized in any Contracting State; it did so in relation to judgments given in breach of Article 22. They chose not to do so. On the contrary, under Article 35 (3) the jurisdiction of the judgment court cannot be reviewed and the test of public policy may not be applied to the rules relating to jurisdiction. Therefore, the general rule must be that judgments given by the court first seised are binding and enforceable in all other Contracting States. It may still be possible to argue that in an extreme case, given other factors, the judgment is inconsistent with public policy but it is difficult to think of many situations where that is likely to be the case[51] and breach of Article 23 will not, in itself, be enough.

Thus, if the French court awarded damages of 5,000 euros to X, this judgment (absent perhaps some overriding consideration of public policy) is entitled to recognition and enforcement in all other Contracting States. This raises the first obstacle to a claim for damages. If the English court were to award X damages of 5,000 euros for breach of the exclusive jurisdiction clause on the basis that it would have reached the opposite view on the merits, it is difficult to imagine that the ECJ would accept that the English court had complied with its obligation to recognise and enforce the French judgment.[52] But a more fundamental problem arises.

A claim for damages would depend on establishing a breach of contract, namely that X was in breach of the promise contained in the exclusive jurisdiction clause by suing in France (and that Y has suffered loss as a result). But, on the hypothesis being considered, the French court in proceeding to hear the case has necessarily already decided that the clause did not apply. Various factual and/or legal findings may be behind that decision (eg that the clause was not incorporated into the contract, that it was not exclusive, or that Y had submitted to the jurisdiction of the French court). Given that the judgment is entitled to be recognized as though it was an English judgment, those findings will be binding on the parties in any subsequent proceedings (that is, they create an issue estoppel in relation to each of those findings).[53] Accordingly, X would be able to rely on any of those findings as a defence to any claim for damages for breach of the clause brought by Y in the English court.

[51] An obvious example might be where the parties have obtained judgment by ignoring an injunction against the continuing of proceedings as in *Philip Alexander Securities and Futures Ltd v Bamberger* [1997] IL Pr 72 where the court indicated that a judgment given in the face of an interlocutory injunction granted by the commercial court should not as a matter of public policy be recognized in the UK. But for the reasons explained in detail above, given that it is no longer open to the court to grant an anti-suit injunction in these circumstances it is unlikely that such a situation would arise in practice.

[52] This difficulty was referred to by Hobhouse J in *The Atlantic Emperor (No 2)* [1992] 1 Lloyd's Rep 624.

[53] Issue estoppel is not dealt with expressly in the Regulation but as a judgment which is entitled to be recognized must be treated *as though it were an English judgment* there seems to be no reason why a defendant could not rely on an issue estoppel arising from that judgment. See A Briggs 'The Conflict of Laws' 116–17.

VI. CONCLUSIONS

An exclusive jurisdiction clause contains a promise not to sue other than in the chosen jurisdiction. The prima facie remedy for breach of that promise at common law is the grant of a stay or anti-suit injunction. At common law, such provisions will be specifically enforced unless a good reason is shown why not. But in a case where specific enforcement is not available it is now clear at common law that redress might be sought through a claim for damages.

The Brussels approach differs in a number of fundamental respects. On the one hand, it appears to afford greater protection to party autonomy than at common law as all courts other than the chosen forum *must* stay in favour of the chosen court. But the application of the *lis pendens* provisions, the absence of an equivalent to section 32 of the Civil Jurisdiction and Judgments Act 1982 potentially make severe inroads into this protection. In particular, if a party sues in another Contracting State it is that court (applying its own procedural rules and rules of private international law) which will determine the scope of the jurisdiction clause. If that court decides that the clause does not apply there is nothing the chosen forum can do about it even if it would have reached a different view as the ECJ has made it clear that an anti-suit injunction cannot be granted as Article 27 trumps Article 23.

Nor does a claim for damages offer an alternative solution. As we have seen, there must also be serious doubts as to whether the chosen forum can award damages to compensate an innocent party who has suffered loss through breach of the exclusive jurisdiction clause. Any claim based on a judgment given in the non-contractual state would seem to undermine the principle that such a judgment is enforceable under the Brussels Regulation. Furthermore, the decision of the non-contractual forum that the clause does not apply is binding the issue estoppel created would also be inconsistent with any claim for damages.

The implications of the decision in *Owusu v Jackson* in the context of exclusive jurisdiction agreements in favour of non-contracting states are not yet clear. Although various solutions have been proposed,[54] it is no longer clear that the English is entitled to stay proceedings against defendants domiciled in the contracting states in favour of a chosen non-contracting state. The most obvious solution would be to require an amendment to the Regulation to deal with this problem (and possibly Article 22 and 27 situations) but unless and until that happens further doubts must be cast on the enforcement of jurisdiction agreements in Brussels cases.

[54] See, for a full discussion of *Owusu v Jackson*, J Harris 'Stays of Proceedings and the Brussels Convention' [2005] ICLQ 933. Colman J in *Konkola Copper Mines plc v Coromin* [2005] EWCH (Comm) 898 ruled that such a stay should in principle be possible but his views were *obiter* and it remains to be seen whether the ECJ would agree.

Given these serious inroads into the respect given to the principle of party autonomy, the fears of many that the Brussels approach may well affect commercial parties willingness to litigate (as distinct from arbitrate) in Europe may well prove to be well founded.

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