

Forum Shopping in the European Judicial Area – Introductory Report

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Conference on Forum Shopping in the European Judicial Area (Hart, forthcoming)*

University of Oxford Faculty of Law Legal Studies Research Paper Series

Working Paper No 39/2006

September 2006

*Now published: Studies of the Oxford Institute of European and Comparative Law - no. 7

"Forum Shopping in the European Judicial Area" Edited by Pascal de Vareilles-Sommières, www.ipeg.com/blog

Introductory Report

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INTRODUCTION

There is an English saying that “you wait for ages for a bus and then three come along at once”. To some extent the triumvirate of decisions in *Gasser*,¹ *Turner*² and *Owusu*³ have that feel to them. The Brussels Convention came into force in the United Kingdom on 1 January 1987.⁴ Yet it is only very recently, and in quick succession,⁵ that certain key principles of English civil procedure, long cherished but always vulnerable to attack, have come within the range of the European Court of Justice. The saying in question is meant to convey a sense of frustration. If it is not entirely apt, it is only because, for most English lawyers, the frustration stems from the decisions having arrived, rather than in the waiting for them. In short order, in cases falling within the scheme of the Convention,⁶ English practitioners have been deprived of the primacy afforded to jurisdiction agreements (*Gasser*, *Turner*), the anti-suit injunction (*Turner*) and the doctrine of *forum non conveniens* (*Owusu*). All three, of course, are designed to curb the worst excesses of forum shopping. To a large extent, the answer given by the European Court in all three cases is that the necessary control is already provided by the scheme of the Convention and the mutual trust between the Contracting States which is its underpinning. The principal focus of this Conference lies in a clearer understanding of the detail of this answer, and an assessment of the ramifications for the future. In this latter regard, much of the fascination lies in the room which may have been left for the creativity of the common law to come to the fore.⁷

In the study of comparative law one is struck by what is often a clash of culture, but it is a feature of comparative civil procedure, and jurisdiction in particular, just how stark is that clash (or *Justizkonflikt*⁸). In matters of substantive law, one regularly finds that the same,

¹ Case C-116/02 *Erich Gasser GmbH v MISAT srl* [2003] ECR I-0000, [2005] 1 QB 1.

² Case C-159/02 *Turner v Grovit* [2004] ECR I-0000, [2005] 1 AC 101.

³ Case C-281/02 *Owusu v Jackson* [2005] ECR I-0000, [2005] 2 WLR 942.

⁴ Throughout this introduction references are made to the Convention and to the relevant Articles therein since it is with the Convention rules that each of the three decisions under consideration was concerned (the relevant version being that upon the Accession of Portugal and Spain: 1989 OJ L285/1). It also follows that references are made to ‘(non-)Contracting States’. Where appropriate, specific references will be made to the Regulation (Council Regulation (EC) 44/2001, 2001 OJ L12/1) which has replaced the Convention (save in Denmark), and to ‘(non-) Member States’.

⁵ It has been referred to as ‘fifteen months of infamy’: A Briggs, ‘The Impact of Recent Judgments of the European Court on English Procedural Law and Practice’ *Zeitschrift für Schweizerisches Recht* (2005) II 231, 232.

⁶ Of course, the understanding of what that means is crucial to at least one of them (*Owusu*): below.

⁷ See, most notably, the development of a claim for damages for breach of contract as a means of enforcing a jurisdiction agreement: below.

⁸ H Muir Watt, ‘Injunctive Relief in the French Courts: A Case of Legal Borrowing’ [2003] *CLJ* 573.

or very similar, answers are reached and it is only the reasoning or the methodology which differs. The same cannot be said of jurisdiction and the reason for this is not hard to find. To compare the French law of contract with the English law of contract is very largely to compare like with like;⁹ it involves, at the very least, the comparison, on both sides, of *private* law. To compare the common law model of adjudication, as exemplified by English law, with the Convention model, at least as it is understood by the Court of Justice, is in one sense to attempt a comparison between *private* law and *public* law.

The private law underpinning of the common law model is apparent from the role given to the consent of the parties, and the sense in which the decisions of the courts represent the vindication of rights and the enforcement of obligations. Two examples, both based on the existence of a jurisdiction agreement should suffice by way of illustration. If the parties have agreed to confer exclusive jurisdiction on the English courts,¹⁰ each of them may assert their legal right not to be sued elsewhere as the basis for seeking a remedy if the other commences proceedings abroad.¹¹ Conversely, if they have agreed to the exclusive jurisdiction of a foreign court and one of them commences proceedings in England, the same legal right may be asserted.¹² The subject matter of the agreement may be jurisdiction, but the cause of action is breach of contract and the remedies are an injunction,¹³ or damages.¹⁴ By contrast, consider this assessment of the recent approach of the Court:

...the Court of Justice does not appear to see the issue of jurisdiction in terms of rights, agreements, private law. It made it clear, in *Gasser and Turner*, that it saw the issue in terms of public law, of rules of jurisdiction which were wholly and exclusively the concern of the court whose jurisdiction had been invoked, and which were of no legitimate concern to the courts of another Contracting State. To put it another way...the Convention is to be read as containing instructions to a court which are not within the parties' power, and over which they have no private rights.¹⁵

As the writer notes, such a view not only goes a long way to explaining the decisions in *Gasser and Turner*, it might also suggest that it is impossible to open up any sort of meaningful dialogue between the two models of adjudication. That would be the extreme

⁹ One should perhaps speak more broadly about the comparison of the law of obligations in each State.

¹⁰ And in some cases, it seems, even if they have only agreed to non-exclusive jurisdiction: *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643; [2003] 2 Lloyd's Rep 571.

¹¹ See, eg, *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588 (injunction); *Continental Bank NA v Aeakos Naviera SA* [1994] 1 WLR 588 (injunction); *Union Discount Co v Zoller* [2001] EWCA Civ 1755; [2002] 1 WLR 1517 (damages).

¹² See, eg, *The Sennar (No 2)* [1985] 1 WLR 490 (where, as is usually the case, the English proceedings were stayed), cf. *The El Amria* [1981] 2 Lloyd's Rep 119 (where a stay was refused for the reasons explained in n.18 below).

¹³ In both cases one seeks an order restraining the breach, even if the language of an injunction tends to be confined to the restraint of the party in default by bringing foreign proceedings (the 'anti-suit injunction') whereas the language of a 'stay' is employed to describe the restraint of the party in default by bringing English proceedings.

¹⁴ See below.

¹⁵ A Briggs, above n.5, 244.

and pessimistic view. The clash of culture may be stark, but one should not lose sight of the fact that we are, ultimately, dealing with differences of degree, or emphasis.

Under the common law model, jurisdiction is not simply left to the redistributive will of the parties. Even if the fiction that a jurisdiction agreement is automatically void as an attempt to oust the jurisdiction of the courts has long since been left behind,¹⁶ the courts nonetheless retain the ultimate power to determine when it shall be exercised. Thus, a stay of English proceedings,¹⁷ or an order restraining a party from commencing or continuing foreign proceedings,¹⁸ may be refused even in the face of the parties' agreement to sue elsewhere if it is in the interests of the sound administration of justice to do so.¹⁹ Under the Convention, the consent of the parties, and the rights to be derived therefrom, is not without significance, if only in the very existence of Article 17. The Preamble to the Regulation states that: 'The autonomy of the parties to a contract...must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation'. There is no reference to Article 27 (ex. 21) so that this still merely begs the question, which lies at the heart of *Gasser* and *Turner*, of *which* court should be expected to respect the parties' autonomy, and uphold their rights. Nonetheless, it is clear that under both models of adjudication there is a balance to be struck between the public law administration of justice and the private law vindication of rights. In that sense, it is hoped that this Conference will look forward, as much as it looks backwards, to see if there is any way in which the balance reached within the two models might be brought a little closer together than at first sight seems possible.

By way of a final preliminary observation, the comparison drawn above between the common law model of adjudication and the *Convention* model was quite deliberate. That is the right comparison; not one between the common law model and the civilian model, however much the original Convention and much of its current version, as well as the Regulation which has replaced it,²⁰ is based on the civilian model. As Horatia Muir Watt

¹⁶ This is a proposition which appears not to have taken root in English law (*Cowen and Mendes da Costa* (1965) 43 Can. Bar. Rev. 453, 474-476; *Gienar v Meyer* (1796) 2 H. Bl. 603; *Johnson v Machielsne* (1811) 3 Camp. 44) and which, in any event, has long since been abandoned following the Common Law Procedure Act 1854. It did hold sway in the US until about the 1940s (*Benson v Eastern Building & Loan Association* 174 NY 83, 86 (1903); *Carbon Black Export Inc v The SS Monrosa* 254 F. 2d 297 (5th Cir.); *The Ciamo* 58 F. Supp 65 (1944); *Mutual Reserve Fund Life Association v Cleveland Woollen Mills* 82 F. 508, 510 (6th Cir. 1897). It was left to Chief Justice Burger, in his masterly analysis in *M/S Bremen v Zapata Off-Shore Company* (1972) 407 US 1, 12, to expose its fictional basis: 'No one seriously contends in this case that the forum selection clause "ousted" the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.' (emphasis added).

¹⁷ *The El Amria*, above n.12.

¹⁸ *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425.

¹⁹ Usually, as in the cases above (n.16, n.17) where there is complex litigation involving other parties not bound by the jurisdiction agreement and which can only be heard in a single venue by overriding the agreement. But, even here, the possibility that damages may be awarded instead of the specific relief claimed sustains the proposition that the courts are still principally concerned with the vindication and enforcement of the parties' rights and obligations: see below.

²⁰ Above, n.4.

has pointed out,²¹ if the civilian tradition finds itself able to borrow, and live with, the anti-suit injunction which typifies the approach of the common law, any objections to the importation of this, and other common law devices, into the scheme of the Convention must be found in the specific architecture of the Convention. They cannot be based on a simplistic and unthinking assessment of the cultural incompatibility of the common law and the civil law. It is with that specific architecture that we must now concern ourselves. The structure of this introductory report is dictated by the topics which are to follow in the Conference. It will first comment on the decisions in *Gasser* and *Turner* individually and then draw out further comment based on their collective effect. This will be followed by consideration of the decision in *Owusu*.

I – THE *GASSER* CASE: THE FATE OF JURISDICTION CLAUSES IN CASE OF *LIS PENDENS*

(1) *Lis pendens: Kompetenz-Kompetenz and the Prior Tempore Rule*

49 Thus, where there is an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention[...], it is incumbent on the court first seized to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seized as having exclusive jurisdiction.

The principal issue in *Gasser* was simple enough. Article 21 contains the clear, simple, and some would say blunt, rule that in proceedings involving the same cause of action²² and between the same parties²³, any court other than the court first seized²⁴ shall stay its proceedings until such time as the jurisdiction of the court first seized is established and, if established, it shall then decline jurisdiction. If there are any exceptions to the operation of this rule, and the earlier decision of the Court in *Overseas Union*²⁵ was interpreted in *Gasser* merely to have left open this possibility without reaching any conclusion,²⁶ a valid agreement under Article 17 is not one of them. The implications of this are fairly obvious. A party to a contract which has secured the inclusion of a jurisdiction agreement, and taken the steps necessary to ensure that it complies with the requirements of Article 17,²⁷ has not, by so doing, ensured that it will not first find itself

²¹ Above, n.8.

²² On which, see: Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861; Case C-406/92 *The Tatry* [1994] ECR I-5439; Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207.

²³ On which, see: *The Tatry*, *ibid.*; Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075

²⁴ There has been an important change under the Regulation (above n.4) so that the determination of when a court is seized is no longer left entirely to the national law of the court concerned: Article 30.

²⁵ Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317.

²⁶ Though the English courts seem persuaded that Article 16 is an exception: *Speed Investments Ltd v Formula One Holdings Ltd* [2004] EWCA Civ 1512; [2005] 1 WLR 1936 (Lugano Convention).

²⁷ As Richard Fentiman explains in his paper, it is wrong, strictly speaking, to describe the issue in *Gasser* as one of competing priority between Article 21 and Article 17 because, until a decision is reached as to the validity of the jurisdiction agreement by *any* court, one simply does not know whether there is a valid Article 17 agreement. In that sense, the issue really is one of *kompetenz-kompetenz* – which court should

having to contest proceedings in the courts of another Contracting State.²⁸ The subsequent decision of the Court in *Turner* has outlawed the injunction which might have ensured this, but the decision in *Gasser* means that the application for it could never be made. Any application must be made to the court first seised and it is an application put directly to that court to decline jurisdiction on the strength of the jurisdiction agreement.

The principal argument relied upon by the Court for this interpretation of Articles 21 and 17, and a theme common to all three decisions considered at this Conference, is ‘legal certainty’:

...it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17...²⁹

But certainty is a flexible concept, as is all too apparent from the Opinion of Advocate General Leger. Dare one say it, but one detects a closer adherence to the common law model of adjudication in his observation that to give priority to Article 21 undermines ‘the effectiveness of Article 17 and the legal certainty that attaches to it’.³⁰

If the Advocate General and the Court take a different view of the legal certainty which is more relevant, they appear to share the same view about the scope of Article 17 and yet still draw very different conclusions from it. It may be noted from the passage above that the Court appears to regard the validity of the parties’ agreement as a matter to be determined ‘solely’ in accordance with the requirements of Article 17. This can be added to what is now a relatively long line of observations,³¹ but *not* clear cut rulings, that *all* issues of validity are determined by compliance with Article 17. The Advocate General takes an even clearer line:

...the Court’s case-law shows that an agreement conferring jurisdiction must be regarded as an independent concept.³² It follows that the formal *and substantive*

determine the validity of the agreement; the court putatively chosen or the court first seised? That said, if is the latter, Article 21 will, in effect, have prevailed.

²⁸ In situations other than those where there is a basis of jurisdiction which takes priority even over the parties’ agreement: eg, the provisions of exclusive jurisdiction in Article 16 or the special rules for consumer contracts and insurance contracts which may allow an agreement to be overridden as against the non-consumer (Article 15), or the insurer (Article 12).

²⁹ Para 51.

³⁰ Para 57, Opinion delivered on 9 September 2003.

³¹ See also: Case C-106/95 *MSG v Les Gravières Rhénanes Sarl* [1997] ECR I-911, para 15; Case C-378 *Coreck Maritime GmbH v. Handelsveem BV* [2000] ECR I-9337, para 13; Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1997] ECR I-1597, paras 49, 51.

³² Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, para 14.

conditions governing validity to which agreements conferring jurisdiction are subject must be assessed in the light of the requirements of Article 17 alone.³³

From this same premise, two different conclusions emerge. For the Court, it means that the court second seised is in no better a position than the court first seised to determine whether the latter has jurisdiction. This leads to the conclusion that certainty demands a clear answer to which of them should do so. For the Advocate General, it reduces the risk of inconsistent judgments as regards the validity of a jurisdiction agreement thereby allowing the court second seised to refrain from applying Article 21 in circumstances where it is 'absolutely sure' that it has exclusive jurisdiction under Article 17.

Whatever the right conclusion to have been drawn, is not the premise false in one sense and incomplete in another? It appears false in the assertion that the formal requirements of Article 17 are a sufficient guarantee both of formal and material validity. However often this may be repeated, it singularly fails to convince. If one party alleges that his 'agreement' was procured by fraud, duress, misrepresentation or some other vitiating factor is it really a proper answer to say that provided it was in writing, or complied with the alternative tests in Article 17,³⁴ there was a real consensus between the parties? If the formal requirements in Article 17 are no guarantee of the material validity of an agreement, how is it to be tested? The answer to that is not clear, if only because the Court continues to insist on avoiding it, but to the extent that it may require the identification of an applicable law, that would mean one court may well be in a better position to assess the validity of the agreement and that court will most often be the chosen court.³⁵ The falsity of the premise that Article 17 alone may determine all aspects of the validity of a jurisdiction agreement might be avoided by extracting an autonomous definition of what it means for the parties to have 'agreed',³⁶ but this will be no easy matter and it is certainly not what the Court has been referring to in its rather naïve reliance on Article 17 to date. Furthermore, it will still leave the premise incomplete. Even the Court has accepted that the construction of the parties' agreement so as to determine whether the dispute falls within its terms,³⁷ or which courts have in fact been chosen,³⁸ and probably whether the agreement is exclusive or non-exclusive, is for the court seised to determine. To the extent that this involves a choice of law, and that is certainly how it is viewed in the English courts,³⁹ the chosen court is very likely to be best placed to determine the agreement's application.⁴⁰

³³ Para 78.

³⁴ Effectively course of dealing and trade custom.

³⁵ On the basis that the choice of the courts of a particular legal system is often accompanied by the choice of the law of the same legal system, or because, in the absence of any express choice, the choice of court will be strong evidence of an implied choice of the law of that court: Rome Convention on the Law Applicable to Contractual Obligations, Article 3(1).

³⁶ See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (4th edn., Lloyds of London Press, 2005), 132-133.

³⁷ *Powell Duffryn*, above n.32.

³⁸ *Coreck*, above n.31.

³⁹ See *Carnoustie Universal SA v International Transport Workers Federation* [2002] EWHC 1624; [2002] 2 All ER (Comm) 657; *British Sugar plc v Fratelli Babbini di Lionello Babbini* [2004] EWHC 2560;

If there is a deeper issue about the scope of Article 17 which is hidden away in the decision in *Gasser*, it must be conceded that, even when identified, none of the possible answers to the relationship between Article 17 and Article 21 is free from difficulty. Those who would give priority to Article 17, whether in an unrestricted fashion or subject to the conditions imposed by Advocate General Léger, are still left with the risk of irreconcilable judgments. Some consider the risk to be overstated,⁴¹ but while it exists it does run counter to one of the central aims of the Convention. Furthermore, what is the party who would now be able to sue in the court second seised to do about the proceedings in the court first seised? He may rely on the court first seised to declare of its own motion that it has no jurisdiction because of the existence of the jurisdiction agreement. Here, there seems to be a difference of opinion between the Schlosser Report⁴² which states that he may so rely and the Court in *Gasser* which seems to have formed the view that a court is only required to decline jurisdiction of its own motion, without any appearance by the defendant, where there is another Contracting State with exclusive jurisdiction under Article 16.⁴³ According to the Court this supported its decision to give priority to Article 21.⁴⁴ The implication is that an application will have to be made to the court first seised in any event, so better in the interest of certainty and efficiency to confine the application to that court. How tempting it must have been for the United Kingdom representatives to argue that this problem could be avoided by the judicious use of an anti-suit injunction,⁴⁵ but with one eye on the reference to come in *Turner*, one assumes they did not do so. There is no mention of such an argument in the Opinion, or the Judgment. The risk of a default judgment in the court first seised is, of course, one which the ‘innocent’ party may have been happy to run.⁴⁶ The ruling of the Court leaves him with no option and, of course, it comes at a price. This brings us to the second topic for discussion.

(2) Fraud and Abuse in Matters of Jurisdiction

53 Finally, the difficulties [...] stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence

[2005] 1 Lloyd’s Rep 332; *Provini Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961; [2003] 2 All ER (Comm) 683.

⁴⁰ See J Mance, ‘Exclusive Jurisdiction Agreements and European Ideals’ (2004) 120 *LQR* 357, 361-362.

⁴¹ *ibid.*, 362.

⁴² 1979 O.J. C. 59, p.124, paras 22 and 174.

⁴³ Para 52. In the Court’s ruling there is no mention of the first paragraph of Article 20 which may form the basis of the comment in the Schlosser Report. It states: ‘Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.’

⁴⁴ *Ibid.*

⁴⁵ As in *Continental Bank NA v Aeakos Cia Naviera* [1994] 1 WLR 588.

⁴⁶ It would rather depend on the circumstances, including in particular where the ‘innocent’ party may ultimately seek to enforce any judgment in his favour. If the other party’s only assets are located in the State of the court first seised, it would be unwise in the extreme not to appear and contest jurisdiction so as to avoid a default judgment which would take priority over any other judgment by virtue of Article 27(3).

proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

It should be noted that this observation of the Court which is highlighted for particular comment was made as part of the answer to the second of the questions referred to the Court by the Oberlandesgericht, i.e. the relationship between Article 21 and Article 17. There was a further question referred to the Court which asked whether the fact that proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties) can have the consequence that the court second seised is not required to proceed in accordance with Article 21. The Court answered this third question in the negative,⁴⁷ but it was a quite different question to the second, not dependent in any way on whether proceedings had been commenced in the court first seised in breach of an exclusive jurisdiction agreement, and it is not the subject of any further comment in this Introduction.⁴⁸

Of course, where there is a jurisdiction agreement, the party in breach may have commenced proceedings in a particular court precisely because of its reputation for delay, but the delaying tactics to which the Court is referring in paragraph 53 are those which flow simply from having commenced proceedings in a court other than that chosen by the parties. Even in courts not known for taking an excessively long time to resolve challenges to their jurisdiction, this can be sufficient to delay resolution of the substantive dispute and obtain a distinct advantage for the party in breach.

To an extent the Court helped to contribute to this problem by its earlier ruling⁴⁹ that here is nothing in the Convention which prevents a party from commencing proceedings for a declaration of non-liability.⁵⁰ What is striking about its response in *Gasser* is the open acknowledgement that this is a problem. Subsequently, in the English courts, it has been rather vividly demonstrated in *JP Morgan Europe Ltd v Primacom AG*⁵¹ in which Cooke J. entertained little doubt that proceedings were commenced in Germany with the primary intention of seeking to frustrate any attempt to obtain appropriate relief in the English courts in accordance with an exclusive jurisdiction clause.⁵² The requirement imposed on him by *Gasser* to give precedence to proceedings brought in breach of an exclusive jurisdiction agreement was regarded by him as ‘self-evidently’ unjust; so much so that if

⁴⁷ As did Advocate General Léger.

⁴⁸ This is not to deny that there is an argument to come on how this ruling might stand if it may leave a court assigned under an exclusive clause, but second seised, in breach of Article 6(1) of the Human Rights Convention because it has failed to progress the suit with reasonable speed: see J. Mance, above n.40, 360.

⁴⁹ Case C-406/92 *The Tatry* [1994] ECR I-5439.

⁵⁰ Something it seems which is ‘generally’ allowed in the legal systems of the Contracting States: Opinion, para 68.

⁵¹ [2005] EWHC 508.

⁵² *Ibid.* para [10]. As Richard Fentiman points out in his paper, nine months after Cooke J. declined jurisdiction, the jurisdiction of the German courts was successfully challenged on the basis of the jurisdiction agreement, but a delay had been obtained and a settlement followed shortly thereafter.

he had only been faced with related actions within the meaning of Article 22,⁵³ the need to avoid that injustice would be sufficient, in the exercise of the court's discretion, to override 'the strong presumption' which lies in favour of a stay of the second action.⁵⁴

What adds to the sense that the delay achieved by the party in breach may amount to fraud and abuse is that with delay comes cost. This may be exacerbated in two ways. First, not all the legal systems of the Contracting States allow for a challenge to be made to jurisdiction before, and separate from, consideration of the merits. For example, it was expressly noted by the Court of Appeal in *Continental Bank NA v Aeakos Cia Naviera SA*,⁵⁵ where proceedings were commenced in Greece in breach of an agreement conferring exclusive jurisdiction on the English courts, that under the Greek rules of civil procedure a defendant is obliged to file a defence on the merits at the same time as an objection to jurisdiction.⁵⁶ This was clearly thought to risk the incurring of very considerable, and unjustified, cost. One possible solution lies in the recovery of those costs, but here the problem may be exacerbated by the fact that not all of the legal systems of the Contracting States award 'costs in the cause'.

On the basis that the ruling in *Gasser* is here to stay, but in the clear recognition even by the Court that there is the danger of abuse, perhaps the next development is to consider how that might be alleviated. Two possible solutions are suggested. First, is it now time to consider whether to adopt, as part of the Convention scheme, and now the Regulation, a uniform procedure allowing for early and speedy resolution of any challenges to jurisdiction? The Convention is, of course, not meant to affect national procedure so that the Contracting States are free to organize the proceedings brought before their judicial authorities. But, as affirmed by the Court in *Turner*, they 'must make certain that the provisions thus adopted do not run counter to the philosophy of the Convention.'⁵⁷ Might that provide the basis for further harmonization not only of the rules of jurisdiction themselves, but how they are enforced? Second, might it lie within the power of the court chosen by the parties to effect a remedy for the recovery of costs 'wasted' on a successful challenge to the jurisdiction of the court first seised? The first signs that the English courts are already beginning to think along these lines have been detected, but the need and basis for such a remedy are better assessed after consideration of the Court's ruling in *Turner*.⁵⁸

⁵³ In fact, it was its successor under the Regulation, Article 28. Cooke J had found, however, that Article 21 applied and he was bound by the ruling in *Gasser*.

⁵⁴ Above, n.51, para [66].

⁵⁵ [1994] 1 WLR 588.

⁵⁶ It may not be entirely accurate to say that the defendant is 'obliged'; however, if he does not file a defence on the merits, he will find that it is too late to do so if his jurisdictional challenge fails.

⁵⁷ Above n.2, para 37, citing its earlier ruling in Case C-365/88 *Hagen* [1990] ECR I-1845, para 20.

⁵⁸ See below.

II – THE *TURNER* CASE: THE PROHIBITION ON ANTI-SUIT INJUNCTIONS

(3) Anti-Suit Injunctions and the Principle of Mutual Trust

28. [...] In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paragraphs 24 to 26 of this judgment, underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.

If the central theme of the ruling in *Gasser* was legal certainty, that which pervades the ruling in *Turner*, as is all too apparent from this passage, is mutual trust. So convinced was the Court as to the force of this argument that it departed from its usual approach and gave a broad answer to what had been a narrowly drafted reference. The question referred to the Court was as follows:

Is it inconsistent with (the Brussels Convention) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country *when* those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts? (emphasis added)

To which the answer provided was:

The (Brussels Convention)...is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, *even where* that party is acting in bad faith with a view to frustrating the existing proceedings. (emphasis added)

The anti-suit injunction *per se* has been outlawed under the scheme of the Convention; the notion of bad faith and the protection of the restraining court's proceedings are seen as but one instance of when such an order might have been made, and even that will not suffice. Accordingly, there is clearly no longer any prospect of an order restraining a party from commencing or continuing proceedings in the courts of another Contracting State brought in breach of a jurisdiction agreement,⁵⁹ even if Lord Hobhouse of Woodborough thought that this issue should not have been affected by the answer to the question referred by the House of Lords.⁶⁰

⁵⁹ *Continental Bank NA v Aeakos Cia Naviera* [1994] 1 WLR 588 and the cases which have followed it may therefore no longer be relied upon.

⁶⁰ *Turner v Grovit* [2002] 1 WLR 107, para [40].

For now, the English courts have persuaded themselves that they still have the power to award an injunction to restrain the breach of an arbitration agreement,⁶¹ on the supposition that the existence of such an agreement takes the application outside the scope of the Convention,⁶² but it seems highly unlikely that this would survive a further reference to the Court.⁶³ Arbitration apart, the anti-suit injunction is dead so far as proceedings in the courts of another Contracting State are concerned, and the cause of death is mutual trust. Much of the difficulty felt by English lawyers about this ruling lies in the perception that, even after the submissions made to it, the Court still did not have a full and proper appreciation of the nature of the order which has come to be known as the anti-suit injunction.⁶⁴ The seeds of doubt are sown in the passage with which this part began. The judgment made in the award of an injunction does not just *imply* an assessment of the appropriateness of bringing proceedings before a court of another Contracting State, it makes such an assessment on an entirely *express* basis, but it is an assessment of the conduct of the party in question; it is no assessment of the court.

It would be quite wrong to suggest that this distinction, based on the *in personam* nature of the injunction was entirely lost on the Court, or Advocate General Colomer. Nevertheless, while the latter conceded that such an analysis was ‘formally correct’, he thought it ‘undeniable’ that ‘as a result of a litigant being prohibited, under a threat of a penalty, from pursuing an action before a given judicial authority, the latter is being deprived of jurisdiction to deal with the case, and the result is *direct* interference with its unfettered jurisdictional authority.’⁶⁵ There is no sense in which, merely by awarding the injunction, an English court deprives another of its jurisdiction. What happens after the injunction has been awarded is a matter for the party to whom it is addressed. If he continues with the proceedings in the courts of another Contracting State, he will be in contempt of the English courts and subject to penalties before them, but there is nothing in the order itself which will prevent the proceedings from continuing.⁶⁶ It may, of course, be different if an attempt is made to have the injunction recognized and enforced by the courts of another Contracting State, but that is another matter which is dealt with below. Advocate General Colomer is perhaps on safer ground when he describes the distinction between an order *in personam* addressed to a litigant and an order addressed to a foreign court as a ‘very fine one’,⁶⁷ but it is a crucial distinction nonetheless. It is also right to remind the Court⁶⁸ that it was happy to accept this distinction as the basis for its

⁶¹ *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Ltd* [2004] EWCA Civ 1598; [2005] 1 Lloyd’s Rep 67; *West Tankers Inc v Ras Riunione Adriatica di Sicurita SpA* [2005] EWHC 454; [2005] 2 Lloyd’s Rep 257.

⁶² Article 1.

⁶³ See A Briggs, ‘Anti-suit injunctions and Utopian Ideals’, (2004) 121 *LQR* 529, 531.

⁶⁴ For a debate as to the correctness of the terminology, see Lord Hobhouse, above n.60, at para [23]. Cf. A Briggs, ‘Decisions of British Courts During 2001’, *The British Yearbook of International Law* 2001, p.438.

⁶⁵ Para 34, Opinion, 20 November 2003.

⁶⁶ It is perhaps in the peremptory dismissal of the argument about the true nature of an anti-suit injunction that one sees the starkest contrast between the private law model of adjudication as practised in English law and the public law model embodied in the approach of the Court.

⁶⁷ G.A. Bermann, ‘The use of anti-suit injunction in international litigation’, *Columbia Journal of Transnational Law*, vol. 28, 1990, pp.630-631; *Peck v Jennes* 48 US (7 How.), pp.612, 624-625.

⁶⁸ As does Briggs, above n.5.

decision in *Webb*⁶⁹ that the *in personam* claim by a beneficiary against a resulting trustee for an order to convey the land does not have as its object a right *in rem* in the land in question for the purpose of Article 16(1).

(4) Relationship between European Rules on Jurisdiction and Domestic Rules on Procedure

29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention [...].

The key to this passage would seem to lie in the assessment that, even if procedural in nature,⁷⁰ the grant of an anti-suit injunction would impair the effectiveness of the Convention. It is in the assessment of this impairment on practical grounds, rather than in notions of mutual trust, that the Court may establish a more cogent basis for the outlawing of the anti-suit injunction. In the paragraph immediately following, it identified this problem:

it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.

Even those highly critical of the ruling in *Turner* are forced to concede that ‘the problems of irreconcilable judgments which risked being summoned into existence, if a foreign court heard the claim on the merits and the English court ordered an injunction, were not insignificant.’⁷¹ There are a number of situations that would occur if *Turner* had been decided differently. If the court in the other Contracting State did proceed to a judgment on the merits, would the English court be obliged to recognize and enforce that judgment at the same time as holding the judgment creditor in contempt for having so obtained it? It seems inconceivable that it would do so and the solution would be to withhold recognition of the judgment on the grounds of public policy.⁷² Advocate General

⁶⁹ Case C-294/92 *Webb v Webb* [1994] ECR I-1717.

⁷⁰ The assessment of Lord Hobhouse in *Turner* that the injunction is intended to protect the integrity of the English proceedings does not wholly convince and was, perhaps, given added prominence in the hope of securing a more favourable ruling. There are types of proceedings where, in reality, it is the integrity of those proceedings which is under threat, e.g. proceedings for a winding-up (see A Briggs & P Rees, *Civil Jurisdiction and Judgments* (4th edn., Lloyds of London Press, 2005), p.432). In cases like *Turner* however, the real concern is with the wrong done by the defendant which can only indirectly be said to frustrate or obstruct the proceedings before the English courts.

⁷¹ Briggs & Rees, *ibid.*, p.437.

⁷² Article 27(1).

Colomber would again appear to betray a lack of true understanding of the nature of an anti-suit injunction when he suggests⁷³ that public policy would not be available in such a case because of the bar against using that defence to review the jurisdiction of the judgment court.⁷⁴ As explained above, there is no review of the jurisdiction of another court in the granting of an injunction and no further review would be involved in regarding a breach of the court's order as sufficient to trigger the defence of public policy. The judgment creditor is free to enforce his judgment anywhere else in the EU, but not in the English courts because of the wrong found to have been committed by him.

More difficult would have been the situation if an attempt was made to 'export' the injunction, in particular to the court of another Contracting State hearing the claim on the merits. Would that court be required to recognize the English court's order? Perhaps the answer is that it would be, but there would be no means by which it could be enforced because of the absence of the procedure for contempt by which the English courts back up their own order.⁷⁵ Any attempt to export such means by first issuing a penalty in the English courts would surely fail on the basis that such a penalty is no 'civil and commercial matter'. In this way the effect of the injunction might have been confined to the process of the English courts, which is consistent with the arguments put to the Court for its compatibility with the Convention. But this is all hypothesis, none of which will now come to pass, because whatever steps an English court might wish to take to sanction the wrongful conduct of the defendant, it must not now involve the use of an injunction.

What then might be left? Ideally, something which takes account of the fact that certainty (*Gasser*) and trust (*Turner*) come at a cost to the claimant, who is obliged to take his challenge to the court before whom he should not have had to appear, but which does not interfere directly or indirectly with the scheme of the Convention as it is understood by the Court. An intriguing possibility has begun to emerge in some recent decisions of the English courts outside the scheme of the Convention. At least where the claimant is able to invoke a *legal* right not to be sued abroad, ie the breach of an exclusive jurisdiction agreement,⁷⁶ he may make a claim for damages representing the loss which flows from the breach. The prospect of such a claim has been approved in principle at the highest level⁷⁷ and the Court of Appeal in *Union Discount Co Ltd v Zoller*⁷⁸ found it sufficiently arguable not to have been struck out as disclosing no cause of action.

⁷³ Opinion, para 36.

⁷⁴ Article 28, third paragraph.

⁷⁵ Cf. H Muir Watt, 'Injunctive Relief in the French Courts: A Case of Legal Borrowing' [2003] *CLJ* 573.

⁷⁶ Though there seems no reason why this might not be extended to cover the equitable wrong committed when the defendant commences proceedings abroad unconscionably so as to vex or oppress the claimant: see Briggs & Rees, above n.70, p.449.

⁷⁷ *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425, at [36] *per* Lord Bingham of Cornhill, [48] *per* Lord Hobhouse of Woodborough, [75] *per* Lord Scott of Foscote.

⁷⁸ [2001] EWCA Civ 1755; [2002] 1 WLR 1517. See also: *Svendborg v Akar* [2003] EWHC 797 (Comm).

There may be formidable obstacles in the prosecution of such a claim.⁷⁹ In simple cases, as exemplified by *Zoller*, the claimant may successfully have challenged the jurisdiction of the foreign court and can point to a fairly definite and assessable loss in the form of his wasted costs.⁸⁰ But what if his claim is unsuccessful and he goes on to lose on the merits, or even to win, but less successfully than he would have done in the chosen court? How is his loss to be measured, and what is the effect, if any, of the finding of the foreign court that proceedings should continue because the jurisdiction agreement does not deprive it of its jurisdiction?

This latter difficulty may be thought particularly acute if this development is extended to cover proceedings in a Contracting State brought, in the eyes of the English court, in breach of contract. The decision in *Turner* (backed up by *Gasser* in cases where the chosen court is second seised) requires the claimant to appear in the foreign court and persuade it to decline jurisdiction. If successful, of course, he may then commence proceedings in England free from the constraints of Article 21 and, by analogy with *Zoller*, he may pursue a claim by way of damages for loss suffered in having been wrongfully required to make his case for suit in England other than in England.

But what if the foreign court has not been persuaded that there is a jurisdiction agreement which prevents it from exercising jurisdiction? On one view that must be the end of the matter. By dint of the automatic procedure for recognition, the foreign court's ruling is the *res judicata* which estops the English court from reaching a finding that there has been any breach of contract.⁸¹ It has however been argued that this may be too simplistic.⁸² All that the foreign court may have decided is that there was not sufficient evidence to persuade it not to hear the case; that does not necessarily involve any finding about the underlying obligation created between the parties. The beauty of this argument is the way that it can be seen to accommodate the clash which was noted at the outset between the private law model of adjudication exemplified by the common law and the public law model exemplified by the Court's interpretations in *Gasser* and *Turner*; when one looks at a jurisdiction agreement, one has to separate the 'jurisdiction' from the 'agreement'.

The irony is that while an award of damages might avoid the appearance of interfering with the jurisdiction of another court, which is associated with an anti-suit injunction, it is highly unlikely to be attractive within the scheme of the Convention. This is precisely because, unlike the anti-suit injunction and its effects, it cannot be confined to the internal process of the English courts. Any damages awarded might be inconsistent with the

⁷⁹ For further discussion, see: E Peel, 'Exclusive Jurisdiction Agreements: Purity & Pragmatism in the Conflict of Laws' [1998] *LMCLQ* 182, 224-226; D Tan & N Yeo, 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?' [2003] *LMCLQ* 435; C-H Tham, 'Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye' [2004] *LMCLQ* 46.

⁸⁰ Subject to any recovery of costs from the foreign court (but the fact that the foreign court allows *some* recovery might of itself cause complications: *Zoller*, above n.78, at [36] *per* Schiemann LJ.

⁸¹ Unless it might be denied recognition on the grounds of public policy: see *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508, para [48].

⁸² A Briggs, above n.5, 257-258.

judgment of the other court (e.g. where the foreign court proceeds to a judgment on the merits, but the English courts are persuaded that a different outcome would have resulted if the defendant had performed his contract and the case had been heard in England) and, as a judgment in a civil and commercial matter, it would have to be recognized and enforced in the courts of other Contracting States.⁸³ But this may be what the European Court has wrought since the creativity of the common law and its adherence to a private law model of adjudication will not easily be subjugated.

III – THE *OWUSU* CASE : THE REJECTION OF ‘*FORUM NON CONVENIENS*’

The three passages which have been extracted from the judgment of the Court for particular comment essentially represent the principal reasons given by the Court for rejecting the application of the doctrine of *forum non conveniens* to regulate jurisdiction between the courts of a Contracting State and the courts of a non-Contracting State: (1) no exception on the basis of *forum non conveniens* was provided for on the accession of the United Kingdom in 1978; (2) the operation of the Convention would be rendered too uncertain; in particular, both defendants *and claimants* should be able to predict with reasonable certainty where the case between them may be heard; and (3) since the doctrine of *forum non conveniens* is recognised only in a limited number of Contracting States, to allow it to operate in cases like *Owusu* would affect the uniform application of the rules of jurisdiction contained therein. They are all concerned therefore with the second part of the Court’s judgment. In the first part, the Court rejected a submission that the Convention, and Article 2 in particular, had no application at all on the basis that a necessary intra-Community element was missing. There are some who see in this a grim portent of things to come in the further development of a European private international law,⁸⁴ but that is a debate for another time. On the assumption that Article 2 did apply in the first instance, what of the conclusion that this left no room for the doctrine of *forum non conveniens*?

(5) The Mandatory Nature of Article 2 and Derogation from the Rule It Lays Down

37. ...Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention [...]

This passage reads very much like a bald assertion. In the same paragraph the Court goes on to note that it is ‘common ground’ that no exception on the basis of the *forum non conveniens* doctrine was provided upon the accession of the United Kingdom and Ireland. This is, at best, inconclusive. Need anything have been included *in the Convention* about how to regulate jurisdiction as between the courts of the Contracting States and the courts of a non-Contracting State? Article 2 is mandatory in the sense that it shall be applied

⁸³ Subject to the defence that the judgment of the other court has already been recognized: see Article 34(4) of the Regulation. Curiously, in the Convention, this defence was only said to apply to the earlier recognition of inconsistent judgments from non-Contracting States: Article 27(5).

⁸⁴ A Briggs, ‘The Death of Harrods: *Forum Non Conveniens* and the European Court’ (2005) 121 *LQR* 535.

subject only to the other bases of jurisdiction in the Convention, but what is not clear is whether that is only true where the choice is between the courts designated by Article 2 and the courts of *another Contracting State*. In short, the real issue is the scope of the Convention and, on that, there is no clear answer in either the text of the Convention or the Schlosser Report.⁸⁵ It is submitted that greater weight should be placed on the other reasons relied upon by the Court for its ruling.

(6) The Principle of Legal Certainty and *Forum Non Conveniens*

38. Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention [...], would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine.

It is clear from the paragraphs which follow this passage that the principle of legal certainty is not to be seen in isolation, but as a means of facilitating the “legal protection of persons established” in the EU. So, let us consider the persons involved. There is much concern in the reasoning of the Court with the position of the claimant. He must be assured that, if the jurisdiction of a court of a Contracting State is invoked it will be exercised, subject only to the exceptions or restrictions laid down in the Convention itself.

This seems a curious inversion of the natural order of the Convention which is to be concerned with the position of the defendant, and not the claimant. If there is any concern in the Convention for the protection of the claimant, it is only in circumstances where the claimant may be thought to occupy a vulnerable position such that additional jurisdictional options are made available.⁸⁶ There is nothing in the operation of *forum non conveniens* in cases like *Owusu*, or the earlier *Harrods* decision,⁸⁷ which seeks to undermine this special protection since such additional optional bases of initial jurisdiction are still available and, if invoked, they may be taken into account in determining whether or not to exercise the power to stay proceedings.⁸⁸ Beyond these categories of the potentially vulnerable, the Convention exhibits no obvious concern with the plight of the claimant.⁸⁹ That said, it has been pointed out to telling effect that *Owusu* did not perhaps represent the ideal case in which to refer to the Court the issue of the

⁸⁵ See further, E Peel, ‘*Forum Non Conveniens* and European Ideals’ [2005] LMCLQ 363, 367-370.

⁸⁶ E.g. such as those made available to consumers (Articles 13-15) and the insured (Articles 8-12).

⁸⁷ *In Re Harrods (Buenos Aries) Ltd* [1992] Ch 72.

⁸⁸ P. Kaye, ‘The EEC Judgments Convention and the Outer World: Goodbye to *Forum Non Conveniens*’ [1991] *Journal of Business Law* 47.

⁸⁹ The *re Harrods* decision has been castigated on the basis that the Convention ‘also takes the legitimate interests of the plaintiff into consideration...(and) guarantee(s) the plaintiff’s right to seek justice by recourse to the courts’: Geimer, ‘The Right of Access to the Courts under the Brussels Convention’, in Tebbens, Kohler & Kennedy (eds.), *Civil Jurisdiction & Judgments in Europe* (1992), 39. There is no textual basis or policy consideration advanced in support of this.

compatibility of *forum non conveniens* with the scheme of the Convention.⁹⁰ The prospect of the tetraplegic Mr. Owusu being sent to Jamaica eight years after he was first injured may have exerted some influence over the Court.⁹¹

Under the Convention, it is clear that the claimant does not enjoy a guaranteed choice of forum. In an earlier ruling, the European Court could find nothing wrong in a party commencing proceedings for a declaration of non-liability so as to ensure that the 'defendant's' preferred forum was first seised for the purposes of Article 21.⁹² In this sense, it may be more accurate to say that what the claimant may be entitled to expect is that, if the courts of one or other of the Contracting States has jurisdiction, he will not be sent away from the EU altogether. This is, ultimately, an argument that he should not lose the benefit of a Convention judgment. It is an observable fact that it is easier to enforce a judgment under Title III of the Convention than it is under the national law of the Contracting States,⁹³ but this might just as easily be regarded as a relevant factor⁹⁴ in the exercise of the courts discretion, rather than as a basis for *its elimination*.⁹⁵

If the Court was right to be as concerned as it clearly was with the position of the claimant, it may be noted that the claimant in *Owusu* was domiciled in England and the emphasis throughout is on the intention of the Convention to 'strengthen in the Community the legal protection of *persons therein established*.'⁹⁶ Does that mean *forum non conveniens* is still available in proceedings commenced by a non-EU claimant against a defendant domiciled in the EU, pursuant to Article 2?⁹⁷ Unattractive and Euro-

⁹⁰ see A. Briggs, 'The Death Of Harrods: *Forum Non Conveniens* and The European Court' 121 LQR 535, where further consideration is given to the question of whether the context of individual cases may have had a profound influence on the development of common law doctrine in England and Australia.

⁹¹ Perhaps if the ruling had been that a discretion was still available, the Court of Appeal might have been inclined not to stay this particular case on the basis that the additional delay represented a change of circumstance which would make it unjust to do so.

⁹² Case C-406/92 *The Tatry* [1994] ECR I-5439.

⁹³ A judgment from a non-Contracting State court falls outside the enforcement regime in the Convention (and stays outside, notwithstanding any subsequent recognition by the court of a Contracting State under its national law: Case C-129/92 *Owens Bank v Bracco* [1994] ECR I-117). It can only be enforced under the national law of each of the Contracting States

⁹⁴ Even this may be said to go too far for assuming what it sets out to prove: since the issue is whether the proceedings should be heard in England in the first place, the loss of the benefit of an English judgment may be criticised as an attempt by the claimant to pull himself up by his own bootstraps.

⁹⁵ *International Credit and Investment Co. (Overseas) Ltd v Adham* [1999] ILPr 302.

⁹⁶ Preamble to the Convention (emphasis added). See para 39 of the Court's judgment.

⁹⁷ Contrary to some interpretations, the decision of the ECJ in Case C-412/98 *Universal General Insurance Co v Group Josi Reinsurance Co SA* [2000] ECR I-5925 does not affect the courts' power to stay proceedings in such circumstances. It merely confirmed that the Convention rules (as opposed to national law) for *establishing* jurisdiction must be applied where the defendant is domiciled in a Contracting State, regardless of the domicile of the claimant. It said nothing about whether the courts are bound to *exercise* such jurisdiction. It might be argued that the ruling in *Group Josi* affirms the mandatory application of Title II when the conditions for its application are satisfied, ie when the defendant is domiciled in a Contracting State, and that this *implies* that such jurisdiction *must* be exercised. It cannot be put any higher than that. See R. Fentiman, 'Stays and the European Conventions - End-Game?' [2001] *CLJ* 10.

centric though it may be,⁹⁸ it would be no great surprise to see such a distinction between local and foreign claimants being invoked, at least before the English courts.

Turning from the claimant, what then of ‘our normally well-informed defendant’ who must be able ‘reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued’?⁹⁹ In this regard the greatest consternation¹⁰⁰ has been caused by paragraph 42 of the judgment in *Owusu* and the Court’s assessment that, if *forum non conveniens* was available, the defendant would be deprived of his reasonable foresight. Quite simply, he would not. It is for the defendant to make the application to the court for a stay; it is not for the court to consider it of its own motion. Any defendant who might have wished to make such an application is now no longer able to do so and one view of the ruling in *Owusu* is that it has sanctioned a degree¹⁰¹ of forum shopping against defendants domiciled in the Contracting States.¹⁰²

One is not left entirely persuaded by the Court’s emphasis on legal certainty which appears to be based in part on a misunderstanding of the true nature of an application to stay proceedings. As a consequence, the arguments for legal certainty seem all to be on the side of the claimant. Perhaps the argument that there is a benefit here on the other side is not for the defendant in any particular case, but for the greater good of defendants generally. Today’s defendant is tomorrow’s counter-party to a transaction which, if it does not go smoothly, may end up before the courts. Each of the parties¹⁰³ needs to be assured that the jurisdiction of the courts of their preferred choice, if available and invoked, will be exercised. With this assurance in place, they will be encouraged to conduct the business at hand and contribute to the effective operation of the internal market; a theme which underpins, and perhaps dominates, the reasoning of the Court, such as it is. *If* this is the argument to be made on the ‘defendant-side’, I am reminded of a less than kindly dentist whose best attempts at soothing words for the terrified child before him was to point out that ‘you may not like this, but it really is for your own good’.

(7) Sources of the Potential Alteration to the European Rules on Jurisdiction: Domestic Law or EC Law ?

43. [...] [A]llowing *forum non conveniens* in the context of the Brussels Convention would be likely to affect the uniform application of the rules of

⁹⁸ R. Fentiman, ‘Jurisdiction, Discretion and the Brussels Convention’ (1993) 26 *Cornell Int. Law Journal* 59, at 93.

⁹⁹ Para 40.

¹⁰⁰ See: A. Briggs, above n.5 and the paper by A Dickinson, below.

¹⁰¹ One must speak in terms of degree since the bases of jurisdiction laid down in Title II are intended themselves to give effect to a degree of *forum conveniens*.

¹⁰² It is assumed that, in proceedings commenced against non-EU domiciled defendants under Article 4, the English courts retain a power to stay their proceedings, but for an argument that the ruling in *Owusu* might imply that it should be lost even here, see A. Briggs, above n.5, 251.

¹⁰³ Since the application for a declaration of non-liability has been sanctioned as a legitimate tactic (see n.49 above), no assumption can be made about which of the parties might end up as claimant and which as defendant.

jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.

In this passage one sees the opportunity to debate the extent to which *some* means may be found to regulate jurisdiction between the courts of a Contracting State and the courts of a non-Contracting State. Since no doctrine, or device, for so regulating is applied uniformly by the Contracting States, this passage should be interpreted as rejecting any solution based on national law and not merely *forum non conveniens*. While happy to reject one solution, one is left with a profound sense of disappointment¹⁰⁴ that the Court did not find it necessary to answer the second question referred to it. This asked if there were at least some circumstances when it might not be inconsistent with the Convention to decline to exercise jurisdiction in favour of the courts of a non-Contracting State. The Court did however give some indication of when this *might* be possible by observing that the ‘second question was asked in connection with cases where there were identical or related proceedings pending before a court of a non-Contracting State, a convention¹⁰⁵ granting jurisdiction to such a court or a connection with that State of the same type as those referred to in Article 16¹⁰⁶ of the Brussels Convention.’¹⁰⁷ In short, the exercise of a Convention jurisdiction might be declined where rules equivalent to those in Article 16 (exclusive jurisdiction), Article 17 (choice of court agreements) and Article 21 (*lis alibi pendens*) pointed to the courts of a non-Contracting State.

The idea of turning around certain of the jurisdictional rules of the Convention and pointing them at proceedings, or potential proceedings, in non-Contracting States was first suggested by Droz¹⁰⁸ who referred to it as *l’effet reflexive des competences exclusifs*.¹⁰⁹ Enough has been said to demonstrate that any so-called reflexive effect of the rules of the Convention cannot involve a full reflection, shorn of the safeguards which underpin the operation of the rules as between the Contracting States.¹¹⁰ But a partial reflection is certainly possible; one where the rules in Articles 16, 17 and 21 determine the scope of those areas in which jurisdiction may be declined, but not how and when this might happen. The obvious solution to the latter is to allow the operation of national law;

¹⁰⁴ But no sense of surprise once the Court decided that it was unnecessary to resolve the issue in *Owusu*: Case C-314/96 *Djabali* [1998] ECR I-1149, para. 19; Case C-318/00 *Barcadi-Martini and Cellier des Dauphins* [2003] ECR I-905, para. 42, and Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-000, para. 72

¹⁰⁵ Here, it seems clear that the Court is referring to an agreement of the parties.

¹⁰⁶ Now Article 22 of the Regulation.

¹⁰⁷ Para. 48.

¹⁰⁸ G Droz, *Compétence judiciaire et effets des jugements dans le marché commun* (Paris 1972), paras. 164-169, 204. See also: Guademet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn., 2002); Loussouarn, Bourel & Vareilles-Sommières, *Droit international privé* (8th edn., 2004), para 485-1.

¹⁰⁹ In its initial conception, the ‘reflexive effect’ was concerned with the ‘exclusive’ jurisdiction conferred by Articles 16 and 17 but, as indicated by the observation of the Court in paragraph 48, it is now found associated with Article 21 as well: see A Briggs, ‘*Forum Non Conveniens* and Ideal Europeans’ [2005] LMCLQ 378, 380

¹¹⁰ E Peel, ‘*Forum Non Conveniens* and European Ideals’ [2005] LMCLQ 363, 375-377; A Briggs, *ibid.*

indeed, this seems to be the practice of the English courts even post-*Owusu* so far as exclusive jurisdiction agreements in favour of the courts of non-Contracting States are concerned.¹¹¹

This may be viewed as a rather attractive compromise, though it almost certainly requires amendments to what is now the Regulation to provide the necessary textual basis. A degree of uniformity will have been achieved in the delineation of the circumstances when jurisdiction *might* be declined and it has been noted that such a limited form of discretion is not altogether alien to other of the Contracting States.¹¹² It is too late to revisit the circumstances of *Owusu*. It is in the assessment of this more limited recourse to *forum non conveniens* that this Conference might adopt a constructive approach which looks to the future.

¹¹¹ *Konkola Copper Mines Inc v Coromin* [2005] EWHC 898 (Comm); [2005] 2 Lloyd's Rep 555, paras [74]-[101]; not appealed on this issue: [2006] EWCA Civ 5 (a stay was not granted because there was 'strong reason' not to so order). Even Schlosser in his Report (1979 O.J. C. 59, p.124, para. 176) and the ECJ itself (Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337) seem to support this approach to exclusive jurisdiction agreements in favour of the courts of non-Contracting States.

¹¹² A Briggs, above n.109 (LMCLQ). Perhaps one could be forgiven the parochial observation that this may amount to allowing some States to apply their national law to regulate jurisdiction between the courts of Contracting and non-Contracting States, but not the United Kingdom.