H.H. Judge Richard Seymour Q. C. : TCC. 12th November 2004

Introduction

1. This judgment is concerned with an application on behalf of the Part 20 Defendant, BF Engineering S.p.A. (*"BF")* for a declaration that this court has no jurisdiction to entertain the claim made in the Part 20 claim form issued on 26 February 2004 on behalf of **Fratelli** Babbini Di Lionello Babbini & C. S.A.S. (*"Babbini"*) and Signor Lionello Morando Babbini. Consequent upon the declaration sought orders were also sought that the Part 20 claim form and the service thereof upon BF be set aside.

2. It is necessary to set out some of the background to the application. By an agreement made at the beginning of 1997 British Sugar Plc (*"British Sugar"*) agreed to purchase from Babbini a pulp press (*"the Press"*) intended for use in the processing of sugar beet at British Sugar's factory at Newark in Nottinghamshire. The model designation of the Press was PB48S. It was envisaged that Babbini would manufacture the Press for delivery to British Sugar. The Press needed to incorporate a gearbox (*"the Gearbox"*). By an agreement in writing (*"the Gearbox Contract"*) dated 31 January 1997 and made between Babbini and BF BF agreed to supply the Gearbox to Babbini. The Press incorporating the Gearbox was duly delivered to British Sugar and put into service. On or about 19 December 2000 the Press failed whilst in use. It seems that the immediate cause of the failure was a failure of the Gearbox.

3. By a claim form issued originally on 29 January 2003 proceedings were commenced on behalf of British Sugar against Babbini, Signor Babbini and two other parties. Babbini was the first defendant and Signor Babbini in his personal capacity was the fourth defendant. The two other parties are not material to the application with which this judgment is concerned. One of the claims made in the action was for damages in respect of the failure of the Press on or about 19 December 2000. The action was defended, but was ultimately settled by an order made by consent on 28 October 2004 under which Babbini agreed to pay a total of £930,000 to British Sugar. The consent order recorded that the agreed sum, not all of which was referable to the claim in respect of the failure of the Press on or about 19 December 2000, had been paid before the date upon which the order was sealed or was to be paid out of monies in court. Although Signor Babbini was a defendant in the action in a personal capacity, under the terms of the consent order the payment agreed to be made was made on behalf of each of the first, second and fourth defendants and there was no continuing actual or contingent liability of Signor Babbini in his personal capacity to British Sugar. As I understood it, the sums paid in settlement of the claims of British Sugar were in fact provided by Babbini.

4. The procedural history of the action commenced on behalf of British Sugar was somewhat tortuous. It is not necessary to go into detail, but the requirement of the defendants in the main action to serve a defence was deferred because of an attempt, ultimately unsuccessful, on the part of the defendants to obtain summary judgment against British Sugar. The Part 20 claim form was issued prior to the service of the defence of the first, second and fourth defendants in the main action and thus did not require the permission of the court. However, the application with which this judgment is concerned was made on 24 May 2004.

5. The application dated 24 May 2004 was supported by a witness statement dated 21 May 2004 made by Mr. Nicholas Bingham, a partner in the firm of solicitors acting on behalf of BF. It was also supported by a witness statement of Professor Tito Ballarino, Professor of International Law (Public and Private) at the University of Padua. Professor Ballarino is also a practising Avvocato. The witness statement of Professor Ballarino was directed to putting before the court evidence of the law of Italy on a number of issues. As matters unfolded, the evidence of Professor Ballarino was answered on behalf of Babbini and Signor Babbini by a witness statement of Professor Domenico Borghesi, Professor of Civil Procedural Law at the University of Modena and also a practising Avvocato. The evidence of Professor Borghesi drew forth a response from Professor Ballarino in a further witness statement. Professor Borghesi in his turn made a further witness statement. Once it was apparent that Professor Ballarino and Professor Borghesi took different views on some questions it was necessary to consider how those differences could be resolved. I therefore directed that each of them should attend to give oral evidence and be cross-examined as to their respective opinions on the matters as to which they disagreed. In the event each did attend the hearing of the application. However, Mr. Raymond Cox Q.C., who appeared

together with Mr. Edward Levey on behalf of Babbini and Signor Babbini, elected not to call Professor Borghesi to give evidence, and thus not to rely upon the opinions contained in his witness statements. Mr. Simon Adamyk, who appeared on behalf of BF, did call Professor Ballarino, whose witness statements thus became part of the evidence before me. Mr. Cox decided to cross-examine Professor Ballarino briefly on one point, to which I shall refer further later in this judgment. Insofar as any question of Italian law is relevant to any issue which I have to decide in respect of the present application, I take the material law to be as stated by Professor Ballarino. I do not do that with any reluctance. Although my opportunity to see and to hear Professor Ballarino give evidence was brief, I was impressed by him. Not only that, but insofar as I was able to form a preliminary view from reading his witness statements, I found his analysis of the relevant law of Italy convincing.

The material terms of the Gearbox Contract

6. What I have described as the Gearbox Contract was in fact, from an English law perspective, a document which looked like an order placed by Babbini with BF. It was a document in a standard printed form with blanks completed as thought appropriate for the purposes of the particular transaction. At the bottom of the first page of the document commenced the setting out of *"Condizioni Generali D'Acquisto"*, which expression was translated as meaning *"General Purchase Conditions"*. Those were standard printed conditions. That which was relevant to the application with which this judgment is concerned was clause 8, to which I shall refer in this judgment as *"the Forum Clause"*. That clause was in these terms:-

"***COMPETENZA***

Per ogni controversia l'autorita giudiziaria esclusivamente competente e quella di FORLI."

That clause was translated on behalf of BF as meaning:-

"***JURISDICTION***

For any dispute, the court of exclusive jurisdiction is that of Forli."

I do not think that that translation, as a translation, was disputed on behalf of Babbini and Signor Babbini. It was repeated, albeit without the word *"exclusive"*, by Mr. Cox in his skeleton argument at paragraph 15. However, there was a difference between Mr. Cox and Mr. Adamyk as to the effect of the Forum Clause, whatever the best way of rendering it in English. Mr. Adamyk submitted that jurisdiction meant jurisdiction in the sense in which that expression was used in the English language text of Council Regulation (EC) No. 44/2001 (*"the Regulation"*). Mr. Cox submitted that the Forum Clause was what he described as a *"competence clause"*.

7. It was common ground that the proper law of the Gearbox Contract was the law of Italy.

8. What Mr. Cox meant by describing the Forum Clause as a *"competence clause"* can best be explained by reference to some passages in the second witness statement of Professor Ballarino. The expression *"competenza"* is used in a technical sense in Italian law. As Professor Ballarino said:-

> "*5. Under Italian procedural law, especially the Italian Civil Procedure Code, the word* "competenza" *is used to define the Italian court in which specific proceedings can be commenced. According to the prevalent definition in the academic opinion of* "competenza", *this is the jurisdiction given to each office which forms part of judicial power. These offices are civil judges, criminal judges and administrative judges. Each of the offices is empowered within the limits set out by law. When a judge sei*[s]*ed is lacking the required* "competenza", *it is possible to apply for his judgment to be set aside. In some cases it is said that the lack of* "competenza" *amounts to a lack of jurisdiction. For example, administrative judges cannot pronounce a criminal sentence. This would be perceived as a lack of* "jurisdiction-competence" *and this would be one example of the two words being used jointly.*
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> *6. The various factors which are relevant in deciding whether a particular tribunal has competence include the following. Civil competence is apportioned according to different criteria, creating a "vertical" and a "horizontal" system. The vertical system is based on the value of the claim; the horizontal system is based on territorial criteria.*
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> *(a) As for the vertical system (based on the value of the claim), the value of the claim leads to actions being ordered in increasing value and allocated to different courts depending on the value of the claim.*

(b) As for the horizontal system (based on territorial criteria), territorial competence is based mainly on the principle that the Defendant should be entitled to defend easily. There are also "optional Courts", for example the place where the contract was agreed.

7. Generally the parties can by agreement derogate from the competenza *which is otherwise established in favour of these tribunals. The determination of territorial competence, either when assigned to only one tribunal or when an alternative forum exists, can be derogated from by the agreement of the parties (see Articles 28 and 29 of the Civil Procedure Code …). Article 29 reads:*

"the agreement of the parties for the derogation of the territorial competence does not give to the chosen judge the exclusive competence unless this is expressly agreed".

We can therefore infer by way of logical reasoning "a contrario" *(to the contrary) the absolute nature of the clause of exclusive competence. Clause 8 of the Gearbox Contract specifically provides for an exclusive competence.*"

Mr. Cox submitted that the Forum Clause was concerned, and concerned only, with the selection within Italy, out of all those courts potentially competent, of a court with competence to hear disputes arising under a contract which incorporated that clause. Thus, submitted Mr. Cox, the Forum Clause was of no relevance if the question arose, as it did in the present case, what court or courts outside Italy might have jurisdiction in relation to disputes arising under a contract which incorporated the clause.

The Regulation

9. Within the European Union the general rule as to where a person may be sued is that set out in Article 2 (1) of the Regulation:- *"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*"

10. One of the exceptions to the general rule for which the Regulation provides is to be found in Article 6. The part of Article 6 which is material for the purposes of this judgment is:- *"A person domiciled in a Member State may also be sued: …*

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case; …"

In the present case the Part 20 claim against BF was issued in this court in reliance upon the provisions of Article 6 (2). It was not suggested that that had been done from any improper motive.

11. The application before me, in the events which happened, was essentially based on the contention that the English court had no jurisdiction over a dispute between Babbini and BF under the Gearbox Contract because the Forum Clause was a clause which fell within Article 23 of the Regulation. There had been a separate question at the time the application was issued as to the claim of Signor Babbini. It was sought to obtain the relief sought in the application as against him on the ground that he had no cause of action in Italian law against BF. That matter became academic once the main action had been settled on terms not involving him personally in any actual or contingent liability, and it was not pursued before me.

12. The Regulation is, so far as is presently material, the successor to the Brussels Convention. Article 23 of the Regulation is in terms not materially different from those of Article 17 of the Brussels Convention. I was referred to a number of authorities under the Brussels Convention. I was also referred to the authoritative reports concerning the Brussels Convention of M. Jenard (*"the Jenard Report"*) and Professor Schlosser (*"the Schlosser Report"*). I shall return to relevant authorities later in this judgment.

13. The English text of the part of Article 23 of the Regulation which is material for present purposes is:- *"If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:*

(a) in writing or evidenced in writing; …"

14. It is convenient at this stage also to set out the Italian text of that part of Article 23 quoted in the preceding paragraph. That is:- *"Qualora le parti, di cui almeno una domiciliata nel territorio di uno Stato*

membro, abbiano attribuito la competenza di un giudice o dei giudici di uno Stato membro a conoscere delle controversie, presenti o future, nale da un determinato rapporto giuridico, la competenza esclusiva spetta a questo giudice o ai giudici di questo Stato membro. Detta competenza e esclusiva salvo diverso accordo tra le parti. La clausola attributiva di competenza deve essere conclusa:

(a) per iscritto o oralmente con conferma scritta, "

The issues between the parties

15. The principal issue between the parties was whether Article 23 of the Regulation had any application in the circumstances of the present case. I shall set out in more detail the submissions of the parties in relation to this issue later in this judgment, but broadly the issue was whether, properly construed in accordance with the relevant principles, the Forum Clause sought to regulate choice of tribunal in the event of a dispute arising which had an international dimension to which Article 23 applied, or whether its focus was purely domestic and confined to regulating the court in Italy in which proceedings could be brought in the event that proceedings were commenced in Italy. Mr. Cox submitted that it was essential that the clause should seek to cover disputes with such an international dimension. Mr. Adamyk submitted, first, that the present case had such a dimension, but, second, that actually such a dimension was not necessary.

16. The only other issue with which I need deal in this judgment was whether Part 20 proceedings were appropriate in any event now that the main action has settled. It was not in dispute that the Forum Clause was a clause which fell within Article 23 of the Regulation if it meant what Mr. Adamyk contended that it meant. A point was taken on the form of certification on the Part 20 claim form, which referred to the Brussels Convention, and not to the Regulation. However, it was accepted at the hearing before me that, if that were the only point which arose, it could be dealt with by an appropriate amendment.

The main issue

17. There was a considerable amount of common ground concerning the principal issue argued before me, that of the applicability of Article 23 at all. It is convenient to set out that common ground before coming to the submissions on behalf of the parties in relation to matters in contention between them.

18. It was agreed between the parties that a clause which fell within Article 23 took precedence over a claim which fell within Article 6(2). Whether that was so was considered by Rix J, as he then was, in the context of the provisions of the Brussels Convention which were the predecessors of Articles 6(2) **and 23 of the Regulation, respectively also Article 6(2) and Article 17, in *Hough*** *v. P & O Containers Ltd.* [1999] QB 834. Rix J dealt with that question in his judgment starting at page 842F. Having rehearsed the arguments advanced to him and considered the authorities cited to him, the learned judge set out his conclusions on page 845 at C to G:- *"These two decisions may be said to indicate that, where it can, the European Court will seek to mitigate the divisive tendency of article 17 to create multiplicity of proceedings. They could also be said to promote the rationale behind article 6. As such they do not really in themselves support the views of the Jenard Report,* Dicey & Morris *and Advocate General Capotorti as to the precedence of article 17 over article 6. Be that as it may, it seems to me that they do not undermine those views either. Blohm + Voss have not chosen to appear without protest, but have sought to rely upon their contractual jurisdiction clause and article 17. The mandatory terms of article 18 cannot therefore be given effect. Similarly, it would not be within "the letter and spirit of the clause conferring jurisdiction" (to quote* **Meeth v. Glacetal** *(Case 23/78) [1978] ECR 2133, 2143) for the English court to retain jurisdiction over P & O's third party proceedings against Blohm + Voss. The mandatory precedence of article 17 over article 6 is also supported by* Kaye, Civil Jurisdiction and Enforcement of Foreign Judgments *(1987), pp 643-644, 650, 1088 and by* O'Malley and Layton, European Civil Practice *(1989), pp 446-447, 450, 551-552. In my judgment, much as the court might regret multiplicity of proceedings, it is bound to recognise P & O's valid agreement to litigate its claim in Hamburg. In any event, not that this is a relevant consideration in applying the Convention in such circumstances, it cannot be said that Hamburg is an inappropriate or inconvenient jurisdiction for that claim. What one sees here are the irreconcilable differences between the right of Mr. Hough to sue P & O in England, where P & O are to be found, and the right of Blohm + Voss to be sued by P & O in Hamburg, where P & O had agreed to litigate.* "

While I incline to the same view as Rix J, the question whether Article 23 of the Regulation took precedence over Article 6 (2) was not argued before me. For the purposes of this judgment I simply proceed on the basis of the agreement of the parties that Article 23 takes precedence over Article 6 (2).

19. The next matter which was agreed between the parties was that the approach which I should adopt to considering whether the Forum Clause fell within the ambit of Article 23 of the Regulation was that laid down by the European Court of Justice in ***Powell Duffryn Plc v. Petereit*** [1992] ECR I-1745. The material part of the judgment of the Court was in these terms:-

> "*11. The question therefore arises whether the concept of "agreement conferring jurisdiction" in Article 17 of the Brussels Convention must be given an independent interpretation or be construed as referring to the national law of one or other of the States concerned.*
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> *12. It must be emphasized that, as the Court held in its judgment in Case 12/76* Tessili v. Dunlop *[1976] ECR 1473, neither of those options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty.*
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> *13. The concept of "agreement conferring jurisdiction" is decisive for the assignment, in derogation from the general rules on jurisdiction, of exclusive jurisdiction to the court of the Contracting State designated by the parties. Having regard to the objectives and general scheme of the Brussels Convention, and in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and persons concerned, therefore, it is important that the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the States concerned.*
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> *14. Accordingly, as the Court has held for similar reasons as regards, in particular, the concept of "matters relating to a contract" and other concepts, referred to in Article 5 of the Convention, which serve as criteria for determining special jurisdiction (see the judgment in Case 34/82* Peters v. ZNAV *[1983] ECR 987, paragraphs 9 and 10), the concept of "agreement conferring jurisdiction" in Article 17 must be regarded as an independent concept.*"

Although the decision of the European Court of Justice does clearly establish that the concept of an *"agreement conferring jurisdiction"* for the purposes of Article 17 of the Brussels Convention and Article 23 of the Regulation is one which needs to be considered independently of the national law of any Member State, the Court gave almost no guidance as to the criteria which should be applied to determining whether any particular agreement was one falling within Article 17 or Article 23, as the case might be. Both Mr. Adamyk and Mr. Cox said, in effect, that it was for me to take the observations of the Court which I have quoted and apply them as best I could. That said, Mr. Adamyk submitted that, although not decisive of the issue, Italian law, as the law governing the Gearbox Contract, was relevant to consider. I shall return to the opinion of Professor Ballarino as to the position under Italian law. Mr. Cox, however, seemed inclined to the view that no assistance was to be derived from any national law. He submitted that the matter must be considered from the perspective of the principles of the law of the European Union. Unhappily he was not able in any detail to articulate what the relevant principles might be.

20. It was also common ground between the parties that although, strictly, the effect of the decision of the House of Lords in ***Canada Trust Co. v. Stolzenberg (No. 2)*** [2002] 1 AC 1 was that the standard of proof to be satisfied by a party contending that the English court has jurisdiction in relation to a particular dispute is that of a *"good arguable case"* that there was jurisdiction, as the question of jurisdiction in the present case depended upon a question of law, namely the proper construction and effect of the Forum Clause, it was necessary for me to decide that question finally at this stage. That approach was adopted by Lawrence Collins J in ***Chellaram v. Chellaram (No. 2)*** [2002] 3 All ER 17. The learned judge explained his reasoning at paragraph 136 of the judgment:- *"Where jurisdiction depends on a question of law or construction, the court will decide it rather than apply the good arguable case test (see cases in Dicey & Morris p 309 (para 11-127, n34). That approach has consistently been applied to cases where jurisdiction has depended on the applicable law of a contract for the purposes of what is now CPR 6.20(5)(c). In such cases the court does not*

consider whether the claimant has a good arguable case that the contract is governed by English law, but rather whether the contract is *governed by English law. Some of the most important cases on the applicable law of a contract at common law were decided under predecessors of this rule (see, for example,* **Amin Rasheed Shipping Corp v. Kuwait Insurance Co., The Al Wahab** *[1983] 2 All ER 884, [1984] AC 50) and I do not consider that anything in the* Seaconsar *case is intended to throw doubt on their approach. Accordingly in a case such as this, the claimant would have to satisfy the court that the applicable law was English law, and the good arguable case test would only have a role to play if there were a relevant factual issue (for example, if an express choice of law were said to be ineffective on the facts of the case).*"

I respectfully agree with the approach of Lawrence Collins J. It reflects, as the learned judge said in the passage quoted, long-established practice and the reality that a court which has heard full argument on a point of law does no service to anyone by not deciding the question argued.

21. The first matter as to which there was not unanimity between Mr. Adamyk and Mr. Cox to which it is appropriate to refer is the issue of what was called in argument the *"international element"*.

22. Mr. Cox submitted that the Regulation, and therefore in particular Article 23, had no application unless there was present in an agreement an international element. In his written skeleton argument he developed the point in this way:-

"*24. In order to fall within the ambit of Article 23, an agreement must have the necessary* "international element". *That such a requirement exists can scarcely be doubted given that it is a concept referred to and approved of in* ***both*** *the Jenard and the Schlosser reports.*

25. In relation to Article 17 of the Brussels Convention (the equivalent of Article 23 in the Judgment Regulation) the Jenard Report clearly states at page 38:

The first paragraph of Article 17 applies only if at least one of the parties is domiciled in a Contracting State. It does not apply where two parties who are domiciled in the same Contracting State have agreed that a court of that State shall have jurisdiction, since the Convention, under the general principle laid down in the preamble, determines only the international jurisdiction of courts.

26. This, it is submitted, is because a clause by which two parties domiciled in one state have agreed that a court of that State shall have jurisdiction does not of itself involve any international element.

27. Similarly, according to Schlosser at paragraph 174:

Article 17, applying as it does only if the transaction in question is international in character …. which the mere fact of choosing a court in a particular State is by no means sufficient to establish …

28. The very purpose of the Conventions and the Judgment Regulation is to allocate and determine jurisdiction as between the courts of the contracting states; they simply have no relevance to or bearing on matters of a purely domestic nature.

29. The ECJ has never disapproved of or cast doubt on the notion that, in the absence of an "international element", *at least not so far as Babbini is aware.*[sic]

30. In all the circumstances, it is submitted that there would have to be extremely cogent and powerful reasons for the court in this case not to accept the authoritative views as set out above, according to which there must be an "international element" *in order for a clause to fall within Article 23. It is submitted that no such reasons exist and the court is bound to accept that requirement as a matter of principle.*"

23. Mr. Cox went on to submit that the relevant international element was lacking in the present case. The kernel of his contention was expressed in his skeleton argument in this way:-

"*32. The agreement is simply a choice of a* particular court *(i.e. the Courts of Forli) as between two parties domiciled in Italy. This is on all fours with the situation referred to by* Jenard *and* Schlosser *in their respective reports.*

33. Clause 8 has no "international element". *Of course, had the parties expressed their agreement in terms of a choice of jurisdiction in favour of the Italian courts* <u>*and*</u> *the exclusive competence of the courts of Forli, that would have provided the agreement with the necessary international character to fall within Article 23; but they did not, and so article 23 has no application.*"

24. Mr. Cox's submission thus involved the propositions that whether an international element was present fell to be determined as a matter of construction of the relevant clause and at the time the contract in which it was included was made, and not at any later time. Clauses like the Forum Clause are not uncommon in contracts made between parties at least one of whom is Italian or German or French. That was the point which Mr. Cox sought to establish by cross-examination of Professor Ballarino. The logic of the position for which Mr. Cox contended was that no such clause was ever relevant for the purposes of Article 23 of the Regulation unless it stated in terms that in the event that the contract gave rise to a dispute involving a party in another Member State of the European Union it was the wish of the parties that such dispute be litigated in the identified court. In other words, in the present case the effect of the Forum Clause was that it only applied if the dispute between Babbini and BF arose and was being litigated in Italy. If, as was the case, Babbini had been made a party to litigation in England in respect of which the question of a breach by BF of the terms of the Gearbox Contract had arisen, BF could be made to litigate that dispute in England.

25. Mr. Cox submitted that a clause in a contract said to satisfy the requirements of Article 23 of the Regulation must be strictly construed. He referred me to a decision of the European Court of Justice on the construction of Article 17 of the Brussels Convention, ***Estasis Salotti di Colzani Aimo e Gianmario Colzani v. RUWA Polstereimaschinen GmbH*** [1976] ECR 1831. At paragraph 7 of its judgment in that case the Court commented:-

"*The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention.*

In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.

By making such validity subject to the existence of an "agreement" between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.

The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established."

Mr. Cox contended that what was required by that passage was that I should enquire into whether Babbini and BF had in fact addressed their minds to the risk of proceedings between them in a non-Italian jurisdiction and positively determined that in the event of such proceedings being commenced or threatened what they each wanted was that any litigation between them be determined in the courts of Forli.

26. Mr. Adamyk submitted that, if an international element was necessary before Article 23 of the Regulation could be invoked, whether that element was present fell to be addressed not at the date of the contract or simply as a matter of construction of the relevant clause, but at the time the issue of whether a particular court had jurisdiction became relevant and having regard to the circumstances in which that issue arose. Moreover, he also submitted that in fact no international element was necessary in a case in which what one was concerned with was the Regulation, and not the Brussels Convention.

27. In support of his submission that the existence of any international element must be considered in the context of proceedings pending in a particular court Mr. Adamyk relied upon a passage in Chapter III of the Jenard Report under the rubric *"I. International Legal Relationships"*:-

"*As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States.*

It alters the rules of jurisdiction in force in each Contracting State only where an international element is involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State

which involves [sic] *only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Articles 21 to 23.*"

Mr. Adamyk contended that it was plain from that passage that M. Jenard was contemplating that the issue of an international element could only arise in the context of particular proceedings and not, for example, be a matter which could be addressed simply as a matter of construction of a choice of forum clause. Moreover, submitted Mr. Adamyk, M. Jenard in terms envisaged that, while proceedings instituted between persons domiciled in a state before the courts of that state would not *normally* be affected by the Brussels Convention, circumstances could arise in which such proceedings could be affected.

28. Mr. Adamyk also relied, in support of his submission that the presence of any requisite international element fell to be addressed only at the time of proceedings before a court the jurisdiction of which was in issue, upon the decision of the European Court of Justice in *Sanicentral GmbH v. Collin* [1979] ECR 3423. In that case what was in contention was a jurisdiction clause in a contract of employment of a French national by a German company. The clause in question provided for a German court to have jurisdiction. At the time the contract was made a clause ousting the jurisdiction of a French court was contrary to French law. However, the relevant French law was itself contrary to Article 17 of the Brussels Convention. After the Brussels Convention had come into force the employee commenced proceedings in a French court in apparent breach of the jurisdiction clause in his contract. In the course of its decision the Court held:- "*6. By its nature a clause in writing conferring jurisdiction and occurring in a contract of employment is a choice of jurisdiction; such a choice has no legal effect for so long as no judicial proceedings have been commenced and only becomes of consequence at the date when judicial proceedings are set in motion.*

That is therefore the relevant date for the purposes of an appreciation of the scope of such a clause in relation to the legal rules applying at that time.

The judicial proceedings were instituted on 27 November 1973 and the Convention thus applies in pursuance of Article 54 thereof.

The effect of that article indeed is that the only essential for the rules of the Convention to be applicable to litigation relating to legal relationships created before the date of the coming into force of the Convention is that the judicial proceedings should have been instituted subsequently to that date, which is the position in the present instance."

29. At paragraph 21 of his written skeleton argument Mr. Adamyk identified the factors which he contended amounted to the international dimension in the present case:- "*In the Main Claim, the Claimant was domiciled in England and the four Defendants are domiciled in Italy. In the Part 20 Claim, all parties are domiciled in Italy. The Main Claim is proceeding in England. There is a dispute as to whether the Part 20 Claim should proceed in England or in Italy. The Gearbox Contract is governed by Italian law, and Mr. Babbini's claim is based on an Article in the Italian Civil Code. It is hard to imagine a situation which could more plainly be said to include an "international element". The mere fact that both parties to the Gearbox Contract are domiciled in Italy is only one factor (out of many) to be considered when deciding whether or not there is an "international element" to the dispute.*"

Mr. Adamyk also placed emphasis upon the fact that Babbini relied upon Article 6(2) of the Regulation as founding the jurisdiction of this court as supplying the requisite international element, if one were needed.

30. In support of his submission that in fact no international element was needed Mr. Adamyk emphasised that in the passage from the Jenard Report which I have already quoted M. Jenard relied on the fourth preamble to the Brussels Convention as defining the legitimate scope of the Convention. That preamble was in these terms:- "*Considering that it is necessary for this purpose to determine the international jurisdiction*

of their courts [that is, the courts of the Contracting States], *to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements;*"

Mr. Adamyk drew attention to the fact that the Regulation contains no similar preamble. In place of the four preambles to the Brussels Convention the Regulation contains 29 recitals. Those which were relevant to his argument Mr. Adamyk identified as numbers one and seven:-

"*(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial co-operation in civil matters which are necessary for the sound operation of the internal market. …*

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters."

31. For the consequences which flow from the difference in the terms of the relevant recitals as between the Brussels Convention and the Regulation Mr. Adamyk relied, first, upon a comment in the Fourth Supplement to *Dicey & Morris* at paragraph 12-089 that:- *"It is unlikely that the application of the Judgments Regulation is restricted to cases with an "international character".*"

Then Mr. Adamyk put before me the unreported judgment of Aikens J in ***Provimi Ltd. v. Aventis Animal Nutrition SA*** handed down on 6 May 2003 and the neutral citation of which is [2003] EWHC 961 (Comm). In that case a question which was debated to an extent was the effect of jurisdiction clauses contained in contracts between German companies. About that question Aikens J commented:-

"*74. In his first report for both groups of actions Professor Wolf raised a further argument. This is that because the contracts were between German companies, the jurisdiction clause is confined to where, as between possible German courts, disputes should be heard. He argued that the clause does not determine issues of international jurisdiction, eg. between English and German courts. Therefore, he submitted, Article 23 of Regulation 44 does not apply at all. So, issues of the validity and scope of the clauses must be dealt with exclusively by German law. Dr. Seiler and Professor Welter responded to this in detail and Professor Wolf returned to the matter in his second reports.*

75. In his oral submissions Mr. Carr did not take up the arguments of Professor Wolf that the clauses dealt only with national jurisdictional issues, so that Article 23 was irrelevant. He was, in my view, correct not to do so. First, Article 23 of Regulation 44 does not contain a requirement that the "agreement conferring jurisdiction" *should expressly relate to international jurisdiction issues. Nor is there any case law of the ECJ that has held that Article 23 (or its predecessor Article 17) only applies to jurisdiction clauses that refer expressly to international jurisdiction issues. In my view the wording of Article 23 is sufficiently broad to apply to all jurisdiction agreements. It would be contrary to the objective of providing legal certainty if some jurisdiction agreements were within Article 23 but some fell outside of its scope and their validity were to be determined by national laws. Therefore, secondly, all issues of formal validity and, I think, material validity of the jurisdiction clauses, must be dealt with by reference only to the requirements of Article 23, rather than the requirements of any system of national law.*"

32. In the ***Provimi Ltd.*** case Aikens J was concerned in the passage which I have just quoted with an argument very similar to that advanced by Mr. Cox before me. Mr. Adamyk submitted that not only should I derive assistance from the consideration by Aikens J of the question of the need for an international element, but I should be helped by his consideration of the whole argument on its merits. Mr. Cox, very decorously, pointed out that the passage from the judgment of Aikens J which I have set out was obiter and that the views expressed were reached without the benefit of argument from English Counsel in support of the analysis of Professor Wolf. He also took the point that, although undoubtedly entitled to respect, the views of Aikens J were not binding upon me in any event.

33. In furtherance of his submission that the law of Italy was relevant for me to consider in determining in the context of the guidance of the European Court of Justice in ***Powell Duffryn Plc v. Petereit*** the effect of the Forum Clause, Mr. Adamyk relied upon the opinion of Professor Ballarino. Professor Ballarino explained at paragraph 9 of his second witness statement the distinction in Italian law between the

concepts of *"competenza"* and *"giurisdizione"*, each of which can be translated into English as *"jurisdiction"*:-

"*It is true that under Italian law, as in many other European systems of procedural law, there is a fundamental distinction in theory between "jurisdiction" and "competence".*

(a) The former expression ("jurisdiction") is an expression of the sovereignty of the state and acquires significance in practice when facts are brought before the judges of the state which are not completely reducible to the "elements" of the sovereignty of the state. This might include, for example, a summons against a foreigner, a claim under a contract when that contract came into existence outside the territory of that state, etc.

(b) The latter expression ("competence") on the other hand divides the judicial power between the various offices or tribunals within *a state which exercise that power (along the lines which I outlined in section A above).*"

Having explained that in his view the distinction was foreign to the Brussels Convention and to the Regulation, he went on to consider what he described as the *"principle that an express choice of the Court with "competenza" is automatically also a choice of the Court with "giurisdizione"*:-

"*12. Clause 8 of the Gearbox Contract determines the competence of the Court of Forli to hear the case as intended by the parties in order to decide swiftly a potential dispute in relation to the supply of the gearbox from BFE to Babbini SAS. These kinds of clauses are usually incorporated so that a dispute can be heard by a "convenient" court, easily reached by the lawyers of the company and by potential witnesses.*

13. In section B above I explained that I agree with Professor Borghesi that there is a fundamental distinction in theory between "jurisdiction" and "competence". I also explained, however, that such a distinction is foreign to the system of the Brussels Convention (now replaced to a large extent by EC Regulation 44/2001). Furthermore, in my view there is no doubt that an express choice of the Court with "competenza" *is automatically also a choice of the Court with* "giurisdizione". *In every case when establishing the territorial competence of any given Italian Court, there is implied acceptance of the fact that the specific Court also has Italian jurisdiction. Given that in civil commercial matters the parties have a very wide power to choose a foreign judge or an arbitrator (whether Italian or foreign), when they agree the competence of the Italian judge they recognize that that judge also has Italian jurisdictional power. The parties' express choice would make no sense otherwise. This is the result of standard logical reasoning. The Part 20 Claimants' position seems to be that there is a possibility to choose the judge with territorial competence without addressing the issue of jurisdiction. As I have said, in my view this makes no sense.*

14. There was no need to refer to international element at the time of executing the Gearbox Contract because the contract was only between parties incorporated in Italy for the supply of goods within Italy. It was inconceivable that any dispute between the parties should be tried anywhere other *than in Italy.*

15. In my view there is no doubt that the election by the parties of a specific territorial court of a country (such as the court of Forli as referred to in the Gearbox Contract) is a valid forum selection clause for the purposes of Article 23 of EC Regulation 44/2001. The choice of one specific court to deal with all disputes arising out of a contract implies an exclusive selection of the Court of a specific country. This is confirmed by the Corte di Cassazione *(Sez. Un. 24 April 2002 n. 6040) … which specifically said in a very similar forum selection clause in an agreement:*

"the dispute belongs to the German court if the parties have expressly indicated in the agreement the Court of Berlin to be the competent court [verbatim: foro competente]".

*16. Furthermore, the words used in Article 23 of EC Regulation 44/2001 are: "*abbiano attribuito la competenza di giudice o dei giudici di uno Stato membro …"*("have agreed that a court or the courts of a Member State are to have jurisdiction …")*

Article 23 of EC Regulation 44/2001 therefore clearly contemplates as falling within its scope not only a choice by the parties of "the courts" (plural) of a particular Member State, but also a choice by the parties of "a court" (singular, i.e. a particular court) of a Member State, which is exactly the scenario which we have here. Article 23 therefore refers to two different cases:

(a) A situation in which the parties have agreed the competence of the Italian Courts in general. (In this case the choice of the Italian Courts in general satisfies the requirements of Article 23, and the competence of a specific

court within Italy will be determined in accordance with the internal rules on the distribution of competence amongst the Italian Courts).

(b) The parties have agreed the competence of a particular specified court within Italy (for example, the Court of Turin or the Court of Forli). (In this case the choice of a specific court satisfies the requirements of Article 23, and whether such a choice is permitted according to the internal rules on the distribution of competence amongst the Italian Courts will be decided according to those internal rules)."

Consideration of the Main Issue and conclusions concerning that issue

34. It seems to me that it is important to be clear what one is concerned with in considering whether an international element is necessary before the Regulation can apply and, if so, what sort of international element is required. It is manifestly not the case that no provision of the Regulation is of any relevance unless there is an international element, because Article 2(1) in terms sets out the general rule that, subject to the provision made by the Regulation, persons domiciled in a Member State are to be sued in that state. In other words, it is prescribing what is to happen internally within a Member State. Other provisions of the Regulation are concerned with exceptions to that general rule, that is to say, circumstances in which a person can be sued other than in the Member State in which he is domiciled. In that sense all of the provisions which set out circumstances in which a person can be sued in a state other than the Member State in which he is domiciled have an international dimension. It seems to me that it is essentially only in that sense that M. Jenard and Professor Schlosser were envisaging that there should be an international element before there could be any question of the Brussels Convention applying. Quite simply, without some issue arising in a given case of someone being sued in a jurisdiction other than the state in which he was domiciled there was nothing upon which the provisions of the Brussels Convention, other than Article 2, could bite. If that is the correct understanding of what was meant, the debate as to whether the omission from the recitals to the Regulation of the reference to the international jurisdiction of the courts of Member States and the substitution of references to the sound operation of the internal market is rather sterile. The substance of the matter appears to be that what is relevant to the application of most of the provisions of the Regulation or the Brussels Convention is whether whatever conditions are prescribed for a person to be liable to suit in a state other than that in which he is domiciled are met.

35. I reject the submission of Mr. Cox that the time at which the question whether a particular clause dealing with forum falls within Article 23 of the Regulation needs to be addressed is when the relevant contract is made. As a matter of logic, as it seems to me, that issue can only arise when a question has been raised as to the effect of the Article upon particular proceedings. That conclusion is supported, in my judgment, as Mr. Adamyk submitted, by the decision of the European Court of Justice in ***Sanicentral GmbH v. Collin*** and the opinion of M. Jenard in the passage upon which Mr. Adamyk relied.

36. It is, in my judgment, a misunderstanding of the judgment of the European Court of Justice in ***Estasis Salotti di Colzani e Gianmarco Colzani v. RUWA Polstereimaschinen GmbH*** to suppose that what the Court was there concerned with was laying down that clauses appearing to fall within the scope of Article 17 of the Brussels Convention should be strictly construed generally or that it was the function of a court before which an issue arose as to whether a clause fell within the scope of Article 17 to enquire into what the parties in fact envisaged and intended by their agreement of the clause in question. All I think that the Court was concerned with in that case was to emphasise that, if a clause was to be held to fall within Article 17, it was important that it satisfied the requirements as to form set out in the Article. If it did, that was conclusive as to the intentions of the parties. In the passage from the judgment which I have quoted what the Court said was to be strictly construed was not the clause in question but *"the requirements set out in Article 17"*. The Court went on to refer to the duty of the court to examine whether the relevant clause *"was in fact the subject of a consensus between the parties"*, but it seems to follow that if, as the Court said, *"The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established"*, all the court before which an issue comes as to compliance has to consider is whether a particular clause meets the formal requirements of Article 17 or Article 23 of the Regulation, as the case may be. I therefore reject the submission of Mr. Cox that a strict approach must be adopted to the construction in this case of the Forum Clause.

37. I come, then, to what seems to be the heart of the main issue, whether the Forum Clause should be construed as an agreement falling within Article 23, that is to say, as an agreement that any dispute between Babbini and BF, no matter where arising or in what circumstances, should be litigated in Forli.

38. Mr. Adamyk accepted that the logic of his argument was that any clause similar to the Forum Clause should be interpreted as dealing with disputes with an international element notwithstanding that there was no reference in the clause to such international disputes. In other words, the logic of his argument was that it was never necessary in terms to deal with disputes with an international element in such a clause for it to be effective to assign such disputes to the nominated court. That was in a sense the opposite extreme to the position of Mr. Cox that without such express reference such a clause would never be effective to deal with disputes with an international dimension.

39. I have already commented that I must address the question of the proper interpretation of the Forum Clause, in the light of the decision of the European Court of Justice in ***Powell Duffryn Plc v. Petereit***, as an independent concept. I have also commented that Mr. Adamyk submitted that in addressing that question it was legitimate to have regard to the law of Italy, as the proper law of the Gearbox Contract. I was shown no guidance from the European Court of Justice as to the detailed principles to be applied in construing the clause. No reference was made either by Mr. Adamyk or by Mr. Cox to the jurisprudence of any Member State other than Italy or England.

40. It seems to me that, although I must not interpret the Forum Clause simply by reference to *"the national law of one or other of the States concerned"*, that is to say, the law of Italy or the law of England, the starting point, at any rate, in the process of construction, is to consider the meaning of the relevant clause under the law which is the proper law of the contract. In formulating its opinion in the terms that *"the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the States concerned"*, I do not think that the European Court of Justice was intending to indicate that those national laws should be excluded from consideration or that it was inappropriate to consider the proper law of the relevant agreement. In this case the proper law of the Gearbox Contract is the law of Italy. Under that law, as I have indicated in citing the opinion of Professor Ballarino, although *"competenza"* and *"giurisdizione"* are in theory different concepts, a choice of a court which is selected as having *"competenza"* automatically operates as a choice of that court as having *"giurisdizione"*. Therefore, if and insofar as it were necessary under Italian law for the issue of *"giurisdizione"* as well as that of *"competenza"* to be dealt with in a forum clause, if that clause were to be effective, it was dealt with implicitly by dealing expressly only with the question of *"competenza"*. That seems logical. There would seem to be no point in choosing a court with *"competenza"* to determine disputes if that court did not also have *"giurisdizione"* to do so. However, the Italian text of Article 23 of the Regulation uses the expression *"competenza"*, and not *"giurisdizione"*, in dealing with agreements falling within its scope. Professor Ballarino's view, at its most straightforward, was that under Italian law the Forum Clause fell within Article 23 simply because by it the parties chose a court, that of Forli, as having jurisdiction. At any rate, under Italian law, in Professor Ballarino's view, the conclusion was plain that the Forum Clause fell within the scope of Article 23.

41. Having considered the position under the law governing the Gearbox Contract, it seems appropriate, next, to consider what the position would be under English law, if that were the law governing the Gearbox Contract. One has to recognise that the language of the contract as made is Italian, and so to consider the position under English law as though the contract were an English contract, the relevant Italian words need to be translated into English. Fortunately in this case it seems that there was no issue as to the correct translation of the Forum Clause. Under English law a clause providing that *"For any dispute, the court of exclusive jurisdiction is that of Forli"* would seem to be effective in accordance with its terms. The possible theoretical difficulties in Italian law of the differences between *"competenza"* and *"giurisdizione"* are not mirrored by any equivalent potential problem in English law.

42. The position thus seems to be that from the perspective of whichever of the great legal traditions of the European Union, the civil law or the common law, one might choose, the answer to the construction of the Forum Clause is the same and is that the clause falls within Article 23 of the Regulation.

43. Logic and common sense seem to support the same conclusion. If it is important to parties to a contract to select, on grounds of convenience, a particular place within the national territory of a Member State at which any disputes which may arise concerning the contract are to be litigated, it would seem even more important that that choice should be given effect when otherwise the parties might be at risk of being compelled to litigate anywhere within the European Union. The suggestions of Mr. Cox that, on the contrary, parties who wished to make specific provision as to the forum within a national territory for resolution of disputes might have been indifferent to the forum if there was an international element, or even anxious to litigate abroad, seem to me, with great respect to him, to be fanciful. In my judgment, the only sensible commercial interpretation to place upon a clause like the Forum Clause is that it is intended to identify the forum for resolution of <u>all</u> disputes which may arise, whether or not having an international dimension.

44. I draw some comfort in reaching that conclusion from the preliminary expression of views of Aikens J in the *Provimi Ltd.* case. Aikens J did not, in that case, have the benefit of argument from English Counsel. However, as a reflection of that, he also did not have to reach a final conclusion on the point with which this section of this judgment is concerned. I do not have that luxury, but it has assisted me to be able to consider the immediate reaction of Aikens J to the issue as set out in the arguments of Professor Wolf in that case.

The appropriateness of Part 20 proceedings

45. The conclusion which I have stated at the end of the preceding section of this judgment is sufficient to dispose of the application presently before the court by an order in the terms sought on behalf of BF. However, it is appropriate to consider an alternative argument of Mr. Adamyk which, if well-founded, leads to the same conclusion if I had reached a different conclusion on the main issue.

46. That argument depends upon the power of the court under Part 20.9 (1) of the Civil Procedure Rules to require a Part 20 claim to be dealt with separately from the claim by the claimant against the defendant. The point is a short one. As articulated by Mr. Adamyk in his written skeleton argument it was put like this:-

> "*36. The fact that the English Courts may have jurisdiction* in principle *under Art. 6(2) does not* require *the English Court to exercise that jurisdiction: whether or not the English Court does so is a matter for the procedural rules of the English Court ...***Kongress Agentur Hagen GmbH v. Zeehaghe BV**, *Case No. C-365/88, [1990] ECR I-1845).*
>
> *37. The procedural rules of the English Court as to whether or not a Part 20 claim should be required to be dealt with separately from the Main Claim, are contained in CPR 20.9. The Main Claim came to a complete stop on 28.10.04 when a consent order was entered. It has not even been stayed in Tomlin form – the action has completely terminated. There will therefore be no determination whatsoever of the rights and wrongs of the allegations in the Main Claim. Furthermore, the claims by Babbini SAS and Mr. Babbini are both based exclusively on Italian law. It is therefore submitted that the English Court, applying its own domestic procedural rules, should require the Part 20 Claim to proceed as a separate claim. The effect of this would be to remove the jurisdictional ground of Art. 6(2).*"

47. In ***Kongress Agentur Hagen GmbH v. Zeehaghe BV*** [1990] ECR I-1845 the principal issue was whether a Dutch court seised of litigation was bound to grant permission under Article 6(2) of the Brussels Convention to a party which wished to sue a third party on a warranty or guarantee. That issue was divided into two, referred to in the report as *"the second and third questions"*. The conclusions of the Court were:-

> "*21. Accordingly, an application for leave to bring an action on a warranty or guarantee may not be refused expressly or by implication on the ground that the third parties sought to be joined reside or are domiciled in a Contracting State other than that of the court seised of the original proceedings.*
>
> *22. The answer to the second and third questions must therefore be that Article 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring an action on a warranty or guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is*

not impaired and, in particular, that leave to bring the action on the warranty or guarantee is not refused on the ground that the third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings."

48. Mr. Cox accepted that I had a discretion as to whether to order that the Part 20 claim against BF be dealt with separately from the main action. However, he submitted that I should not exercise that discretion.

49. In fact the main debate between Mr. Cox and Mr. Adamyk in relation to this alternative argument of Mr. Adamyk turned on the question of the current status of the main action. Mr. Adamyk submitted that, in the light of the judgment by consent for a money sum, which money sum has been paid, the main action is at an end. Mr. Cox submitted that the main action continued in existence until dismissed or discontinued. He sought to support that submission by reference to the decision of the Court of Appeal in ***Rofa Sport Management AG v. DHL International (UK) Ltd.*** [1989] 1 WLR 902. However, it seemed to me that that submission was misconceived. The comments in the judgment of Neill LJ as to the circumstances in which an action could come to an end need, it seems to me, to be viewed against the background of the facts of that case and not as intended as exhaustive. After all, they omitted a not infrequent circumstance in which an action comes to an end, by judgment for a claimant, which judgment is satisfied.

50. In my judgment it was appropriate for the debate to be about whether the main action in the present case had come to an end, because if it had not, it seems to me that the effect of the judgment of the European Court of Justice in the ***Kongress Agentur Hagen GmbH*** case is that I could not exercise my discretion under CPR Part 20.9 so as to prevent the Part 20 claim in the present instance from continuing, as to do that would impair the effectiveness of the Regulation. There would be no ground for exercising my discretion in favour of separate treatment of the Part 20 claim in this instance, if the main claim were still live, other than the fact that BF was domiciled outside England. However, as the main action is no longer live there is no discretion to be exercised. If the Part 20 claim were to continue in England, it would be as a separate claim simply because there is no main action to be carried forward. Thus the requirements of Article 6(2) of the Regulation are simply not met as matters have turned out.

Conclusion

51. For the reasons which I have given the application of BF succeeds and I grant the relief sought. I do that without regret. It seems to me that it would be a serious indictment of English and European Union law if a dispute between Italian parties arising under a contract made and performed in Italy, expressed in the Italian language and governed by Italian law were to be compelled to be litigated in England simply as a result of the historical accident that the goods the subject of the contract were subsequently incorporated in the Press, which was sold to an English company and then failed. Now that the main action has been finally resolved there is nothing remotely English about the dispute between Babbini and BF. Every conceivable aspect of the dispute is Italian. Perhaps the ultimate irony is that the Forum Clause was not put forward initially by the party now seeking to rely upon it, BF, but by the party seeking to resist its application, Babbini.

Raymond Cox Q.C. and Edward Levey (instructed by Clarkson Wright and Jakes for the Part 20 Claimants)
Simon Adamyk (instructed by Pini Bingham and Partners for the Part 20 Defendant)
The parties in the main action in their capacities as such did not appear and were not represented.