LECTURE NINE

Staying of actions and Restraining Foreign Proceedings:

The Impact of Forum Non Conveniens

Aim:
To determine the principle(s) under which the English courts will decline jurisdiction over a case in favour of the courts of another more appropriate forum; and /or the principle(s) under which the English courts instruct litigants in other jurisdictions to cease their actions there in favour of the courts of another forum.

Objectives.
After carefully studying the following notes and other prescribed readings for this lecture, you should be able to:

1. Explain the basis on which an English court stays an action in favour of another forum, be it a foreign court or arbitration and discuss the ***Spiliada*** judgment;
2. Discuss the principles expounded in the ***Eleftheria*** on whether to stay an action in breach of a foreign jurisdiction clause;
3. Discuss the principles relating to the restraining of foreign proceedings as established in the ***SNIA*** and ***Airbus*** cases; and
4. Evaluate the impact of EU Law on the power of the court to restrain proceedings in the courts of member states in relation to litigation, with particular reference to ***Turner v. Grovit*** – and in relation to arbitral proceedings with particular reference to ***West Tankers v. RAS .***

Introduction

Where two different legal systems appear to have equal claim to the jurisdiction over the same case, there must be some sound (overriding) principle(s) underlying the decision of an English court to grant leave to serve a writ out of the jurisdiction and secure the case for a hearing before the English courts when the defendant is neither present in England nor has he submitted to the court. Equally, if the English court decides not to exercise jurisdiction over a case which it is entitled to hear, i.e., it decides to *stay the action*, there must be some (perhaps the same) principle for referring the case for decision to the other forum.

To have the jurisdiction to hear a case but to refuse to do so because other factors make the other forum more appropriate, means that those factors make England a less appropriate forum or *forum non-conveniens.* The authoritative case on *forum non-conveniens* is a case which, in fact, wasn't a case on stay of proceedings but which was concerned with an application for leave to serve a writ on a defendant abroad under ***RSC O.11.*** The reason why the particular case, ***Spiliada,*** became the authoritative case is because the principle of forum non-conveniens had always applied in O.11 cases and ***Lord Goff*** said that the doctrine applied in the same way to applications to serve out of the jurisdiction and to stay English proceedings brought as of right, notwithstanding the distinction in the burden of proof, i.e., that whereas it is the plaintiff who asks the court to exercise its discretion to allow service out of the jurisdiction it is the defendant who seeks a stay of action.

The Spilada [1987].[1] **:** A cargo of sulphur was shipped from British Columbia to India on board the '**Spiliada**'. Severe corrosion was caused to the vessel, allegedly because the cargo was wet when loaded. The shipowners, Spiliada Maritime Corporation, a Liberian Company, decided to sue the British-Columbian registered shippers, Cansulex Ltd., in England, and thus sought leave to serve Cansulex outside the jurisdiction. The bills of lading contained an express choice of English law, so the case plainly fell within

[1] ***Spiliada Maritime Corporation v. Cansulex*** [1987] AC 460

RSC 0.11, r.(1)(d)(iii); but the question to answer was whether the court would exercise its discretion and allow service outside the jurisdiction. At the same time a very similar action for sulphur damage (involving the same shippers but a different vessel, the 'Cambridgeshire') was being litigated in England and the *Cambridgeshire* action involved many of the same solicitors, counsel and expert witnesses as were involved in the *Spiliada* action. (This suggested that trial in England of the ***Spiliada*** action might be more convenient). If the shipowners were forced to sue in British Columbia, they would be faced with a defence of limitation in the British Columbian courts but were in time in England.

HELD: Following an extensive review of the applicable law, the House decided that it should exercise its discretion in the interests of the parties and for the ends of justice. In the circumstances, taking the '*Cambridgeshire factor*' into account, and the fact that English law was the proper law of the contract, England was the appropriate forum for the more suitable trial of the action. Leave would, therefore, be granted. As to what constituted the applicable law was summarized by ***Lord Goff*** in six propositions, viz;

(a) *The basic principle is that a stay will only be granted on the ground of* forum non conveniens *where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. [Note that the search is for an* appropriate *rather than a convenient forum.]*

(b) *In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... [but] if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country ...*

(c) *[Contrary to what was then the position in the United States and Canada] ... I can see no reason why the English court should not refuse to grant a stay ... [where no particular forum can be described as the natural forum]. It is significant that in all the leading English cases where a stay has been granted there has been another clearly more appropriate forum ... In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another available forum which is clearly or distinctly more appropriate ... [If] the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas. [See now* ***Airbus*** *(1998) for the doctrine of* forum non-conveniens *in Texas].*

(d) *Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors Lord Diplock described (in* ***MacShannon v Rockware Glass****) as indicating that justice can be done in the other forum at "substantially less inconvenience or expense". [Though] ... it may be more desirable ... to adopt the expression used by* **Lord Keith** *in* ***The Abidin Daver*** *... when he referred to the "*natural forum*" as being "*that with which the action has the most real and substantial connection.*" So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business.*

(e) *If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay ... It is difficult to imagine circumstances when, in such a case, a stay may be granted.*

(f) *If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with the other jurisdiction. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice, in the foreign jurisdiction ... [but here] the burden of proof shifts to the plaintiff ...'*

With regard to proposition (f), in ***Purcell v Khayat*** (1987)[2], a case decided a year after ***Spiliada***, it was decided that, whereas Lebanon was clearly the more appropriate forum, a stay of action was refused because it could not be considered an irrelevance that the plaintiff had been convicted in his absence of a crime there and sentenced to three years imprisonment.

The overall effect of the propositions summarized by ***Lord Goff*** in ***Spiliada*** is expected to be that, in future, a trial judge who abides by them will be able to decide a case quickly, relatively cheaply, and with little likelihood of his decision being reversed on appeal. These points were addressed in ***Spiliada*** by ***Lord Templeman*** who said that:

> *"the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge ... I hope that in future the (trial) judge will ... study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not in days. An appeal should be rare and the appellate court should be slow to interfere ..."*

Differences Between the Staying of Actions and the Granting of Leave Under RSC 0.11 r.1(1)

Notwithstanding the substantial unification of principles applicable to these areas of the law, *Lord Goff* identified three remaining differences, viz;

RSC O.11 r.1(1)	**Stay of Actions**
Burden of proof is on P	Burden of proof is on D
Leave is not granted *'unless it shall be made sufficiently to appear to the court that the case is a proper one for service cut of the jurisdiction:'* ***RSC O.11, r.4(2)***	[No corresponding provision]
Gives rise to *'exorbitant jurisdiction'* which is to be exercised with *'extreme caution and with full regard in every case to the circumstances':* ***Cordova Land Co. Ltd. v Victor Brothers*** **(**1966). (See, now: ***Seaconsar*****)**	[Not applicable]

The conclusions to be drawn from these differences is that it is likely to be more difficult to obtain leave to serve outside the jurisdiction than it will be to obtain a stay of proceedings begun by service of a claim form in England. Note that today the court would apply the CPR not the RSC.

Lis Alibi Pendens

With regard to cases in which proceedings between the same parties and involving the same issues have been commenced both in England and in a foreign forum, the English court has jurisdiction to stay the English proceedings at the request of the defendant or order the proceedings abroad to be discontinued. Concurrent actions involving the same issues between the same parties are referred to as *lis alibi pendens, i.e.* suit pending elsewhere. The actions may involve either:
(a) P suing D both in England and abroad; or
(b) P suing D in England whereas D is suing P in the same action in the foreign forum.

The effect of a request for a stay which is refused gives rise to trial in England *and* trial abroad (situation (a)); or trial in the foreign forum only (situation (b)). As a general rule in relation to (a): only rarely are English proceedings stayed unless, e.g., there two actions in rem against the same ship, as in ***The Abidin Daver***; and it is equally rare for a plaintiff to be restrained from continuing foreign proceedings unless the connection with a particular forum is tenuous.[3]

That the doctrine of *forum non conveniens* applied to *lis alibi pendens* cases was decided in ***The Abidin Daver*** [1984]. H.L.[4] A Cuban ship collided with a Turkish owned ship, the Abidin Daver, in Turkish territorial waters. The Turkish owners commenced proceedings before the Turkish court in Instanbul. The Cuban owners then began an action in rem in the English Admiralty Court when a sister ship of the Abidin Daver docked in a Welsh port. The Turkish shipowners asked for a stay of this action. The House of Lords granted

2 Times, 23rd November 1987
3 ***S.N.I.A. v. Lee Kui Jak*** (1987) AC 871.
4 ***The Abidin Daver*** [1984] 1 All ER 470.

the stay holding that the Turkish court was the natural and more appropriate forum. The principles which are applicable to determine whether the English action should or should not be stayed are indistinguishable from the Scottish doctrine of *forum non conveniens*.

With regard to the principles of *forum non conveniens* applying to *lis alibi pendens* cases, ***Lord Goff*** confirmed in the later case of ***De Dampiere v De Dampiere*** (1988) that *'the same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum'*. Accordingly, it is for the defendant to prove that the foreign forum is the appropriate or natural forum.[5]

Foreign Jurisdiction Clauses

A term common to many international commercial contracts provides for the exclusive determination by a foreign court of any dispute arising between the parties to the contract. Furthermore, that parties to the contract should abide by their terms of the contract is supported at common law.[6] However, in situations where the English court has jurisdiction over actions properly instituted in England and Wales, *there is an inherent* ***discretion*** *in the court* ***to disregard an express foreign jurisdiction clause***. The principles on which a decision whether or not to stay an action were formulated by ***Brandon J*** in ***The Eleftheria*** (1970) and repeated by him in ***The El Amria*** (1981).[7] The principles were affirmed, in ***The Nile Rhapsody*** [1992]. [8]

In ***The Eleftheria***, ***Brandon J*** said:

"The principles established by the authorities can, I think, be summarised as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

- *(a) In what country the evidence on the issues of the fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.*
- *(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.*
- *(c) With what country either party is connected, and how closely.*
- *(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.*
- *(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:*
  1. *be deprived of security for their claim;*
  2. *be unable to enforce any judgement obtained;*
  3. *be faced with a time bar not applicable in England; or*
  4. *for political, racial, religious or other reasons be unlikely to get a fair trial."*

Whereas the ***Eleftheria*** criteria of appropriateness include those which are also considered under the doctrine of *forum non conveniens*, differences remain.

Forum Conveniens	**Foreign Jurisdiction Clause**
An action properly commenced in England should be allowed to continue.	Stay the proceedings if the contract provides for exclusive jurisdiction by foreign court.
Forum Non Conveniens	Burden of proof is on P to demonstrate that stay should not be granted.
Burden is on D to show that the appropriate or the natural forum is the foreign forum.	P cannot complain of procedures adopted by foreign court when that court has been specified in the jurisdiction clause.

5 See: ***Du Pont v Agnew*** [1987] 2 Lloyd's Rep 585

6 ***R v. International Trustee for the Protection of Bondholders*** [1937] A.C. 500

7 ***The El Amria*** [1982] 2 Lloyd's Rep. 28.

8 ***The Nile Rhapsody*** [1992] 2 Lloyd's Rep 399.

CASES ON FORUM CONVENIENS

R v Minister of Agriculture and Fisheries ex p. Padfield [1968].[9] Whether or not arbitration was suitable for the resolution of this dispute or whether it was outside the scope of arbitration.

Connelly v RTZ [1997]. [10] Connelly pursued action against RTZ for lung disease contracted whilst working in South Africa. The issue here was whether the UK or Namibia appropriate forum and in addition, whether Connelly was entitled to legal aid in a forum action, cross referencing arbitration principles and whether under a CFA RTZ was entitled to a contribution on costs.

Askins v Absa Bank Ltd [1999].[11] On an application to stay proceedings on the ground of forum non conveniens where the onus of proof was in issue such that it was contended that the defendant had not shown there was an appropriate or other available tribunal in which to try the issues or if he had, that the plaintiff could not then show why justice required trial in the jurisdiction where the proceedings were issued, it was arguable whether the alternative court had to be available to the plaintiff in practical terms. The Court of Appeal so stated when dismissing the appeal of Mr Julian Askin. Amesby Ltd and Cormon Investments Inc against a decision of Mr Justice Buckley on June 13, 1997 staying proceedings against Absa Bank Ltd, Bankorp Ltd, Mr Gerhie Strydon, Mr Jacobus Morland, Dr Daniel Cronje and Mr Petrus Badenhorst, on the ground of forum non conveniens.

The plaintiffs had instituted claims against the defendants for fraud, misrepresentation and conspiracy relating to business dealings in South Africa. Absa applied to stay proceedings in the United Kingdom arguing that South Africa was the appropriate forum

Mr Askins appealed on the basis

(i) that he could not bring proceedings in South Africa because there was outstanding in South Africa a warrant for his arrest on criminal charges; South African law did not allow a person outside the country who was avoiding pro posed criminal charges within South Africa to institute civil proceedings there; and

(ii) that he would not return to South Africa because he considered himself in personal danger.

Lord Justice Tuckey said that in the light of twenty volumes of evidence reduced to seven on appeal and following what Lord Templeman said in ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460, 465) on such applications, evidence should be focused on the essential points and the submissions should be measured in hours and not days.

As was accepted in argument, the court was concerned with the big picture not a multitude of issues of detail. The Guide to Commercial Court Practice (4th edition) (The Supreme Court Practice 1999 paragraphs 72/AI-30) set four hours as the maximum time for the hearing of such an application. Practitioners should hear that in mind whether or not the summons was in the Commercial Court.

The judge had applied the two stage test laid down by Lord Goff in ***Spiliada*** (at p474-478). His finding on applying the first stage, that the case was clearly centred in one jurisdiction, South Africa, was not challenged on appeal. However, in defining the first part of the test lord Goff had referred to *"some other available forum"*.

The plaintiffs contended that South Africa was not an available forum to them because Mr Askin would not go there as he would be arrested and imprisoned and he feared for his personal safety.

The judge accepted that "*available"* meant "*available in practice*", but held that the South African courts were available to Mr Askin because the fact that in order to avoid a fair trial of the criminal charges he chose to stay in England and not avail himself of them could not alter that.

It was common ground that the South African courts had jurisdiction to hear the plaintiffs' civil claims. The plaintiffs challenged the judge's decision on availability. The defendants contended, if necessary, that

[9] ***R v Minister of Agriculture and Fisheries ex p. Padfield [1968] UKHL 1 .*** Before Lords Reid ; Morris ; Hodson ; Pearce ; Upjohn. 14th February 1968.

[10] ***Connelly v. RTZ Corporation Plc [1997] UKHL 30.*** Before Lords Goff ; Lloyd ; Hoffmann ; Hope ; Clyde. 24th July 1997

[11] ***Askins v Absa Bank Ltd*** [1999] The Times, 23 February, CA. before Lord Justices Peter Gibson, Robert Walker and Tuckey.

"available" did not mean "*available in practice"*. It only meant that the courts of the other forum had competent jurisdiction to try the dispute.

The judge dealt with the second stage of the ***Spiliada*** test under the question: did justice nevertheless require trial in England? In answering that question he noted that it was his duty to consider all the circumstances of the case. He was clearly of the view that justice did not require trial in England.

On the point about "*availability"*, his Lordship noted that in ***Mohammed v Bank of Kuwait*** [1996} 1 WLR 1483, the Court of Appeal accepted the judge's definition that "*available*" meant "*available in practice to the plaintiff to have his dispute resolved".*

While the decision in ***Mohammed*** could be explained on its special facts what Lord Justice Evans said about "*available"* was criticised by commentators. The essence of the criticism was that the court had elided the two stages of the test in ***Spiliada*** which was clearly spelt out by Lord Gaff and was simple to apply.

It was submitted that Lord Goff could not have intended "available" to mean available in practice since his statement of the principle that a defendant was entitled to apply to stay proceedings on the basis that there was a more appropriate forum was derived from the Scottish case of ***Sim v Robinow*** ((1892) 19 R 665). There Lord Kinnear referred simply to, the fact that a' plea could never be sustained unless the court was satisfied there was some other tribunal having competent jurisdiction.

At *the' first stage of the test. the court was only concerned to identify and evaluate the connecting factors where' there were competing courts of competent jurisdiction.'* It was only at the second stage that questions relating to availability in practice arose. That was clearly the approach which Lord Goff adopted when applying ***Spilada*** in ***Cornelly v RIY Corporation plc*** [1998] AC 854, 871-2.

His Lordship thought there was substance in the criticisms of Mohammed. However the point was only of any practical importance in a case, unlike the present case, which turned upon the onus of proof. On applications of this sort it was for the defendant to show that another appropriate forum was available. It was for the plaintiff to show that nevertheless justice required trial in England and the availability of the other forum in the wider sense was relevant to that second stage.

Furthermore, it was common ground in the present case that wherever the ultimate onus of proof lay, the evidential burden of proof lay initially with the party who made the allegation.

Here the plaintiffs had made extremely serious allegations. Mr Railton accepted that it was for them to produce evidence objectively supporting those allegations before any question of onus arose.

His Lordship did not think that the outcome of the present case depended upon onus. Nevertheless in a case which did, it might he necessary for the court to consider whether its decision in ***Mohammed*** could stand against ***Spiliada*** and ***Connelly.*** Lord Justice Robert Walker and Lord Justice Peter Gibson agreed.

ACE v Zurich Insurance [2001].[12] ZIC, which is a Swiss company, and ZAIC, which is a New York company, have applied to have these proceedings stayed on the ground of forum non conveniens in favour of proceedings in Texas. This is an appeal from the judgment of Longmore J, who acceded to that application [2000] 2 Lloyd's Rep 423. Appeal refused.

Petroleo Brasiliero v Mellitus Shipping **[2001]**.[13] CA on appeal from Commercial Court (Mr Justice Longmore) : service out of jurisdiction of claims against part 20 defendants. Application to set aside service declined at first instance and on appeal.

Samcrete Egypt Engineers v Land Rover Exports [2001].[14] Arts 3 & 4 Rome Convention on the Law Applicable to Contractual Obligations ("the Rome Convention"). Contract of Guarantee Application for stay of proceedings.

[12] ***ACE Insurance SA-NV v Zurich Insurance Company [2001] EWCA Civ 173.*** CA before Kennedy LJ : Rix LJ; Mr Justice Jacob. 2nd February 2001.

[13] ***Petroleo Brasiliero SA v Mellitus Shipping Inc [2001*** EWCA Civ 418. CA before Potter LJ; Sedley LJ; Jonathan Parkter LJ. 29th March 2001.

[14] ***Samcrete Egypt Engineers and Contractors S.a.e. v Land Rover Exports Ltd [2001] EWCA Civ 2019.*** CA before Thorpe LJ; Potter LJ. 21st December 2001.

Chellaram v Chellaram [2002]. [15] Burden of proof lies on applicant to demonstrate the England is the most convenient forum. Failed. A challenge that a judge might favour a chambers or a solicitor's practice that he once worked in failed.

British Sugar v Fratelli [2004].[16] Jurisdiction and choice of forum - Brussels Convention considered.

Limit (No 3) v PDV [2005].[17] Unsuccessful appeal against a determination that Venezuela was the most convenient forum for this action.

Antec v Biosafety USA [2006]. [18] Forum Non-Conveniens : Jurisdiction.

Dornoch v Mauritius Union Assurance [2006].[19] Conflicts : Forum. Reinsurance Dispute.

Cherney v Deripaska [2008].[20] Forum conveniens : purported oral contract subject to English Law & Jurisdiction : Court determined that the risks inherent in a trial in Russia (assassination, arrest on trumped up charges and lack of a fair trial) are sufficient to make England the forum in which the case can most suitably be tried in the interests of both parties and the ends of justice and, accordingly, the proper place for the determination of this claim.

Alberta v Katanga [2008]. [21] Forum conveniens : Place of business : whether Democratic Republic of Congo a venue where the claimant might be accorded justice or is rife with corruption and systemic instability.

Restraining Foreign Proceedings

Here the central issue is to determine whether the facts of the case in question are such that they would convince the courts to grant an injunction to restrain foreign proceedings on the basis of justice requiring that the plaintiff should be restrained.

(I) Where There is a Choice of Forum.

Under this heading, the leading case is that of ***S.N.I.A. v. Lee Kui Jak*** (1987). [22] This case was decided by the Privy Council and the decision is incompatible with an earlier House of Lords case. Nevertheless, it is a decision that has now been followed by subsequent decisions of the Court of Appeal.

S.N.I.A. : Y had been killed in a helicopter crash in Brunei. The plaintiff's (Y's widow and the administrators of the estate of Y) had instituted actions in Brunei and Texas against S, the helicopter manufacturers, and M, the helicopter operators. Jurisdiction in the Texas proceedings was based on the fact that S did business in Texas - and that was sufficient to give the Texas courts jurisdiction. The dispute had nothing to do with Texas other than the 'business connection' and Texas having product liability laws favourable to the plaintiff's.

HELD: (Privy Council). An injunction was granted restraining the plaintiff's from pursuing the Texas proceedings. The natural forum for the trial of the plaintiff's action against S was Brunei. Trial in Texas would involve serious injustice to S amounting to oppression in that the company might be unable to claim a contribution from M in the Texas proceedings: they would then have to institute proceedings against K in Brunei to try and rectify this injustice. For the plaintiff's, however, they would not be deprived of any advantages by proceeding with the trial in Brunei: S had already given an undertaking that evidence already obtained in the Texas proceedings would be available in Brunei proceedings.

It would appear that at least three significant points emerge from the *Privy Council* decision, viz;

1. It is *incompatible* with the *earlier House of Lords* decisions in the ***Casthano*** and ***South Carolina*** cases.[23]
2. It is uncertain as to what is meant by *vexation or oppression;* and

[15] ***Chellaram v Chellaram [2002] EWHC 632 (Ch).*** Mr Justice Lawrence Collins. 16th April 2002.
[16] ***British Sugar v Fratelli [2004] EWHC 2560.*** HHJ Richard Seymour. 12th November 2004.
[17] ***Limit (No 3) Ltd & Ors v PDV Insurance Company [2005] EWCA Civ 383.*** CA before Auld LJ; Tuckey LJ; Clarke LJ. 11th April. 2005.
[18] ***Antec International Ltd v Biosafety USA Inc [2006] EWHC 47 (Comm).*** Mrs Justice Gloster. 27th January 2006.
[19] ***Dornoch Ltd v Mauritius Union Assurance Co Ltd [2006] EWCA Civ 389.*** CA before Sir Mark Potter; Tuckey LJ ; May LJ. 10th April. 2006.
[20] ***Cherney v Deripaska [2008] EWHC 1530 (Comm) :*** Mr Justice Christopher Clarke. 3rd July 2008.
[21] ***Alberta Inc 889457 v Katanga Mining Ltd [2008] EWHC 2679 (Comm)*** **:** Mr Justice Tomlinson. 5th November 2008.
[22] ***S.N.I.A. v Lee Kui Jak*** **[**1987] AC 871 : Applied in ***Du Pont v Agnew*** [1987] 2 Lloyds Law Reports 585 CA
[23] ***South Carolina Insurance Co. v Assurantie*** [1986] 1 AC 24.

3. This was a decision of a case in which there was a choice of forum and proceedings had been commenced in both of them. [24]

In ***Du Pont v Agnew,*** [1987],[25] Bingham LJ stated that *"The policy of the law must … be to favour the litigation of issues only once, in the most appropriate forum"*. However, he also recognised that this is never the only consideration to be brought into the balance, noting that : *"The general undesirability of such concurrent proceedings is … but one consideration to be weighed as part of the overall assessment. It cannot necessarily lead to a stay or setting aside of English proceedings. It may, on the facts, be correct to restrain the pursuit of the foreign proceedings … or to make no order."*

(II) Where there is no Choice of Forum.

There may be no choice of forum open to the plaintiff: he may be confined to bringing his case only before the foreign court perhaps because his claim is one which is known only to the foreign court and, consequently, would not be recognised in another forum:

British Airways v Laker [1984]. [26] **:** Following the liquidation of Laker Airways in 1982, the British liquidator commenced proceedings in the United States of America under, inter-alia, the U.S. Anti-Trust laws, alleging that two British airlines (including British Airways) had conspired with other airlines and aircraft manufacturers to drive Sir Freddie Laker out of business. If the liquidator won the case he would be entitled to treble damages, i.e. the actual compensation trebled. Such an action could not have been brought in England, so the defendant airlines sought an injunction from the court restraining the liquidator from his action in the U.S. on the basis that it would be unjust to them and against public policy. This was refused at first instance but then granted by the Court of Appeal after the Secretary of State acted under the ***Protection of Trading Interests Act 1980*** preventing British Airways from producing documents or information to the U.S. courts. The Court of Appeal thought that this rendered a proper trial in the U.S. impossible. Nevertheless, this decision was appealed to the House of Lords.

HELD: The injunction was refused, i.e. the foreign proceedings would not be restrained. ***Lord Diplock***, speaking on behalf of a unanimous House of Lords, said that where a foreign court was the only forum which was of competent jurisdiction to determine the claim of a plaintiff who was amenable to the jurisdiction of the English courts, an English court would intervene to issue an injunction restraining the plaintiff from bringing his claim in the foreign court, ***but only if*** *it would infringe a legal or equitable right of the defendant not to be sued in the foreign court*, so that it would be an injustice if the defendant was not protected from the foreign claim. Since British Airways could not show that it would be unconscionable to allow Laker to proceed in the United States, the injunction was refused. The following case further extends the law :

South Carolina v Assurantie [27] **:** The P's, an American insurance company, brought an action in England against the D's, a number of other insurance companies of different domiciles, under a contract of reinsurance. The D's had commenced proceedings in America for pre-trial discovery of documents relevant to the claim against persons resident there who were not parties to the English action. P sought an injunction restraining the D's from continuing with the American proceedings.

HELD: (Unanimous decision of the House of Lords). No injunction would be granted. An injunction could be granted if: (a) a party to an action had invaded or threatened to invade a legal or equitable right of another; ***or*** (b) *where one party had behaved or threatened to behave in a manner which was unconscionable*. On the facts of the case, no injunction was necessary.[28]

The Airbus case involved litigation in India in respect of an air crash in India resulting in, *inter alia*, the deaths of British citizens resident in England and litigation in Texas in respect of three American passengers who died in the same crash. Airbus obtained an injunction in India restraining the appellants (Patel and

[24] Nevertheless, it has been decided that the same principles apply to cases in which no choice of forum applies, e.g. *lis alibi pendens* cases where the roles of the parties are reversed, i.e. P in England is the D in the foreign forum: ***Du Pont v Agnew*** (1988).

[25] ***Du Pont v Agnew,*** [1987] 2 Lloyd's Rep 585 at p.289

[26] ***British Airways Board v Laker Airways Ltd.*** [1984] 3 All ER 39

[27] ***South Carolina Insurance Co. v Assurantie*** [1986] 1 AC 24

[28] See also the decision of the *Court of Appeal* in: ***Airbus Industrie GIE v. Patel,*** (1996) *The Times*, August 12th; and its subsequent ***reversal*** by the ***House of Lords*** expressed in the judgments published on 2nd April 1998: [1999] AC 119.

others) from proceeding against Airbus in any court other than in Bangalore. In the English courts, Airbus sought to restrain the English claimants from continuing with the actions they had commenced Airbus in Texas on the grounds that they were vexatious and oppressive. In the *Court of Appeal*, ***Hobhouse LJ*** said that there was no precedent covering the case, all previous cases having been concerned with the interrelation of English proceedings and proceedings in a foreign court. However, he identified issues relating to the natural forum and the disadvantages both to Airbus in having the case continue in Texas and to the claimants in not having the case continue there and concluded that the conduct of the claimants was clearly oppressive and caused significant injustice to Airbus.

In the ***House of Lords***, however, ***Lord Goff,*** on behalf of a unanimous House, noted that:
" ... *Airbus is relying simply on the English court's power of itself, without direct reliance on the Indian court's decision, to grant an injunction in this case where, unusually, the English jurisdiction has no interest in, or connection with, the matter in question. ... [As such] interference, even indirect interference, by the courts of one jurisdiction with the exercise of the jurisdiction of a foreign court cannot in my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene.* **The basic principle is that only the courts of an interested jurisdiction can act in the matter***; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place*."

Courts will not necessarily restrain proceedings brought in breach of agreement.
Whereas the English court will readily restrain proceedings commenced abroad by a party in breach of an agreement to submit to the jurisdiction of the English court[29], it is far more reluctant to do so when the purpose of the proceedings is to obtain security for the plaintiff's claim. Thus in ***The Lisboa*** [1980]**.** [30] **c**argo owners had arrested D's ship in Italy for towage fees. D's had sought restraint of further proceedings in Italy and release of their ship. An injunction restraining proceedings was refused since the arrest of the ship was made to obtain security. The breach of jurisdiction (England) clause was not in the circumstances oppressive.

CASES ON ANTI-SUIT INJUNCTIONS

Youell v Kara Mara Shipping [2000]. [31] Here the insurers sought an anti-suit injunction in favour of English litigation of insurance claims and opposing Louisianna jurisdiction. The contract of insurance contained an "Exclusive Jurisdiction clause" in favour of English Law and Courts. The application was granted.

National Westminster Bank v Utrecht-America Finance Co [2001]. [32] Ultrecht commenced action in California to rescind a Take Out Agreement (purchase of interest in a credit agreement). NWB had previously successfully sought summary judgement in UK and an anti-suit injunction on the basis that the California action was contrary to the provisions of the TOA. Here Ultrecht unsuccessfully appealed against that order, asserting that the contract had been breached by non-disclosure. In the circumstances the court held that this was not a contract of uberimae fidei and accordingly there was no duty to disclose, so no there had been no breach. There was no valid reasons to stay the action to California.

Royal Bank of Canada v CCR-B [2004]**.** [33] Anti-suit injunction sought against trial in New York. The New York trial was in its final stages. Held : Even if there was an English Jurisdiction clause it was now too late for an injunction. The following extract from the judgment provides a valuable recap of the law :- " …

8. At paragraph 29 of his judgement the judge summarised the law applicable to an application under ***section 37 of the Supreme Court Act 1981*** for an injunction to restrain proceedings in a foreign court in such circumstances as fall to be considered in the present case. The judge did not understand the principles that he summarised to be disputed and they were not disputed in this court. I will set out the judge's summary of the applicable legal principles verbatim as follows:-

[29] ***Tracomin SA v Sudan Oil Seeds (No.2)*** (1983),
[30] ***The Lisboa*** [1980] 2 Lloyd's Rep 546 (CA). (per *Dunn LJ*)
[31] ***Youell v Kara Mara Shipping Company Ltd [2000] EWHC 220 (Comm)*** : Per Mr Justice Aikens. 13th March 2000.
[32] ***National Westminster Bank v Utrecht-America Finance Co [2001] EWCA Civ 658.*** CA before Aldous LJ ; Clarke LJ; Laws LJ. 10th May 2001.
[33] ***Royal Bank of Canada v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2004] EWCA Civ 7.*** CA before Thorpe LJ; Mance LJ; Mr Justice Evans-Lombe. 23rd January 2004.

*"29(i) "Under English law a person has no right to be sued in a particular forum, domestic or foreign, unless there is some specific factor that gives him that right", but a person may show such a right if he can invoke a contractual provision conferring it on him or if he can point to clearly unconscionable conduct (or the threat of unconscionable conduct) on the part of the party sought to be restrained: **Turner v Grovit [2002] 1WLR 107, 118C** at para 25 per Lord Hobhouse.*

*(ii) There will be such unconscionable conduct if the pursuit of foreign proceedings is vexatious or oppressive or interferes with the due process of this Court: **South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provincien NV 1987 AC 24** at page 41 D; **Glencore International AG v Exter Shipping Ltd 2002 2 All ER (Comm) 1, 14a** at para 42.*

*(iii) The fact that there are such concurrent proceedings does not in itself mean that the conduct of either action is vexatious or oppressive or an abuse of court, nor does that in itself justify the grant of an injunction: **Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 817** at page 894c, **Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep. 767** at page 781, **Airbus Industrie GIE v Patel** [1999] 1AC 119 at page 133G/H.*

*(iv) However, the court recognises the undesirable consequences that may result if concurrent actions in respect of the same subject matter proceed in two different countries: that "there may be conflicting judgments of the two courts concerned" or that there "may be an ugly rush to get one action decided ahead of the other in order to create a situation of res judicata or issue estoppel in the latter": see **The Abidin Daver [1984] AC 398** at page 423H-424A per Lord Brandon.*

*(v) The Court may conclude that a party is acting vexatiously or oppressively in pursuing foreign proceedings and that he should be ordered not to pursue them if (a) the English court is the natural forum for the trial of the dispute; and (b) justice does not require that the action should be allowed to proceed in the foreign court, and more specifically, that there is no advantage to the party sought to be restrained in pursuing the foreign proceedings of which he would be deprived and of which it would be unjust to deprive him**: Societe Aerospatiale** ibid at page 895D and 896 F/G.*

*(vi) In exercising its jurisdiction to grant an injunction, "regard must be had to comity and so the jurisdiction is one which must be exercised with caution": **Airbus Industrie** ibid at page 133F. Generally speaking in deciding whether or not to order that a party be restrained in the pursuit of foreign proceedings the court will be reluctant to take upon itself the decision whether a foreign forum is an inappropriate one: **Turner v Grovit** ibid at para 25."*

9. Mr Malek for Rabobank made the following further submissions of law developing the judge's summary which, again, were not challenged. Those submissions are set out between paragraphs 16 and 19 of his written submissions to this court as follows:-

*"16 First, the fact that there are concurrent proceedings does not in itself mean that the conduct of either party is vexatious or oppressive, nor does it justify the grant of an injunction. The court cannot grant an injunction only on the basis that it is undesirable for there to be parallel trials or a competition for judgment. See the **Aerospatiale** case at page 894C the **Airbus Industrie** case at page 132H and 133 G and the **Credit Suisse** case at page 781.*

*17 Secondly where the foreign proceedings are in breach of contract an injunction is ordinarily granted, provided that it is sought promptly and before the foreign proceeding are too far advanced. See the **Angelic Grace [1995] 1 Lloyd's Rep. 87** at page 96 per Millett LJ; **Donohue v Armco [2002] 1 Lloyd's Rep. 425** at page 433.*

18 Thirdly where the foreign proceedings are not in breach of contract, then the English court may intervene only if the pursuit of foreign proceedings would be vexatious and oppressive. There are three conditions that generally have to be satisfied:

(a) First the English court must be the natural forum for the trial of the action.

(b) Secondly the injunction must not unjustly deprive the respondent of advantages in the foreign forum.

*(c) Thirdly, the conduct of the respondent must be vexatious or oppressive. See the **Aerospatiale** case at 896 F-G.*

*19 Fourthly although the injunction is in form in personam affecting only the parties before the court, it is in substance an interference in the process of the foreign court. Where the ground relied on is unconscionable conduct in a foreign court the principle of comity requires that the jurisdiction be exercised only with great caution. See the **Angelic Grace** case at page 96; the **Airbus Industrie** case at page 133; **Turner v Grovit** at page 119, para 28."*

10. I accept Mr Malek's further submissions of law."

Dornoch v Mauritius Union Assurance [2005]. [34] The court determined that the proper law and forum was England but nonetheless refused to maintain an anti-suit injunction against action in Mauritius.

Horn Linie v Panamericana Formas Impresos [2006]**.**[35] The nubb of this anti-suit injunction application was whether there was a valid choice of law, and whether UK or Columbian law applied. The significance was the impact this would have on whether or not the Hague Visby Rules applied to the contract of carriage.

Goshawk v ROP [2006]**.** [36] Here an injunction was successfully applied for to prevent the other party pursuing an action to strike out arbitration proceedings before the Georgia Court.

Masri v Consolidated Contractors International [2007].[37] Here the applicant sought an injunction against re-litigating the same issue before the Yemen Courts, on the grounds that the matter was res judicata since it had been dealt with before the UK courts in 2006.

Samengo-Turner v Marsh & McLennan (Services) Ltd [2007].[38] This action involved an application for an anti-suit injunction to prevent litigation in New York over contracts of employment governed by UK Law, aimed at examining breach of solus agreement / non-competition terms regarding ex-employees.

C v D [2007].[39] The applicant here sought an injunction against attempts through subsequent litigation to circumvent the protections provided by the Bermuda Form in relation to settlement of insurance issues.

Satyam Computer v Upaid Systems [2008]. [40] The issue here was whether actions in Texas were the subject of an entire settlement agreement subject to English Law and jurisdiction. In the circumstances the court held that the instant actions concerned new rights not contemplated by the agreement and accordingly the injunction was refused.

CASES ON ANTI SUIT INJUNCTIONS AND THE EU

Glocom v Eagle Star [1996].[41] This case concerned the inter-relationship between an Open Cover insurance policy (subject to Dutch Law) and the certificate issued pursuant to and in compliance with a c.i.f. sales contract requiring equivalent minimum GAFTA provisions, including English Law. In the circumstances the court held that the English jurisdiction clause prevailed.

Credit Lyonnais v New Hampshire Insurance [1997]. [42] The issue here was whether English or French law applied. If French law then the action was time barred. A French finance house issue policies in UK for the UK market. The question the Judge had to decide was what law was applicable to these policies. The criteria which she had to apply are laid down in the ***Insurance Companies Act 1982*** as amended to give effect to the Second Council Directive dated 22 June 1988 (OJ 1988 No.L172). The court held that English Law applied.

Blue Nile Shipping v Iguana Shipping [1997]**.** [43] This case concerned a collision between vessels. There has previously been an application for limitation of liability before a French Court. There were however multiple claimants to this action. One party, with an English Jurisdiction contract sought action in England. In the circumstances however the action was stayed to France. Here the applicant sought to appeal the stay. Articles 21 & 22 Brussels Convention considered.

Agnew v Lansforsakringsbolagens [1997] EWCA Civ 2253.[44] At first instance Mance J. dismissed the defendants' application to set aside the proceedings, made under ***Order 12 Rule 8,*** on the ground of want of

[34] ***Dornoch Ltd. v The Mauritius Union Assurance Co Ltd. [2005] EWHC 1887 (Comm).*** Mr Justice Aikens. 19th August 2005.

[35] ***Horn Linie GmbH & Co v Panamericana Formas E Impresos SA [2006] EWHC 373 (Comm).*** Per Mr Justice Morison. 6th March 2006.

[36] ***Goshawk Dedicated Ltd v ROP Inc [2006] EWHC 1730 (Comm).*** Per Mr Justice Morison, 12th July 2006.

[37] ***Masri v Consolidated Contractors International (UK) Ltd & Ors [2007] EWHC 1510 (Comm) :*** Per Mackie J. 25th May 2007.

[38] ***Samengo-Turner v J & H Marsh & McLennan (Services) Ltd [2007] EWCA Civ 723 ;*** CA before Tuckey LJ; Longmore LJ; Lloyd L:J. 12th July 2007.

[39] ***C v D [2007] EWCA Civ 1282:*** CA before the Master of the Rolls; Longmore LJ; Jacob LJ. 5th December 2007.

[40] ***Satyam Computer Services Ltd v Upaid Systems Ltd [2008] EWHC 31 (Comm) :*** Per Mr Justice Flaux. 17th January 2008.

[41] ***Glocom Ltd v Eagle Star Reinsurance Co Ltd [1996] EWCA Civ 659 :*** CA before Phillips LJ; Mummery LJ. 4th October 1996.

[42] ***Credit Lyonnais v New Hampshire Insurance Co [1997] EWCA Civ 1218 .*** CA before Evans LJ; Hobhouse J; Mummery J. 12th March 1997.

[43] ***Blue Nile Shipping Co Ltd v Iguana Shipping & Finance Inc [1997] EWCA Civ 2192.*** CA before The President (Sir Stephen Brown.) Saville LJ; Schiemann LJ. 25th July 1997.

[44] ***Agnew v Lansforsakringsbolagens [1997] EWCA Civ 2253.*** CA before Evans LJ : Hobhouse LJ; Schiemann LJ. 31st July 1997.

jurisdiction in the Court. The defendants appeal against that ruling on two grounds, one of which was not raised before the judge. They also apply to have the issue of jurisdiction referred for a preliminary ruling by the European Court. The issue decided by the judge arises under ***Article 5(1) of the Lugano Convention (Schedule 3C to the Civil Jurisdiction and Judgments Act 1982).***

British Nuclear Fuels v Comex [1998].[45] This case concerned an application for an anti-suit injunction to restrain the defendants from continuing with proceedings in France and by the defendants to dismiss or stay the action. The basis of both applications was ***articles 21 and 22 of the Brussels Convention***.

MBM Fabri-Clad v Eisen Und Huttenwerke Thal [1999].[46] The court determined that the English Court has jurisdiction over an action for delivery of defective goods in the UK even though the defect occurred during manufacture abroad. ***Art 5 Brussels Convention considered***.

Andrea Merzario v Internationale Spedition Leitner [2001].[47] The issue here was whether the English Court or the Austrian Court in Vienna Court had jurisdiction. The dispute concerend international road transport. Application of article 31 of the Convention for the International Carriage of Goods by Road.

Standard Bank London v Apostolakis [2001]. [48] The court here was concerned with a jurisdiction clause that sought to impose English Law and Jurisdiction over a consumer investment contract (albeit one in excess of £1M was unfair especially since it was not know of in advance.) Under EC consumer law it was displaced in favour of Greek court action. Various issues arose concerning Banking & Financial services – conflicts of laws – contract – anti-suit injunction – Unfair Contract terms. The defendants signed a Foreign Exchange Margin Trading Agreement in Greece. There had been proceedings in Greece & England. The agreement contained an English jurisdiction clause but since the defendants acted as consumers they were entitled to bring proceedings in Greece despite the jurisdiction clause since under Arts 13/14 Brussels Convention – a jurisdiction clause was not binding by virtue of the UCTCCR 1994 and 1999.

Turner v. Grovit [2001]. [49] This is the leading case on the questions of anti-suit injunctions in relation to the EC. Here the House of Lords made a reference to ECJ on a question of interpretation of the Brussels Convention. The crucial matter is the ECJ's response. The question was :-

> *"Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) for the courts of the United Kingdom 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?"*

The facts : Mr Turner, a British citizen domiciled in the UK, was recruited in 1990 as solicitor to a group of undertakings by one of the companies belonging to Chequepoint Group. The group is directed by Mr Grovit and its main business is running *bureaux de change*. It comprises several companies established in different countries, one being China Security Ltd, which initially recruited Mr Turner. Chequepoint UK Ltd, which took over Mr Turner's contract at the end of 1990, Harada, established in the United Kingdom, and Changepoint, established in Spain. Mr Turner carried out his work in London. However, in May 1997, at his request, his employer allowed him to transfer his office to Madrid (Spain). Mr Turner started working in Madrid in November 1997. On 16 November 1998, he submitted his resignation to Harada, the company to which he had been transferred on 31 December 1997. On 2 March 1998 Mr Turner brought an action in London against Harada before the Employment Tribunal. He claimed that he had been the victim of efforts to implicate him in illegal conduct, which, in his opinion, were tantamount to unfair dismissal. The Employment Tribunal dismissed the objection of lack of jurisdiction raised by Harada. Its decision was confirmed on appeal. Giving judgment on the substance, it awarded damages to Mr Turner.

[45] ***British Nuclear Fuels PLC v. Comex Nuclear Services Ltd, Comex Nucleaire SA [1998] EWHC TCC 334.*** Per HHJ Anthony Thornton. 11th March 1998.

[46] ***MBM Fabri-Clad Ltd v Eisen Und Huttenwerke Thal AG [1999] CA. Lawtel AC9500474.*** CA before Pill LJ, Aldous LJ, Ward LJ. 3rd November 1999.

[47] **Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH [2001] EWCA Civ 61.** CA before Vice Chancellor : Chadwick LJ; Rix LJ. 23rd January 2001.

[48] ***Standard Bank London Ltd. v Apostolakis [2001] EWHC 493 (Comm).*** Mr Justice Steel. 9th February 2001.

[49] ***Turner v. Grovit [2001] UKHL 65 .*** Before Lords Nicholls; Hoffmann; Hobhouse; Millett; Scott. 13th December 2001.

On 29 July 1998, Changepoint brought an action against Mr Turner before a court of first instance in Madrid. The summons was served on Mr Turner around 15 December 1998. Mr Turner did not accept service and protested the jurisdiction of the Spanish court. In the course of the proceedings in Spain, Changepoint claimed damages of ESP 85 million from Mr Turner as compensation for losses allegedly resulting from Mr Turner's professional conduct. On 18 December 1998 Mr Turner asked the High Court of Justice of England and Wales to issue an injunction under section 37(1) of the Supreme Court Act 1981, backed by a penalty, restraining Mr Grovit, Harada and Changepoint from pursuing the proceedings commenced in Spain. An interlocutory injunction was issued in those terms on 22 December 1998. On 24 February 1999, the High Court refused to extend the injunction. On appeal by Mr Turner, the Court of Appeal (England and Wales) on 28 May 1999 issued an injunction ordering the defendants not to continue the proceedings commenced in Spain and to refrain from commencing further proceedings in Spain or elsewhere against Mr Turner in respect of his contract of employment. In the grounds of its judgment, the Court of Appeal stated, in particular, that the proceedings in Spain had been brought in bad faith in order to vex Mr Turner in the pursuit of his application before the Employment Tribunal. On 28 June 1999, in compliance with that injunction, Changepoint discontinued the proceedings pending before the Spanish court. Mr Grovit, Harada and Changepoint then appealed to the House of Lords, claiming in essence that the English courts did not have the power to make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Convention.

Turner (Judgments Convention/Enforcement of judgments) [2004].[50] Response to the House of Lords reference in Turner v Grovit - to the effect that anti-suit injunctions are not available against European Member State courts. The House of Lords expressed the view that such injunctions would only be issued where a party acting in bad faith sought to abuse the litigation process and was not an attack on the jurisdiction of an EU member state court. This was rejected by the ECJ.

"Findings of the Court

24. *At the outset, it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments (**Case C-116/02 Gasser [2003] ECR I-0000**, paragraph 72).*
25. *It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them (see, to that effect, **Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317,** paragraph 23, and Gasser, paragraph 48).*
26. *Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State (see, to that effect, Overseas Union Insurance and Others, paragraph 24).*
27. *However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.*
28. *Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. 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*

[50] ***Turner (Judgments Convention/Enforcement of judgments) [2004] EUECJ C-159/02. Before*** V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas, Presidents of Chambers, A. La Pergola, J.-P. Puissochet, R. Schintgen, N. Colneric and S. von Bahr, Judges. 27th April 2004.

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.

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 (Case C-365/88 Hagen [1990] ECR I-1845,*** *paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.*

30. *The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions. Second, 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.*

31. *Consequently, the answer to be given to the national court must be that the 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. "*

TSN Kunststoffrecycling v Jurgens [2002].[51] This concerned the registration of a default judgment pursuant to Title III of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as given the force of law by the Civil Jurisdiction and Judgments Act 1982.

Evialis S.A. v S.I.A.T. [2003].[52] the court concluded that this action was clearly subject to French and Italian Law and Jurisdiction and stayed this application before the UK court for summary judgment. Brussels / Lugano were considered and led to the stay to litigation in Italy pursuant to Council Regulation (EC) No 44/2001, Articles 27 and 28 (Brussels Regulation). The court considered whether it is inconsistent with the Brussels Convention for the courts of this country to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country where the defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly brought before the English courts. ***Turner v Grovit*** applied. Application for an injunction refused.

Mora Shipping v Axa [2005]. High Court.[53] Here the defendant Insurers applied for an order that the court had no jurisdiction over the claim (a general average assessment) and applied for the issue and service upon them of the Claim Form be set aside. The application was set aside. Jurisdiction vested in defendant's home state, not UK. The Brussels Convention applied.

Mora Shipping v Axa [2005]. CA. [54] Underwriters refused to comply with a General Average adjustment on the grounds of unseaworthiness, which would negate the right to General Average. The owners sought enforcement in UK. The underwriters were domiciled in various EU states. The court held that in the absence of a Choice of English Law and Jurisdiction clause, under Brussels enforcement had to be sought individually before the courts of the respective states of domicile.

[51] ***TSN Kunststoffrecycling GmbH v Jurgens [2002] EWCA Civ 11.*** CA before Rix LJ; Robert Walker LJ : Dyson LJ. 25th January 2002.

[52] ***Evialis S.A. v S.I.A.T. & Ors [2003] EWHC 863 (Comm) :*** Mr Justice Andrew Smith. 16th April 2003.

[53] ***Mora Shipping Inc v AXA Corporate Solutions Assurance S.A. [2005] EWHC 315 (Comm) :*** Mr Justice Langley. 16th March 2005.

[54] ***Mora Shipping Inc v AXA Corporate Solutions Assurance S.A. [2005] EWHC 315 (Comm) :*** CA before Ward LJ; Clarke LJ; Neugerber LJ. 28th July 2005.

Tavoulareas v Tsavliris [2006].[55] The issue here was whether an English or a Greek court was seized of action, and the status of the determination of the Greek Court, the CA having previously declared that the English Court had jurisdiction.

Andromeda v OW Bunker [2006]. [56] This case concerned an application for a negative Injunction. The claimant's, third parties ship owners to a charterer's contract for bunkers from the defendant, sought a declaration / injunction that no action lay against them as third parties. The main action was before the Danish Court. The court held that it had no jurisdiction. If at all, this action should be pursued before the Danish Court.

WPP Holdings Italy v Benatti [2006]. [57] In this challenge to the jurisdiction of the English Court, it was noted that the English court was the first to be seized of this dispute which involved an Italian entity. Applying the Judgment Regulations, the court held that the challenge failed.

Hewden Tower Cranes v Wolffkran [2007].[58] A hire crane collapsed. Hewden having paid out compensation to various parties sought to recover against the German manufacturer / hirer of the equipment on the grounds of negligence – defective welds in crane – in reliance upon the provisions of the Civil Liability Contribution Act 1978. The question here was whether under ***EC Reg 44/2002 Arts 2(1); 5(3) & 23*** the UK or the German court had jurisdiction. The court held that the UK Court had jurisdiction.

Kolden v Rodette [2007].[59] Here an application for a stay to Cyprus was refused. The English court was first ceised of action. The same parties were involved even though there had been a change of name. Arts 28 / 28 Council Regulation (EC) 44/2001 applied.

Scottish & Newcastle v Othon Ghalanos [2008].[60] The question here was where is delivery made in an f.o.b. export contract? The answer "*At ships rail in export country*" impacts upon jurisdiction of a dispute; application of **Council Regulation (EC) No 44/2001**.

Curtis v Lockheed Martin [2008].[61] This concerned an unsuccessful application for a stay of action pending outcome of deliberation by Italian Court on procedural grounds.

Lloyd's Syndicate 980 v Sinco [2008]. [62] This involved an insurance dispute between underwriters and brokers. There were ongoing actions in Greece & UK. The claimant here sought damages for breach of the English jurisdiction clause by the defendant by commencing action in Greece.

CASES ON CHOICE OF FORUM

Suendborg v Wansa [1997].[63] Failed appeal against a refusal to set aside UK proceedings regarding bills of lading and short delivery, in favour of Sierra Leone.

New Hampshire Insurance v Phillips Electronics [1997].[64] This case involved actions in Illinois and London, one regarding entitlement the other regarding quantum.

TWTT v Bangladesh Biman Corp. [1998].[65] Costs of determining the issue in respect of the curial law to be borne by the successful party that instigated the hearing.

Lilly v Novo Nordisk [1999].[66] Patent disputes : action filed in US for breach of patent : separate action filed in the UK for rectification. Application for stay to US. Contract included UK law and jurisdiction clause. UK

55 ***Tavoulareas v Tsavliris [2006] EWHC 414 (Comm).*** Mr Justice Tomlimson, 9th March 2006.
56 ***Andromeda Marine SA v OW Bunker & Trading A/S [2006] EWHC 777 (Comm).*** HHJ Morison. 11th April 2006.
57 ***WPP Holdings Italy Srl v Benatti [2006] EWHC 1641 (Comm).*** Mr Justice Field. 18th July 2006.
58 ***Hewden Tower Cranes Ltd v Wolffkran GmbH [2007] EWHC 857 (TCC) :*** Mr Justice Jackson. 3rd April 2007.
59 ***Kolden Holdings Ltd v Rodette Commerce Ltd [2007] EWHC 1597 (Comm) :*** Mr Justice Aikens. 4th July 2007.
60 ***Scottish & Newcastle International Limited v Othon Ghalanos Ltd [2008] UKHL 11 :*** Before Lords Bingham; Rodger ; Brown; Mance ; Neuberger. 20th February 2008.
61 ***Curtis v Lockheed Martin UK Holdings Ltd [2008] EWHC 260 (Comm) :*** Mr Justice Teare. 20th February 2008.
62 ***Underwriting Members of Lloyd's Syndicate 980 v Sinco SA [2008] EWHC 1842 (Comm)*** **:** Mr Justice Beatson. 29th July 2008
63 ***A/S D/S Suendborg v Wansa [1997] EWCA Civ 1411.*** CA before Staunton LJ; Waite LJ; Aldous J. 16th April 1997.
64 ***New Hampshire Insurance Company v Phillips Electronics North America Corp [1997] EWCA Civ 1727.*** CA before Leggatt LJ; Morritt LJ; Phillips LJ. 16th May 1997.
65 ***TWTT SA v Bangladesh Biman Corporation [1998] EWCA Civ 1807.*** CA before Morritt LJ; Waller LJ. 19th November 1998.
66 ***Lilly & Company v Novo Nordisk AS [1999] EWCA Civ 928.*** CA before Peter Gibson LJ: Henry LJ : Morritt LJ. 9th March 1999.

action imminent : US action 18 months away. Stay refused : Rectification not the same dispute. Brussels Convention considered where one party not from a member state.

Ingosstrakh Insurance v Latvian Shipping [1999].[67] Successful appeal against a finding that English Jurisdiction applied. Law and jurisdiction Russian.

Pirelli Cables v United Thai Shipping [2000]. [68] Conflicts : Choice of law - Thailand - HVR - Cargo damage. Application for stay to Thailand - implications for HVR time bar.

Aeolian Shipping v ISS Machinery Services [2001].[69] Vessel supplied with a Japanese turbo charge : This broke down : Second contract to supply a replacement – via Hong Kong distributor. Refusal to pay and claim for set off against broken down original. Held; English Law and jurisdiction – including English Conflicts of Law which resulted in Japanese substantive law applying – whereby there is no warranty of satisfactory quality beyond 6 month guarantee – and claim time barred under that law. Summary judgement ordered and confirmed on appeal.

IFR v Federal Trade [2001]. [70] Whether contract voidable for duress -impact upon choice of law clause : availability of injunctive relief.

Burrows v Jamaica Private Power Co [2001].[71] Insurance policy claims in relation to a power plant in Jamaica : Whether English Law & Jurisdiction or Jamaica – whether additional underwriter could be added as a claimant.

Konamaneni v Rolls Royce Industrial Power Ltd [2001] EWHC Ch 470. [72]
Successful application to set aside English action in favour of actions in the Indian courts – in relation to cross claims.

Beximco Pharmaceuticals v Shamil Bank of Bahrain [2004].[73] Choice of Law : England : Reference to the Shariah alluded to an intention by the parties to comply with Islamic Principles but they did not agree to be governed by Sharia Law. A contract must chose one Law alone to govern a contract.

Harding v Wealands [2004] CA.[74] Whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 or whether it is a question of procedure which falls to be determined in accordance with English law. Overruled court at first instance.

Konkola Copper Mines v Coromin [2006].[75] Unsuccessful appeal against refusal of application to stay to foreign jurisdiction.

Harding v. Wealands [2006] HL. [76] Whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 or whether it is a question of procedure which falls to be determined in accordance with English law. Reinstated the judgement at first instance.

Tajik Aluminium Plant v Abdukadir Ganievich Ermatov [2006].[77] Application to set aside Part 20 proceedings for lack of jurisdiction dismissed. Admonition regarding lost costs.

67 ***Ingosstrakh Insurance Co Ltd v Latvian Shipping Co [1999] EWCA Civ 1830.*** CA before Kennedy LJ : Ward LJ : Tuckey LJ. 14th July 1999.

68 ***Pirelli Cables Ltd v United Thai Shipping Corporation Ltd [2000] EWHC 195 (Comm) :*** Mr Justice Langley. 7th May 2000.

69 ***Aeolian Shipping SA v ISS Machinery Services Ltd [2001] EWCA Civ 1162.*** CA before Potter LJ; Mance LJ; Sir Martin Nourse. 20th July 2001.

70 ***IFR Ltd v Federal Trade Spa [2001] EWHC 519 (Comm):*** Mr Justice Colman. 19th September 2001.

71 ***Burrows v Jamaica Private Power Co Ltd [2001] EWHC 488 (Comm).*** Mr Justice Moore-Bick. 29th October 2001.

72 ***Konamaneni v Rolls Royce Industrial Power Ltd [2001] EWHC Ch 470.*** Mr Justice Lawrence Collins. 20th December 2001.

73 ***Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] EWCA Civ 19.*** CA before Potter LJ; Laws LJ; Lady Justice Arden. 28th January 2004.

74 ***Harding v Wealands [2004] EWCA Civ 1735 :*** CA before Waller LJ ; Arden LJ ; Sir William Aldous. 17th December 2004.

75 ***Konkola Copper Mines Plc v Coromin Ltd [2006] EWCA Civ 5.*** CA before Sir Anthony Clarke MR. Rix LJ. Richards LJ. 17th January 2006.

76 ***Harding v. Wealands [2006] UKHL 32 :*** Before Lords Bingham; Woolf ; Hoffmann; Rodger ; Carswell. 5th July 2006.

77 ***Tajik Aluminium Plant v Abdukadir Ganievich Ermatov [2006] EWHC 2374 (Comm).*** Mr Justice Cresswell. 28th July 2006.

***Tehrani v SS of State for the Home Department (Scotland)* [2006].**[78] Whether English or Scottish court had jurisdiction over appeal / judicial review of IAT.

Barlow Clowes v Henwood [2008].[79] For the purposes of a winding up petition was the respondent domiciled in England & Wales or overseas at the relevant time. Test for domicile restated. Held : Yes, on the facts, he was domiciled in E & W.

UBS v HSH Nordbank [2008].[80] Jurisdiction : interpretation of clause - viz whether New York Court or English Court had jurisdiction. Held : New York.

Middle Eastern Oil v National Bank of Abu Dhabi [2008].[81] Choice of Law and Forum : Tort action : loss sustained by sums in bank account being frozen pending investigations of allegations of money laundering : Impact upon share value of english Company forced into a creditor's voluntary liquidation - resulting in the applicant losing $6M. Banking contract subject to UAE law. Held : UAE the proper forum - seized of whether UAE or English Law to apply.

SCOTTISH JURISDICTION CASES

Wylie v Corrigan [1998].[82] Application to cist to arbitration rejected. The litigation had proceeded without objection and decisions entered upon the record. Applicant had waived right to arbitration.

Andre SA v Artibell Shipping [1999].[83] Charterparty dispute

Bentley v Harvie [1999].[84] Couple married in Scotland. Divorced in Ontario and entered a divorce settlement agreement – variations to which were subject to the law of Ontario and arbitration. Pursuer sought to enforce payment under the settlement. No question of variation. Application to sist to arbitration in Ontario refused.

***La Pantofola D'Orso v Blaine* [1999].**[85] Application to cist to arbitration rejected. The litigation had proceeded without objection. Claimant had waived right to arbitration.

Re Conti [2000].[86] The court could not determine the issues before it until an arbitral tribunal had issued its determinations in that depending upon that decision the pursuer either had no liability or would be liable.

George Martin (Builders) v Shaheed Jamal [2000].[87] Waiver : application to sist hearing to arbitration denied. By participating in the litigation without complaint the right to arbitrate was lost.

Cameron v Melville Dundas[2001].[88] Construction dispute. Main and sub contract : whether the defender was a party to a contract containing an arbitration clause. Held : Not a party – sist refused.

Caledonia Subsea v Micoperi [2001] .[89] Whether Scots law and jurisdiction applied : or Egyptian Law and arbitration in Cairo. Held : Scots Law & jurisdiction.

Marodi v Mikkal Myklesbusthaug Rederi [2002].[90] Waiver or right to arbitration by engagement in judicial process. Implications of Brussels Convention

Caledonia Subsea v Micoperi [2002] .[91] Whether Scottish law and jurisdiction applied or Eqyptian Law and arbitration. Scottish Law & jurisdiction applied.

78 ***Tehrani v Secretary of State for the Home Department (Scotland) [2006] UKHL 47.*** Before Lords Nicholls, Hope, Scott, Rodger, Carswell. 18th October 2006.

79 ***Barlow Clowes International Ltd. v Henwood [2008] EWCA Civ 577 :*** CA before Waller LJ, Arden LJ, Moore-Bick LJ. 23rd May 2008.

80 ***UBS Ag v HSH Nordbank Ag [2008] EWHC 1529 (Comm) :*** Mr Justice Walker. 4th July 2008.

81 ***Middle Eastern Oil LLC v National Bank of Abu Dhabi [2008] EWHC 2895 (Comm) :*** Mr Justice Teare. 27th November 2008.

82 ***Wylie v Corrigan [1998] ScotSC 24.*** Lords Coulsfield ; Milligan ; Allanbridge. 13th October 1998.

83 ***Compagnie Commercial Andre SA v Artibell Shipping Company Ltd [1999] ScotCS 2.*** Lord MacFadyen. 7th January 1999.

84 ***Bentley v Harvie [1999] ScotCS 83.*** Lord MacLean. 19th March 1999.

85 ***La Pantofola D'Orso S.P.A. v Blaine [1999] ScotsSC 261 ; CA107/14(20)/97.*** Lord Hamilton. 5th November 1999.

86 ***Conti, Re Application for An Order In Terms Of s653 Companies Acts 1985 [2000] ScotCS 10.*** Lords Prosser ; Marnoch ; Weir. 14th January. 2000.

87 ***George Martin (Builders) Ltd v Shaheed Jamal [2000] Scotsc 17 ; A1291/98.*** Sheriff AL Steward. 7th July 2000.

88 ***Cameron (Scotland) Ltd v Melville Dundas Ltd [2001] ScotCS 46.*** Lord Hamilton. 28th February 2001.

89 ***Caledonia Subsea Ltd v Micoperi SRL [2001] ScotCS 56 .*** Lord Hamilton Lord. 9th March 2001.

90 ***Marodi Service di D. Mialich & C.s.a.s. v. Mikkal Myklesbusthaug Rederi AS [2002] ScotCS 111 .*** Coutts QC T.G. 18th April 2002.

91 ***Caledonia Subsea Ltd v. Micoperi SRL [2002] ScotCS 345 .*** President Lord Cameron; Lord Marnoch. 12th July 2002.

LECTURE NINE

Astilleros Zamakona v Mackinnons [2002] **.**[92] Whether there was a contract subject to Scottish Jurisdiction or whether contract was subsumed into another contract subject to London Jurisdiction and arbitral provisions. Held : The latter – case dismissed for lack of jurisdiction.

McGruthor v Apollo Engineering [2002].[93] Liquidation proceedings cisted by lower court pending outcome of arbitration. Appeal repelled on the facts.

Liffe v Scottish Ministers **[2003].**[94] Brussels Convention does not extend to arbitration – unless concerning public authority duties - but it does extend to ombudsmen and other forms of ADR.

McGruther v Blin [2003]**.**[95] Liquidation proceedings cisted pending outcome of arbitration by lower court. Appeal repelled.

Tonner v Reiach & Hall [2005].[96] Negligence claim sisted in 1988. In 2005 the pursuers sought in this action to recall the sist and continue the litigation. Litigation to continue on whether case should be absolved – want of prosecution.

[92] ***Astilleros Zamakona SA v. Mackinnons [2002] ScotCS 343 .*** Lord MacFadyen. 26th August 2002.
[93] ***McGruthor v Apollo Engineering [2002] P310/01.*** Lady Smith. 26th November 2002.
[94] ***Liffe Administration and Management v. Scottish Ministers [2003] ScotCS 357 .*** Lord MacFadyen. 4th December 2003.
[95] ***McGruther v Blin [2003] ScotSC P30/01.*** Lords Hamilton ; McCluskey ; Weir. 23rd December 2003.
[96] ***Tonner v. Reiach And Hall [2005] ScotCS CSOH_103 .*** Lady Smith. 5th August 2005.

STAY OF LEGAL PROCEEDINGS TO ARBITRATION

It is not uncommon for a party to an arbitration agreement to regret that decision once a dispute arises, particularly if there is a perception that litigation may be in their better interests.[97] When this occurs, for whatever reason, that party may commence litigation. If the other party consents to litigation, either expressly or by implication – which is demonstrated by taking an active part in the litigation, then the arbitration provision is usually defeated but this is not inevitable. Where the other party continues to value arbitration there is the facility in most (but not all) jurisdictions to apply to the court to *"stay"* the litigation as and until the arbitral proceedings are exhausted. Where a stay to arbitration is available it will be :-

1) as a recognition of and respect for the collective choice (autonomy) of the parties, and
2) a policy decision of the courts and the government to defer to private dispute resolution for financial reasons, namely to limit costs to the judicial system.

The stay facility in England and Wales is long standing, but was uncertain prior to the 1996 Act, given the tendency of the judiciary to find reasons for accepting jurisdiction founded on an unjustified professional distrust of private dispute resolution particularly in the period from 1950 through to the passing of the new Act. The 1996 Act sought to immunize the arbitral process from unnecessary interference by the judiciary. Today ***s9 Arbitration Act 1996*** provides a relatively robust mechanism for the stay of court proceedings to arbitration where the parties have previously agreed that that was the preferred mechanism for the resolution of future disputes between them.

The discretionary grounds for refusal do not admit of a preference for judicial determination. The key factors, as per ***s9(4) Arbitration Act 1996***, are that the agreement is null and void, inoperative or incapable of performance. ***s9(5) Arbitration Act 1996*** negates the effect of a ***Scott v Avery*** Clause in the advent that the court does refuse a stay.

Section 9 Arbitration Act 1996. Stay of legal proceedings.

9.(1) *A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*

9(2) *An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*

9(3) *An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*

9(4) *On an application under this section the court **shall** grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*

9(5) *If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.*

Compare and contrast Article 8 Model Law : Arbitration agreement and substantive claim before court

8(1) *A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

8(2) *where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

[97] The consequences of choosing a particular form or dispute resolution, a specific forum and governing law can turn out to be detrimental to one party and beneficial to another.

LECTURE NINE

It is perhaps not surprising that section 9 has resulted in a flurry of judicial activity, triggered by parties attempting to escape their prior contractual / arbitral obligations. The traffic has mainly and happily for arbitration, been one way, that is to say, in favour of arbitration but there have been exceptions, often linked to the uncertainty of the arbitration clause, jurisdiction and availability of a tribunal. Cases are set out in date order rather than by issue.

Crouch Mining Ltd v British Coal [1996]. [98] Here the court was asked to consider an application for a stay to arbitration, which was due under the terms of the contract at the end of the project, which was likely to be in 2004. Did this deprive a party of an opportunity of justice? Held : NO. This is what the parties contracted for and they must therefore live with it. Note – a Scottish arbitration, with implications of New York award.

Note that it is no longer possible for a construction contract subject to the HGCRA 1996 to prevent a dispute being referred to adjudication at any time.

Palmers Corrosion Control v Tyne Dock [1997]. [99] s4 AA 1950 : Stay: Third party. CA on appeal from QBD (HHJ Faulks) : Stay of third party proceedings to arbitration removed.

Malekout v Medical Sickness Annuity [1998]. [100] S4 AA 1950. Stay appeal : Application for an extension of time and for leave to appeal : availability of legal aid – ability to engage in arbitration due to impecuniosity : applicant would have received £10K / year in invalidity pension – absence of which caused the impecuniosity.

***Andrews v Brock Buildings Ltd* [1996].**[101] Dispute about delay on a contract. Sub-contractor alleged contractor responsible. Contractor terminated the contract. Sub-contractor put into liquidation by a creditor for £8K. Administrator in pursuit of £120K. Contractor commenced action for £60K for delay. Sub-contractor applied for a stay to arbitration – acceded to at first instance – sub-contractor likely to recover £70K for wrongful determination – contractor's claim likely to fail. Appeal on grounds of sub-contractor's poor financial status. Appeal failed : It appears likely that the sub-contractor's financial state was due to the contractor's wrong doing. Stay to arbitration affirmed.

***Ali Shipping v Sour Brodogradeevna Industrija* [1996].**[102] Having participated in an on-going arbitration a party discovered a get out card viz a cancellation clause. They sought a judicial determination in lieu of arbitration : CA held : Too late to back out of the arbitration. If this was a preliminary matter tribunal could deal with it quickly.

***Davies Middleton v Toyo Engineering Corp* [1997].**[103] Jurisdiction of court to determine whether ADR exhausted and dispute now subject to arbitration : CA stayed action to arbitration.

***Inco Europe Ltd v First Choice Distribution* [1998].**[104] Stay to arbitration granted.

***Wylie v Corrigan* [1998].** Application to cist to arbitration rejected. The litigation had proceeded without objection and decisions entered upon the record. Applicant had waived right to arbitration. Before Lords Coulsfield, Milligan and Allanbridge.

***S.S. Foreign &Commonwealth Affairs v Percy Thomas Partnership* [1998].**[105] Contract performed 1986/87. Applications to appoint an arbitrator in April 1996 in respect of a defective roof. Notices of appointment issued in 1992 & 1993. Trial delayed pending supporting evidence. Court struck applications out for inordinate delay.

***Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd* [1998].**[106] Arbitration - Stay of court proceedings - Grant of stay - Building contract - Employer claiming damages against contractor and architects for breach of

98 ***Crouch Mining Ltd v British Coal Corporation (t/a British Coal) [1996] EWCA Civ 981*** Saville LJ; Brooke LJ. 18th November 1996.

99 ***Palmers Corrosion Control Ltd v Tyne Dock Engineering Ltd [1997] EWCA Civ 2776*** Staughton LJ; Hirst LJ; Potter LJ 20th November 1997.

100 ***Malekout v Medical Sickness Annuity & Life Assurance Society Ltd [1998] EWCA Civ 872*** Hirst LJ : Brooke LJ. 21st May 1998

101 ***Andrews, Trustee Of Property Of v Brock Buildings (Kessingland) Ltd [1996] EWCA Civ 1023***. CA. MR; Aldous LJ; Brooke LJ

102 ***Ali Shipping Corporation v Sour Brodogradeevna Industrija [1996] EWCA Civ 1258.*** CA before Hirst LJ; Waite LJ; Peter Gibson LJ.

103 ***Davies Middleton v Toyo Engineering Corp [1997] EWCA Civ 2318.*** CA before Simon Brown LJ; Phillips LJ.

104 ***Inco Europe Ltd v First Choice Distribution [1998] EWCA Civ 1461***. CA before Hobhouse LJ; Thorpe LJ; Mummery LJ.

105 ***HM S.S. Foreign and Commonwealth Affairs v Percy Thomas Partnership [1998] EWHC TCC 348.*** HHJ Bowsher QC.

106 ***Beaufort Developments (NI) Ltd V Gilbert-Ash Ltd [1998] All ER 778.***

contract and negligence - Building contract providing for disputes to be referred to arbitration -Arbitrator having power to open up, review and revise architects' certificates and opinions - Whether court having similar power - Whether court proceedings should be stayed to enable dispute between employer and contractor to be settled by arbitration.

The appellant employer entered into a contract dated 3 May 1994 with the contractor for the construction of a nine-storey office block in Belfast. The contract was in the standard JCT form. By a separate contract it employed a firm of architects. By art 5 of the JCT agreement, the parties agreed to refer any disputes arising thereunder or in connection therewith to arbitration and by c141 any such arbitrator was expressly empowered to open up, review and revise the architects' certificates. Litigation commenced in Northern Ireland on 31 August 1995 when the contractor issued a writ, claiming about £230,000 and interest due under six architects' certificates. In December 1995 the employer issued a writ against both the contractor and the architects, claiming damages for negligence and breach of contract. Thereafter, the contractor applied to the court for an order staying the employer's action pursuant to s 4 of the Arbitration Act of (Northern Ireland) Act 1937. The master granted the stay. On appeal, his decision was affirmed by the judge who held that he was bound by authority to hold that an arbitrator would have the power to 'open up, review and revise' certificates or opinions of the architect which the court did not possess and that, if a stay was refused, the contractor would be at a grave disadvantage in that it g would be faced with architect's certificates which the court would not be able to review. The Court of Appeal in Northern Ireland upheld the judge's decision and the employer appealed.

Held - The court had not been deprived, by the power which the parties had h given to their arbitrator to open up, review and revise certificates, opinions and decisions of the architect, of its ordinary power to determine the rights and obligations of the parties and to provide them with the usual remedies. In the circumstances, there would be no injustice to the contractor in refusing a stay. Indeed, to grant a stay would be to risk conflicting decisions in the separate proceedings which would be needed to determine the respective responsibilities I to the employer of the contractor and of the architect. Accordingly, the appeal would be allowed. [107]

Inco Alloys Ltd v First Choice [1999].[108] The third defendant in this action, Steinweg (Handelsveem BY) appealed from the decision of HH Judge Hegarty QC to refuse leave to appeal against his refusal to grant a stay of the action under s.***9 Arbitration Act 1996***. The application was on the ground that the action, a claim for damages in respect of the loss of a consignment of nickel cathodes being carried from Rotterdam to Hereford, was brought in respect of a matter which the plaintiffs had agreed to refer to arbitration. The plaintiffs' claim against Steinweg was for damages for breach of contract as the first CMR carrier, i.e. the person or entity with whom the actual contract of carriage was made. Inco Europe made that contract with Steinweg and Inco Alloys claimed under the CMR consignment note as the consignee of the goods who was entitled to enforce the contract of carriage. Steinweg claimed that any contractual relationship they had with the plaintiff was on the terms of the FENEX conditions (the conditions of the Netherlands Association for Forwarding and Logistics) as referred to on the back of their invoices, which included an arbitration clause requirng the arbitrators to observe international transport treaties *"and they were therefore entitled to a stay under s.9 of the 1996 Act."*

The judge refused to grant the stay, holding that the arbitration agreement was *"null and void or inoperative"*. He held that the arbitration clause was incorporated in the contractual relationship between Inco Europe and Steinweg and was also binding on Inco Alloys. He also held that as a matter of construction the claim made in the action fell within the matters to be referred to FENEX arbitration.

However, he held that because the plaintiffs were mounting a contractual claim under CMR against Steinweg, the arbitration clause must be held to be void and invalid because it did not expressly provide that the arbitration tribunal should apply the CMR Convention in accordance with the requirements of articles 33 and 41 of CMR. He also held that the plaintiffs had a good arguable case that Steinweg was the first carrier of this consignment under CMR.

[107] ***Northern Regional Health Authority v Derek Crouch Construction Co Ltd*** [1984] 2 All ER 175 overruled.
[108] ***Inco Alloys Ltd v First Choice*** *[1999] 1 All ER 820.*

He refused leave to appeal because it appeared that s.107 and para. 37 of the Third Schedule to the 1996 Act had removed the jurisdiction of the CA to entertain any appeal from a decision of a lower court or judge under s.9. The issues before the court were its jurisdiction to entertain the appeal and, if it had jurisdiction, the merits of the application.

HELD:

(1) Neither the Report of the Departmental Advisory Committee on the Bill which became the 1996 Act nor the Parliamentary Debates supported an intention to remove any right of appeal in respect of the grant or refusal of a stay of litigation.

(2) To conclude that the right of appeal had nevertheless been removed would result in discrepancies of treatment within the 1996 Act and would not be a rational method of treating the UK's international obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as re-enacted in the 1996 Act.

(3) The removal of a right of appeal (with leave) from a decision whether or not to stay litigation covered by an arbitration clause would not be consequential upon anything contained in the 1996 Act, but a radical and additional provision. Such a change in the pre-existing law was not achieved by wording such as that used in s.107 of the 1996 Act. The effect was that the amendment to s18(1) Supreme Court Act 1981 must be understood as giving effect to the exclusions and restrictions on the right of appeal to the CA laid down in Part I of the 1996 Act and no more.

(4) There was nothing in Part I which excluded the jurisdiction of the CA in these circumstances, although there were a number of sections which did, expressly and for good reason, limit rights of appeal.

(5) There was a jurisdiction of the CA to hear appeals from decisions of a judge or court under s.9 of the 1996 Act and there was a right of an aggrieved party to apply to the judge or to the CA for leave to appeal and a power of that judge or the CA to grant leave.

(6) There was no evidence to support the judge's conclusions that the plaintiffs had a good arguable case that Steinweg was the first CMR carrier, i.e. that Steinweg had made a contract of carriage with Inco Europe. He should have concluded that the plaintiffs had not provided any basis for their allegation that Steinweg was the carrier and that the evidence on which the plaintiffs relied showed no more than that Steinweg was a forwarder.

(7) The FENEX arbitration clause did not offend against CMR. The effect of the judge's conclusion was that the Convention could never be satisfied by a multi-purpose arbitration clause. This clause contained an express requirement that the arbitrators should observe the applicable convention [109]

(8) In any event the relevant question was whether a contract of carriage had been made between Inco Europe and Steinweg, an issue which the parties had agreed would be decided by FENEX arbitration and which was antecedent to any question of the application of the CMR Convention. The judge's reasoning in relation to the CMR Convention provided no basis for nullifying the effect of or refusing to enforce that arbitration agreement.

(9) The judge should have held that Steinweg was entitled to the stay of the action against it.

Leave to appeal to the House of Lords granted. The House of Lords granted an application by Inco Europe Ltd for leave to appeal in this case on 21 August 1999. The appeal Committee had been unable to reach a unanimous decision and the matter was therefore referred to a hearing for final resolution. The appeal was set down for hearing on 16 June 1999 and referred to an Appellate Committee for determination.

***Wealands v CLC Contractors Ltd* [1999].**[110] Review of relevant law before confirming stay. Ensured that all like disputes came before same tribunal.

Jitendra Bhailalhhai Patel v Dilesh R Patel [1999].[111] This matter concerned the defendant's appeal from the order of Wilcox J made on 16th October 1998 whereby it was ordered that the defendant's summons dated 19 May 1998 be dismissed. On 21 January 1998 the plaintiff issued a writ endorsed with a statement of claim

[109] ***Bofors UVA v Skandia Transport*** *(1982) 1 Lloyds Rep 410 distinguished.*

[110] ***Wealands v CLC Contractors Ltd [1999] EWCA Civ 1922.*** CA before Nourse LJ; Mantell LJ; Mance LJ.

[111] ***Jitendra Bhailalhhai Patel v Dilesh R Patel*** [1999] CA (Lord Woolf MR, *24.3.99.*

seeking damages for breach of a building contract by the defendant. On 23 February the defendant acknowledged service of the writ and endorsed on the acknowledgement his intention to defend the action. On 23 March the judgment in default of defence was entered against the defendant. On 28 April the defendant issued a summons seeking (I) an order that judgement entered by the plaintiff be set aside unconditionally (ii) that the defendant be given leave to defend the action and counter claim ; and (iii) that consequential directions be given. At the hearing of the defendant's summons, the judge took the view that because of the terms of paragraphs (I) and (ii) of the summons the situation which arose was one where the defendant had taken a step in the proceedings to answer the substantive claim. Accordingly s9(3) Arbitration Act 1996 applied and the defendant could not seek a stay of the proceedings. The defendant appealed. The question which arose for the court's consideration was whether, for the purpose of s9(3) of the 1996 Act, the application for a stay was made after the defendant "had taken any step in the proceedings to answer the substantive claim" by virtue of the issue and service of the summons dated 28 April 1998.

The court held :-

(1) The principle outlined in ***Pitchers v Plaza*** [1940] [112] applied to the new law under the 1996 Act as it did to the Arbitration Act 1950. Furthermore, the general approach under the old law had been summarised in Mustill & Boyd on Commercial Arbitration 2nd ed p472.

(2) In a case where there were two affidavits, one which stated that the party required a stay and the other dealing with the merits, that could not be taken as steps for the purpose of s.9 of the 1996 Act and prevent a stay of the proceedings being granted.

(3) The 1996 Act tried to set out in readily understandable terms what was required of parties to arbitrate. The starting point for the court was to approach the language of s9(3) by applying the actual words of the subsection and ask whether the defendant in the instant proceedings had taken any step to answer the substantive claim. At that point it could be appropriate to consider the terms of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, in particular Art.8 thereof. However, the best test was that which appeared in the 1996 Act.

(4) In the instant case, the fact that the defendant had applied to have the default judgment set aside did not assist the plaintiff in his contention that the defendant was not entitled to a stay, since unless there was an application to set aside the default judgment there would be nothing to stay. It followed that if the defendant had merely asked for the default judgment to be set aside he would undoubtedly have been entitled to a stay of the proceedings.

(5) The defendant did not need to ask for leave to defend the action and counterclaim since he was entitled to do so. Whether judgment was set aside was otiose to the relief which the defendant needed. Furthermore, the application seeking consequential directions was ambivalent: one direction could have been a direction that there be a stay of the proceedings. Accordingly, the judge was wrong to dismiss the defendant's application fur a stay of the proceedings. Appeal allowed. Stay of proceedings granted pending the outcome of arbitration.

London Central & Suburban Dev Ltd v Gary Banger *[1999].*[113] By a contract containing an arbitration clause the Defendant provided M&E services to the plaintiff. Disputes arose and the plaintiff commenced High Court proceedings by generally endorsed writ. The Defendants acknowledgement of service form was accompanied by a letter to the court containing a section of about one and a half pages headed "Defence", concluding with a reservation of the right to provide "additional defence information" when the statement of claim was properly particularised. Upon later obtaining legal advice, the Defendants applied to stay the proceedings to arbitration. This was resisted by the plaintiffs on the grounds that by virtue of Section 9(3) of the Act the Defendants had lost the right to a stay by taking a step in those proceedings to answer the substantive claim.

The court held that the Defendants were not entitled to a stay. The court had to consider whether the letter accompanying the acknowledgement of service form was a *"step in the proceedings"* and an *"answer to the substantive claim"*. If so, the court has no power to order a stay because the Section says that an application may not be made by a person who has so acted. In considering whether the letter was a step in the proceedings, the

[112] ***Pitchers v Plaza*** [1940] 1 All ER 151

[113] ***London Central & Suburban Dev Ltd v Gary Banger*** *[1999] ADRLJ 119.*

court should *"step back"* and have regard to relevant related acts and exchanges between the parties following that letter. In addition the court was not either required or entitled to confine its consideration of the requisite step to ones that were in strict conformity with the rules of court, though the non-conformity of an alleged step to the rules might be a relevant consideration. In this case, although the Defendant was entitled to await service of a statement of claim from the plaintiff before serving a defence, he was not precluded from serving one earlier, and this in fact is what he did. Thus the letter is the taking of a step in the proceedings and is one which answers the substantive claim.

***Birse Construction Ltd v St David Ltd* [1999].**[114] Jurisdiction : Proof of existence of a contract, containing an arbitration agreement that gave rise to jurisdiction and right to a stay to arbitration.

Plaintiff contractors commenced court proceedings to recover payment for work allegedly done under a letter of intent. The Defendants asserted that the works in question were performed under a contract incorporating the conditions of the JCT 80 Standard Form of Contract and containing an arbitration clause, and they applied to stay the plaintiff's action to arbitration pursuant to Section 9 of the Act.

The court held that the works in question were undertaken pursuant to a contract containing an arbitration clause, and accordingly the matter would be stayed to arbitration. Section 30 of the Act permits an arbitral tribunal to decide questions of jurisdiction but it is not mandatory and the existence of this power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed.

Normally a court would first have to be satisfied that there is an arbitration agreement before staying the proceedings to arbitration, but in some cases it would be better for the court to leave the matter to be decided by an arbitrator (e.g. where the determination of whether or not a contract was made also embraces the determination of the scope of the contract). Ordinarily however, the matter should not be left to an arbitrator unless it is virtually certain that there is an arbitration clause or there is only a dispute about the ambit or scope of the arbitration agreement. It is highly desirable that an issue such as the formation of a contract incorporating an arbitration agreement should be determined by the court before time and money is expended on an assumption which might turn out not to be valid.

***Birse Construction Ltd v St David Ltd* [2000].**[115] Jurisdiction : No contract concluded. Arbitration agreement not alive. No stay to arbitration.

***George Martin Ltd v Shaheed Jamal* [2000].**[116] Waiver : application to sist hearing to arbitration denied. By participating in the litigation without complaint the right to arbitrate was lost.

***Ahmad Al Naimi (t/a Buildmaster C.S) v Islamic Press Agency Inc.* (2000)** Waller J CA. The plaintiff respondent was a builder who in July 1996 signed a contract in the form JCT Agreement for Minor Biildng Works (1980 edition) to carry out building work for the defendant. During the course of the contract the respondent carried out work not originally envisaged in the contract The contract was terminated and the respondent claimed the additional work was not covered by the contract but was the subject of a separate, oral contract which did not contain an arbitration clause. The respondent was legally aided, but his legal aid would not cover arbitration proceedings.

The matter went before Bowsher J, QBD. It was held that where there were genuine disputes between parties to a contract which might or might not be caught by the arbitration clause in the contract, the court should order a stay of court proceedings under **s.*9 Arbitration Act 1996*** and allow the arbitrator to decide any question of his jurisdiction under ***s.30 Arbitration Act 1996.*** The court went on to hold that bearing in mind ***Halki Shipping Corp v Sopex Oil Ltd*** [1998],[117] there were 'genuine disputes' concerning the construction of the contract of July 1996. Accordingly the application was granted and the proceedings were stayed under ***s.9.***

The claimant appealed that judgement on the grounds that the judge had refused to decide whether the matters forming the subject matter of the action were covered by the arbitration agreement relied on by the

[114] ***Birse Construction Ltd v St David Ltd [1999] EWHC TCC 253*** HHJ Humphrey Lloyd. 12th February 1999

[115] ***Birse Construction Ltd v St David Ltd [2000] Lawtel AC0100051.*** Recorder Colin Reese QC. TCC. August 2000.

[116] ***George Martin (Builders) Ltd v Shaheed Jamal [2000] Scotsc A1291/98.*** Sheriff AL Steward.

[117] ***Halki Shipping Corp v Sopex Oil Ltd*** *(1998] 1 WLR 726,*

defendants. The appeal raised the point as to the proper approach of the court to an application under ***s.9 Arbitration 1996 Act,*** particularly in light of the change, brought about by the Act, as to the arbitrator's powers to decide his own jurisdiction. The court held :-

(1) There were four courses open to the court on an application to stay proceedings under ***s.9 Arbitration Act 1996.*** These were:
   (a) to decide on the affidavit evidence that there was an arbitration agreement, and grant a stay accordingly;
   (b) to stay the proceedings on the basis that the arbitrator would decide whether there was an arbitration agreement;
   (c) to order an issue to be tried; or
   (d) to decide that there was no arbitration agreement and dismiss the application.[118] The court could alternatively grant a stay under its inherent jurisdiction. This could be sensible where good sense and litigation management made it desirable for an arbitrator to consider the whole matter first

(2) Where, as here, both sides wished the court to decide on the affidavit evidence whether or not the dispute was covered by the arbitration agreement then the court should do so, and the judge was wrong to refer that decision to the arbitrator.

(3) On the affidavit evidence it was overwhelmingly clear that there was only ever a single contract which had been extended to cover the additional work and to which the arbitration clause applied.

(4) A stay should therefore be granted, and at the same time it should be made clear that the court had decided the issue of the applicability of the arbitration clause in favour of the defendant

Inco Europe Ltd & Taco Alloys Ltd v First Choice & Logistics Planning Services Ltd [2000] HL. The matter concerned the plaintiffs' appeal from the Court of Appeal's (CA) decision solely on the question of whether an appeal lay to the CA from a decision of the first instance court made under s.9 of the Arbitration Act 1996.

The plaintiffs did not seek to challenge the decision of the CA if; contrary to their submissions, the CA did have such jurisdiction. Section 9, which empowered the court to stay legal proceedings brought against a patty to an arbitration agreement in respect of a matter; which under the agreement was to be referred to arbitration, was silent on this point.

It was argued for the appellants that s.***1 8 (1)(g) of the Supreme Court Act 1981,*** as amended by s107 and Sch. 3 to the 1996 Act, read: *'No appeal shall lie to the Court of Appeal. . . (g) except as provided by Part I of the Arbitration Act 1996 from any decision of the High Court under that Part'*. The effect of this, as the decision under s.9 was a decision of the High Court under Part I of the 1996 Act, was that no appeal lay to the CA from the original decision. The CA rejected the submission. **HELD**:

(1) The decision of the CA was correct. The drafting of para. 37(2) Sched 3 which set out the amendment to s.18(1)(g) of the 1981 Act, had gone awry.

(2) The phrase 'except as provided' in s18(l)(g) in its original form meant 'except in accordance with the provisions of the Arbitration Act 1979', those provisions being restrictions on appeal. Section 18(1)(g) did not impose additional restrictions on the right to appeal to the CA from decisions of the High Court, but brought forward into s18(1) restrictions on rights of appeal already expressed in the relevant sections of the 1979 Act.

(3) The style of drafting of the 1996 Act pointed strongly to the conclusion that where a section was silent about an appeal from a decision of the court, no restriction was intended. The draftsman must have intended that, save to the extent that an appeal was expressly circumscribed, parties to court decisions under the various sections would be able to exercise whatever rights of appeal were available to them from sources outside the 1996 Act itself.

(4) However; as drafted and enacted, by including within its scope every court decision under Part I 1996 Act, the new para. (g) abolished an appeal to the CA from all court decisions made under Part I save for decisions made under sections containing restrictions on such an appeal. This abolition, moreover; was

[118] *dicta* of HH Judge Humphrey Lloyd CC in ***Birse Construction Ltd v St David Ltd*** *(1999) BLR 194* approved

achieved by a paradoxical drafting technique: when the draftsman intended to restrict the right of appeal, he did so expressly, but when taking the more far-reaching step of wholly excluding a right of appeal he said nothing about this in the section. Instead, on the literal reading of the new para. (g) the abolition was effected by an obscure provision, supposedly no more than consequential, in one of the schedules to the Act Para. 37(2) Sch. 3).

(5) The draftsman had slipped up. The new s18(1)(g), substituted by para. 37(2), should be read as confined to decisions of the High Court under sections of Part 1 which made provision regarding an appeal from such decisions. In other words, 'from any decision of the High Court under that Part' was to be read as meaning 'from any decision of the High Court under a section in that Part which provides for an appeal from such decision'.

(6) In this case the court was sure of the intended purpose of the statute in question, that the draftsman and Parliament had inadvertently failed to give effect to that purpose and was also, crucially, sure of the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The insertion of the additional words was not too far-reaching. The court was able to give effect to a construction of the statute which accorded with the intention of the legislature. Appeal dismissed.

Ahmad Al-Naimi v Islamic Press Agency Inc* [2000] EWCA *Civ 17.[119] Stay issued at 1st instance - leaving it to tribunal to rule on jurisdiction : On appeal stay confirmed - but CA chose to address the jurisdiction issue and found the tribunal had jurisdiction.

***Petroleo Brasiliero SA v Mellitus Shipping Inc* [2001].**[120] Stay to arbitration s9. Part 20 defendants to a charter party action cannot seek a stay on grounds of arbitration clause in bills of lading. Court had the jurisdiction over the action to which they could be validly enjoined.

AIG Europe v QBE [2001].[121] A non binding arbitration / conciliation procedure does not oust the jurisdiction of the court – in this case a French Court. Stay declined.

***Capital Trust Investment Ltd. v Radio Design AB* [2002].**[122] Was appellant a party to the arbitration agreement? Had the respondent's taken a step in litigation preventing a stay. No. Stay to arbitration in Sweden upheld.

***Downing v Al Tameer Establishment* [2002]**:[123] Disputes as to whether there was a valid arbitration agreement : Held : Arbitrator has initial jurisdiction over jurisdiction. Choice of substantive law not indicative of procedural law.

***Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd.* [2003].** [124]Appeal against a refusal to grant a stay on the grounds that there was no arbitration agreement. Whilst there was by mutual agreement an oral agreement, a written treaty was never concluded between the parties. Appeal failed. CA

***Import Export Metro Ltd. v Compania Sud Americana De Vapores S.A.* [2003].**[125] Application for stay to arbitration in Chile refused. Whilst the fact that the two proceedings were at the same time and that might cause inconvenience, the claims were distinct and separate. Application refused.

Whiting v Halverson* [2003].**[126] ***An ex-member of a club continued to be bound by the club's rules, including arbitration procedures after membership ended. Accordingly the dispute was stayed to arbitration at the Club's behest. This is a logical application of the doctrine of separability, which ensures that simply because a contract has been purportedly avoided, lawfully or otherwise, this provides no grounds to evade the chosen dispute resolution procedure. Arbitration survives determination of relationships.

119 ***Ahmad Al-Naimi (t/a Buildmaster Construction) v Islamic Press Agency Inc [2000] EWCA Civ 17.*** CA before Waller LJ; Chadwick LJ.
120 ***Petroleo Brasiliero SA v Mellitus Shipping Inc [2001] EWCA Civ 418.*** CA before Potter LJ; Sedley LJ; Jonathan Parker LJ.
121 ***AIG Europe S.A. v QBE International Insurance Ltd [2001] EWHC 491 (Comm*** Mr Justice Moore-Bick. 3rd May 2001.
122 ***Capital Trust Investment Ltd. v Radio Design AB [2002] EWCA Civ 135.*** CA before Schiemann LJ; Clarke LJ; Arden LJ.
123 ***Downing v Al Tameer Establishment [2002] EWCA Civ 721.*** CA before Potter LJ; Keene LJ; Mr Justice Sumner.
124 ***Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd. [2003] EWCA Civ 283.*** Potter LJ; Carnwath LJ; Mr Justice Lawrence Collins.
125 ***Import Export Metro Ltd. v Compania Sud Americana De Vapores S.A. [2003] EWHC 11 (Comm).*** Mr Justice Gross.
126 ***Whiting v Halverson [2003] EWCA Civ 403.*** CA before Schiemann LJ; Brooke LJ.

Placito v Slater **[2003]** .[127] Party had undertaken not to pursue an action : this did not prevent the court from considering an application for extension of time. In the circumstances no extension was justified.

Benford Ltd v Lopecan SL **[2004].**[128] Main contract contained an arbitration clause – but individual supply contracts subject to litigation. Counterclaim to a supply contract had potential to involve main contract issues if sum due rose above a certain level. Court refused stay – decided the amount – in the event below the limit. Court pointed out that once the figure was fixed by the court, an arbitration would be pointless since all the tribunal could do would be to confirm the judgment figure.

Through Transport Mutual Ins. Assoc (Eurasia) Ltd v New India Ass. Assoc. Co Ltd **[2004].** [129] Stay to arbitration upheld : Foreign Anti-Suit injunction lifted.

Three Shipping v Harebell Shipping **[2004].**[130] Owners had an option to arbitrate or litigate. Charterers had no option. Owners submitted dispute to arbitration. Charterers commenced litigation. Opposing the action for a stay the charterers maintained that since they had no option to arbitrate they had no duty to do so and thus had done nothing wrong and the litigation was therefore valid. Court disagreed. Once the owners opted for arbitration the charterers could not decline and litigation ended.

ET Plus SA v Welter **[2005].**[131] Whilst Et Plus & Channel tunnel were subject to a Paris Arbitration agreement others including the respondent to this application were not, accordingly the stay to Paris rejected. Certain of the actions filed were dismissed out of hand. There remaining actions were stayed pending the outcome of the Paris arbitration.

Law Debenture Trust Corporation Plc v Elektrim Finance BV **[2005].**[132] Contract provided for arbitration but gave one party the right to litigate. One party submitted dispute to arbitration. Subsequently the other commenced litigation. Application for stay refused. The contract did not create an embargo on litigation once arbitration commenced.

Carvill v Camperdown **[2005]**.[133] Arbitration provisions between A & B do not prevent C who is not a party to the arbitration agreement from maintaining court action and enjoining A & B. Stay refused..

Sawyer v Atari **[2005].**[134] Four contracts re publishing rights of computer games subject to arbitration – stay granted : remaining 4 contracts – court held proper law is English law not US and stay refused.

Glidepath v Early Red Corp **[2005].**[135] Unsuccessful defendant to an action for a stay to arbitration and withdrawal of a freezing order appealed costs on the basis that the day before the hearing they had conceded the stay. However this was not drawn to attention of court and argument adduced resisting the stay. Appeal failed.

Abu Dhabi Investment Co v Clarkson & Co **[2006].**[136] Application for stay to arbitration in the UAE. Court held that since arbitration as opposed to litigation in the UAE, of a dispute not related to the execution of a contract, is permissive, not compulsory, this amounted to an application for a stay to litigation in the UAE. Accordingly the application was refused.

Weissfisch v Julius **[2006].**[137] Jurisdiction : Unsuccessful appeal against refusal of application for an interim order to stay arbitral jurisdiction hearing. Arbitration agreement - seat - Switzerland : Swiss choice of Law : Kompetenze/Kompetenze.

127 ***Placito v Slater [2003] EWCA Civ 1863***. Potter LJ; Laws LJ; Arden LJ

128 ***Benford Ltd. v Lopecan SL [2004] EWHC 1897 (Comm).*** Mr Justice Morison

129 ***Through Transport Mutual Ins. Assoc (Eurasia) Ltd v New India Ass. Assoc. Co Ltd [2004] EWCA Civ 1598.*** LCJ; Clarke LJ; Rix LJ.

130 ***NB Three Shipping Ltd. v Harebell Shipping Ltd. [2004] EWHC 2001 (Comm).*** Mr Justice Morison.

131 ***ET Plus SA v Welter [2005] EWHC 2115 .*** Mr Justice Gross

132 ***Law Debenture Trust Corporation Plc v Elektrim Finance BV [2005] EWHC 1412 (Ch) .*** See ***Three Shipping Ltd v Harebell Shipping Ltd*** [2005] 1 Lloyds Rep 509. Order restraining continuation of the arbitration issues. Mr Justice Mann

133 ***Carvill America Incorporated v Camperdown UK Ltd [2005] EWCA Civ 645***. CA before Ward LJ; Clarke LJ; Longmore LJ.

134 ***Sawyer v Atari Interactive Inc [2005] EWHC 2351 (Ch).*** Mr Justice Lawrence Collins.

135 ***Glidepath Holdings BV v Early Red Corporation [2005] EWCA Civ 525.*** CA before the VC; Clarke LJ; Neuberger LJ.

136 ***Abu Dhabi Investment Co v H Clarkson & Company Ltd. [2006] EWHC 1252 (Comm)*** Mr Justice Morison.

137 ***Weissfisch v Julius*** **[2006] EWCA** ***Civ 218.*** CA before the Lord Chief Justice, The Master of the Rolls and Mr Moses.

Park Lane Ventures Ltd v Locke **[2006].**[138] Party withdrew an application for stay. The application submitted existence of documents. This provided evidence for the purposes of this litigation that both parties intended the documents to have legal force.

Ravennavi v New Century Shipbuilding Co **[2006].** [139] *"An Entire agreement"* contract which contained an arbitration clause replaced a prior agreement that contained a litigation clause. Application to serve out of jurisdiction withdrawn.

Legal Services Commission v Aaronson **[2006].**[140] Following a successful application for a stay the LSC argued that costs should not follow the event because their attempts to settle outside arbitration were frustrated because the applicants had refused to disclose documents outside the arbitration. Held : Whilst obstructive, this was not a reason to deprive the applicants of costs of the application.

Fiona Trust v Privalov [2006] Commercial Court: [2007] CA. [141] S9 AA 1996 application for a stay to arbitration. Application to stay to arbitration refused on grounds that the contract potentially invalid due to bribery, but overturned on appeal, in that the doctrine of separability meant that the arbitrator could determine whether or not the bribery assertions was made out and accordingly whether there was a valid contract. This is a significant case in that the Court of Appeal rejected the view that bribery, corruption, and fraud are not suitable issues for arbitrators, as opposed to the judiciary, to adjudicate on.

Albon v Naza [2007].[142] ***S9 AA 1996*** : Stay : forum. Multi-faceted dispute : car sales to Malaysia : some aspects subject to Malaysian arbitration : other aspects entirely UK based and not subject to arbitration. Permission to pursue certain claims annulled.

A v B [2007] EWHC 54 (Comm) [143]**:** Costs : Stay to arbitration : ***CPR 44.4(2)*** **:** Costs of a successful application for a stay to arbitration normally awarded on an indemnity basis.

Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD [2007] EWHC 665 (Ch)[144] S9 AA 1996 : Stay to arbitration - jurisdiction. Existence of contract and Malaysian arbitration clause. Held : English Court had first to determine existence of contract before a stay to arbitration could be ordered.

Homepace Ltd v Sita South East Ltd [2007] EWHC 629 (Ch):[145] ***S9 AA 1996***: Validity of certification. Certification process and arbitration provision in a mining lease. Certification as to mine-able resources flawed - certifier did not answer the question posed - departing from the remit. Certificate invalid - accordingly arbitration clause did not kick in. No stay to arbitration.

Mabey and Johnson Ltd v Danos [2007] EWHC 1094 (Ch) :[146] ***S9 AA 1996*** : Stay to arbitration : fraud - forum conveniens. Agency dispute already subject to arbitration - in Jamaica. Fraud action filed against the Principal - should this be stayed to arbitration as well - did Jamaica have jurisdiction. Held : All the relevant players in the UK. Justice required a full trial. Stay refused. Two applications for stay to arbitration in a civil fraud trial. One successful – relevant arbitration clause : one failed – third party not subject to arbitration clause.

Loon Energy Inc v Integra Mining [2007] EWHC 1876 (Comm) :[147] ***S9 AA 1996*** : Stay : declarations. Application for stay to arbitration: applications for declarations on interpretation of terms of contract.

El Nasharty v J. Sainsbury Plc [2007] EWHC 2618 (Comm) **:** [148] ***S9 AA 1996***. Application for a declaration that an agreement for sale of shares in Egyptian Distribution Group SAE was entered into as a result of duress

138 ***Park Lane Ventures Ltd v Locke [2006] EWHC 1578 (Ch).*** Mr John Randall QC.. Deputy Judge

139 ***Ravennavi Spa v New Century Shipbuilding Company Ltd [2006] EWHC 733 (Comm).*** Mrs Justice Gloster.

140 ***Legal Services Commission v Aaronson [2006] EWHC 1231 (QB) .*** Mr Justice Jack

141 ***Fiona Trust & Holding Corp v Privalov [2006] EWHC 2583 (Comm)*** : Mr Justice Morrison . 20th October 2006. ***Fiona Trust & Holding Corp v Yuri Privalov [2007] EWCA Civ 20. before*** Tuckey LJ; Arden LJ; Longmore LJ. 24th January 2007

142 ***Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD [2007] EWHC 9 (Ch) :*** Mr Justice Lightman. 23rd January 2007.

143 ***A v B [2007] EWHC 54 (Comm) :*** Colman J. 23rd January 2007.

144 ***Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD [2007] EWHC 665 (Ch)*** Mr Justice Lightman. 29th March 2007.

145 ***Homepace Ltd v Sita South East Ltd [2007] EWHC 629 (Ch):*** Mr N Strauss QC. 30th March 2007.

146 ***Mabey and Johnson Ltd v Danos [2007] EWHC 1094 (Ch) :*** Mr Justice Henderson. 11th May 2007.

147 ***Loon Energy Inc v Integra Mining [2007] EWHC 1876 (Comm):*** Mr Justice Langley. 31st July 2007.

148 ***El Nasharty v J. Sainsbury Plc [2007] EWHC 2618 (Comm)*** **:** Mr Justice Tomlinson. 13th November 2007.

and has been avoided. In his Points of Claim he additionally claims damages of at least US$104,000,000. The agreement contained an arbitration clause, pursuant to which Sainsbury make this application. Stay granted.

Heifer International Inc v Helge Christiansen [2007] EWHC 3015 (TCC) : [149] *S9 AA 1996*. Application for stay to the Danish Building & Construction Arbitration Board of a dispute about a UK building project. Impact of the UCTA & Brussels Convention. Stay granted.

Ardentia Ltd. v British Telecommunications Plc [2008] EWHC B12 (Ch) [150]. **S9 AA 1996**. Jurisdiction of Chancery to issue interim injunction : arbitral tribunal to issue permanent injunction.

Stay pending outcome of other proceedings

Reichhold Norway ASA v Goldman Sachs International **[1999]**.[151] Where plaintiffs, who were engaged in a foreign arbitration against a company not party to relevant English proceedings, brought an action in England against defendants in respect of claims which arose out of the same subject matter the court, in exercise of its inherent jurisdiction, might properly stay the action pending final determination of the arbitration. The Court of Appeal so held when dismissing an appeal by Reichhold Norway ASA and Reichhold Chemicals Inc from Mr Justice Moore-Bick, who, on the application of the defendants, Goldman Sachs International, stayed the action brought against them by the plaintiffs for damages for negligent misstatement in respect of the sale to the plaintiffs' by Jotun AS of the issued share capital of Jotun Polymer Holdings AS.

The stay was to operate until final determination of the arbitration between the plaintiffs and Jotun which was proceeding in Norway under an arbitration clause in the sale agreement governed by Norwegian law.

The Lord Chief Justice referred to the factual inter-relationship between the action and the foreign arbitration, and said that Mr Carr accepted the court's wide discretion to grant a stay and did not challenge its jurisdiction to make such an order: but he had submitted that such power could never properly be exercised in a case such as the present. He had argued that the plaintiffs' case could not be stigmatised as abusive, oppressive, vexatious or brought in bad faith and that the present order was without precedent. Mr Pollock had accepted both submissions.

Mr Carr had contended that the order violated a fundamental principle that a plaintiff making a bona fide claim, not tainted with abuse, oppression or any vexatious quality might sue in the English court any defendant over whom the court had jurisdiction; that a plaintiff did not have to obtain "a passport" from the court to sue such a defendant; and that the court had no role to decide whom a plaintiff might or might not sue here. [152] He also relied on the current doctrines of lis alibi pendens and forum non conveniens, both of which, he argued, depended on showing disadvantage to the defendant from suit in the English jurisdiction.

His Lordship referred to the defendants' argument, which he accepted subject to all the qualifications which were inherent in it. He said that Mr Pollock had taken issue not so much with the general thrust of Mr Carr's submissions as with their absolute nature: he did not assert that a plaintiff had to obtain "a passport" and he pointed out that the judge had not lent support to any such statement of principle. But he did assert that forensic practice was changing and developing; that the movement was towards greater control by the courts over the course of proceedings; and that the Court of Appeal should be slow to interfere with a judge's procedural directions unless, unlike here, they were vitiated by error of law or manifest error. [153]

His Lordship referred to the series of examples posed by Mr Pollock in seeking to justify the making of the judge's order: If the plaintiffs had issued proceedings in England against Jotun and separately against the defendants the court could order that the action against the defendants await the outcome of the proceedings against Jotun. Similarly, if the plaintiffs gave notice of arbitration against Jotun in England pursuant to an English arbitration clause and also sued the defendants in court proceedings the court could order that the action await the outcome of the arbitration reference against Jotun.

[149] ***Heifer International Inc v Helge Christiansen [2007] EWHC 3015 (TCC) :*** HHJ. Toulmin. 18th December 2007.

[150] ***Ardentia Ltd. v British Telecommunications Plc [2008] EWHC B12 (Ch)*** per David Donalson QC. 19th June 2008.

[151] ***Reichhold Norway ASA v Goldman Sachs International [1999] EWCA Civ 1703*** before Lord Bingham of Cornhill, CJ, Otton L.J. Robert Walker L.J.

[152] see ***Abraham v Thompson*** ([1997] 4 All ER 362, 374) and ***Molnlycke AB v Procter and Gamble Ltd*** ([1992] 1 WLR 1112, 1124).

[153] see ***Ashmore v Corporation of Lloyd's*** ([1992] 1 WLR 446) and ***Thermawear Ltd v Linton*** (The Times October 20, 1995).

In each case Mr Pollock had not submitted that the court would necessarily make such an order, but only that on appropriate facts it properly could do so. If his propositions were correct, he posed the bull question: W***hat difference did it make in principle that the arbitration was in Norway instead of England***? He had contrasted the effect of the judge's order with a stay granted on grounds of lis alibi pendens or forum non conveniens where it would in all probability be permanent and the plaintiff would be driven from the judgment seat. That was not so here; the plaintiffs' claim against the defendants was alive and well, but delayed for a year to await the outcome of the arbitration in Norway and in the expectation, on the judge's part, that the action might then not be effective at all.

As Mr Pollock had accepted, a stay such as the present would only be granted in rare and compelling circumstances, account always being taken of the legitimate interests of plaintiffs and the requirement that there should be no prejudice to them beyond that which the interests of justice were thought to justify. It was plain that in exercising the jurisdiction the court would have to be mindful of the effect of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). In the present case the judge's order fell properly within the exercise of his discretion; the appeal would be dismissed. Lord Justice Otton and Lord Justice Robert Walker agreed.

Bankers Trust Co International v P T Jakarta International Hotels & Development *[1999] QBD.*[154] This matter arose as a result of an application for an injunction to restrain litigation in Indonesia pending the hearing of an arbitration in England. In the autumn of 1997 the applicants and the respondent entered into a number of currency swap transactions under the terms of an ISDA Master Agreement which contained a London Court of International Arbitration ('LCIA') arbitration clause providing for arbitration in London under English law. In January 1998, due to the financial turmoil in Indonesia, the respondent defaulted on the agreements, and subsequent negotiations for restructuring came to nothing. In January 1999 the respondent instituted proceedings in Indonesia claiming that the transactions should be set aside, and claiming damages and indemnities of about US$850 million. These proceedings were served on the applicants in February for a return date of 16 March. In the meantime the applicants gave notice of default, and then terminated the agreements on 25 February, claiming sums due of about US$85 million.

On 2 March Cresswell J ordered a temporary ex parte injunction to last until the present hearing to restrain the Indonesian litigation, and the applicant initiated an LCIA arbitration. Full notice was given to the respondent of the application to extend the injunction over the hearing of, and delivery of an award in, the arbitration, but the respondent did not appear at the hearing on 12 March. The court held:-

(1) To be entitled to an injunction the applicants had to establish a high degree of probability that their case was right and that they were entitled as of right to have the foreign litigation restrained. Judgment of Colman J in ***Baniers Trast Co v P T Mayora Jndbh*** *(1999)* followed.

(2) The claims made in the Indonesian proceedings appeared to disclose no causes of action.

(3) In any event all of those claims were covered by the arbitration clause and could be dealt with in the arbitration. The Indonesian proceedings were thus a breach of the arbitration clause contained in the ISDA Master Agreement. The injunction, if granted, would be to restrain this breach.

(4) The LCIA was one of the longest-established of all major international arbitration institutions; to deny effect to an arbitration clause pursuant to LCIA rules would be to create a real risk that the worldwide currency swaps market might be undermined

(5) It was highly desirable that the arbitration be conducted as expeditiously as possible, as the ***Mayora*** dispute would be.

(6) The applicants had discharged the burden imposed by the case of ***Mayora*** (supra), and an injunction over the hearing of the arbitration and delivery of an award would be granted.

Redland Aggregated Ltd v Shepherd Hill Engineering Ltd *[1998] CA.*[155] Appeal of the plaintiff from the order of Mr Recorder Brian Knight QC sitting as a deputy Official Referee made on 23 May 1997 whereby he dismissed

[154] Bankers Trust Co v P T Jakarta International Hotels and Development (1999) 1 Lloyd's Rep 910,

[155] ***Redland Aggregates Ltd v. Shepherd Hill Engineering Ltd*** [1999] BLR 252 (CA). [2000] 1 WLR 1621; 11th December 1998

the plaintiff"s originating summons for declaratory' relief that the subcontract dispute between itself and the defendant be referred to arbitration.

The defendant was engaged by Essex Country Council ('the council') under the standard form of civil engineering contract ICE Fifth Edition (June 1973) (revised 1979) (reprinted January 1986) as main contractor for the construction of a bypass ('the main contract' I. The plaintiff was engaged by the defendant under a subcontract. standard form FCEC 'Blue' Form (September 1984). to carry out asphalting ('the subcontract'). The works under the subcontract were substantially completed by 17 January 1995 and the works under the main contract were certified as complete on 19 February 1995. Disputes arose between the plaintiff and the defendant relating to payment of an outstanding sum. The plaintiff sought by letter dated 15 February 1995, to refer that dispute to arbitration in accordance with the arbitration agreement in the subcontract.

The defendant sought to have the subcontract dispute dealt with together with a dispute that had arisen under the main contract. The issues in respect of which the defendant alleged touched and concerned the issues in the subcontract dispute. This was provided for under clause 18(2) of the subcontract which provided that *" the contractor may by notice in writing to the subcontractor require that any dispute under the contract be dealt with jointly with the dispute under the main contract in accordance with the provisions of clause 66 thereof".*

The defendant served such a notice on 6 March 1995 but then continued to negotiate with the council After two years the plaintiff sought declaratory relief that it was entitled to have the subcontract dispute referred to arbitration whilst the defendant argued that it was entitled to continue negotiation with the council The judge found for the defendant and dismissed the plaintiff's summons. The plaintiff appealed contending that the defendant had a positive duty to progress tripartite arbitration. The court held :-

(1) It was clear that the purpose of the provisions for joining a subcontract dispute to a main contract dispute was to avoid the possibility of inconsistent findings. ***Erith v Costain*** [*1994)* ADRLJ *123).*

(2) Although cl.18(2) of the subcontract provided for notice to be served joining the subcontract dispute to the main contract dispute, the main contract did not contain any provision regarding the determination of subcontract disputes.

(3) The defendant's submissions that because of the difficulties involved in a tripartite arbitration the parties must have intended for some alternative form of joint dispute resolution (such as two sets of arbitration proceedings before the same arbitrator) could not be supported. The wording of cI. 18 clearly envisaged a tripartite arbitration.

(4) That being so, the question arose as to when the defendant was obliged to arrange the tripartite arbitration and in particular whether there was no limit of time whilst the defendant negotiated with the council.

(5) Negotiations were to be encouraged but a lengthy period of negotiation was not allowed by the provisions of the main contract. Under the main contract clause 66 set out a timetable under which the dispute could be referred to an engineer; if there was no decision within three months then within a further three months the dispute could be referred to arbitration. Where no specific time limits were laid down a reasonable time was to be implied.

(6) A reasonable time in the circumstances would be a short period-and certainly not as long as 2 years or 18 months.

(7) The problem which arose was where it was not possible to arrange for a tripartite arbitration, either because the defendant was not prepared to arrange it or the council employer was not willing to agree to it.

(8) The subcontract cl.18 was not a promissory term entitling the plaintiff subcontractor to damages for breach but a condition subsequent. That is, if not performed the plaintiff was not obliged to participate in a tripartite arbitration and could pursue its claim independently against the defendant main contractors ***Sudbrook v Eggleton*** [*1983].*[156]

(9) Here the defendant had shown that it was unable or unwilling to pursue tripartite arbitration and in those circumstances the plaintiff was entitled to have the subcontract dispute independently referred to arbitration.

[156] ***Sudbrook v Eggleton*** [*1983] AC 444).*

Appeal allowed. Leave to appeal to the House of Lords refused. The House of Lords received an application from Shepherd Hill Engineering Ltd seeking leave to appeal in this case. The Appeal Committee was unable to reach a unanimous decision and the matter was therefore referred to a hearing on 29 March 1999.

***Zietsman, R v Dental Practice Board* [2000].**[157] Where a tribunal has the power to defer a decision pending outcome of other proceedings this power does not override any duty to promptly investigate. A tribunal cannot indefinitely defer pending an outcome which is delayed itself for an indefinite period.

***Nokia v Interdigital Technology Corp* [2005].**[158] Application to stay patent proceedings pending arbitration on amounts due under licence. Held : Stay refused – validity of patent a key factor in the validity of sums due under the licence and thus key to the outcome of the arbitration – and thus needs to be settled as soon as possible to assist the tribunal.

***Hillcourt v Teliasonera [2006]*.**[159] Application for a stay of enforcement of arbitral award pending litigation of significant counterclaim.

Stay to arbitration and anti-suit injunctions.

Section 9 is effective to stay legal proceedings before the courts of England and Wales to arbitration, but the English court cannot stay the deliberations of a foreign court. The English courts have developed the remedy of the anti-suit injunction directing that parties to either arbitration or litigation desist from continuing actions in foreign court or tribunals in respect of a matter before an arbitral tribunal or before an English court. This is to avoid the risk of conflicting judgments or awards. There are limitations on the effectiveness of such injunctions in that the restrained party must fall within the jurisdiction of the court, with assets within the reach of the court, for contempt proceedings to have any impact.

***Alfred Toepfer v Cargill* [1997].**[160] Reference to ECJ to determine whether an anti-suit injunction can be issued where a defendant institutes litigation in an EC court contrary to an arbitration clause and in breach of contract.

***Major Shipping v Cosco* [1998].**[161] Whether actions on two bills of lading or replacement bills of lading to be pursued by arbitration – UK Law and arbitration – or litigation in Singapore : Held : Injunction – in support of arbitration.

***The Ivan Zagubanski* [2000].**[162] Anti-suit injunctions : validity of arbitration clause : impact of Brussels Convention. Where a New York convention award is enforced as a court judgment, enforcement is nonetheless on the basis of New York not the Brussels Convention.

***Donohue v Armco* [2000] CA.**[163] Appeal from a judgment of Aikens J. whereby he dismissed the Claimant's application for an anti-suit injunction to restrain the Defendants' from suing him in any forum other than England.

***Donohue v Armco* [2001]HL.**[164] Whether an injunction should have been granted to restrain the prosecution of proceedings in New York and, if so, in whose favour it should have been granted.

***Through Transport Mutual Insurance v New India Assurance* [2003].**[165] Declaration that there was a valid arbitration agreement : anti-suit against Finnish litigation.

[157] ***Zietsman, R v Dental Practice Board [2000] EWHC Admin 433.*** HHJ Jack Beatson QC.

[158] ***Nokia Corporation v Interdigital Technology Corporation [2005] EWCA Civ 614.*** CA before Mummery LJ; Rix LJ; Jacob LJ

[159] ***Hillcourt v Teliasonera [2006] EWHC 508 (Ch) LAWTEL AC9100860.*** HHJ Evans-Lombe J.

[160] ***Alfred C Toepfer International GmbH v Societe Cargill France [1997] EWCA Civ 2811:*** CA before Staughton LJ; Phillips LJ; Robert Walker LJ. 25th November 1997.

[161] ***Major Shipping Co Ltd v Cosco Feoso (Singapore) Ltd [1998] EWCA Civ 1373 :*** CA before Morritt LJ : Sir Christopher Staughton 31st July 1998.

[162] ***Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski) [2000] EWHC 222 (Comm) :*** Westlaw. Mr Justice Aikens 16th November 2000.

[163] ***Donohue v Armco Inc. [2000] EWCA Civ 94 :*** CA before Stuart-Smith LJ; Brooke LJ; Sedley LJ. 29th March 2000.

[164] ***Donohue v. Armco Inc [2001] UKHL 64 :*** Before Lords Bingham ; Mackay ; Nicholls ; Hobhouse ; Scott. 13th December 2001.

[165] ***Through Transport Mutual Insurance Association Ltd v New India Assurance Co. Ltd. [2003] EWHC 3158 (Comm)*** . Mr Justice Moore-Bick

Enron v Clapp **[2004].**[166] Arguable defence to part of an enforcement judgment : other part no defence. Enforcement in part ordered. Any dispute on quantum re outstanding sum to be settled if at all at either parties behest by arbitration. Anti-suit injunction against commencing action in Texas court since arbitration / exclusive jurisdiction & law clause effective.

OT Africa Line v Magic Sportswear [2004].[167] Impact of ***Section 46(1) of the Canadian Maritime Liability Act 2001*** which seeks to override choice of law and forum and arbitration clause. Held : Anti-suit injunction to prevent litigation in Canada issued.

OT Africa Line v Magic Sportswear [2005]. [168] Issue : whether ***s6(1) Canadian Marine Liability Act 2001*** which enabled the Canadian court to override an arbitration clause, choice of law and exclusive jurisdiction (here London) was a reason to issue to stay to the Canadian Court. Held : Stay refused – anti-suit injunction issued.

Goshawk Dedicated v ROP [2006].[169] Injunction successfully applied for to prevent party pursuing an action to strike out arbitration proceedings before the Georgia Court.

Kallang Shipping v Axa [2006].[170] Failed application to lift an anti-suit injunction in respect of court proceedings in Dakar in favour of an LCIA arbitration.

Ace Capital v CMS Energy [2008].[171] Successful application for a permanent anti-suit injunction in respect of Michegan litigation - in favour of LCIA arbitration of insurance disputes.

Albon v Naza Motor (No 4) **[2007].** [172] Anti-suit injunction granted since respondent would not unconditionally accept that the question as to whether a signature had been forged was solely in the jurisdiction of the English Court - it would be oppressive and unconscionable to allow a duplication of proceedings.

Steamship Mutual v Sulpicio [2008].[173] P&I cover provided subject to rules, London Arbitration & Jurisidction. Club cancelled membership for breaches of rules - ending cover for two vessels that were lost : Sulpicio commenced action in Phillipines court alleging breach of contract & fraud. Injunction granted.

Verity Shipping v Norexa [2008].[174] Charterparty and bills of lading. Anti-suit refused because it would impact adversely on 3rd party rights – where the third parties were not parties with notice to arbitration proceedings.

West Tankers v Ras [2005].[175] Contract substantively subject to Italian Law. Arbitration – London subject to English Law and jurisdiction. Arbitration virtually complete. Syracuse litigation commenced, hearings scheduled several months away. Under Italian law subrogation did not extend to arbitration – thus the arbitration would be ignored in Italy. Court concluded that this was an appropriate case for an anti-suit order.

West Tankers v RAS [2007]. [176] The question here was whether or not it was in line with ***EC Regulation 44/2001*** to restrain a party from pursuing litigation before the court of a member state where the governing contract provided for arbitration. The House of Lords felt it was, but that a reference to the ECJ was justifiable, since matter not entirely clear.

166 ***Enron (Thrace) Exploration and Production BV v Clapp [2004] EWHC 1612 (Comm).*** Mr Justice Langley

167 ***OT Africa Line Ltd. v Magic Sportswear Corporation [2004] EWHC 2441 (Comm) :*** Mr Justice Langley 2004.11.03

168 ***OT Africa Line Ltd v Magic Sportswear Corporation [2005] EWCA Civ 710*** . CA before Laws LJ; Rix LJ; Longmore LJ.

169 ***Goshawk Dedicated Ltd v ROP Inc [2006] EWHC 1730 (Comm) :*** Mr Justice Morison, 12th July 2006.

170 ***Kallang Shipping SA v Axa Assurances Senegal & Ors [2006] EWHC 2825 (Comm).*** Mrs Justice Gloster. 7th November 2006.

171 ***Ace Capital Ltd v CMS Energy Corporation [2008] EWHC 1843 (Comm) :*** Mr Justice Christopher Clarke. 30th July 2008.

172 ***Albon v Naza Motor Trading Sdn Bhd (No 4) [2007] EWHC 1879 (Ch) :*** Mr Justice Lightman. 31st July 2007.

173 ***Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc [2008] EWHC 914 (Comm):*** Mr Justice Walker. 4th April 2008.

174 ***Verity Shipping SA ("Owners") & Anor v NVNorexa [2008] EWHC 213 (Comm) :*** Mr Justice Teare. 13th February 2008.

175 ***West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa [2005] EWHC 454 (Comm).*** Mr Justice Colman

176 ***West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA [2007] UKHL 4.*** Lords Nicholls, Steyn, Hoffmann, Rodger, Mance. 21st February 2007.

Allianz (*formerly RAS*) v West Tankers [2008]. [177] Following on from the reference by the House of Lords in the West Tankers litigation to the ECJ, on the question as to whether or not an anti Suit injunction in support of arbitration is compatible with EU Law, the Advocat General Kokott has issued to an opinion to the court to the effect that it is not compatible, following rationale in ***Turner v Grovit*** as set out in the ECJ ruling in ***Turner.*** In the Advocate General's opinion, all courts in member states are Kompetenze Kompetenze - and deserve to be accorded mutual respect. Thus the courts must trust member court's in other EU jurisdictions to make the right decisions, rather than seek to deprive them of the opportunity to do so.

The opinion inevitably makes no comment about what happens if that court makes the wrong decision since it concludes that this will not happen and such actions cannot at the end of the day detract from the validity of the arbitration clause. Despite this confidence, it is inevitable that from time to time a domestic court will find it has jurisdiction, contrary to the terms of the contract, which presumably will then lead to action before the ECJ to determine whether or not that decision was justified. The pragmatic, commercially orientated view of the English Court in issuing anti-suit injunctions is likely to be displaced by a very time consuming and expensive alternative if this opinion is adopted by the ECJ, at least in the EU.

A sitting tribunal may well in future have to wait until a foreign court completes its deliberations before proceeding, assuming that court confirms the tribunal's jurisdiction. If not the court might well deal with the matter itself, ousting the jurisdiction of the tribunal, or at least triggering further action to assert the tribunal's jurisdiction. Confusion and delaying tactics are in the air. What impact this will have on future choice of law and arbitration clauses is not clear, but one option might be for international contractors to go outside the EU for dispute resolution services in the future.

The anti-suit injunction is also available where a matter is *"res judicata"* having already been determined by a tribunal or court, to prevent double jeopardy.

ARBITRATION AND FORUM CONVENIENS

Tavoulareas v Tsavliris [2003].[178] Salvage Lloyds Open Form – London arbitration and English Law. The Claimant's action should be stayed. The default judgment must be set aside as obtained in circumstances where the Greek Court was already seised of the dispute.

Tavoulareas v Tsavliris [2004].[179] Salvage Lloyds Open Form – London arbitration and English Law. Failure to demonstrate that Greek law and jurisdiction applied. Article 21 Brussels Convention. Freedom to forum shop by seeking negative declaratory relief is inherent in the European Court of Justice's decisions in Gubisch v. Palumbo (Case 144/86), ***The Tatry and Maciej Rataj*** (Case 406/92) [1995] 1 Ll.R. 302 and, most recently, ***Erich Gasser GmbH v. Misat Srl*** (C-116/02), where the court declined to reconsider its previous jurisprudence in this regard.

Travelers v Sun Life Canada [2004].[180] Range of claimants in EU, US & Canada. Application to stay English action to Canada. Some of the policies contained arbitration clauses in respect of US and Canada – others did not. Events all occurred in England. Most evidence to be adduced from England but significant evidence due from Canada. On a balance, England the appropriate forum, in absence of clear choice of law and forum. Stay refused.

Munchener Ruckversicherungs v Commonwealth Insurance [2004].[181] Court found England the appropriate forum on the basis of the facts and circumstances of the case, as applied to legal principles on forum. Court made it clear the decision is based on facts not law to prevent any further legal challenge on a point of law.

[177] ***Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) v West Tankers Inc.Case C-185/07.*** Advocate General Kokott ECJ – Opinion. 4th September 2008.

[178] ***Tavoulareas v Tsavliris [2003] EWHC 550 (Comm) :*** Mr Justice Tomlinson. 21st March 2003.

[179] ***Tavoulareas v Tsavliris [2004] EWCA Civ 48*** **:** CA before Thorpe LJ; Mance LJ ; Mr Justice Evans-Lombe. 5th February 2004.

[180] ***Travelers Casualty v Sun Life Assurance Company of Canada (UK) Ltd [2004] EWHC 1704 (Comm) :*** Jonathan Hirst QC. 16th July 2004.

[181] ***Munchener Ruckversicherungs Gesellschaft v Commonwealth Insurance Co [2004] EWHC 914 (Comm) :*** Mr Justice Morison. 28th April 2004.

S10 Arbitration Act 1996. Reference of interpleader issue to arbitration.

10.(1) Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.

10(2) Where subsection (1) applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall not affect the determination of that issue by the court.

S10(2) Arbitration Act 1996 expressly sets aside the impact of any **Scott v Avery** clause.

Staying of legal proceedings.

86(1) In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.

86(2) On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied-

(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or

(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.

86(3) The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.

86(4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced.

Effectiveness of agreement to exclude court's jurisdiction.

87(1) In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under-

(a) section 45 (determination of preliminary point of law), or

(b) section 69 (challenging the award: appeal on point of law),

is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

87(2) For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).

87(3) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.

FURTHER READING

Clarkson & Hill, Jaffey on the Conflict of Laws, 2/e. London: Butterworths, 1997, pp114-142

O'Brien, Smith's Conflict of Laws, 2/e. London: Cavendish, 1999, Ch.12.

WORKSHOP QUESTIONS

1 Noddy buys 100,000 tons of toys from big ears under a contract which states that any question as to the quality of the toys must be arbitrated. Noddy discovers that only 95,000 tons are delivered and files a claim in court for short delivery. Big Ears seeks your advice as to whether a stay of action is possible pending the outcome of arbitral proceedings.

2 Farouk, an Egyptian buyer of building materials shipped from England seeks a stay of action for non-payment of goods by John an English seller, and insists on arbitrating the dispute in Egypt on the basis that defective goods were delivered. Discuss whether the English court can or will proceed with the claim.

3 Rachman engages Bob the Builder to build a block of flats. Bob submits a payment dispute to adjudication. Rachman thinks adjudication is a pointless exercise and wants to arbitrate under the contract's express arbitration clause, which states that no action may be brought prior to practical completion and the determination of final accounts. Advise Rachman as to whether or not he can afford to ignore the adjudication and refer the dispute to arbitration or ignore both and litigate.

4. Charlie, (the employer / developer in a construction project) the defendant in a payment dispute lost an adjudication but refused to pay, asserting that the adjudicator got it wrong and in addition claiming that he had a far bigger outstanding counter claim. Andy, the building contractor has commenced enforcement proceedings.

   Advise Charlie as to the availability or otherwise of a stay of the enforcement proceedings pending the outcome of a subsequent arbitration in respect of the counterclaim and a retrial of the payment dispute.

   What difference, if any might if make if Andy has a number of outstanding County Court Judgements and is in an apparently precarious financial position ?

   What difference, if any might it make if Andy has entered into administration and the enforcement action is brought not by Andy but by an administrator?

5. Ad Co UK contracted to supply glossy magazines for The United Nations Environmental Agency (UNEA) at a favourable rate subsidised by private sponsorship. UNEA terminated the agreement on the grounds that the manager who brokered the contract had a financial interest in one of the sponsors. The contract contained an English arbitration clause and Ad Co submitted a claim for breach of contract to arbitration. UNEA 1) assert state immunity and 2) assert that the contract is invalid due to corruption and not amenable to arbitration. Discuss.

6. John, resident in England, entered into a contract with Vic, manufacturer resident in Davania, to act as Vic's sole agent in England for the distribution of his products. The contract provided that all disputes arising between the parties should be settled by the Davanian courts only.

   A dispute arose between the parties over whether John was properly performing his obligations under the contract. Vic purported to terminate the contract. John, wishing to sue Vic for breach of contract, had a writ served on Vic while he was in England for two days to attend a business meeting. John had been advised by a Davanian lawyer that an action in the Davanian court will take five years to come to trial (it would be heard within a year in England), that the Davanian court would apply Davanian law which is very unfavourable to John and that, as a Roman Catholic, John is unlikely to receive a fair trial in Davania. Vic has started an action against John in Davania for breach of contract.

   John wishes the trial of both actions to take place in England. Vic wishes it to take place in Davinia.

   Advise John.