

case with cabotage, short sea shipping and fishing. In fact, most ocean carriers fly flags of convenience and the majority of flags of the EC member states are granted to vessels performing cabotage, passenger ferry services between two neighbouring countries and fishing. Thus, the rules will have to be changed for the majority of them.

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## WHO DECIDES ON JURISDICTION CLAUSES?

### *Erich Gasser v. MISAT*

At last the European Court of Justice (“ECJ”) has decided one of the key issues at the heart of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the “Brussels Convention”): which court has jurisdiction to decide whether there is a jurisdiction clause: the court first seised in the dispute or the court chosen, if that is the court second seised? This involves considering the interrelationship between Arts 17 and 21 of the Brussels Convention. Although the ECJ in *Erich Gasser GmbH v. MISAT Srl*<sup>1</sup> has decided these issues in the context of the Brussels Convention, the decision will apply equally to Arts 23 and 27 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters<sup>2</sup> (“the Brussels Regulation”), which replaces the Brussels Convention,<sup>3</sup> and to the EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1998 (the “Lugano Convention”).<sup>4</sup>

The *Gasser* decision completely reverses the controversial decision in *Continental Bank NA v. Aeakos Compania Naviera SA*.<sup>5</sup> There the Court of Appeal held that, although the Greek court was first seised, the English court had jurisdiction because there was an exclusive English jurisdiction clause. The wording of the Brussels Convention itself did not clearly answer whether Art 17 was an exception to Art 21; but the Court of Appeal was so determined that its interpretation of the issue was correct, that it refused to refer the issue as a preliminary matter to the ECJ. Not only this, but the English court also granted

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1. (*Case C-116/02*) [2004] 1 Lloyd’s Rep 222.

2. It entered into force in the United Kingdom on 1 March 2002: see the Civil Jurisdiction and Judgments Order 2001.

3. Except in relation to Denmark. The Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000 sets out the 1996 Accession Convention in Sched I and came into force on 1 January 2001. The 1996 Brussels Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden is in force in Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK but not Belgium.

4. It is in force in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and the UK. The Civil Jurisdiction and Judgments Act 1982, s 3A (inserted by the Civil Jurisdiction and Judgments Act 1991) gives the force of law to the Lugano Convention, which is set out in Sched 1 to the 1991 Act. It came into force in the UK on 1 May 1992.

5. [1994] 1 WLR 588; [1994] 1 Lloyd’s Rep 505; followed in *OT Africa Line Ltd v. Hijazy (The Kribi)* [2001] 1 Lloyd’s Rep 76. See A. Briggs, “Anti-European Teeth for Choice of Court Clauses” [1994] LMCLQ 158.

an anti-suit injunction to restrain the Greek borrower from continuing the proceedings in Greece in breach of the English jurisdiction agreement. In *Eviafis SA v. SIAT*<sup>6</sup> Andrew Smith J refused to distinguish *Continental Bank v. Aeakos* on the ground that the Brussels Regulation applied and not the Brussels Convention.

Other Contracting States considered that the court first seised must always establish its jurisdiction first, including whether it must decline jurisdiction due to a jurisdiction agreement. Thus, in *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*,<sup>7</sup> the Italian court referred 14 issues of interpretation on Art 17 of the Brussels Convention to the ECJ but it did not question its own right to be applying Art 17, presumably on the basis that it was so obvious to the Italian court that it, as the court first seised, should do so. Attempts to clarify this issue by amending the Brussels and Lugano Convention foundered.

In *Erich Gasser v. MISAT*, MISAT brought proceedings in Rome against Gasser. Nearly eight months later, Gasser brought proceedings which involved the same cause of action in Austria. Gasser relied on payment of invoices for childrens' clothing sold to MISAT under a contract which included a jurisdiction clause to which there had never been an objection. Gasser argued that that meant the (Austrian) *Landsgericht Feldkirch* alone had jurisdiction to deal with the dispute. On appeal, the *Oberlandesgericht Innsbruck* referred issues of interpretation to the ECJ.

Even though the trial judge in Austria had not determined whether there was a jurisdiction clause, the ECJ held that it could determine the issues referred to it, as they were not hypothetical. If the European Court determined that Art 21 applied, despite the existence of a jurisdiction agreement, then the Austrian court would not need to go through the potentially costly exercise of determining whether there was indeed a jurisdiction agreement. This was the conclusion to which the court came. This was clearly the correct decision. It would have been ludicrous to say that the European Court could not make a decision because the Austrian court had not determined that there was a jurisdiction agreement when the European Court's decision is that the Austrian court has no jurisdiction to make that decision.

The ECJ referred to the main aim of the Brussels Convention, s 8, to prevent parallel proceedings and to avoid irreconcilable judgments. Article 21 provides for a simple rule based on the chronological order in which proceedings are brought. The court limited the exception to that rule in *Overseas Union Insurance Ltd v. New Hampshire Co*<sup>8</sup> to exclusive jurisdiction under Art 16. The ECJ rejected the United Kingdom government's argument that the court designated by the agreement conferring jurisdiction will, in general, be in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated.<sup>9</sup> The court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined by applying the requirements of Art 17 and only those requirements. Neither court may apply its national law or any other restrictions as to form, language, appearance or link with the dispute to determine whether there is a jurisdiction clause, as is clear from

6. [2003] EWHC 863 (Comm).

7. (*Case C-159/97*) [1999] ILPr 492.

8. [1992] 1 Lloyd's Rep 204.

9. *Denby v. Hellenic Mediterranean Lines Co UK* [1994] 1 Lloyd's Rep 320.

*Castelletti*. The merit of this decision is that the court second seised will only have jurisdiction if the court first seised declines jurisdiction because there is a jurisdiction clause. Otherwise one could find that the court second seised determined the issue whether there is a jurisdiction clause and reached the conclusion that there is not. The matter would then revert to the court first seised.

### Delay

The ECJ also considered whether Art 21 may be departed from where the proceedings in the court first seised have taken an excessively long time and proceeded on the basis that the average duration of proceedings before the Italian courts is excessively long. Gasser argued that Art 21 must be interpreted as excluding excessively protracted proceedings, ie, exceeding three years, which are contrary to Art 6 of the European Convention on Human Rights. Thus, where no decision on jurisdiction has been made within six months or no final decision on jurisdiction has been given within one year, Gasser argued that the court second seised would be entitled to rule both on the question of jurisdiction and, after slightly longer periods, on the substance of the case. The court rejected any such exception as there is no such provision in the Brussels Convention and there must be certainty.

### Practical consequences

It is still very important to advise a party to a contract to have an exclusive jurisdiction clause. Indeed, it is even more important that the parties make a very clear choice, ideally in a written contract signed by both parties which falls within Art 17(a). The problem in a case such as *Gasser* is that there was a dispute between the parties as to the existence of the jurisdiction clause, as it had only been inserted in invoices presumably sent after the contract had been concluded.<sup>10</sup> Situations such as these raise genuine disputes as to whether the jurisdiction clause forms part of the contract. So do situations where there is a dispute such as to whether a contract incorporates the terms of another contract<sup>11</sup> or a case of the battle of the forms.<sup>12</sup> The issues raised by whether a jurisdiction clause satisfies the requirements of Art 17(c) are complex. Thus, in *Castelletti* the Italian court referred no less than 14 issues of interpretation on that provision to the ECJ. In that case the Italian courts had very properly taken the point that, if there was an English jurisdiction clause in a bill of lading, they would have no jurisdiction. The problem was whether there was such a clause. The parties have to help themselves and address the issue of jurisdiction up front, rather than trying to slip a jurisdiction clause into an invoice or bury it in standard terms incorporated by reference. In *Gasser* the UK government argued that the commercial practice of agreeing which courts are to have jurisdiction in the event of

10. See also *Mainschiffahrts – Genossenschaft eG (MSG) v. Les Gravieres Rhenanes Sarl (Case C-106/95)* [1997] I ECR 911.

11. See *AIG Europe v. Ethniki* [1998] 4 All ER 301; *AIG v. QBE* [2001] 2 Lloyd's Rep 268 at [17] and [26] on whether the words of incorporation in a reinsurance contract are clear enough to incorporate the jurisdiction clause from the insurance contract; and *Siboti K/S v. BP France SA* [2003] EWHC 1278; [2003] 2 Lloyd's Rep 364, on the incorporation of a charterparty jurisdiction clause into a bill of lading.

12. See G. Dannemann, "The Battle of the Forms and the Conflict of Laws", ch 11 of F.D. Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (2000) (hereafter "*Lex Mercatoria*"), 199 and esp. 210–215.

disputes should be supported and encouraged, as they promote legal certainty. However, this assumes that the parties have made a clear agreement. The Brussels Convention, and the Brussels Regulation in its turn, recognize party choice and will enforce it provided that choice satisfies the requirements of Art 17.

Furthermore, even if there is a clear jurisdiction clause, the party wishing to rely on the clause must seise the court chosen first. Fortunately, under the Brussels Regulation a new Art 30 provides when a court is seised and this makes it easier to seise the English court first than was formerly the case under the Brussels Convention.<sup>13</sup> The Brussels provisions really do encourage the parties to sue first and settle later. This may be no bad thing, as there is nothing like a claim form to focus the mind on settlement and the jurisdiction of the proceedings is a major tactic in achieving that goal.

Where the decision is very tough is where, for example, a party wishes to enforce a clear English jurisdiction clause but the other party flagrantly breaches that clause and it takes considerable time for the court first seised to decide that it has no jurisdiction. The claimant in the English proceedings would presumably be able to recover the additional costs of the proceedings in the court first seised as damages for breach of the jurisdiction agreement and interest for the whole of the period it has been kept out of its money. This will not help the small business which has foundered due to non-payment.

### Anti-suit injunctions

Not only was the Court of Appeal so sure that their interpretation of the interrelationship between Arts 17 and 21 was correct in *Continental Bank v. Aeakos*; but they went further and granted an anti-suit injunction to restrain the Greek borrower from pursuing proceedings before the Greek court which was first seised. The use of anti-suit injunctions has been seen as highly controversial in the European arena<sup>14</sup> and indeed some Contracting States to the Brussels Convention have refused to serve them on the ground that they are unconstitutional and interfere with their sovereignty.<sup>15</sup> Despite a note of caution by the Court of Appeal in *Phillip Alexander Securities & Futures Ltd v. Bamberger*,<sup>16</sup> the English courts have continued to grant them to enforce a jurisdiction agreement and to prevent an abuse of process in *Turner v. Grovit*.<sup>17</sup> In the latter case the House of Lords has referred to the ECJ the issue of whether an anti-suit injunction can be granted to prevent an abuse of process in the European context. The European Court has not yet given judgment but the opinion of Ruiz-Jarabo Colomer AG<sup>18</sup> considers them contrary to the spirit of the Brussels Convention. The irony is that, had the English courts accepted that the court first seised should determine whether there is a jurisdiction agreement, there would be no need for an anti-suit injunction. As a result of the decision in *Gasser*, the English courts, if second seised, will have no jurisdiction to determine whether there is a jurisdiction agreement and will not therefore be in a position to grant

13. *The Freccia del Nord* [1989] 1 Lloyd's Rep 388; *Dresser UK Ltd v. Falcongate Freight Management Ltd (The Duke of Yare)* [1992] QB 502; *Neste Chemicals SA v. D K Line SA (The Sargasso)* [1994] 2 Lloyd's Rep 6; and *Internationale Nederlanden Aviation Lease BV v. The Civil Aviation Authority* [1997] CLC 43.

14. See, eg, A. Briggs, "Anti-Suit Injunctions in a Complex World", ch 12 of Rose (ed), *Lex Mercatoria*.

15. *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320, (Dusseldorf CA).

16. [1996] CLC 1757, 1789.

17. [2001] UKHL 65; [2002] 1 WLR 107.

18. [2004] 1 Lloyd's Rep 216.

a remedy for breach of that agreement, unless the court first seised declines jurisdiction. This does not affect the use of anti-suit injunctions where the Brussels and Lugano Conventions and the Brussels Regulation do not apply, as different considerations apply where there is no mutual agreement as to jurisdiction between two states.<sup>19</sup>

### **Conclusion**

*Gasser* is a welcome decision to end the divergence of opinion amongst the EC Member States as to the supremacy of Art 21 over Art 17 of the Brussels and Lugano Conventions and Art 23 over Art 27 of the Brussels Regulation. It also ends the need for anti-suit injunctions to enforce jurisdiction agreements amongst the EC Member States. Article 21 provides for a simple and inflexible rule based on the chronological order in which proceedings were brought and the rule does not bend for jurisdiction clauses or delays. The costs involved in a dispute as to whether there is a jurisdiction clause and the delay in obtaining judgment in the court of one's choice may well outweigh the benefits of choice of jurisdiction. Thus, a contracting party should do its utmost to prevent such a dispute arising by focusing on the jurisdiction clause at the negotiation stage and commencing proceedings promptly in the chosen court.

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19. See, eg, Briggs, *supra*, fn 14.

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