

understanding informed the decision-taker's decision. This is a matter of considerable practical significance, given the common commercial practice of contracts being negotiated by individuals who are not the ultimate decision-takers.

In many cases, this evidence is likely to include minutes of relevant meetings of the decision-taker, any presentations made to the decision-taker prior to its approval of the contract in its final form, any instructions to the signatory, and the evidence of witnesses including the negotiator(s) and decision-taker(s).³⁰ However, when (as is often the case with charterparties) the contract is simply passed for signature to a senior manager or director, who has been involved in neither negotiating the terms of the contract nor checking the final document, such evidence is likely to be seriously lacking, substantially reducing the probability of a successful claim for rectification.

Conclusions

It is clear from this decision that there is a substantial evidential burden on any party seeking rectification on the basis of unilateral mistake to establish both that the mistake was indeed one made by the relevant decision-taker and that the defendant had the requisite knowledge of that mistake. However self-evident it may seem, it must not be taken for granted that the mistake of the negotiator is shared by the decision-taker, and detailed evidence will need to be adduced. Detailed evidence and pleadings are also crucial to establishing actual knowledge, particularly when seeking to rely on the extended categories. In such cases, although there is some uncertainty as to the relevance of dishonesty, it should be assumed that dishonesty must be specifically pleaded and put to the witnesses. Finally, this decision undoubtedly sends a stark message to larger and more experienced businesses that they, in particular, will face an extraordinarily heavy burden in claims for rectification.

Elaine Palser*

AN ENGLISH JURISDICTION CLAUSE DOES BATTLE WITH CANADIAN LEGISLATION SIMILAR TO THE HAMBURG RULES

OT Africa v. Magic Sportswear

It is increasingly complex to advise on the effect of an English jurisdiction clause. Recently Colman J began his judgment in *Advent Capital Plc v. GN Ellinas Imports-Exports Ltd and Standard Trading Ltd*¹ with the following paragraph:

In recent years the Commercial Court has increasingly been called upon to resolve complex jurisdictional issues which have arisen even in the face of binding law and jurisdiction clauses. Such disputes arise because of the apparent inability of the parties even to apply commonsense to the

30. At [49].

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1. [2005] EWHC 1242 (Comm); [2005] 2 Lloyd's Rep 607, [1].

choice of venue for resolution of their disputes. Parties to the Brussels,² Lugano³ and San Sebastian⁴ Conventions and ultimately to EU Regulation 44/2001⁵ have at least established a jurisdictional regime of reasonable certainty for international commercial disputes connected with the courts of Member States.

Once outside that regime, the opportunities for disruption of the resolution of substantive claims by time consuming and costly ancillary litigation are far too often relentlessly and needlessly pursued to the prejudice of all parties. The applications now before this court exemplify the futility of this kind of ancillary litigation and point up the urgent need for an international jurisdiction and judgments convention of the widest possible application.

The purpose of this Comment is to consider the recent Court of Appeal decision in *OT Africa Line Ltd v. Magic Sportswear Corp.*,⁶ which involved just such a complex jurisdictional issue even in the face of a binding English law and jurisdiction clause in a bill of lading. Three issues are considered: first, should an exclusive English jurisdiction clause be upheld despite proceedings already pending in Canada, where legislation modelled on the Hamburg Rules gives the Canadian courts jurisdiction. Secondly, the EC Regulation was not mentioned in the judgment. The application of the Regulation, and in particular Art 23, will be considered in the light of the recent decision of the European Court of Justice in *Owusu v. Jackson*.⁷ Thirdly, the application of the Hague Convention on Choice of Court Agreements 2005 to bills of lading is very briefly considered.

The facts of *OT Africa v. Magic Sportswear*

OT Africa Line Ltd (OTAL), an English company which also had offices in Toronto, carried goods from New York on board their vessel *Mathilde Maersk* to Monrovia. OTAL issued a bill of lading in Toronto, where the ocean freight was payable. The bill of lading named Magic Sportswear Corporation (“Magic”), a Delaware corporation with business interests in New York, as the shippers; and the intended receivers were Blue Banana, a Liberian corporation. It was alleged that the goods were short delivered and Magic and Blue Banana commenced proceedings in Toronto in August 2003. The instigators of those

2. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 as amended on the accession of new Contracting States. The latest Accession Convention is the Brussels Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden 1996 (the “EC Jurisdiction Convention”), which is set out in Sch I of the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000 and came into force in the United Kingdom on 1 January 2001. This Convention is now replaced by the EC Regulation (see fn 5 *infra*), except in relation to Denmark, although an agreement to apply the Regulation to Denmark has been signed and will come into force on the first day of the sixth month after the parties notify completion of its adoption in accordance with their respective procedures (Art 12): [2005] OJ L299/62 (16.11.05).

3. The EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (the “Lugano Convention”).

4. The version of the Jurisdiction Convention on the Accession of Spain and Portugal, now replaced by the EC Regulation (see fn 5 *infra*) except in relation to Denmark (see fn 2 *supra*).

5. Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“the EC Regulation”), which entered into force in the UK on 1 March 2002 and replaced the EC Jurisdiction Convention, except in relation to Denmark where the EC Regulation will apply in the future (see fn 2 *supra*).

6. [2005] EWCA 710; [2005] 2 Lloyd’s Rep 170; *aff’g* [2004] EWHC 2441; [2005] 1 Lloyd’s Rep 252 (Langley J.).

7. (*Case C-281/02*) [2005] I ECR 1383; [2005] 1 Lloyd’s Rep 452; referred from [2002] EWCA Civ 877. See fn 35.

proceedings were the Canadian cargo insurers exercising their subrogated rights to bring the claims in the name of the insured, as Magic and Blue Banana were dormant.

The bill of lading provided for the United States Carriage of Goods by Sea Act 1936 to apply to the bill of lading and contained an English law and exclusive English court jurisdiction clause.⁸ The basis on which the jurisdiction of the Canadian courts was invoked was the Canadian Marine Liability Act 2001, s 46(1)(b) and (c).⁹ Although Canada does not give the force of law to the Hamburg Rules,¹⁰ this section is a similar jurisdiction provision to the Hamburg Rules, Art 21, which provides that the cargo claimant has an option to bring proceedings in a number of places including the place designated by the contract of carriage. The Canadian legislation is more favourable to the cargo claimant in that it permits an action to be brought if the defendant has a place of business, branch or agency in Canada, rather than *the* principal place of business or the habitual residence of the carrier provided for by the Hamburg Rules. The rationale for s 46 included giving Canadian importers and exporters the right to pursue cargo claims in Canada and an attack on what was perceived to be a monopoly of the UK courts over such claims. The Canadian court retained a discretion to refuse jurisdiction on grounds of *forum non conveniens* and the choice of law provision remained effective. The Hamburg Rules are not in force in England and Wales and there are no current plans to change this. The case therefore challenged the principle of the supremacy of party autonomy long recognized by the English courts.

A month after the commencement of the Canadian proceedings, OTAL commenced proceedings in England against Magic and Blue Banana claiming a declaration that there was no short delivery and an injunction restraining the defendants from pursuing the proceedings in Canada. Gross J granted permission to serve out of the jurisdiction and an anti-suit injunction. Although Magic and Blue Banana filed an acknowledgment of service indicating an intention to contest the jurisdiction, again at the instigation of the insurers, no application to contest jurisdiction was ever made and therefore both Magic and Blue Banana were to be treated as having accepted the jurisdiction of the English court.

Despite the anti-suit injunction, the Canadian proceedings continued. OTAL contested the jurisdiction of the Canadian court but was unsuccessful as it was held that s 46 removed the binding effect of the English jurisdiction clause and Canada was the

8. Cl 25(1). Cl 25(2) further provided: "In the event that anything herein contained is inconsistent with any applicable international convention or national law which cannot be departed for [*sic*] private contract, the provisions hereof shall to the extent of such inconsistency but no further be null and void." It was accepted that this provision did not apply as the Canadian Marine Liability Act, s 46 (see fn 9 *infra*) was not mandatory but permissive.

9. "46(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada where:

- (a) the actual port of loading or discharge under the contract, is in Canada;
- (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
- (c) the contract was made in Canada."

10. UN Convention on the Carriage of Goods by Sea 1978, in force in Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, the Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Saint Vincent and the Grenadines, Syria, Tanzania, Tunisia, Uganda and Zambia as at October 2005. See *The Ratification of Maritime Conventions* (LLP).

appropriate forum. OTAL's appeal to the Federal Court Judge was dismissed and OTAL appealed to the Canadian Federal Court of Appeal. Before the hearing of that appeal, which was fixed for June 2005, OTAL were granted permission to join the insurers as defendants to the English action and to serve on the insurers out of the jurisdiction in Canada.

The defendants sought orders that service on the insurers be set aside; the proceedings against Magic and Blue Banana be stayed and the anti-suit injunction be discharged. OTAL sought an anti-suit injunction against the insurers.

The decision at first instance

Langley J refused the defendants' three applications,¹¹ and granted OTAL's application for an anti-suit injunction against the defendant insurers. The key question was whether the "clash of jurisdictions, with the appalling prospect of an apparent challenge from this Court to Canadian legislation and the cost and disruption of the same claims proceeding in two jurisdictions with the added risk of different outcomes"¹² was sufficiently exceptional to justify the English court not upholding the English jurisdiction agreement. Langley J held that that issue had to be decided in favour of OTAL as the parties should abide by the agreement that they had made.

The decision of the Court of Appeal

The Court of Appeal considered two issues: first, whether the proceedings against Magic and Blue Banana should be stayed and the proceedings against the insurers set aside; and, secondly, if either or both proceedings should continue, whether they should be enforced by continuing the anti-suit injunctions.

As regards the stay of the proceedings against Magic and Blue Banana and the application to set aside the proceedings as against the insurers, the critical issue was the extent to which, if at all, it is appropriate for the English court to have regard to the Marine Liability Act 2001, s 46(1), an equivalent of the Hamburg Rules in relation to jurisdiction in Canadian domestic law. The Court of Appeal restated the principle governing the exercise of the court's discretion to stay an action brought in the country which has been agreed by the parties as set out in *The Eleftheria*,¹³ *The El Amria*¹⁴ and *Donohue v. Armco*¹⁵ that strong reasons are required for staying the proceedings in the forum in which the parties have agreed that they will be litigated.

The conflict between the provisions of the Canadian legislation and the agreed jurisdiction of England is to be resolved by the rules of private international law of the court in which the question has to be resolved, ie, the proper law of the contract, which

11. Save for setting aside service on the insurers on the ground of CPR Rule 6.20(8)(a) that a claim was made in tort where damage was sustained within the jurisdiction. Service was upheld on the grounds of CPR Rule 6.20(17) for the purpose of seeking a costs order against a third party and CPR Rule 6.20(3) that the insurers were necessary or proper parties to the claim against Magic and Blue Banana.

12. [2005] 1 Lloyd's Rep 252, [38].

13. [1970] P 94.

14. [1981] 2 Lloyd's Rep 119.

15. [2001] UKHL 64; [2002] 1 Lloyd's Rep 425.

was English law.^{15A} Although there was no direct authority on how to resolve such a conflict, the court relied on the decision of Thomas J in *Akai Pty Ltd v. People's Insurance Co Ltd*.¹⁶ In that case an insurance policy between a Singapore insurer and an Australian subsidiary of a multi-national company provided for English governing law and English court jurisdiction and contained a 12-month time bar. Under the Australian Insurance Contracts Act 1984, s 8 if the proper law of the contract would be the law of an Australian state but for an express provision to the contrary included in the contract, then, notwithstanding that provision, the proper law of the contract was to be the law of that state. The Act forbade contracting out. Section 52 rendered any provision void if it had the effect of modifying the operation of the provision of the Act to the prejudice of the insured. The reason that the insurers were anxious to have the case determined in England was twofold: the law in Australia was more favourable to the insured as it restricted the insurers' right to decline to pay a claim in the event of a breach of a policy term. The knock-out blow, however, was that, if English law applied to the policy, it was common ground that the claim was time barred pursuant to the express 12-month time bar in the policy.

The High Court of Australia refused a stay of the proceedings in New South Wales.¹⁷ It upheld the policy of Australian law and the Australian Constitution rather than the parties' agreement, as "the policy of the Act, evinced by s 8, is against the use of private engagements to circumvent its remedial provisions".¹⁸ Secondly, the English jurisdiction clause was rendered void. In England the insurers sought a declaration of non liability and summary judgment in reliance on the time bar. The insured sought a stay of the English proceedings and the insurer sought an anti-suit injunction. Thomas J dismissed the argument that the High Court of Australia had applied the same principles as were followed by the House of Lords in *The Hollandia (The Morviken)*.¹⁹ The real question was whether the English court should give effect to public policy as set out in an Australian statute as determined by the High Court of Australia. He upheld the English jurisdiction agreement and held that there were no strong reasons for deciding not to hold the parties to their bargain. He also granted an anti-suit injunction.

In *Magic Sportswear* the Court of Appeal approved the decision in *Akai* and concluded that there was no strong reason not to hold the parties to the English jurisdiction clause.^{19A} Furthermore, the Court of Appeal upheld the anti-suit injunctions. Although the English

15A. Followed in *Horne Linie GmbH & Co v. Panamericana Formas E Impresos SA* [2006] EWHC 373 (Comm).

16. [1998] 1 Lloyd's Rep 90; noted FMB Reynolds, "Overriding policy of the forum: the other side of the coin" [1998] LMCLQ 1.

17. (1996) 188 CLR 418; *rev'sg* (1995) 126 FLR 204 (NSW SC(CA)).

18. (1996) 188 CLR 418, 447.

19. *The Hollandia* [1983] 1 AC 565; *sub nom The Morviken* [1983] 1 Lloyd's Rep 1. The House of Lords held that the English court should not stay its proceedings where jurisdiction was founded on the arrest of a sister ship within the jurisdiction, despite the fact that the bill of lading contained an Amsterdam court jurisdiction clause and Netherlands governing law clause. Both clauses were null and void pursuant to Art III, r 8 of the Hague-Visby Rules, given effect to by the Carriage of Goods by Sea Act 1971. The clauses sought to lessen the carrier's liability, as the Amsterdam court would have applied the Hague Rules, which have a lower package limitation. See also *Baghlaf Al Zafer Factory Co v. Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229 and N Gaskell, *Bills of Lading: Law and Contracts* (LLP, 2000) (hereafter "*Gaskell*"), §§ 20.74, 20.202 and 20.220.

19A. The decision has since been followed in *Horne Linie GmbH & Co v. Panamericana Formas E Impresos SA, Ace Seguros SA* [2006] EWHC 373 (Comm).

court can no longer grant this remedy to restrain a defendant from pursuing proceedings in a Member State of the EC Regulation or Contracting State of the EC Jurisdiction or Lugano Conventions,²⁰ this does not affect the use of anti-suit injunctions where the EC Regulation and EC Jurisdiction and Lugano Conventions do not apply, as different considerations apply where there is no mutual agreement as to jurisdiction between two states. Furthermore, an anti-suit injunction to enforce an arbitration agreement may still be granted, as arbitration falls outside the scope of the EC Regulation and Conventions.²¹

Does Art 23 of the EC Regulation apply?

Apparently no argument was made that the EC Regulation applied in *Magic Sportswear*. The claimant, OTAL, an English company, was presumably domiciled²² in England, a Member State. There is no decision to that effect but it will now be assumed that this was the case. OTAL commenced proceedings in England in September 2003 after the EC Regulation came into force. The parties had chosen the courts of a Member State, ie, England.

Article 23(1) of the EC Regulation provides that, if either of the parties is domiciled in a Member State (eg, England) and a court of a Member State has been chosen (eg, the English court), that court shall have exclusive jurisdiction,²³ provided the formalities of Art 23 have been satisfied.²⁴

Where neither party is domiciled in a Member State but the parties have chosen an exclusive English jurisdiction clause, Art 23(3) of the EC Regulation applies. This provision, unlike Art 23(1), does not provide that the English court shall have jurisdiction, but provides that the courts of other Member States shall have no jurisdiction over the parties' disputes unless the English court has declined jurisdiction. Pursuant to the EC

20. *Erich Gasser GmbH v. MISAT SRL (Case C-116/02)* [2003] I ECR 14693; [2005] QB 1; [2004] 1 Lloyd's Rep 222; noted Y Baatz, "Who decides on jurisdiction clauses?" [2004] LMCLQ 25; Sir J Mance, "Exclusive Jurisdiction Agreements and European Ideals" (2004) 120 LQR 357; A Dickinson, "A Charter for Tactical Litigation in Europe?" [2004] LMCLQ 273 and *Turner v. Grovit (Case C-159/02)* [2004] I ECR 3565; [2005] 1 AC 101; [2004] 2 Lloyd's Rep 169; *JP Morgan Europe Ltd v. Primacon AG* [2005] EWHC 508 (Comm), [65]; [2005] 2 Lloyd's Rep 665, 675.

21. *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd (The Hari Bhum)* [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; noted J Harris, "Arbitration Clauses and the Restraint of Proceedings in Another Member State of the European Union" [2005] LMCLQ 159; *West Tankers Inc v. RAS Riunione Adriatica di Sicurtà (The Front Comor)* [2005] EWHC 454; [2005] 2 Lloyd's Rep 257. P Gross, "Anti-suit injunctions and arbitration" [2005] LMCLQ 10.

22. See the EC Regulation, Art 60.

23. Art 23 is subject to limited exceptions in consumer, insurance and employment contracts due to the need to provide consumer protection and to overriding considerations such as the variation of the agreement by the parties by submission to the jurisdiction of the court of another state (Art 24) or an international Convention (Art 71). If proceedings are commenced by one of the parties in the courts of another Member State which is first seised, the European Court of Justice has held in *Erich Gasser GmbH v. MISAT SRL (Case C-116/02)* [2003] I ECR 14693; [2005] QB 1; [2004] 1 Lloyd's Rep 222 that the court second seised, even if apparently chosen, must of its own motion stay its proceedings until the court first seised has established that it has jurisdiction or that there is a jurisdiction clause and that it does not have jurisdiction. This decision has been criticized: see fn 20 *supra*; A Briggs, "Anti-suit injunctions and Utopian Ideals" (2004) 120 LQR 530; and A Briggs and P Rees, *Civil Jurisdiction and Judgments*, 4th edn (LLP, 2005) (hereafter "Briggs & Rees"), §§2.38, 2.198 and 2.207. This assumes that the two sets of proceedings in different Member States involve the same cause of action: see *JP Morgan v. Primacon*, *supra* fn 20.

24. Again this is assumed here.

Regulation, Art 4,²⁵ the English court has to apply its national law to determine its jurisdiction and may decline jurisdiction.²⁶

Article 4 of the EC Regulation cannot apply to the situation where one of the parties to an English jurisdiction agreement is domiciled in a Member State, even though that party is the claimant and not the defendant. The important principle is that of party autonomy, recognized in Recital 14.²⁷ Both parties are bound by the agreement, so that it matters not who brought the proceedings and who is the defendant. Article 4 of the EC Regulation has been amended to make it clear that it is subject, not only to Art 22, just as Art 4 of the EC Jurisdiction and Lugano Conventions is subject to Art 16, but, unlike those Conventions,²⁸ that it is also expressly subject to Art 23. Thus, if the defendant is not domiciled in a Member State to the EC Regulation, Art 23(1) will still apply if the claimant is, and the English court is chosen. It follows that the English court would have no discretion to refuse to exercise jurisdiction, as Art 23(1) is mandatory and Art 4 is subject to that provision. Thus, the English court could not refuse jurisdiction in favour of the courts of another Member State.

Does Art 23 of the EC Regulation apply mandatorily where the other state is a non-Member State? The impact of *Owusu*

It seems that the effect of Art 23(1) goes further and the English court has no discretion to stay its jurisdiction in favour of a non-Member State such as Canada in *Magic Sportswear*. The issue was considered in the context of the EC Jurisdiction Convention in *Ultisol v. Bouygues*.²⁹ In that case the defendant was domiciled in France and the jurisdiction chosen was that of a Contracting State, ie, England. At first instance Clarke J held that the application of the EC Jurisdiction Convention, Art 17 did not exclude the jurisdiction of the courts of a non-Contracting State (South Africa), even where one of the parties proceeds in the courts of such state in breach of an exclusive jurisdiction agreement for the courts of a Contracting State. In other words, the English court still has a discretion at common law to determine whether a party should be permitted to proceed in a non-Contracting State in breach of its exclusive jurisdiction clause in favour of the English courts because the Convention is not concerned with the jurisdiction of non-Contracting States. It is noteworthy that Clarke J thought that the purpose of Art 17 was to exclude the jurisdiction of the courts of the other Contracting States where parties (whether domiciled in a Contracting State or not) have agreed to the exclusive or non-exclusive jurisdiction of the courts of a Contracting State. His judgment is couched in terms of not excluding the

25. Art 4(1) provides: "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State."

26. See J Hill, *International Commercial Disputes in English Courts*, 3rd edn (Hart, 2005) (hereafter "Hill"), § 5.3.5 and fn 142.

27. Recital 14 states: "The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation."

28. Even though there is no express exception in Art 4 of the Conventions, see the opinion of Darmon AG in *Brenner and Noller v. Dean Witter Reynolds Inc (Case C-318/93)* [1994] I ECR 4275, 4280; *Dicey & Morris: The Conflict of Laws*, 13th edn (Sweet & Maxwell, 2000) (hereafter "*Dicey & Morris*"), 12-090, fn 66 the last two sentences; A Briggs, *The Conflict of Laws* (Clarendon, 2000), 68; and *Cheshire and North's Private International Law*, 13th edn (Butterworth, 1999), 236 and 263-266.

29. [1996] 2 Lloyd's Rep 140, 146-148.

jurisdiction of a non-Contracting State rather than whether Art 17 imposes an obligation on the court chosen to exercise jurisdiction. Although the case went to the Court of Appeal,³⁰ it did not consider this issue. In a brief judgment in *Eli Lilly and Co v. Novo Nordisk A/S*,³¹ the Court of Appeal, without referring to *Caspian v. Bouygues*, reached the same conclusion as Clarke J. Morritt LJ thought the position “straightforward.”³²

Dicey & Morris state that whether the English court can stay in favour of a non-Member State “has little practical significance since it will be a very rare case in which an English court will not give effect to a valid English jurisdiction clause”.³³ However, *Bouygues* was just such a rare case.³⁴ There, despite the exclusive English jurisdiction agreement, the Court of Appeal stayed English liability, but not limitation, proceedings in favour of a non-Contracting State (South Africa), due to multiple proceedings in South Africa.

The practical significance for OTAL in *Magic Sportswear* would have been to avoid the legal costs. At first instance Langley J had already commented that the scale of the litigation was out of all proportion to the sum concerned. If there were a clear rule with no discretion, that might be avoided.

It is now necessary to review the decisions in *Ultisol v. Bouygues* and *Eli Lilly v. Novo Nordisk* in the light of the recent decision of the European Court of Justice (“ECJ”) in *Owusu v. Jackson*.³⁵ That case did not concern a jurisdiction clause but Art 2 of the EC Jurisdiction Convention. However, the basic principles underlying that Article may be equally applicable to the EC Regulation and jurisdiction agreements.³⁶

In *Owusu* proceedings were brought by Mr Owusu, domiciled in the United Kingdom, against Mr Jackson, a defendant also domiciled in the UK, for damages in respect of an injury suffered by the claimant in Jamaica. Mr Owusu also sued various Jamaican

30. *Caspian v. Bouygues* [1998] 2 Lloyd’s Rep 461.

31. [2000] ILPr 73. The issue was not decided by the Court of Appeal in *DSM Anti-Infectives BV v. Smith Kline Beecham Plc* [2003] EWCA Civ 1199; [2004] 2 CLC 900, as Peter Gibson LJ thought that a decision should await a case where the court would be minded to grant a stay on *forum non conveniens* grounds: see *ibid*, [46].

32. *Ibid*, [17].

33. *Dicey & Morris*, § 12–090, fn 66, the last two sentences.

34. See also *Donohue v. Armco* [2001] UKHL 64; [2002] 1 Lloyd’s Rep 425. For the converse situation, where the English court refuses to enforce a foreign jurisdiction agreement because of multiple proceedings, see *Citi-March Ltd v. Neptune Orient Lines Ltd* [1997] 1 Lloyd’s Rep 72; *The MC Pearl* [1997] 1 Lloyd’s Rep 566; *Konkola Copper Mines Plc v. Coromin* [2006] EWCA Civ 5; [2006] 1 Lloyd’s Rep 410; and *Gaskell*, §§ 20.213–20.219.

35. (*Case C–281/02*) [2005] I ECR 1383; [2005] 1 Lloyd’s Rep 452; referred from [2002] EWCA Civ 877; [2002] ILPr 45; applied in *Konkola Copper Mines Plc v. Coromin* [2005] EWHC 898; [2005] ILPr 39 and *CNA Insurance Co Ltd v. Office Depot International (UK)* [2005] EWHC 456; [2005] WL 1033527; *Koshy v. DEG-Deutsche Investitions- und Entwicklungsgesellschaft mbH* [2006] EWHC 17. *Owusu* was noted by E Peel, “*Forum Non Conveniens* and European Ideals” [2005] LMCLQ 363; A Briggs, “*Forum Non Conveniens* and Ideal Europeans” [2005] LMCLQ 378; A Briggs, “The Death of Harrods: *Forum Non Conveniens* and the European Court” (2005) 121 LQR 535; D Jackson, “Jurisdiction in Europe—and *forum non conveniens*” (2005) 5(2) STLI 33, and C Hare, “*Forum non conveniens* in Europe: game over or time for reflection” [2006] JBL 157. This decision overturns the earlier decision in *Re Harrods (Buenos Aires) Ltd (No. 2)* [1992] Ch 72, applied in *The Po* [1991] 2 Lloyd’s Rep 206. Although the House of Lords in *Re Harrods* referred this issue to the European Court of Justice, the case settled.

36. See the EC Regulation, Recital 11, which states: “The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor . . .” See also Recital 14 (quoted *supra*, fn 27). For a contrary view, see A Briggs (2002) 73 BYBIL 453, 457, before the decision of the ECJ in *Owusu*. In the light of the reasoning in *Owusu*, this view is not accepted by the author.

companies in tort in the same proceedings. Mr Jackson and three other defendants applied for a declaration that the English court should not exercise its jurisdiction, as the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice. The Court of Appeal referred issues of interpretation to the ECJ as to whether it is inconsistent with the EC Jurisdiction Convention where domicile is founded on Art 2 (ie, the defendant's domicile) to decline to hear proceedings in favour of the courts of a non-Contracting State where the jurisdiction of no other Contracting State is in issue and there is no connecting factor to any other Contracting State.

The ECJ stated that there is no condition for the application of the EC Jurisdiction Convention that there should be a legal relationship involving a number of Contracting States. Although there must be an international element for the jurisdiction rules of the Convention to apply, this could be derived from the involvement of a Contracting State and a non-Contracting State. It specifically remarked that the rules on express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States.³⁷ Article 2 is a fundamental rule of jurisdiction of a mandatory nature and there can be no derogation from the principle that it lays down except in the cases expressly provided for by the Convention. Respect for the principle of certainty was stressed. Certainty could not be fully guaranteed if the court having jurisdiction was allowed to apply the principle of *forum non conveniens*. Application of the doctrine would undermine the predictability of the rules laid down by the Convention, in particular that of Art 2, and therefore undermine the principle of legal certainty. It would also affect the uniform application of the Rules. Thus, the ECJ concluded that the Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Art 2 on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other Contracting State is in issue, or the proceedings have no connecting factors to any other Contracting State.

If Art 23(1) is also mandatory in nature, by analogy with *Owusu*, and a party domiciled in a Member State to the EC Regulation is entitled to the legal certainty and predictability of jurisdiction in the court of the Member State it has chosen, and the English court cannot decline jurisdiction in favour of a non-Member State.³⁸ The English court would reach the same conclusion as in *Magic Sportswear* but by a different route. The national legislation of any state, non-Member or Member State, would be irrelevant to the validity of the jurisdiction agreement.³⁹

This issue came before Gloster J in *Antec International Ltd v. Biosafety USA Inc*^{39A} but, in view of the decision that no stay of the English proceedings would be given, the judge thought it unnecessary to express a view on "what is an extremely difficult question of European law and where it is highly likely that, for the issue to be resolved, it would be

37. [2005] 1 Lloyd's Rep 452, [28].

38. See Hill, §§ 5.3.6 and 9.5.10; and Hare [2006] JBL 157, fn 98.

39. *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* (Case C-159/97) [1999] I ECR I 1597; [1999] ILPr 492. See *Gaskell*, § 20.74 and Part 20C7, esp § 20.124.

39A. [2006] EWHC 47 (Comm).

necessary for there to be a reference to the European Court of justice".^{39B}

Exceptions to *Owusu*—a limited discretion?

In *Owusu* the ECJ did not go on to consider whether there are any limits to their decision, eg, if there were "identical or related proceedings pending before a court of a non-Contracting State; a convention⁴⁰ granting jurisdiction to such a court or a connection with that State of the same type as those referred to in Art 16 of the Brussels Convention",⁴¹ as none of these circumstances arose in that case. Articles 16, 17, 21 and 22 of the EC Jurisdiction Convention and Arts 22, 23, 27 and 28 of the EC Regulation do not apply to non-Contracting or non-Member States. Both Edwin Peel and Adrian Briggs⁴² argue very compellingly that the courts of a Member State should still have a limited discretion to stay proceedings even where a defendant is domiciled in a Member State in these three circumstances, not as a result of a reflexive effect. It would be very odd if, for example, the principle of legal certainty based on the defendant's domicile were to override the autonomy of the parties who have clearly elected to have their disputes determined in the courts of a non-Member State.⁴³

In *Konkola Copper Mines Plc v. Coromin*,⁴⁴ Colman J stated that, if a reinsurance contract contained an exclusive Zambian jurisdiction clause,⁴⁵ the English court still had a discretion even though English jurisdiction was founded on Art 42 in the case of the English reinsurers and Art 6(1) in the case of the other EU or Swiss reinsurers. However, in view of the multiparty litigation, he would not have stayed the English proceedings. The Court of Appeal upheld his decision, but there was no appeal on this point, and the Court of Appeal neither approved nor disapproved of it.^{45A} The full ramifications of the *Owusu* decision have yet to be worked out.

Lis alibi pendens and a jurisdiction agreement

The exception of *lis alibi pendens* arises in *Magic Sportswear* as the Canadian court was first seised. The English court would probably still have a discretion to stay its proceedings. It is important that Art 27 of the EC Regulation would not have a reflexive effect as this would require the English court to stay its proceedings in favour of the Canadian court, until the Canadian court had established its jurisdiction. There is no reciprocal agreement between England and Canada that the court second seised must stay

39B. *Ibid*, [19].

40. Where the ECJ refers to "convention" here, it must mean a jurisdiction agreement, as this is to what the English Court of Appeal referred: [2002] EWCA Civ 877; [2002] ILPr 45 813, paras [48] (5), 55 and 56; as did Leger AG in his Opinion in the case at [63], [69], [77] and [80]. See also Peel [2005] LMCLQ 363, 375 fn 75.

41. [2005] I ECR 1383, [48].

42. Peel [2005] LMCLQ 363; Briggs [2005] LMCLQ 378; and Briggs & Rees, §§ 2.219–2.230. See also Hill, §§ 9.5.13–9.5.18 and 9.5.23.

43. Thus, in *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382 the Court of Appeal declined to refer to the ECJ the question whether an English court still retains the power to stay proceedings in a case where there was an exclusive Egyptian jurisdiction clause or on *forum conveniens* grounds: *ibid*, 391–392, *per* Neill LJ. See also the Opinion of Darmon AG in *Brenner v. Dean Witter Reynolds (Case C-318/93)* [1994] I ECR 4275 and *American Motorists Insurance Co v. Cellstar* [2003] EWCA Civ 206; [2003] Lloyd's Rep IR 295.

44. [2005] EWHC 898; [2005] ILPr 39.

45. Colman J held that the reinsurers had not shown a good arguable case that there was such a clause.

45A. [2006] EWCA Civ 5, [46]; [47] and [71]; [2006] 1 Lloyd's Rep 410, 418–419, 423.

its proceedings until the court first seised has established its jurisdiction. Due to this lack of reciprocity, the decision in *Gasser*⁴⁶ would not apply in this situation and the English court would no doubt give effect to the English jurisdiction agreement, unless there were multi-party litigation.⁴⁷

International Conventions

In *Owusu* the ECJ did not mention the position where the other state applies an international Convention. The EC Regulation, Art 71 provides that the EC Regulation shall not affect any Conventions to which the Member States are parties and which in relation to particular matters govern jurisdiction. Where another Member State does give effect to the Hamburg Rules,⁴⁸ then the jurisdiction agreement may be overridden as a result of Art 71.⁴⁹ Where another non-Member State is a party to the Hamburg Rules, Article 71 would not apply, but *Owusu* does not decide whether the English court has a discretion to consider the issue of the international Convention.

An international Convention was not in issue in *Magic Sportswear*, as Canada has not given the force of law to the Hamburg Rules. As Rix LJ said in that case, “England and Canada are not part of a club, who have agreed to be bound by its rules. They have been offered the chance to join, but have declined”.⁵⁰ This is important, as other Member States to the EC Regulation or Contracting States to the EC Jurisdiction and Lugano Conventions also have jurisdiction rules similar to the Hamburg Rules, although they have not ratified them.⁵¹

The 2005 Hague Convention on Choice of Court Agreements

Colman J’s plea for “an international jurisdiction and judgments convention of the widest possible application”, quoted at the beginning of this Comment, seems unlikely to materialize. As it has not been possible to reach agreement on such a Convention, it was decided to try for a Convention of more limited scope and on 30 June 2005 the Final Act of the 20th Session of the Hague Conference on Private International Law was signed, including the Convention on Choice of Court Agreements.⁵² However, even if the Convention comes into force,⁵³ it does not apply to the carriage of goods⁵⁴ and would not assist in a bill of lading claim such as that in *Magic Sportswear*.

46. See *supra*, fn 23.

47. See, eg, *Donohue v. Armco* [2001] UKHL 64; [2002] 1 Lloyd’s Rep 425.

48. Such as Austria. See fn. 10.

49. See, eg, *The Bergen* [1997] 1 Lloyd’s Rep 380 for the effect of the Arrest Convention on a German jurisdiction agreement. See *Gaskell*, Part 20C7, esp. § 20.128. *Nurnberger Allgemeine Versicherungs AG v. Portbridge Transport International BV (Case C-148/03)* [2004] I ECR 10327 considers Arts 20 and 57(2).

50. [2005] 2 Lloyd’s Rep 170, [75].

51. Eg, Denmark, Finland, Norway and Sweden. See, eg, P Wetterstein, “Jurisdiction and Conflict of Laws under the New Rules on Carriage of Goods by Sea”, H Honka (ed), *New Carriage of Goods by Sea: The Nordic Approach, Including Comparisons with some Other Jurisdictions* (Institute of Maritime and Commercial Law, Abo Akademi University, Abo, 1997); and T Falkanger, HJ Bull and L Brautaset, *Scandinavian Maritime Law The Norwegian Perspective*, 2nd edn (2004), §§ 1.52 and 14.31, on the Maritime Code of 1994.

52. See http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

53. Art 31.

54. Art 2(f) excludes the carriage of passengers and goods and Art 2(g) excludes marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage. The Convention does, however, apply to contracts of insurance and reinsurance that relate to such matters (Art 17).

Conclusion

If a litigant wishing to use the English courts asks for advice on the effectiveness of an exclusive English jurisdiction clause, it may be surprised to find that the answer depends on where the parties are domiciled. The parties' domicile may determine whether the English court has a discretion to exercise its jurisdiction. The decision in *Magic Sportswear* is clearly correct and would have been arrived at whether the English court applied the rules under the EC Regulation or the discretion under the English common law rules. However, it is important to clarify the scope of the EC Regulation in relation to jurisdiction clauses as any discretion could make a difference, particularly where there are multiple proceedings.

Yvonne Baatz*

REINVENTING THE WHEEL: RECENT INTERPRETATIONS OF *DUNLOP* ON THE PENALTY DOCTRINE

Murray v. Leisureplay
Ringrow v. BP Australia

There are two recent cases of high authority and much importance concerning the doctrine of penalties. One is the Court of Appeal's decision in *Murray v. Leisureplay Plc*¹ concerning an employment contract. The other is a decision of the High Court of Australia in the context of arrangements affecting the sale of fuel at petrol stations: *Ringrow Pty Ltd v. BP Australia Pty Ltd*.² In both cases, the court found there was no penalty. Whilst the results were similar, the Court of Appeal and the High Court offer quite different interpretations of Lord Dunedin's classic test in *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co.*³

Murray v. Leisureplay

In *Murray*, the Court of Appeal upheld the validity of a so-called "golden parachute" clause. In 1998, Kenneth Murray established Murray Financial Corporation (later, Leisureplay Plc). The corporation engaged Mr Murray as Chief Executive Director. The service agreement stipulated that "the Executive" was entitled to either one year's written notice, or payment in lieu of notice, before the contract of employment could be lawfully terminated. Pursuant to cl 17.1, non-compliance with the notice provisions would entitle the Executive to "a sum equal to one year's gross salary, pension contributions and benefits in kind". On 7 May 2003, Mr Murray received a letter from Leisureplay which purported to terminate his employment with effect from 30 June 2003. The company did

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1. [2005] EWCA Civ 963; [2005] IRLR 946.

2. [2005] HCA 71.

3. [1915] AC 79.