House of Lords before Lords Nicholls of Birkenhead ; Hoffmann ; Hobhouse of Wood-borough ; Millett ; Scott of Foscote 13th December, 2001

LORD NICHOLLS OF BIRKENHEAD My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hobhouse of Woodborough. For the reasons he gives I would refer to the European Court of Justice the question formulated by him on the interpretation of the 1968 Brussels Convention.

LORD HOFFMANN My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hobhouse of Woodborough. For the reasons he gives I would refer to the European Court of Justice the question formulated by him on the interpretation of the 1968 Brussels Convention.

LORD HOBHOUSE OF WOODBOROUGH My Lords,

3. By Article 3(1) of the Protocol on the interpretation of the 1968 Brussels Convention by the European Court signed at Luxembourg on 3rd June 1971 (the 1971 Protocol) made part of English domestic law by s.2(1) of the Civil Jurisdiction and Judgments Act 1982, your Lordships' House is under an obligation, where a question of interpretation of the Brussels Convention is raised in a case pending before it and the House considers that a decision is necessary in order to give judgment, to request the European Court of Justice to give a ruling on that question. Your Lordships are in agreement that such a question of the interpretation of the Brussels Convention is raised in the present case and accordingly will refer the question to the Court of Justice. In this speech I will therefore, besides formulating the question of interpretation, state the facts which have given rise to this question and provide a statement of the English domestic law which is relevant to explain how and why the question arises and to provide a brief discussion of the arguments. The facts which I will set out are derived from the findings of fact made by the Court of Appeal in the present case and by the Employment Tribunal in its judgment of 10 September 1998. These findings have been made in contested proceedings after receiving evidence from and the submissions of the parties. Before your Lordships, the appellants have again sought to present a different view of the facts but it is upon the facts as so found that the question of interpretation arises and is referred. Your Lordships have heard full argument upon the relevant questions of English domestic law. Mr Turner himself has not taken any part in this hearing and has not been represented. In order to be able fully to consider the legal arguments your Lordships requested the assistance of an *amicus curiae* to present the relevant legal arguments and materials to the House. I am sure that I speak for all your Lordships in expressing my gratitude to Mr Laurence Rabinowitz for his assistance.

***The Facts*:**

4. The parties to the present proceedings are as follows:

   Mr Gregory Paul Turner, the claimant, who is a British citizen and is, and has at all material times been, domiciled in the United Kingdom.

   Mr Felix Fareed Ismail Grovit, the first defendant who is likewise a British citizen, described by the claimant as being domiciled in the United Kingdom and by Mr Grovit as being domiciled in Belgium. He appears to have residences in both countries. Harada Ltd, the second defendant, which is a company incorporated in the Republic of Ireland but carries on its business in the United Kingdom as a UK registered overseas company under the name 'Chequepoint UK' with its seat in the United Kingdom. Changepoint SA, the third defendant, which is a company incorporated in the Kingdom of Spain and carries on business there. Mr Turner is the respondent to the appeal to this House; the defendants are the appellants. As previously stated the former was not represented before us; the latter have throughout these proceedings been jointly represented by senior and junior counsel.

5. The two defendant companies are part of the *'Chequepoint Group'*. This is a group of companies incorporated in a number of countries including various tax havens. The member companies have varied from time to time as new companies have been formed and existing ones dissolved. The directing mind of the group is Mr Grovit who effectively controls what the group does. The principal business of the group is *bureaux de change* and companies in the group carry on business in a number of different countries. But the origin of the group was the United Kingdom and it is in the United Kingdom and Belgium that it has its head management.

6. Mr Turner is a qualified English solicitor with a practising certificate (*ie*, a licence to practise as an English solicitor) from the Law Society London. He has never at any time had any qualification to act as a Spanish lawyer nor is he competent or permitted under Spanish Law to practise as a Spanish lawyer in Spain.

7. In 1990 Mr Turner entered the employment of China Security Ltd, a company in the Chequepoint group, incorporated in Hong Kong and registered under Part XXIII of the UK Companies Act 1985 as an overseas company in the United Kingdom with its place of business at 43 Oxford Street, London. The terms of Mr Turner's contract of employment were set out in a letter on the writing paper of that company dated 10 April 1990 signed by the "*Group personnel director*" on behalf of China Security Ltd and countersigned by Mr Turner. The letter described the company as the employment company for the group. His employment was to be as "Group Solicitor" with responsibility for all group legal matters apart from "*company secretarial*". He was to be based in London but could be required to travel. His salary was a sum in sterling. Detailed provisions covered pension contributions, health insurance, the provision of a company car, holidays, normal hours of work, notice, *etc*. The company would pay his practising certificate fee and for his Law Society membership. His role as group solicitor was to cover all group UK conveyancing and (if requested) liaison on other conveyancing; all "*commercial matter*" relating to existing companies within the group, new business, joint ventures and acquisitions; all UK litigation; all

UK legal enquiries; and "*other legal matters which may arise from time to time within the group*". He reported to Mr Grovit. At the same time as signing these terms he also signed a confidentiality/ non- solicitation/ non-competition undertaking.

8. At the end of 1990 Mr Turner's contract was (with his agreement) transferred to a British Virgin Islands company, likewise registered in the United Kingdom, called Chequepoint UK Ltd and on 31 December 1997 it was again transferred, this time to Harada Ltd. Each of these transfers took place as part of a transfer of assets from one group company to another and did not alter the terms of Mr Turner's contract. The proper law of his contract continued to be English law.

9. In November 1996 Mr Turner had indicated that he was minded to resign from his employment as he wanted to learn Spanish and would like to live in Spain while he was doing so. His employers were anxious to retain his services and agreed that he could move his office to Spain and do the work there that he would have done in London. This was what occurred and the London office remained his address registered with the Law Society and he remained the person registered to accept service there for Chequepoint. He continued to report to Mr Grovit in Brussels. The Madrid office was a small one and it was contemplated that Mr Turner would not stay there for more than a year and would then move on to the Paris office. The terms of his relocation were agreed between Chequepoint UK and Mr Turner in a letter dated 21 May 1997 which varied the terms of the letter of 10 April 1990. It was again on the company writing paper and signed and countersigned. It provided that his "present salary of £65,000 will continue"; Chequepoint UK would continue to pay the pension contribution and medical cover, continue to provide and pay for a company car, and continue to pay for his annual practising certificate and Law Society membership; the holiday and notice provisions would continue as before. In other words, although he was to relocate to the Madrid office his previous contract was to continue in force and his employer was to continue to be Chequepoint UK. He continued to be paid by Chequepoint UK (and then by Harada) in sterling with deductions as required by English law.

10. However Mr Turner did not move to Spain until November 1997. He took a six month lease of a flat in Madrid. On 16 February 1998 he gave notice to Harada. He did not go into the Madrid office after 26 February. He had only worked in Spain for a total of 35 days. He did not renew the lease on the flat when it expired. He returned to London where on 2 March 1998 he commenced proceedings for unfair and wrongful dismissal against Harada in the Employment Tribunal in London. These proceedings were served on Harada at its registered address for service in London. The nature of the claim he made was that there had been repudiatory breaches of his contract of employment which were tantamount to dismissing him. He alleged that there had been attempts to involve him in unlawful and irregular conduct in relation to the misuse of, and failure to account for, deductions from the wages and salaries paid to the employees of group companies. It would have been material for Harada, besides denying his allegations, to allege in answer that Mr Turner had been in breach of his obligations and that it would have been justified in dismissing him (whether or not it knew of such breaches at the time). The allegations later made against Mr Turner in the Madrid proceedings would be directly material to the determination of his claim in the Employment Tribunal.

11. Harada appeared before the Tribunal and took two initial objections to the proceedings. Harada objected to the constitution of the Tribunal and asked that the matter should be transferred to a differently constituted Tribunal. Harada also submitted that the claims did not come within the domestic law jurisdiction of the Tribunal since the place of Mr Turner's employment was, at the time of its termination, Spain not the United Kingdom. They also argued in favour of being sued in Ireland (their country of incorporation) or Belgium (as being where Mr Grovit lived). Harada also relied upon Article 5.1 of the Brussels Convention. None of these objections was upheld. Having considered the parties' arguments and the evidence tendered, the Tribunal held that it did have jurisdiction to entertain the claim both under the relevant English statutes and under the Brussels Convention. Harada was domiciled in England. The Tribunal gave its reasoned decision on 10 September 1998.

12. On 14 October 1998, Harada exercised its right to appeal against this decision to the Employment Appeal Tribunal. The appeal was dismissed by the Appeal Tribunal. It has sought to appeal further from the Appeal Tribunal to the Court of Appeal. However, on the basis of the jurisdiction which had been held to exist, the Tribunal has considered the substantive claim and has given judgment for Mr Turner and has awarded him substantial damages.

13. On 29 July 1998, Changepoint and (apparently) Harada asked for conciliation in Spain with Mr Turner. They issued the requisite documents. It appears that under Spanish law conciliation must be attempted before some legal proceedings may be started. Mr Turner not having responded to that request, a summons (*cedula de citacion*) was issued on 1 September by the First Instance Court in Madrid on behalf of Harada and Changepoint appointing 21 September for the parties to attend. On 21 October 1998, Changepoint started legal proceedings against Mr Turner in the Madrid Court by issuing a summons with a statement of claim. The summons was served upon Mr Turner in London on about 15 December. Mr Turner did not accept service and protested the jurisdiction of the Madrid Court. Mr Turner has not taken any part in the proceedings in Spain. His response was to issue the writ in the present proceedings on 18 December and apply for a restraining order against the defendants.

14. The claims made in the Spanish proceedings are set out in the statement of claim of Changepoint. The monetary amounts claimed, 85 million pesetas (or some £340,000), are very substantial. They far overtopped Mr Turner's claim in the Employment Tribunal and, if to be sustained, would have more than cancelled out any sum which the

Tribunal might award him. The basis of claim was (in translation) stated to be: *"against Paul Turner, with domicile in London SW6 1NX 11 Claylands Rd, for breach of contract and liability, initially amounting to 85 million pesetas occasioned in respect of damage and losses to [Changepoint SA], under articles 1091 and 1101 of the Civil Code in relation to Article 1544 thereof, as a result of the service agreement existing between the parties".*

The facts pleaded referred first to the 10 April 1990 agreement with China Security Ltd, secondly to a memorandum of 2 December 1996 generated in London by Mr Turner at the request of Mr Grovit's personal assistant for the purpose of furthering the discussion of Mr Turner's possible relocation, and thirdly the letter of 21 May 1997 already referred to. Seven instances of deficient performance of his duties were alleged and, further, it was alleged that he had wrongfully *"disappeared"* from the Madrid office without notice to Changepoint and then raised baseless court claims against the *"client"* in Great Britain concealing the truth from the English Court. By the "client" the pleader should be referring to Changepoint SA on whose behalf he says at the outset that he is delivering the pleading. But it is more likely that, in the context, he means the Chequepoint group: Changepoint had not as such been sued in the Employment Tribunal proceedings. Finally and, as it is put, by way of "summary", it is said that Mr Turner *"undertook to perform legal advising service that he later failed to carry on and improperly ended the contractual relation existing between the parties to this litigation". "He did not perform his obligations under the service agreement ... he terminated the said service agreement unilaterally. The client company must therefore be compensated."* The paragraphs that follow again stress Mr Turner's termination of the agreement and the filing of the employment claim. The pleading acknowledged that Mr Turner was domiciled in the United Kingdom but claimed to base jurisdiction upon the fact that the agreement was a service agreement and the place of performance of the obligation was Madrid. As already stated, Mr Turner did not accept the jurisdiction of the Madrid court nor did he take any part in the proceedings there. The defendants have filed (in the present action) an affidavit dated 21 May 1999 which (in translation) certifies that *"the Justice Department has decided following consultation with the court which is handling the proceedings that the Spanish courts are competent to hear the complaint drawn up by Changepoint SA against Mr Paul Turner".*

15. The relevant claim made in the writ in the present action is a claim by Mr Turner for an injunction - *"to restrain the first and second defendants from procuring the third defendant to continue and the third defendant from continuing, the action commenced by the third defendant against the plaintiff in the court of first instance in Madrid on or about 21 October 1998".*

From a practical point of view, the important thing for Mr Turner was to get an order against the first and second defendants, Mr Grovit and Harada. The joinder of Changepoint was clearly appropriate and no point has been taken by the defendants upon Changepoint's joinder. They voluntarily submitted to the jurisdiction. For the order asked for to be effective it was essential that it should be enforceable against Mr Grovit or Harada (as subsequent events were to confirm).

16. At a hearing before Pumphrey J on 22 December 1998 which was technically *ex parte* but at which counsel for the defendants as well as counsel for the claimant appeared and were heard, the judge granted, upon the usual undertakings from the claimant, a temporary injunction in the above terms. The substantive application came on before David Donaldson QC sitting as a deputy judge of the Chancery Division in early February 1999. Both sides filed affidavit evidence and were represented by leading and junior counsel. By his judgment of 24 February the deputy judge declined to renew the injunction. The claimant appealed to the Court of Appeal which, on 28 May, allowed the appeal and made the following orders:

"3. The defendants and each of them shall :-

(1) take all necessary steps forthwith to discontinue or to procure the discontinuance of the claims made against the Claimant in proceedings commenced by one or more of the Defendants in the Court of First Instance, Madrid, Court 67, under Proceedings number 70/98 single Identification number 28079 1 6700100 1998 on 7 October 1998;

(2) be restrained until further Order from taking or procuring any other person or persons to take, any step in the action commenced by one or more of the Defendants in the Court of First Instance Madrid, Court 67, under Proceedings number 70/98 Single Identification number 28079 1 6700100 1998 on 7 October 1998, except to carry out paragraph 3(1) of this Order hereinabove;

(3) be restrained until further Order from commencing or continuing or procuring any other person or persons (including any company directly or indirectly controlled by the Respondents or any of them, or any company within or associated with the Chequepoint Group of companies, and further, in respect of the 1st Defendant, any company of which [he] is a Director) to commence or continue any further or other proceedings against the Claimant (arising out of his contract of employment) in Spain or elsewhere, except that this paragraph shall not apply to proceedings commenced or continued in England and Wales."

I will refer to these orders as the "*restraining orders*".

17. The Court of Appeal differed from the deputy judge both on the law and the facts. The Court of Appeal made findings of fact which put the present case into an exceptional category. I will expand later upon the relevant English law but the proposition adopted by the Court of Appeal was: *"Were the English court to find that proceedings had been launched in another Brussels Convention jurisdiction for no purpose other than to harass and oppress a party who is already a litigant here, the English court possesses the power to prohibit by injunction the plaintiff in the other jurisdiction from continuing the foreign process."* ([2000] 1 QB 345 at 357)

Having reviewed the evidence, Laws LJ, with whom the other members of the court agreed, said:

"On the question of abuse of process, it is to my mind plain beyond the possibility of argument that the Spanish proceedings were launched in bad faith in order to vex the plaintiff in the pursuit of his application before the Employment Tribunal here. The proceedings before the deputy judge and so before us were and are in the nature of an interlocutory application, in form at least. I accept at once that it must be unusual for any court to arrive at such findings of fact as I think it right to make in this case without the benefit of hearing the evidence tested. But all the credible evidence points one way. The documents lead to the ineluctable conclusion that, as I have said, the Spanish proceedings were intended, and intended only, to oppress the plaintiff and as such fall to be condemned as abusive as a matter of elementary principle." (p.362)

"... The deployment of [Changepoint SA], a Spanish company, as claimant in Madrid is nothing but a device to confer putative jurisdiction on the Spanish court. ... [It is a] sham and pretence ..." (p.363)

Laws LJ also made findings about the role of Mr Grovit (at pp.361-2). He accepted the evidence that *"the decisions were always taken by Mr Grovit"*. His was the "controlling hand". "The Spanish proceedings were an orchestrated response to the plaintiff's application before the Employment Tribunal and there is no candidate for the orchestra's conductor but Mr Grovit."

18. The Court of Appeal's decision and the restraining orders which they made were founded upon their finding that the defendants were acting in abuse of the Employment Tribunal proceedings. It is implicit in their judgment that they found that, unless restrained, the defendants would persist in their abusive conduct. However Laws LJ also considered the position under Article 21 of the Brussels Convention. There was no dispute that the Employment Tribunal proceedings were prior in time to those before the Madrid court. The question was whether those proceedings involved the same cause of action between the same parties. It was the case of the defendants that Article 21 had no application as the causes of action and the parties were different; they further said that any question of the impact of Article 21 upon the jurisdiction of the Madrid court was a question to be decided in the Madrid proceedings: ***Overseas Union v New Hampshire,*** ECJ (351/89), [1992] QB 434. The Court of Appeal, citing ***Gubisch v Palumbo*** (144/86) [1987] ECR 4861, concluded that the two actions were based upon the "same contractual relationship" and concerned the *"same subject matter"*. Similarly, looking at the substance of the matter, the actions were between the same parties in that in each action it was aspects of the group that was involved. Mr Grovit was the directing mind of the group and Changepoint SA was for the purposes of the Madrid proceedings a front for the group. This conclusion was given as an additional reason for the Court of Appeal to allow the appeal of Mr Turner from the judgment of the deputy judge.

19. The defendants were at first reluctant to comply fully with the orders of the Court of Appeal and it was necessary for Mr Turner to return to the lower court in London in order to procure that compliance. Accordingly, on 28 June 1999, the Spanish lawyer representing Changepoint filed a *desistimiento* in the Madrid action. This brought the Madrid action to an end but did not involve a waiver of the alleged cause of action or of any right to bring a further action.

***The Reference*:**

20. The defendants have now appealed to your Lordships' House. Their appeal turns upon questions of law. They have put their legal argument at several levels. They first submit that the power of an English court to make a restraining order in relation to the continuation of proceedings in foreign jurisdictions covered by the Brussels Convention (and the other similar conventions and protocols) does not now exist in view of the ratification of the Brussels Convention by the United Kingdom and its incorporation into English law by the Act of 1982. Secondly, they submit that to make any such restraining order on the ground of *'abuse of process'* is inconsistent with the Brussels Convention. Thirdly, they make the same submission in respect of any restraining order made on the ground that continuation of the foreign proceedings would be contrary to Article 21. It is the first two ways of putting the defendants' legal argument which raise the necessity for a reference. The third does not come into the same category since it is not decisive in the present case. The restraining orders in the present case are founded on the findings by the Court of Appeal of abusive conduct on the part of these defendants. If the Court of Appeal was not, in law, permitted to treat such conduct as a ground for making a restraining order, their decision cannot be sustained; whether or not the Madrid court was in breach of Article 21 is a matter for the Madrid court. (***Overseas Union Insurance v New Hampshire Ins Co,*** *sup.*) The question of interpretation referred is therefore asked in terms of the ability of an English Court to make a restraining order on the *'abuse'* ground. Although the defendants have formulated their propositions of law in relation to the *continuance* of foreign proceedings already begun, it is not desirable so to limit the question referred since it can be questioned whether there is any valid distinction to be made between the continuation and the commencement of foreign proceedings. Mr Harvie QC, for the defendants, and Mr Rabinowitz each submitted that their respective interpretations of the Convention were *acte clair*. Your Lordships do not regard the answer to the question of interpretation as *acte clair*.

21. Accordingly the question of interpretation which should be referred is - *"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 English Law*:**

22. The power exercised by the Court of Appeal in the present case is one which had historical origins in the English legal system and the relationships which once existed between various different courts and the limited remedies which they were variously able to grant. It had however been recognisably established by 1834 (***Portarlington v Soulby*** 3 My & K 104) and described as being grounded not upon "*any pretension to the exercise of judicial rights abroad*" but upon the fact that the party being restrained is subject to the *in personam* jurisdiction of the English court. The modern law is now based upon a statutory authority which is expressed in simple and broad terms in s.37(1) of the Supreme Court Act 1981: *"The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so."*

    The Court of Appeal has the like powers on an appeal from the High Court. Judicial decisions, however, limit when it may be considered just to grant an injunction. Certain preconceptions and misunderstandings still tend to persist as to the nature of the type of restraining order made in the present case and the grounds upon which it can be applied for. It is important not to be misled by these misconceptions.

23. The present type of restraining order is commonly referred to as an "*anti-suit"* injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court: Lord Goff, ***SNI Aerospatiale v Lee*** [1987] AC 871 at 892. The order binds only that party, *in personam*, and is effective only insofar as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him. *"An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy":* Lord Goff (*ib*).

24. The power to make the order is dependent upon there being wrongful conduct of the party to be restrained of which the applicant is entitled to complain and has a legitimate interest in seeking to prevent. In ***British Airways v Laker Airways*** [1985] AC 58 at 81, Lord Diplock said that it was necessary that the conduct of the party being restrained should fit "*the generic description of conduct that is **'unconscionable'** in the eye of English law"*. The use of the word *"unconscionable*" derives from English equity law. It was the courts of equity that had the power to grant injunctions and the equity jurisdiction was personal and related to matters which should affect a person's conscience. But the point being made by the use of the word is that the remedy is a personal remedy for the wrongful conduct of an individual. It is essentially a *'fault'* based remedial concept. Other phrases have from time to time been used to describe the criticism of the relevant person's conduct, for example, "*vexatious"* and *"oppressive*", but these are not to be taken as limiting definitions; it derives from *"the basic principle of justice*" (per Lord Goff, ***SNI Aerospatiale v Lee***, at 893). Sometimes, as in the present case, the phrase "*abuse of process*" (borrowed from another context) is used to express the same general ideas but with particular reference to the effect of the unconscionable conduct upon pending English proceedings. As I will explain, policy considerations enter into the decision whether or not to make the restraining order but only as constraints upon the exercise of the power. To the same effect is the statement of Lord Woolf **MR** ***Fort Dodge v Akzo Nobel*** [1998] FSR 222 at 246: *"The United Kingdom courts have jurisdiction to prevent vexation and oppression by persons subject to their jurisdiction. In particular, the courts are entitled to prevent persons domiciled in this country from being submitted to vexatious or oppressive litigation whether started or to be started in this country or another country. As was stated in the advice of the Privy Council in SNI Aerospatiale v Lee, a court can restrain a person from pursuing proceedings in a foreign court where a remedy is available both in that foreign court and [in] this country, but will only do so if pursuit by the person **'would be vexatious or oppressive'**. Further, since such order indirectly affects the foreign court, the jurisdiction must be exercised with caution and only if the ends of justice so require. We emphasise that injunctions granted for such purpose are directed against the vexatious party and not the courts of the other jurisdiction."*

25. An order restraining proceedings in some other forum is the obverse of an order for the stay of proceedings before the forum itself. If there are proceedings before an English court which it is unconscionable for a party to pursue, such proceedings will be stayed. This follows the same basic logic as the grant of a restraining order where the unconscionable conduct lies in the pursuit of proceedings elsewhere. The difference between the two situations does not materially alter the nature of the unconscionable conduct being relied upon by the applicant but does importantly affect the grant of the remedy. As Lord Goff put it in ***Airbus Industrie v Patel*** (at p.133), "*the former [the power to stay] depends on its voluntary adoption by the state in question and the latter [the power to make a restraining order] is inhibited by respect for comity"*. Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other; the parties' contractual agreement does that for him. Similarly, where as in the present case there has been clearly unconscionable conduct on the part of the party sought to be restrained, this conduct is a sufficiently strong element to support the affected party's application for an order to restrain such conduct. This, as well, is not based upon the complaint that the action has been brought in an inappropriate forum - the doctrine of *forum non conveniens*. But, where the conduct relates to the prosecution of proceedings abroad, the question whether or not the foreign forum was an appropriate forum in which to sue is bound to have an evidential importance in the evaluation of the conduct complained of and to affect importantly the decision whether or not to grant the remedy of a restraining order. By contrast, there are cases where the only unconscionable conduct alleged is the

fact that the party sought to be restrained has commenced proceedings in an inappropriate forum. This is a weak complaint and is easily overridden by other factors or considerations: see for example ***Castanho v Brown & Root*** [1981] AC 557 , ***Spiliada Maritime v Cansulex*** [1987] AC 460 and *SNI Aerospatiale v Lee* [1987] AC 871. Most of the criticism of the use of 'anti-suit' injunctions (*ie* restraining orders) relates to their use in this field. These criticisms are recognised and for reasons of comity an English court will be reluctant to take upon itself the decision whether the foreign forum is an inappropriate one (***Airbus Industrie v Patel*** [1999] 1 AC 119) and it will not do so where the foreign country is a Brussels Convention country (*ib.* at p.132).

26. The making of a restraining order does not depend upon denying, or preempting, the jurisdiction of the foreign court. One of the errors made by the deputy judge in the present case was to treat the case as if it were about the jurisdiction of the Madrid court. Jurisdiction is a different concept. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws (including conventions to which the foreign country may be a party). The jurisdiction which the foreign court chooses to assume may thus include an extraterritorial (or exorbitant) jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted.

27. The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract. But where he is relying upon conduct of the other person which is unconscionable for some non-contractual reason, English law requires that the legitimate interest must be the existence of proceedings in this country which need to be protected by the grant of a restraining order. This was the point decided by this House in ***Airbus Industrie v Patel*** [1999] 1 AC 119. The case arose out of the crash of an Indian Airlines Airbus A-320 whilst landing at Bangalore airport after an internal Indian flight from Delhi. Among the passengers were Mr and Mrs Patel who lived in England. Proceedings were started by the injured parties in Bangalore against the airline and the airport authority which was also alleged to be to blame. The natural forum was the Bangalore court in India and there were proceedings on foot there. The Patels and other English passengers, however, having settled with the airline for its maximum liability, chose, in defiance of an order made by the Bangalore court, to sue the French manufacturers of the aircraft not in France but in Texas (which had no natural jurisdiction) on the basis of an American principle of no-fault liability, punitive damages and contingent fees. What is more, the Texas court had no principle of *forum non conveniens* and it was not an option for Airbus Industrie to apply to the Texas court to stay the proceedings there on that ground. The House held that the English passengers should not be restrained from suing in Texas. There were no English proceedings (other than the application to the English court for the injunction). Airbus Industrie had no sufficient interest in asking the English court for a remedy. This is a striking example of the important restriction upon the willingness of the English courts to grant restraining orders in relation to foreign legal proceedings: The applicant for the restraining order must be a party to litigation in this country at which the unconscionable conduct of the party to be restrained is directed. It is not sufficient for the applicant to say that there is another foreign forum which is the appropriate forum.

28. Similarly, English law attaches a high importance to international comity (***Airbus Industrie***, *sup*, per Lord Goff at pp.133 and 138) and the English court has in mind how the restraining order will be perceived by foreign courts. This is the prime reason for strictly limiting the making of restraining orders on grounds of *forum non conveniens*. It is recognised that to make an order against a person who is a party to proceedings before a foreign court may be treated as an interference (albeit indirect) in the foreign proceedings. Thus English law requires the applicant to show a clear need to protect existing English proceedings. The protection of English proceedings is, understandably, regarded as a legitimate subject matter for an English court. It is not the concern of any other court. The order made operates *in personam* and relies for its enforcement solely upon the English court. In the present case, the Court of Appeal were at pains to stress that their orders were directed to the defendants and not the Spanish court: see [2000] 1 QB at 364.

29. Therefore, to summarise, the essential features which made it proper, under English law, for the Court of Appeal to exercise its power to make the order in the present case are -

    (a) The applicant is a party to existing legal proceedings in this country;

    (b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in this country;

    (c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants.

    The order applies only to the defendants before the English court. It does not require the English court to make any finding as to the jurisdiction of the foreign court.

***Discussion*:**

30. The question is whether the English law is consistent with the Brussels Convention. The preamble to the Convention identifies the primary purpose of the Convention. It is "*to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals*". It considers that "*it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements*". It is not the object of the Convention to unify procedural rules or the national rules governing the admissibility of an action but national procedural rules may not impair the effectiveness of the Convention. (***Kongress Agentur Hagen v Zeehaghe***, case 365/88, §§17-20).

31. The Convention has two main parts corresponding to its primary and subsidiary purposes. These are Title III, *'Recognition and Enforcement'* and Title II, '*Jurisdiction'*. Article 26 requires judgments given in Contracting States to be recognised in other Contracting States. The grounds upon which recognition may be refused are very limited and are spelled out in Articles 27 and 28. These do not include a right to dispute the jurisdiction of the court which gave judgment save as permitted by the first paragraph of Article 28. For present purposes the only significant paragraph of Article 27 is (3) which provides that a judgment shall not be recognised *"if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought."*

    This exclusion is the only one which directly addresses the question of the irreconcilable judgments arising from the exercise of overlapping jurisdictions which may not have fully complied with the provisions of Title II. Article 27(3) does not give any priority to the judgment pronounced earlier in time. It does not deal with attempts to register inconsistent judgments in 3rd party Convention countries (but this point has now been covered in the expanded fourth paragraph in Article 34 of the Council Regulation 44/2001, 22 December 2000) nor does it deal with the position of a party who, although domiciled in one Convention country, has a business or property in another and therefore cannot afford to ignore a judgment given in that other country even though he has an irreconcilable judgment given in his own favour in his own country. Title III does not obviate the need for a restraining order where there is a risk of irreconcilable judgments or other specific detriment which the applicant can show he will suffer if a restraining order is not made.

32. The defendants have not submitted that Title II contains any provision which expressly precludes an English court from granting a restraining order. Indeed, it may be thought that certain provisions are fully consistent with the exercise of such a power. Arbitration has been excluded from the scope of the Brussels Convention by Article 1 (4) and the relevant operation of the New York Convention of 1958 is preserved by the general words of Article 57. The question of exclusive jurisdiction clauses is addressed in Article 17 with the clear general intention that they should be given effect to in all Convention countries as there provided. This, it may be thought, gives rise to no inconsistency in principle with the power of the English court to grant a restraining order on the ground of an exclusive jurisdiction clause although it should usually make such an order unnecessary.

33. Section 8 of the Convention (Articles 21 to 23) likewise does not, it may be thought, create an inconsistency. The basic object here is to avoid irreconcilable judgments by providing that the court first seised should assume jurisdiction and not defer to courts which only became seised subsequently and, in cases which involve a risk of such judgments, that a court other than that first seised may chose to decline jurisdiction or stay the relevant proceedings before it. The English law, as I have explained, will only grant a restraining order (other than under an arbitration or exclusive jurisdiction clause) in aid of existing proceedings in England. This means that, unless the English court has infringed Article 21 by not having declined jurisdiction when those proceedings were instituted, the grant of a restraint order *in personam* in support of those proceedings will not be inconsistent with the Convention. It is only if the grant of the restraining order has been preceded by a breach by the English court of Article 21 or, say, Article 16 that the grant of the restraining order would be objectionable under the Convention and that would be because the earlier steps taken would conflict with the Convention and not because of any inherent inconsistency arising from the restraining order itself.

34. The primary argument of the defendants was that the power to grant a restraining order was inconsistent with the Convention because it was inconsistent with the jurisdiction conferred by the Convention upon the courts of other Convention countries and their competence to decide their own jurisdiction. This argument would be sound if the restraining order was directed to the foreign court not to the party whose conduct was in question. As explained, the order is not addressed to the foreign court and does not bind it. It does not involve a decision upon its jurisdiction: indeed, it assumes that the foreign court will hold that it has jurisdiction under its own law. The decision involved is about the quality of the conduct of the party sought to be restrained and the need to protect existing English proceedings. If the English courts based the grant of a restraining order upon the view that the foreign Convention country was a *forum non conveniens*, that would be inconsistent with the decision of the ECJ in the *Overseas Union* case (*sup*). But the English courts would not grant a restraining order on such a ground in such circumstances. As Lord Goff said in *Airbus Industrie*, at p.132, the principle of *forum conveniens "has no application as between states which are parties to the Brussels Convention*". The present case out of which this reference arises is not such a case. The conduct of the defendants was unconscionable because, in bad faith, it was designed to obstruct and frustrate the existing English proceedings, not because the Madrid court was a *forum non conveniens*.

35. Support for the view which I have expressed is to be found in the leading English text book, Dicey & Morris: *Conflict of Laws* 13th Edn. at §12-066, p.419: *"The European Court has held that a court of one Contracting State has no right to adjudicate upon the jurisdiction of a court in another Contracting State [cases 351/89 and 163/95*

cited]; if the claim for an anti-suit injunction is in substance founded on the bare argument that the other court should have concluded that it had no jurisdiction under the [Brussels] Convention, it may be incompatible with the Convention for an injunction to be ordered. ... By contrast, where the injunction is in substance directed at unconscionable conduct of the defendant, as distinct from an alleged jurisdictional error by the foreign court, there is no reason why an English court should not have recourse to its procedural law by granting an injunction to restrain such behaviour."

36. In so far as a purpose of the Convention is to limit the risk of irreconcilable judgments, the use of restraining orders by the English courts is effective to achieve or aid this result. (It has achieved it in this case: the probability of irreconcilable judgments has been avoided.) It does so by granting a remedy which does not attack the jurisdiction of the foreign court. It bases the grant of that remedy upon a ground which does not involve a denial of the jurisdiction of the foreign court. It achieves a result intended by the Convention in a manner which is consistent with the Convention.

37. The secondary argument of the defendants was that to grant a restraining order on the ground of obstructing in bad faith existing English proceedings was inconsistent with the Convention. This argument accepted that a restraining order for the purpose of enforcing an exclusive jurisdiction clause might be consistent with the Convention. It was argued that what Mr Turner was complaining about is being sued in Spain and that, accordingly, it should be a matter for the Spanish courts alone to decide whether what the defendants were doing in the Madrid action was objectionable and, if they held that it was, themselves to make an appropriate order. This argument misstates what the English court has to consider. It has to consider the significance of the defendants' conduct for the proceedings in England. That is a matter for the English court not the Spanish court and there is no reason, whether under the Convention or otherwise, why the Spanish court should concern itself with the protection of the English proceedings. It was further argued that the grant of an order restraining the obstruction in bad faith of English proceedings was contrary to the spirit of the Convention since not all Convention countries choose to give their courts that power and there would be a "loss of equality" between courts. This argument takes the argument too far. It is not the purpose of the Convention to require uniformity but to have clear rules governing jurisdiction. (See the *Hagen* case *sup.*) The grant of the restraining order is not concerned with and does not deny the jurisdiction of the foreign court.

38. A further argument of the defendants was to treat the present case as if the English proceedings relevant to the grant of the restraining order were the application for the restraining order itself. That is not correct. The order that has been made is to protect and prevent the obstruction of the Employment Tribunal proceedings. Those proceedings were the first proceedings in point of time. The proceedings in the Madrid court came second and gave the defendants no right to rely on Section 8 of the Convention as against the Employment Tribunal proceedings. Mr Turner's application for the restraining order had to be made to the High Court and not to the Employment Tribunal itself because the Employment Tribunal, as a statutory tribunal, does not have the power under English procedural law to grant an injunction under s.37(1) of the Supreme Court Act 1981.

39. Were the question of interpretation one which it was for your Lordships' House alone to decide, I would reject the defendants' arguments and dismiss the appeal primarily upon the ground that the defendants' arguments misstate the English law and that therefore their arguments upon the Convention are misplaced. But their arguments also seek to give the Convention an ambit, wider than is justified by any decision of the Court of Justice which they have cited, so as to cover questions of the procedure to be followed and remedies to be adopted by national courts where jurisdiction is not the issue.

40. Finally it should be mentioned that the defendants sought to challenge the authority of the decision of the Court of Appeal in ***Continental Bank v Aeakos SA*** [1994] 1 WLR 588 . That was a case concerning an exclusive jurisdiction clause submitting the parties' disputes to the jurisdiction of the English courts. The agreement was expressly governed by English law under which it and the exclusive jurisdiction clause were valid and enforceable. The relevant contract was a loan contract between an American bank, as lender, and a Greek shipowning company, as borrowers, and various individuals as guarantors. The borrowers defaulted. They commenced proceedings in Greece claiming that the agreement "*violated the commands of morality"* contrary to a provision of the Greek Civil Code together with a claim for damages and a claim for a declaration that the guarantors were released. Relying on the exclusive jurisdiction clause, the bank sued in London for the repayment of the loan and also applied for an order restraining the borrowers and guarantors from continuing the action in Greece. The judge and the Court of Appeal granted the order. The relevant question which the Court of Appeal had to consider was the interaction of Article 17 and Articles 21 and 22 of the Convention. The Court of Appeal decided that to treat Article 21 as overriding Article 17 would frustrate the purpose of both Article 17 and of the parties' agreement upon an exclusive jurisdiction clause: they gave Article 17 priority. It is not necessary for the decision of the present case or the answering of the question of interpretation which it raises to decide whether the Court of Appeal were right to do so.

LORD MILLETT My Lords,

41. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree with it and with the order he proposes.

LORD SCOTT OF FOSCOTE My Lords,

42. I have had the opportunity of reading in draft the opinion of my noble and learned friend, Lord Hobhouse of Woodborough, and am in agreement with it and with the order he proposes.