JUDGMENT : Mr Justice Beatson : Commercial Court. 29th July 2008

1. On 7 March 2008 the defendant ("Sinco") applied for a stay pursuant to Council Regulation (EC) 44/2001 ("the Regulation") of one of the claims advanced by the claimants ("the Syndicates") in this action, pending the determination by the Greek court of its jurisdiction in proceedings commenced by Sinco on 11 April 2007. This action was issued on 15 January 2007. The Syndicates did not inform Sinco they had issued proceedings before the claim was amended on 21 June 2007. The amended claim form was served on Sinco in Greece on 29 June 2007. The Particulars of Claim were served on 21 November 2007.

2. This application is confined to the claim contained in paragraphs 9 and 15 of the Particulars of Claim that Sinco, in bringing the Greek proceedings, is in breach of the exclusive jurisdiction clauses in favour of the English courts contained in its contracts with the Syndicates, the "*jurisdiction clause claim*". The Syndicates' claim is for damages for this alleged breach of contract. Sinco's application is made solely pursuant to Article 27 of the Regulation. No application has been made pursuant to Article 28. For this reason, it is not disputed that the Syndicates are entitled to proceed in this court with the principal claims (summarised in paragraph [8]) which they advance against Sinco in these proceedings.

3. The application came before me on 14 May. At that time the case was also before the court for the case management conference. The case management conference was adjourned, but has since been held on 19 June when directions for the remainder of the claimants' action were made. The trial, with a time estimate of 10-12 days, is to be heard not before 23 February 2009.

4. The claimants are the members of three Lloyd's Syndicates (980, 2000 and 1886) for various years of account between 1999 and 2006. Sinco is a Greek company operating as a motor insurance broker. Between 1999 and 2006 it had authority under binding authority agreements ("the Binders") to bind Greek motor insurances on behalf of the Syndicates. The Binders contain materially identical provisions, including exclusive jurisdiction clauses in favour of England. So, section 39 of Syndicate 1886's Binder provides *"the agreement is subject to English law and practice and to the exclusive jurisdiction of the English courts*".

5. On 17 November 2006 the Syndicates purported to terminate the 2006 Binder. As I have stated, the Syndicates instituted proceedings against Sinco in this court on 15 January 2007, but did not serve the claim form on Sinco or tell Sinco that they had issued it.

6. On 11 April 2007 (before being served with these proceedings) Sinco commenced proceedings against the Syndicates in Greece and served them on the Syndicates. On 21 June 2007 the Syndicates amended the claim form *inter alia* adding a statement that this court has jurisdiction pursuant to Regulation EC 44/2001 and served the amended claim form on Sinco on 29 June 2007.

7. On 20 July Sinco filed an Acknowledgement of Service stating it would contest jurisdiction. It did not do so before 27 September 2007, the time agreed with the Syndicates and pursuant to CPR 11(5) is thus to be treated as having accepted that the court has jurisdiction to try the claim as set out in the claim form.

8. The Syndicates bring three principal claims. The first (the fraud claim) is that Sinco fraudulently back dated policy cancellations and generated a fictional return of premium which it has retained for its own account. The second (the misrepresentation claim) is that, from 2000, Sinco represented that claims under the Binders were significantly lower than it alleges they are in the Greek proceedings. The Syndicates claim that, had the claims position not been misrepresented and they had known the true position, they would not have entered into the Binders for subsequent years. The third (the premium claim) is that Sinco has failed to account to it for premium. There was an extension of time granted for service of the Defence which was served on 10 March 2008. The Defence does not plead to the parts of the claim which are the subject of the present application.

9. The principal claims brought by Sinco in the Greek proceedings are: a claim for clientele compensation in accordance with Presidential Decree 219/1991; claims for financial and moral damages arising from the unlawful termination of the relationship between the parties; and a claim pursuant to the Greek Commercial Code for expenses incurred in accordance with the Binders. The Greek proceedings were listed for hearing on 12 March 2008. That hearing was cancelled due to a strike in the Greek courts. The case is now listed for 11 February 2009.

10. The Syndicates have challenged the Greek court's jurisdiction, arguing that the claims brought in Greece fall within the scope of the jurisdiction clauses in the Binders and that Sinco is therefore bound to pursue them in England. Sinco's position is that the claims in Greece, which are based in tort and statute, are not covered by the jurisdiction clauses in the Binders which only cover contractual claims. Sinco also argues that the clauses are contrary to mandatory provisions of Greek law. The Greek court will consider its jurisdiction when it considers the merits of the claim.

11. The evidence before me consists of statements by Mr Alexopoulos, a partner of DLA Piper LLP, Sinco's solicitors, Mr Wareham, a partner of Holman Fenwick Willan, the claimants' solicitors and Maria Katsarou, a Greek lawyer, whose statement is concerned with the Greek proceedings and the risk of irreconcilable judgments. These statements are respectively made on 7 March, 21 April and 7 May 2008.

12. The positions of the parties are summarised in paragraphs 6 and 7 of Mr Henshaw's skeleton argument on behalf of Sinco. Paragraph 6 states that Sinco's argument may be summarised as follows:

"6.1 The claims made in the Greek proceedings are different from the claims set out in the English claim form, and the Greek court was first seised of the claims which Sinco makes in Greece."

"6.2 The claimants' claim for breach of the jurisdiction clauses in the Binders ("the Jurisdiction Clause Claim") involves the same cause of action as the jurisdiction dispute before the Greek court."

"6.3 The Jurisdiction Clause Claim should accordingly be stayed pending the Greek court's determination as to whether it has jurisdiction over the Greek claims."

13. Mr Phillips, who appeared on behalf of the Syndicates, did not suggest that paragraph 7 of Mr Henshaw's skeleton argument which summarises the position of the Syndicates was inaccurate. I set it out with Mr Phillips' suggested addition to paragraph 7.3 in square brackets:

"7.1 The Jurisdiction Clause Claim is not an assertion of jurisdiction; by this claim the claimants' simply seek compensation for breach of their contractual rights."

"7.2 The claims made in Greece, including the jurisdiction dispute, can be distinguished from the legal basis of the Jurisdiction Clause Claim, which is founded purely in contract."

"7.3 Success by the claimants in the Jurisdiction Clause Claim would not give rise to any risk of an irreconcilable judgment even if Sinco were to succeed on all of its claims in the Greek proceedings" [because the claimants in these proceedings are not seeking to stop the Greek proceedings but to claim damages for breach of contract].

The legislative framework

14. Chapter II of the Regulation deals with "Jurisdiction". Chapter III, with which I am not concerned, deals with "Recognition and Enforcement". The material provisions of Chapter II are:-

Section 9: lis pendens – related actions

Article 27

"(1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

"(2) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

Article 28

"(1) Where related actions are pending the courts of different member states, any court other than the court first seised may stay its proceedings."

"(2) Where the actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof."

"(3) For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

Article 29

"Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court."

Article 30

"For the purposes of this section, a court shall be deemed to be seised:

(1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

(2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court."

15. Section 6 of Part II deals with "*Exclusive jurisdiction*". Article 22 provides that in proceedings which have as their object rights *in rem* in immovable property, the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations the court of the state in which the property is situated or the company or legal person has its seat have exclusive jurisdiction. Section 7 deals with "Prorogation of jurisdiction". Article 23 deals with jurisdiction clauses and provides that the relevant court shall have jurisdiction, which shall be exclusive unless the parties have agreed otherwise. Section 8 deals with "Examination as to jurisdiction and admissibility". Article 25 provides that where a court is seised of a claim which is principally concerned with a matter over which the courts of another member state have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

16. The recitals to the Regulation include:

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

"(4) … this Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose."

"(11) 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 party warrants a different linking factor. …"

"(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two member states. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously."

"(16) Mutual trust in the administration of justice in the Community justifies judgments given in a member state being recognised automatically without the need for any procedure except in cases of dispute."

Discussion

17. Mr Phillips accepted the summary of the essential approach to Articles 27 and 28 of the Regulation, their predecessor provisions in the Brussels Convention (Articles 21 and 22), and the decisions of the European Court of Justice on these provisions contained in paragraph 30 of Mr Henshaw's skeleton argument. This states:

"30.1 A key objective, probably the key objective, of these provisions is to minimise the risk of conflicting judgments by courts of different Member States."

"30.2 To that end, priority is given to the court first seised in determining whether it or some other court has jurisdiction."

"30.3 Pursuant to the principles of mutual trust underlying the Convention/Regulation, other Member State courts should stay their hand pending the determination by the court seised of its own jurisdiction, and should not in the meantime review that court's jurisdiction."

"30.4 The provisions of the Convention/Regulation are to be interpreted in the light of the objectives and principles set out above."

It will be seen that, in respect of 30.2, although there is agreement as to the principle, there is a dispute as to which court is first seised of the jurisdiction clause claim.

18. There are two issues. The first ("the Article 30" issue) is what appears to be an undecided issue about the effect of Article 30 of the Regulation. It is whether, once this court was seised with the issue between Sinco and the Syndicates in accordance with the claim form in this action, it was also seised of the dispute in relation to the alleged breach of the exclusive jurisdiction clauses (the "jurisdiction clause claim"). That dispute could not have been included in the claim form, save in an anticipatory and possibly hypothetical manner, because on 15 January 2007, when the claim form was issued, Sinco had not brought proceedings in Greece. It was included in the amended claim form served on 29 June 2007.

19. The second issue ("the Article 27" issue) is whether the cause and object of the jurisdiction clause claim in these proceedings is the same as that of the claims made in Greece, including the jurisdiction dispute, and should, pursuant to Article 27, be stayed pending the Greek court's determination as to whether it has jurisdiction over the Greek claims. Although, the second issue only arises if this court is not the court first seised of the jurisdiction clause claim pursuant to Article 30, I consider it first because the policy underlying the Regulation and the approach to it have been developed in cases on Article 27 of the Regulation and its predecessor, Article 21 of the Brussels Convention. The equivalent provisions in the Brussels Convention to Articles 23 and 28 of the Regulation are respectively Articles 17 and 22. They largely correspond linguistically to those of the Regulation and, while there are differences in the recitals to the two instruments, their purposes and aims do not differ significantly: ***Evialis v SIAT*** [2003] 2 Lloyd's Rep. 377 at [92] and [94] per Andrew Smith J.

Article 27

20. The second issue arises on facts such as those in this case because the European Court of Justice has held that the rule in Article 21 of the Brussels Convention (Article 27 of the Regulation) that any court other than the court first seised shall stay its proceedings is not displaced by Article 17 (Article 23 of the Regulation) where the contract contains a jurisdiction clause in favour of the court second seised: Case C-116/02 ***Erich Gasser v Misat GmbH*** [2005] QB 1. In Case 159/02 ***Turner v Grovit*** [2005] AC 101 the ECJ held that this is so even where the party who has breached a jurisdiction agreement is acting in bad faith with a view to frustrating existing proceedings in the state designated by the jurisdiction clause. The reason for this was the Court's perception that insofar as is possible parallel proceedings before the courts of different contracting countries should be prevented and the conflicts between decisions which might arise are avoided by precluding "*from the outset*" the possibility of the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the state in which recognition is sought: *Gasser's* case at [41] reiterating what had been said in Case 144/86 ***Gubisch Maschinenfabrik KG v Giulio Palumbo*** [1987] ECR 4861 at [8].

21. In *Gasser's* case Advocate General Léger had taken a different view. He did so (see [57] – [67]) because he considered that obliging the court second seised but designated under a jurisdiction clause to stay its proceedings undermines Article 17 and the legal certainty that attaches to giving effect to contractual provisions and the legitimate expectations of commercial parties. He also considered it runs the risk of encouraging dilatory conduct.

A number of commentators in this country share his view and have not welcomed the decisions of the ECJ. Sir Jonathan Mance states ((2004) 120 LQR 357, 360, 363) that the result of ***Gasser's case*** "*can only be practical uncertainty with large scope for tactical manoeuvring*" and, in the light of ***Turner v Grovit***, to diminish the ability of national courts to restrain abusive conduct and to do practical justice between litigants. Briggs and Rees, *Civil Jurisdiction and Judgments* (4th ed., 2005) p 223 consider that *"few will trouble to persuade themselves that [**Gasser's case**] was the Court's finest hour"*. The view of Dicey, Morris and Collins, *The Conflict of Laws* (14th ed., 2006) 12-049 is that:

"[e]ven though the English Court, seised second, may be in the best position to give decisive effect to the agreement of the parties, the broader scheme of the legislation has been held to preclude it, no matter how severe or unjustified the disadvantage for those who enter into dispute-resolution agreements".

22. It is with this background that I turn to the Article 27 issue. The approach to the question whether the cause of action in proceedings in this country and proceedings in another member state are the same reflects the underlying policy of avoiding at the outset the possibility of irreconcilable judgments. In considering whether the causes of action are the same, Article 27 is to be interpreted *"broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States*": Case C-351/89 ***Overseas Union Insurance Ltd. etc v New Hampshire Insurance Co***. [1991] ECR I-3317, at [16]. In ***Glencore International AG v Shell International Trading and Shipping Co. Ltd.*** [1999] 2 Lloyd's Rep. 692, at 697, a case on the Brussels Convention decided before the decision of the ECJ in ***Gasser's case***, Rix J was of the view that:

"… broadly speaking, the triple requirement of same parties, same cause and same objet entails that it is only in relatively simple situations that art. 21 bites, and, it may be said, is intended to bite. After all, art. 22 is available, with its more flexible discretionary power to stay, in the case of 'related proceedings'. … There is no need, therefore, as it seems to me, to strain to fit a case into art. 21."

23. The ***Overseas Union*** case also considered (at [16]) that "*in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction*". It stated this was so whether the jurisdiction of the court first seised is determined directly by the rules of the Convention (now the Regulation) or is derived from the law of the state of the court first seised. This was reiterated (at [48]) in ***Gasser's case***. A broad approach to Article 27 will, it is said, preclude, insofar as possible and from the outset, the possibility of a situation arising where the judgment given in one state will not be recognised because of its irreconcilability with a judgment given in proceedings between the same parties in the state in which recognition is sought.

24. The term "*cause of action*" has an autonomous European meaning. The French text of the article, unlike the English and German texts, provides that the article applies where two actions have "*le même objet et la même cause*". It, however, clear that Article 27 must be construed by reference to both concepts even where the text does not use both terms: Case C-406/92 ***The Tatry*** [1999] QB 515 at [38] (reported as ***The Maciej Rataj*** in [1995] 1 Lloyd's Rep. 302). In ***The Tatry*** it was stated (at [39]) that the *"cause of action*" comprises the facts and the rule of law relied on as the basis of the action, and (at [41]) that the "*object of the action*" means the end the action has in view. It is also settled that it is not necessary for the claims to be identical to involve the same subject-matter (***Gubisch's case***), and that in making the assessment what is considered are the claims in the two actions, the defences are disregarded: Case C- 111/01 ***Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV*** [2003] ECR I-4207.

25. ***Gubisch's case*** and ***The Tatry*** illustrate the operation of the test. In the former an action for the price of goods sold and an action for rescission of the contract were held (at [16]) to be the same for the purposes of Article 27 because the question whether the contract was binding lay at the heart of the two actions. In ***The Tatry*** a claim by shipowners for a declaration that they were not liable for damage to cargo carried was held (at [40] and [42] – [45]) to have the same cause and object as a claim by the owners of the cargo against the shipowners under contracts in identical terms, concerning the same cargo, and damage in the same circumstances. In ***Glencore International AG v Shell International Trading and Shipping Co. Ltd.*** [1999] 2 Lloyd's Rep. 692, at 697 Rix J stated that in these cases the respective claims differed, but the issue between the parties was "*essentially the same*": the two claims were "*essentially mirror images of each other*".

26. Briggs and Rees, *Civil Jurisdiction and Judgments,* state (at 224-5) that one way of asking the question is "*to examine whether a decision in the one set of proceedings would be a conclusive answer to the question raised in the other*". (The authors suggest that, in the light of ***JP Morgan Europe Ltd. v Primacom AG*** [2005] EWHC 508 (Comm), this may be too restrictive because the policy is to avoid the appreciable risk of irreconcilable judgments, not their certainty.) They, however, state that where the two decisions "*would be reconcilable, albeit a little awkwardly so, Article 27 would, on this view, not apply, as the proceedings will not have the same objet*". So, proceedings against a shipowner to establish liability do not involve the same cause and object as proceedings by the shipowner to limit its liability: Case 39/02 ***Maersk Olie and Gas A/S v De Haan and De Boer*** [2005] 1 Lloyd's Rep. 210. Again, in ***Bank of Tokyo-Mitsubishi Ltd and others v Baskan Gida Sanayi Pazarlama AS*** [2004] 2 Lloyd's Rep. 395, at [203] – [210] it was held that contractual claims brought in England by three Banks involved substantially the same cause of action as Italian proceedings for a negative declaration brought earlier as a pre-emptive strike to the Banks' contractual claims, but that tortious claims in conspiracy and conversion did not. In that case there was a jurisdiction clause in favour of the Italian court. Lawrence Collins J stated that, as the Italian court was first seised of the contractual claims, although there were some serious jurisdictional issues to be determined, it was for that court to consider them. It was not, however, first seised of the tortious claims and no stay was ordered of that part of the English proceedings.

27. The next question is whether one looks at the proceedings as a whole, or whether one looks at particular issues. In the circumstances of this case, does one look at the English proceedings and the Greek proceedings as a whole, or does one only look at the jurisdiction clause claim and the Syndicates' challenge to the jurisdiction of the Greek court?

28. It appears from ***The Tatry*** [1999] QB 515 at [35] that in the case of different parties, Article 21 requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another state and does not prevent the proceedings from continuing between parties who were not parties to the action previously started. Briggs and Rees, *Civil Jurisdiction and Judgments* suggest (at p 226) that ***The Tatry*** probably provides authority for an obligation to treat different claims separately in the same way as in relation to different parties.

29. It is clear, for example from ***Bank of Tokyo-Mitsubishi Ltd v Baskan Gida Sanayi Ve Pazaralam AS*** [2004] 2 Lloyd's Rep 395, that the application of Article 27 of the Regulation can lead to the fragmentation of actions. Mr Henshaw submitted that the approach in ***Toepfer International GmbH v Molino Boschi Sril*** [1996] 1 Lloyd's Rep 510, in which Mance J considered the application of Article 21 of the Brussels Convention to English proceedings and analysed the claims for injunctive relief separately from his analysis of the claims for declaratory relief supports examination of the individual issues. It should, however, be noted that there was no consideration of the fragmentation point. In any event, although Mance J stated that it was necessary to bear in mind possible differences between the claims for declaratory and injunctive relief for Article 21 purposes, he concluded that the cause of action was not the same as that in the Italian proceedings for reasons similar to those he identified in relation to the claim for an injunction.

30. Although in some situations the consequence of the rules in what is now the Regulation is that proceedings may be fragmented, in the ***Bank of Tokyo-Mitsubishi*** case (see paragraph 26 above) Lawrence Collins J described the result as by no means satisfactory. In the earlier descision in ***Grupo Torras SA v Al-Sabah*** [1995] 1 Lloyd's Rep 374 at 419 Mance J referred to the undesirable practical implications of splitting up litigation between different states and causing inappropriate complexity. The present case will involve proceedings in this country and in Greece so that whatever my decision is, unless the Greek court declines jurisdiction in the light of the exclusive English jurisdiction clause, the proceedings will be split in the way that Lawrence Collins J described as by no means satisfactory.

31. Whether to examine the proceedings as a whole or the individual issue was considered in ***Evialis SA v SIAT*** [2003] 2 Lloyd's Rep 377. That case involved a dispute between the buyers under a c.i.f. contract and insurers about a cargo claim. The insurers brought proceedings in Italy alleging that the claim was time barred, the damage to the cargo had been caused by inherent vice, and the buyers had failed to mitigate their loss. Evialis, the buyers, subsequently brought proceedings in England seeking an indemnity arising from the damage to the cargo and relief (including an interim anti-suit injunction) on the ground that the Italian proceedings were in breach of an exclusive jurisdiction clause in favour of the English court. The insurers applied for a stay of the English proceedings. The buyers argued *inter alia* that, in considering Article 27 of the Regulation, their jurisdiction claims in the English proceedings should be considered separately from their claim for an indemnity.

32. Andrew Smith J (at [130]) did not entirely rule out the possibility that in unusual circumstances it might be proper to look at separate causes of action within the proceedings when determining an application under Article 27 but held that it was not right to do so in that case. He relied on the reference in the English version of Articles 27 and 28 of the Regulations to "*actions*" and "*proceedings*", words which he stated do not, on the face of it, contemplate parts of actions or proceedings being stayed. He acknowledged that ***The Tatry*** held that proceedings might be stayed against some parties and allowed to continue against others but noted that the ECJ described the fragmenting of proceedings even to that extent as a disadvantage. He stated that there is nothing in ***The Tatry*** to suggest that the court contemplated further fragmentation of the kind that the buyers sought. He also relied on the observations of Mance J in ***Grupo Torras SA v Al-Sabah*** [1995] 1 Lloyd's Rep 374 at 419 about the undesirable practical consequences of splitting up litigation between different states. He concluded that, looking at the English proceedings as a whole, the essential issue in both the English proceedings and the Italian proceedings was the insurers' liability in respect of the cargo damage.

33. If consideration is only given to a single claim, here the jurisdiction clause claim, the position depends upon what it is compared with. At first instance in ***Continental Bank v Aeakos*** [1994] 1 Lloyd's Rep 505, ***Toepfer International GmbH v Molino Boschi SRL*** [1996] 1 Lloyd's Rep 510 and ***Toepfer International GmbH v Société Cargill France*** [1997] 2 Lloyd's Rep 98 the comparison was between the English proceedings and the proceedings as a whole in the other Member State. It was held that a claim brought in relation to a breach of jurisdiction clause does not trigger Article 21 of the Brussels Convention where there are proceedings in another EU member state allegedly in breach of that clause. The reasoning and application of those cases applies to Article 27 of the Regulation: see ***Evialis SA v SIAT*** [2003] 2 Lloyd's Rep 377 at [92]-[94], and [96]. In those cases the only claim in the English proceedings was for injunctive or declaratory relief (or both) to give effect to the English jurisdiction or arbitration clause. There was no claim for substantive relief. The proceedings in the other state were for substantive relief.

34. I turn to the reasons given by the three Commercial Court judges; Gatehouse, Mance, and Colman JJ. Gatehouse J's decision in ***Continental Bank v Aeakos*** has not been reported but the material part of his judgment is set out in Steyn LJ's judgment in the Court of Appeal: [1994] 1 Lloyd's Rep 505 at 510. The defendant's action for damages in the Greek court in respect of the conduct of the bank under a loan agreement was based on Article 919 of the Greek Civil Code. In the English proceedings, the plaintiff sought an anti-suit injunction to restrain the

defendant from taking further steps in the Greek proceedings. Gatehouse J held that the Greek action did not involve the same cause of action as the English action for the purposes of Article 21 of the Brussels Convention. He also considered that they were not "*related actions*" for the purposes of Article 22. He stated that it appeared from the respective pleadings that the actions are totally different and "*it is not enough that one issue – jurisdiction – could arise in both actions*".

35. In ***Toepfer v Molino*** buyers brought proceedings in the Italian court claiming short delivery and an allowance to reflect excessive urease activity in the cargo. The sellers challenged the jurisdiction of the Italian court *inter alia* because the contract provided for GAFTA arbitration in London. They subsequently applied to the English court for an anti-suit injunction and declarations that the buyers were obliged to refer the dispute to arbitration in London. Mance J held that the Italian proceedings did not have the same cause and object as the English proceedings.

36. As far as the object is concerned, he stated (at 513) that the buyers in the Italian proceedings: "*are seeking to recover sums allegedly due on an examination of the terms and performance of the contract. [The claimants] in England are seeking to stop any such examination taking place in Italy at all.*"

As far as the cause of action is concerned, he stated "*in Italy the terms regarding delivery and urease and the parties' performance in that regard fall for determination, whereas in England the only issue is whether the Italian claims should be being determined by arbitration in London*". He continued:

"It is true that [the claimants] have also raised in Italy the preliminary objection that the claims should be being arbitrated in London. But that is, at most, only one aspect of the Italian proceedings and, although this is not critical, because of the differences between the English and Italian law regarding arbitration agreements, it raises very different considerations in the two countries. It does not make it possible to view the two sets of proceedings as having the same cause of action.

The claim for a declaration also has a different object and cause of action in my view from the Italian proceedings. Its object is less clear-cut. Insofar as it is to try and oblige or influence the Italian court to accede to Toepfer's defence in Italy that the matter falls within a binding arbitration agreement, the object is to prevent the determination by the Italian court of the claims which it [the defendants] aim in Italy to pursue. Insofar as it is to resist enforcement in third countries such as Germany or to base a later claim for damages for breach of the arbitration proceedings, the object is again distinct from any which [the defendants'] suit in Italy is aimed. The cause of action in the sense identified above is also not the same for reasons similar to those identified in considering the claims to injunctions."

37. ***Toepfer v Cargill*** also concerned a cargo claim on a contract providing for a GAFTA arbitration. The buyers instituted proceedings in France for breach of the sale contracts. The sellers subsequently brought proceedings in England seeking similar relief to the injunction and declaration sought in ***Toepfer v Molino***. Colman J granted the relief sought. He rested his decision on the exclusion of arbitration from the Brussels Convention regime but (at [1997] 2 Lloyd's Rep at 106), in what he described as a provisional view, said that he found the reasoning of Mance J in ***Toepfer v Malino*** "*cogent and convincing*". He also said that Mance J's view that it is necessary to compare the object or cause of action in the English proceedings with the object or cause of action in the substantive proceedings, in that case in France, and not with the issues raised by the jurisdictional objection raised in the French proceedings was "*compelling*".

38. The decisions of Gatehouse, Mance, and Colman JJ. in these cases pre-date the decisions of the ECJ in *Gasser's* case and ***Turner v Grovit***. In those cases the ECJ placed an increased emphasis on the need to avoid the possibility of irreconcilable judgments as a major principle underlying Article 27. Before those decisions, in 1997, in ***Toepfer v Cargill,*** the Court of Appeal ([1998] 1 Lloyd's Rep 379, at 387-8) referred two questions to the ECJ. The first question referred, whether the Brussels Convention applied to the proceedings at all in view of the exception for arbitration, is not relevant in this case. The second was whether:

"An injunction restraining the appellants [Cargill] from continuing the proceedings before the French court, or instituting any further proceedings before any other court, in breach of the arbitration agreement… constitute the same cause of action as a challenge to the jurisdiction of the French court founded on the same arbitration agreement, so as to require the English court to stay the proceedings pursuant to Art. 21 of the Convention."

39. The reference was apparently withdrawn because the claim was settled: see Dicey, Morris and Collins, *The Conflict of Laws* at 16-090. Earlier in his judgment, Phillips LJ said that it seemed to the court that "a question arises as to whether a dispute as to jurisdiction can properly be categorised as "*cause of action*" at all and that a nice question arises as to whether *"one can equate, as a cause of action under Art. 21, a procedural objection under the domestic civil code in the French court with a claim for relief based on an allegation of breach of contract in the English court"*. Phillips LJ stated:

"*While the form is totally different, the principal issue – the existence of a binding arbitration agreement – is the same. So is the object of each proceeding – the restraint of the substantive hearing before the French court.*"

As I have noted, the reference was abandoned and, other than these indications, there has been no decision of the Court of Appeal on this point.

40. The decisions in ***Continental Bank v Aeakos, Toepfer v Molino*** and ***Toepfer v Cargill*** were considered **in *Evialis SA v SIAT*** [2003] 2 Lloyd's Rep 377, the facts of which I have summarised at paragraph 31 above. It appears to have been argued before Andrew Smith J. that what Phillips LJ said in ***Toepfer v Cargill*** when referring the case to the ECJ puts the first instance decisions in these three cases into question: see [2003] 2 Lloyd's Rep at [87]-[88].

Andrew Smith J did not consider that it would be right for him to treat the decisions as wrong but concluded that they did not apply. He stated (at [88]):

"In none of [the] three cases did the claimant seek any relief in the English proceedings other than declarations and injunctions concerning the proper forum for the resolution of the underlying claim. No relief was sought in respect of the underlying claim."

41. As I have noted, he concluded that, looking at the English proceeding as a whole, the central or essential issue in it and that in the Italian proceedings was the same; it was the insurers' liability in respect of the cargo damage. After considering a number of other submissions, he ordered a stay of the English proceedings.

42. Mr Henshaw, on behalf of Sinco, submits that the three first instance decisions were decided before the enhanced emphasis by the ECJ in ***Gasser's case*** and ***Turner v Grovit*** and must be reassessed in the light of them. Gatehouse J's decision in ***Continental Bank v Aeakos*** mainly concerned whether Article 21 of the Brussels Convention is displaced by an exclusive jurisdiction or arbitration clause. The "*same cause and object*" issue was dealt with only briefly by Gatehouse J and the Court of Appeal did not deal with it at all because it upheld the decision on the jurisdiction clause ground, a ground which does not survive ***Gasser's case***.

43. Mr Henshaw submitted that the jurisdiction clause claim in these proceedings and the jurisdiction dispute in Greece concern the same "*cause*" (the jurisdiction clause) and the same object (a ruling on whether Sinco is bound to pursue its claims exclusively in England and may not sue in Greece). They accordingly involve the same cause of action for the purposes of Article 27. He submitted that as an English judgment to the effect that Sinco's claims in Greece were in breach of the jurisdiction clauses would be in conflict with a determination by the Greek court that it had jurisdiction over the Greek claims, the judgments would be irreconcilable. Accordingly, he submitted that if a stay is granted, this would involve reviewing the Greek court's jurisdiction, something which the ECJ jurisprudence and, for example, the *Bank of Tokyo-Mitsubishi* case state should not be done.

44. He also submitted that the concern about fragmentation of proceedings in *Evialis's* case is not applicable here because there are in any event proceedings on foot in both Greece and in this country concerning the dispute between the parties. Staying the jurisdiction clause claim would not fragment the proceedings any further.

45. On behalf of the Syndicates, Mr Phillips submitted that the court should have regard to the proceedings as a whole. In this case there are English proceedings on foot which are, on Sinco's own arguments, clearly different from the Greek proceedings. He relied on the decisions of Gatehouse, Mance and Colman JJ. He submitted that if the claims for declarations in the two ***Toepfer cases*** were not seen as giving rise to a risk of irreconcilable judgments, neither should a claim to damages for breach of contract because a claim for a declaration as to jurisdiction runs a greater risk of giving rise to irreconcilable judgments than a claim to damages for breach of contract.

46. As to the developments since those decisions, Mr Phillips submitted that the indications given by Phillips LJ in *Toepfer v Cargill* do not provide a sound reason for not following the three first instance decisions. There was no concluded judgment after full argument.

47. As far as *Evialis's* case was concerned, he submitted it is distinguishable from the present case. In that case the substantive cause of action in the English proceedings was held to be a mirror image of the substantial claim in the Italian proceedings in that case. It was that which enabled Andrew Smith J to distinguish the three first instance decisions. In the present case, the jurisdiction claim is not the mirror image of the claims in the Greek proceedings.

48. Finally, he submitted that although the object of the claims advanced in the Greek proceedings and those in the English proceedings are damages, the damages sought in the two proceedings related to different causes of action. Moreover, the English court was the court first seised of the claims for damages for breach of contract.

49. Mr Henshaw made his submissions attractively and moderately. The approach of the ECJ in *Gasser's* case and ***Turner v Grovit*** and the emphasis placed on the need to avoid irreconcilable judgments are pointers favouring the submissions he made. I have, however, concluded for the reasons given in the following paragraphs that, on the assumption that this court is not, pursuant to Article 30, the court first seised of the jurisdiction clause claim, that claim should not be stayed.

50. If the proper approach is (as Andrew Smith J stated in *Evialis's* case) to look at the proceedings as a whole, and to ask what is the central or essential issue in the Greek proceedings and these proceedings, on Sinco's own arguments, the substantive claims advanced and the issues are different. The Greek proceedings involve claims arising outside contract and founded on tort or statute. The English claims, including the jurisdiction clause claim, are founded on alleged breaches of the contracts contained in the binders. In this respect, this case is to be distinguished from ***Evialis v SIAT*** and ***Bank of Tokyo- Mitsubishi Ltd v Baskan Gida Sanayi Ve Pazaralam AS***, in which the English claims that were stayed were mirror images of the claims in the Italian courts.

51. It is, moreover, significant that the English proceedings were instituted in January. Although Sinco had not been served with them at the time the Greek proceedings were instituted, the main part of this action is clearly also the first in time. The question is whether the claim for breach of contract in the jurisdiction clause claim should be separated from the claims of other breaches of the same contracts.

52. If, however, I accept Mr Henshaw's submissions and consider only the jurisdiction clause claim, I do not consider that Phillips LJ's statements in ***Toepfer v Cargill*** or the decision in ***Evialis v SIAT*** mean that I should not follow the decisions in ***Continental Bank v Aeakos,*** and ***Toepfer v Molino***, and that of Mr Justice Colman in ***Toepfer v Cargill***. Those judgments, by three experienced Commercial Court judges, do not appear to me to be wrong.

53. There may, in this case, be a risk of irreconcilable judgments. However, as Mr Phillips submitted, while that may be an underlying policy factor in the Regulation, the test in Article 27 is whether the cause and object of the two sets of proceedings are the same and between the same parties. That Article 27 does not completely eliminate the risk of irreconcilable judgments is shown by the fact that in assessing whether the claims have the same object and cause, the defence is disregarded: see Case C- 111/01 ***Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV*** [2003] ECR I-4207.

54. Secondly, although in the present case relief is sought in respect of the underlying claim, that claim is to be compared with the proceedings as a whole in the Greek proceedings (including the substantive claim) which, for the reasons I have given, differs from the jurisdiction clause claim in the English proceedings. I also respectfully agree with Gatehouse J that it is not enough that one issue – jurisdiction – could arise in both actions. As Mance J stated in ***Toepfer v Molino***, the fact that a preliminary objection has been raised in the proceedings in the other country that the claims should be pursued in this country is only one aspect of those proceedings. It does not justify regarding their cause and object as the same. In ***Evialis v SAIT*** Andrew Smith J (at [89]) compared the English proceedings with the substantive claims in the Italian proceedings. What Gatehouse and Mance JJ said may also reflect the issue raised by Phillips LJ in ***Toepfer v Cargill*** as to whether a dispute as to jurisdiction can properly be categorised as "*cause of action*" in the light of the scheme of the Convention. That scheme, he stated, appears to anticipate that a dispute as to the jurisdiction of the court to entertain a substantive dispute will arise either by way of challenge to jurisdiction in the court first seised or by reason of the commencement of proceedings involving the same substantive dispute before a second court. Notwithstanding what the Court of Appeal said about the cause and object, it also doubted that jurisdictional disputes were "*causes of action*".

Article 30

55. I have explained why, although strictly the Article 27 issue only arises if this court is not the court first seised of the jurisdiction clause claim pursuant to Article 30, I dealt with it first. I turn to Article 30.

56. Apart from the Syndicates' jurisdiction clause claim, the relevant date of seisin for the English action is 15 January 2007 when the claim form was issued. By 21 June, when the claim was amended, Sinco had brought the Greek proceedings.

57. Mr Phillips submitted that once the English court was seised of the dispute between Sinco and the Syndicates in accordance with the claim form, it was seised of that dispute in relation to an alleged breach of contract which it is common ground could not have been included on the claim form issued on 15 January. He submitted that the date of sesin in relation to the dispute between the parties should not be parsed with regard to different elements of the dispute. He relied in particular on the absence of a substantive claim in the Greek proceedings which conforms to the jurisdiction clause claim in the English proceedings and on this not being a case where the jurisdiction clause claim was omitted from the claim form but one which it was impossible to advance at the time the claim form was issued. He submitted that no reliance was placed on "*relation back*", and that the approach of the Court of Appeal in ***Kolden Holdings v Rodette Commerce*** [2008] EWCA Civ 10 in relation to the *"same parties*" question shows that a flexible approach is possible.

58. Mr Phillips argued that his approach is consistent with a scheme of jurisdictional regulation which affords equal recognition to the courts of all member states and simply allocates jurisdiction on the basis of the rule of first seizure and will also avoid forum shopping by defendants seeking to steal a march on a claimant. He also submitted that it was consistent with the policy of the Regulation in seeking to avoid potentially conflicting decisions between the courts of Member States.

59. Mr Henshaw submitted that Mr Phillips' argument is in effect one that any claim subsequently arising out of the contract between the parties is the "same" claim within Article 30 even where, as in this case, neither the original claim nor the amended claim had been served on the defendant. Where the unamended claim has been served, he asked whether the overseas court would be obliged to stay any claim under the contract even where that claim is not in existence at the time the overseas proceedings are instituted. He relied on the fact that the scheme of the Regulation can, as discussed earlier in this judgment, lead to the fragmentation of actions. He also relied on the approach of Mance J in ***Toepfer v Molino*** (considered in paragraph 29 above) and the inapplicability in purely domestic proceedings of the doctrine of relation back.

60. In terms of domestic English procedure, pursuant to CPR 7.2, these proceedings started when the court issued the claim form on 15 January. By CPR 7.4(2) and 7.5, where proceedings are served out of the jurisdiction, the claim form must be served on the defendant within 6 months after the date of issue. The Particulars of Claim must be served within 14 days after service of the claim form. In this case Sinco was served in Greece and the 6 month period after the claim form was issued expired on 15 July 2007. By CPR 17.1 a party may amend the statement of claim at any time before it has been served without the permission of the court. The amendment made on 21 June was made pursuant to rule 17.1. By CPR 17.3.4 the amendment took effect on the date of the original document which it amended, that is 15 January 2007. By CPR 20.8(1) where an additional claim may be made without the court's permission, the claim form must be served within 14 days after the date on which the additional claim is issued by the court. The additional claim and the original claim were served within that 14 day period on 29 June 2007. Accordingly, this is a case in which the Syndicates were able to amend the claim without seeking the permission of the court and did so. Domestic procedural law provides that the amendment took effect on 15 January 2007.

61. In a case where an amendment can only be made with the permission of the court, it must be the position under the Regulation that the proceedings can be seen as pending in relation to the amendment only once an order allowing it has been made and the claim form reissued. What is the position where no permission is required? Dicey, Morris and Collins, *The Conflict of Laws* deals with the position under Article 30 briefly. It states (12-061) that:

"where new parties or new claims are to be added by amendment, the corresponding date is presumably the date of reissue, rather [than] the date of application for such permission as may be required".

62. Briggs and Rees, *Civil Jurisdiction and Judgments* deal with Article 30 in section 2.204. Neither they nor Dicey, Morris and Collins deal expressly with the position where the permission of the court is not required for an amendment and it is made pursuant to CPR 17.1. Briggs and Rees state that in cases where an amendment may be made only with permission of the court, the proceedings can be seen as pending only once an order allowing the amendment has been made. In relation to the position of an amendment to the claim Briggs and Rees state:

"Suppose A has commenced proceedings against B for breach of contract; and later seeks to amend to add a claim for a new head of damages, or a claim for equitable relief for breach of fiduciary duty. But if in the mean time B, seeing the limited nature of the claim advanced by A has commenced proceedings of his own in the courts of another Member State for a declaration that he owed no fiduciary duties, would this preclude A from making the amendment sought? It would be no answer that the later claim would relate back to the earlier as a matter of the law of limitation, for in ***Grupo Torras SA v Sheikh Fahad Mohammad Al-Sabah****, the Court of Appeal considered that the date upon which proceedings were definitively pending was a question essentially of fact, and which arose before and quite independently of any internal procedural law doctrine of relation back which had any effect. If the court were persuaded that the new claim had the same objet and the same cause as the original claim, it may conclude that it was in fact and in law pending as from the issue of the original claim form. Desirable as this undoubtedly is, there will clearly be cases where this analysis is too strained to be advanced; and in those cases it appears that a defendant, who sees his opponent's claim as being limited or potentially incomplete, may be able to pre-empt later amendment by commencing proceedings of his own to steel the gap. If the law is indeed to be interpreted as here set out, there is a high price to pay if the original claim form is not drafted as fully and completely as the claimant's capacity for foresight permits.*"

With regard to the price to be paid if a claim form is not drafted to reflect the entire dispute between the parties, Briggs and Rees refer to the tactical disadvantage to a claimant who has to apply to the court for permission to amend and thus gives the intended defendant the opportunity to commence proceedings of its own before the application is heard.

63. It is clearly desirable to have a rule which avoids forum shopping. Treating the relevant date for seisin of the English proceedings as different in respect of different elements of the dispute does not reflect the reference in the English version of Articles 27 and 28 of the Regulations to "actions" and "proceedings", words which, on their ordinary meaning, as Andrew Smith J stated in ***Evialis's*** case (paragraph 32 above) do not on the face of it contemplate parts of actions or proceedings being stayed. Although it might have been possible to seek a declaration as to the scope of the exclusive jurisdiction clause at the time the claim was originally issued, there has been criticism of the use of negative declarations as pre-emptive devices in jurisdiction disputes: see the comments of Lawrence Collins LJ in ***Kolden Holdings v Rodette Commerce*** [2008] EWCA Civ 10 at [6]-[7] and his earlier comments in the ***Bank of Tokyo-Mitsubishi* case** [2004] 2 Lloyd's Rep. 395 at [244]. Those criticisms were made where the application for a negative declaration was seen as an attempt to remove proceedings from their natural forum. In this case, such a declaration would have been in support of an exclusive jurisdiction clause favouring England, and not open to those criticisms. Briggs and Rees are of the view that it is desirable that a new claim with the same *objet* and *cause* as the original claim should be held to be in fact and in law pending as from the issue of the original claim form. Notwithstanding these factors, I see difficulties in accepting Mr Phillips' submission in circumstances such as those in the present case.

64. The purpose of Artcle 30 is to have a uniform interpretation of the date on which a court is regarded as seised. Recital 11 to the Regulation states that the rules of jurisdiction must be "*highly predictable*" and Recital 15 that there "*must be a clear and effective mechanism for resolving cases of lis pendens*". Of particular significance in the present context is the statement in Recital 15 that:

"*for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously*".

Grupo Torras SA v Al-Sabah shows that, in the context of the Convention and now the Regulation, including Article 30, any domestic procedural doctrine of relation back (such as that in CPR 17.3.4) does not apply.

65. The interpretation for which Mr Phillips argued may, on an ex *post* analysis and with hindsight, be "*a clear and effective mechanism"* but, if the matter is considered at the time the proceedings in the other member state are instituted, it is not. At that time, as the facts of this case show, the intended defendant to the English proceedings may not know of the proposed amendment. Unless the court of that other state is obliged to stay any claim under the contract, even a claim not existent when the proceedings in the other member state are instituted, regarding the court as seised of the jurisdiction clause claim in January is likely to give rise to a possibility of conflict. It was noted by Lawrence Collins J in the ***Bank of Tokyo-Mitsubishi* case** (paragraphs 29-30 above) that, notwithstanding the disadvantages of fragmentation of proceedings this may be a consequence of the rules in the Regulations. Where not to fragment the proceedings gives rise to the possibility of conflicting decisions, in view of the strength

of the policy to prevent that possibility at the outset (see paragraphs 20 and 23 above), fragmentation may be the option that is less inconsistent with the policy and purpose of the Regulation.

66. In ***Kolden's case*** the issue was whether an assignment after the English proceedings were issued, but before the Cyprus proceedings were, meant that the two proceedings did not involve the same parties for the purpose of Article 27. Kolden was regarded as the "*same party*" for the purpose of Article 27 as the original claimant although, by English law, he only became party to the English proceedings when substituted by the assignment. It is significant that the issue concerned Article 27 where (see paragraph 22 above and [2008] EWCA Civ 10 at [85]) a broad view of the concepts is taken and one looks to substance and not to form.

67. In a case of assignment there is only one right (see [2008] EWCA Civ 10 at [91]) and in general there is a substitution of parties. The issue before the court in ***Kolden's case*** was whether the assignee's interests were "*identical*" to and "*indissociable*" from those of the original claimant. Moreover, if the assignor and assignee are not treated as the same party there would be an easy way to defeat the application of Article 27 and frustrate the purpose of the Regulation: [2008] EWCA Civ 10 at [95]. The position of additional claims is different. The new claim is an additional allegation of breach of the same contract as the contract giving rise to the claims issued in January. At one level, it has the same *cause* and *objet* as the remainder of the claim because the essential claim is for compensation for breach of obligations under and associated with the binders. But at another level, the *cause* of the jurisdiction clause claim differs from that of the remainder of the claims in the English proceedings because the facts relied on differ. The facts giving rise to the jurisdiction clause claim – the institution of the Greek proceedings – had not taken place when the claims were issued in January.

68. Mr Phillips recognised that the interpretation he was advancing was novel. Although, it might serve to avoid forum shopping by defendants seeking to steal a march in the manner contemplated by Briggs and Rees, for the reasons I have given, I do not consider that it affords the certainty that Article 30 was intended to provide and may give rise to a possibility of conflicting decisions where, as in this case, at the time proceedings in another member state are instituted the claim made in that member state has not been made in the English proceedings. This is particularly so if, as in the present case, the defendant in the English proceedings has not been served when it launches the overseas proceedings. Accordingly, I do not consider that this application can be dismissed purely on the ground that, under Article 30 of the Regulation, on 15 January the English court was seised of the entire claim, including the amendments.

Conclusion

69. For the reasons given in the section of this judgment dealing with Article 27, this application is dismissed.

MR S PHILLIPS & MR R SARLL (instructed by Holman Fenwick Willan) for the Claimants
MR A HENSHAW (instructed by DLA Piper) for the Defendant