Jurisdiction over actions *In Personam,* where the defendant is domiciled in the E.C.

Aim:
To provide an analysis of the jurisdiction provisions of the 1968 Brussels Convention in matters relating to contract and matters relating to tort.

Objectives.
After careful study of the following notes, and other prescribed readings for this lecture, you will be able to:

1. Discuss the scope of the 1968 Brussels Convention as provided for in Article 1 and explain the provisions of Articles 2 and 4;
2 Discuss the special jurisdiction provisions of Article 5 in matters relating to contract;
3 Discuss the special jurisdiction provisions of Article 5 in matters relating to tort.

Introduction.

Whereas the English court enjoys extensive, ***discretionary*** powers of jurisdiction over a defendant who is ***not*** domiciled within the EC., for example, by way of a defendant's presence in England or by way of granting leave to serve a writ out of the jurisdiction, the enactment of the ***Civil Jurisdiction and Judgements Act 1982,*** which gives the force of law to the 1968 ***Brussels Convention,*** has heralded significantly different and less extensive powers over a defendant who *is* domiciled within the EC. In essence, the exercise of discretion under the traditional rules has been replaced by the *mandatory* provisions of the Convention; and the mere presence of the defendant in England no longer gives the English courts jurisdiction if the defendant is domiciled in some other Member State of the EC / Contracting State of the Convention.

Nature and Scope of the Brussels Convention.

In England and Wales, the ***1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*** (the 'Brussels Convention') provides the essential basis of the modern law on jurisdiction and the enforcement of judgements over a defendant who is domiciled in a Contracting State. The Brussels Convention had been agreed to by the original six Contracting States of the EEC, viz; France, Germany, Italy, Belgium, Luxembourg and the Nether1ands. Indeed, these States were obliged by *the* ***'old'Article 220*** of the ***Treaty of Rome*** (now ***Art.293EC***), to enter into such a convention with regard to the *recognition of foreign judgements.* However, the scope of the Brussels Convention was extended by including the provisions relating to *jurisdiction.* Furthermore, ***Article* 63** of ***the Brussels Convention*** provided that any State which subsequently joined the E.C. (such as the U.K., Eire and Denmark in 1973; Greece in 1981; Spain and Portugal in 1986; and Finland, Austria and Sweden in 1995) would be bound by its terms.

s.1(1) CJJA 1982 confirms that the purpose of the ***CJJA 1982*** was to implement the provisions not only of the ***Brussels Convention 1968*** but also the ***Protocol on Interpretation 1971,*** which provides for uniform interpretation throughout the Community and ***the Accession Convention 1978*** (under which the first of the new Member States: U.K.; Eire; and Denmark, acceded to the 1968 Convention).

s.2(1) CJJA 1982 specifies that *'the Conventions shall have the force of law in the United Kingdom, and judicial notice shall be taken of them'*.

Two recent amendments have been made to the scope of the jurisdiction principles, and both have been incorporated into English law:

1 The ***Lugano Convention 1988*** which extended the principles of the Brussels Convention to the *European Free Trade Association* (EFTA) in order that the advantages of, inter alia, a uniform law of jurisdiction could be enjoyed by EFTA countries.[1] The Lugano Convention has been given the force of law by the ***Civil Jurisdiction and Judgments Act 1991*** which has amended the ***CJJA 1982.*** In essence, whereas the provisions of the Lugano Convention are virtually identical to those of the Brussels Convention, as they apply to non-EC Contracting States the ECJ does not have jurisdiction to interpret any of its provisions. This, of course, could lead to differences in interpretation even though ***Protocol 2*** of the ***Lugano Convention*** requires the parties to *'pay due account to the [relevant] principles laid down ... by the courts of other Contracting States*.'

[1] EFTA being the trading bloc which, at that time, was the single most important trading partner of the EC

2 Secondly, the ***San Sebastian Convention 1989*** made adjustments to the Brussels Convention on the accession of Spain and Portugal to the EC and, consequently, the Brussels Convention.

The adjustments were necessary not only to provide for the accession of Spain and Portugal but also to eliminate differences between the Brussels Convention and some improvements on the Brussels Convention that were incorporated into the Lugano Convention. Thus the improvements brought about by the Lugano Convention have been incorporated (albeit with some minor differences) into the Brussels Convention by the San Sebastian Convention! These improvements have been enacted by Order in Council made under ***s.14 CJJA 1982.***[2]

Scope of the Brussels Convention.

Article 1 of the Convention provides that: *'This Convention **shall apply** in **civil** and commercial matters whatever the nature of the court or tribunal.'*

Whereas this appears to be a very wide application, Art.1 then goes on to specify matters to which the Convention does not apply, viz; *'revenue, customs or administrative matters*'. In addition, four classes of cases are expressly excluded even though they may be regarded as civil and commercial matters. They are:

1. Matters of 'status or legal capacity of natural persons, rights in property arising out of the matrimonial relationship, wills and succession'.
2. Bankruptcy, proceedings relating to winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.
3. Social Security
4. ***Arbitration***. ***Article 1(4)*** provides that; '***the Convention shall not apply to ... arbitration***'.

That ***all*** provisions relating to arbitration are excluded under the Convention was confirmed in **The Atlantic Emperor.**[3] Here a dispute had arisen between M, the Swiss purchaser, and S, the Italian seller of a cargo of oil. The dispute arose because the oil was contaminated with water. M had telexed S the terms of the contract, one of which subjected the contract to English law and provided for arbitration in London. However, S did not reply to this telex. Whereas a significant part of the dispute revolved around the issue of whether the telexed terms were part of the contract, the main issue was: did M's request to the English court to appoint an arbitrator come within the Convention? S alleged that it did on the basis that it was a commercial matter and, by coming within the scope of the Convention, S could only be sued in their own jurisdiction unless it could be proved that they had contracted to submit to another jurisdiction (***Art.2 Brussels Convention***). Otherwise, contended S, it would be possible to evade the application of the Convention simply by alleging the existence of an arbitration clause.

HELD: (ECJ) That reference *solely* to the subject matter of the dispute would suffice to determine whether the dispute was within the scope of the Convention. Here, the reference was to 'arbitration'. Accordingly it was irrelevant that the validity or otherwise of the arbitration term was to be determined as a preliminary point: once the subject matter of the dispute came within an excluded category then the litigation fell outside the scope of the Convention.

Meaning Of 'Civil and Commercial Matters'.

There is no definition of this term within the Convention. Apart from ***Art.1*** providing that it does not include 'revenue, customs or administrative matters' guidance as to what the term does encompass has been left for case law to establish. One of the first cases, ***L.T.U. v Eurocontrol***[4] had to decide whether litigation with a public authority constitutes a *'civil and commercial matter'*.

L.T.U., a German airline corporation, disputed the validity of charges imposed by Eurocontrol, a public authority and international organisation, which provided air safety services. Eurocontrol was acting within the exercise of its powers when it sought to collect charges from L.T.U. for the use of its services. Although

2 Whereas the Article numbers in the Brussels and Lugano Conventions are the same, significant differences which, nevertheless, remain between the Conventions are to be found in relation to certain aspects of special and exclusive jurisdiction in Articles: 5(1); 16(1)(b); and 17(5). See infra

3 **The Atlantic Emperor ; Marc Rich & Co. v Societa Italiana Impianti PA** (Case C-190/89) [1992] 1 Lloyd's Rep 342

4 **L.T.U. v Eurocontrol** [1976] ECR 1541

the use of the services was obligatory and the rate of charge was fixed unilaterally, i.e. it was non-negotiable, Eurocontrol succeeded in obtaining a judgement in Belgium, the Belgian court expressly finding the matter to be commercial in nature. However, when the German court was asked to enforce this judgement it referred the question of interpretation of 'civil and commercial matters' to the European court.

HELD: This was not a civil or commercial matter. Accordingly, the enforcement of the judgement fell outside the scope of the Convention. The court made it clear that the meaning of a 'civil and commercial matter' would be derived from the Convention and not from the provisions of the national laws involved in the litigation.

Commenting on this decision, ***Hartley,*** in ***Civil Jurisdiction and Judgments***, 1984, p13, said that: *'unless the public authority was acting as an ordinary citizen and not claiming any special prerogatives*' the matter under litigation will lie outside the scope of the Convention.

Another case which fell outside the scope of a *'civil and commercial matter'* was: ***Netherlands State v Ruffer.***[5] [1981] 3 CMLR 293. Here, a claim was made by the Dutch public waterways authority for reimbursement of the costs of removing the wreck of a German vessel following a collision. Dutch law classified the action as one in tort. **HELD:** The action arose from international treaty obligations and, thus, would be regarded by many Contracting States as an administrative action.

Another recent case on the meaning of 'civil and commercial matter' is **Menten v The Federal Republic of Germany.**[6] As a result of a fraudulent claim made by M, the German government had paid compensation to him and his wife amounting to 550,000 DM. The German government sought restitution of this sum when the fraud was discovered. They succeeded in obtaining judgments in the German courts and then attempted to enforce them against M in the Nether1ands.

HELD: (by the Dutch court). The claim for repayment of the money, the original payment of which had been induced by fraud, was a matter 'rooted in private law': it had nothing to do with public authority powers. Accordingly, the matter was within the 'civil and commercial' category under the Brussels Convention

Interpretation of the Convention by English Courts.

A consequence of 'the Conventions' having the force of law ***(s.2(1) CJJA 1982)*** is that English courts can, and sometimes must, refer questions relating to the interpretations of the Conventions to the ECJ: ***Arts 1-4*** *of the* ***Protocol on Interpretation 1971****.*

However, the Protocol on Interpretation contains two limitations on when a national court can request such a ruling, viz;

1. *'the national court must ... consider that a decision on the question is* necessary *to enable it to give judgement*.' So, if the English court is of the opinion that the meaning under the Convention is clear then no reference to the ECJ is necessary.
2. With regard to a jurisdiction case, the House of Lords ***must*** request a preliminary ruling where the meaning of a term is in doubt, whereas a court (*other than the House of Lords*) *when sitting in an appellate capacity* ***may*** request such a ruling. A court at first instance is *not* empowered to make such a request. ***This process is in marked contrast with the procedure under*** **Art.234EC** ***where any court may request a preliminary ruling****.*

If the English court doesn't believe that it is necessary to seek a ruling from the ECJ on a provision of the Convention, then ***s.3(1) CJJA 1982*** provides that the matter must be determined *'in accordance with the principles laid down by and any relevant decisions ... [of that court]*'.

Cheshire & North point out: "*There is a substantial body of case law on the Brussels Convention ... [and] The English courts are bound by these decisions and are required to take judicial notice of them.*"

Collier adds: *'When the (ECJ) has had to decide whether the provision in question should be interpreted in accordance with its meaning under the law of a Member State, because it is either the* lex fori *or the* lex causae *or in accordance*

[5] ***Netherlands State v Ruffer*** [1981] 3 CMLR 293.

[6] **Menten v The Federal Republic of Germany** [1991] ILPr 259

with the basic principles of the Convention itself, which are sometimes called 'Community' principles, it has, except in one case[7] *adopted the latter opinion*.'

The approach to interpreting Community law by the English courts is entirely different from that adopted when interpreting English statutes. The reason for this is that the function of the English court when interpreting the Brussels Convention is "*to seek to give effect to its purpose and not to give it 'a narrow literalistic construction'*," per ***Potter J*** in ***New Hampshire Insurance Co. v Strabag Bau*** (1990). In this case, *Potter J* also adopted ***Lord Diplock's*** dictum in ***Henn & Derby v DPP*** (1980), where *Lord Diplock* said that:

"The European court in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties: sometimes, indeed, to an English judge it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth."

However, perhaps the most remarkable aid to interpreting provisions of the Brussels Convention is that ***s.3(3) CJJA 1982*** permits unconditional reference to be made to the ***Jenard Report*** (on the 1968 Convention) and to the ***Schlosser Report*** (on the 1971 Protocol on Interpretation and the 1978 accession Convention). The Reports *'may be considered in ascertaining the meaning or effect of any provision of the Convention and shall be given such weight as is appropriate in the circumstances*.'

Jurisdiction

Articles 2-23 of the ***Brussels Convention*** contain the principles relating to jurisdiction. An overview of these provisions of the Convention reveals that:

Art. 1	provides that the Convention applies to Civil & Commercial matters; and
Art. 2	is the source of the basic jurisdictional principle. D is sued in the court of his domicile (see infra).
Art. 3	When D is domiciled in the E.C., his presence in England is insufficient reason to exercise jurisdiction.
Art. 4	Provides for determination of where D is domiciled if he is not domiciled within the E.C. (See infra).
Arts. 5 & 6	Provide for Special Jurisdiction; i.e., notwithstanding the basic jurisdictional principle in Art. 2, Arts. 5, 6 and 6A provide for circumstances in which a court other than that of D's domicile shall have jurisdiction.
Arts. 7-12A	Contain provisions relating to insurance matters.
Arts. 13-15	Deal with Consumer Contracts.
Art. 16	Provides for Exclusive Jurisdiction; i.e. when the provisions of Art 16 apply, a particular court has jurisdiction to the exclusion of all other courts and irrespective of D's domicile.
Art. 17	Refers to Prorogation of Jurisdiction.
Art. 18	Deals with Submission to the jurisdiction of a court.
Arts. 21-23	Relate to Lis Pendens ('First come first served').
Art. 24	Mareva Injunctions.

Differences Between the Brussels Convention and the Traditional Principles of English Law Governing Jurisdiction and Recognition & Enforcement of Judgements.

Collier (2/e, pp136-137) says that the 1968 Convention *"departs in five main ways from the existing principles of English law governing jurisdiction and recognition and enforcement of judgments.*

[1] Jurisdiction exercised on the basis of the defendant's presence in England alone is prohibited. [(Art.3]

[2] If the defendant is outside England but the action falls within the jurisdiction of the English courts, service upon him is a matter of right and not merely within the courts' discretion.

[3] If the English court has jurisdiction it [probably] has no discretion to stay the action on the ground that a court of another Contracting State is a more convenient forum. It can only stay an action or decline jurisdiction if such a court has already been seised of the case.[8]

[4] The grounds for refusal of recognition or enforcement of judgments are very limited indeed, especially as regards investigation of the jurisdiction of the court which pronounced the judgment.

[5] Judgements other than money judgements can be enforced, as can judgments which are not final and conclusive."

[7] **Tessili v Dunlop** *(1976)]*

[8] *However, this should now be reviewed in the light of the provisions of* **s.49 CJJA 1982** *and the decision in* **Re Harrods** *(1991)]*

Provisions of the Convention in more detail

The basic principle is contained in ***Art.2*** which states that: *"Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that state alone."*

However, whereas the general rule is that: "*The jurisdiction of the courts of the defendant's domicile is comprehensive and covers all matters within the scope of the Convention*" (*per* ***Collier***), it is subject to two exceptions, viz; "*A defendant cannot be sued in the courts for his domicile if some other court has exclusive jurisdiction [Art.16] and where the defendant is a party to a contractual agreement to submit to another jurisdiction [Art.17].*" (Ibid., p139)

With regard to the jurisdiction of the forum (say the English courts), ***Art.3*** provides that the court's jurisdiction can no longer be founded on presence of the defendant in the forum, i.e. the jurisdiction *'shall not be applicable'* against persons domiciled in the E.C.[9]

Article 4 then states that:
"If the defendant is not domiciled in a Contracting State [(i.e. a European Union Member State], the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16 [(which refers to exclusive jurisdiction], be determined by the law of that state."

In other words, ***if the defendant is not domiciled within another Contracting State, the traditional rules of jurisdiction of the English courts come into play***.

Clearly, it is necessary to explain the meaning of terminology such as 'domicile', and 'exclusive jurisdiction' and then to explain the circumstances leading to the submission to a particular jurisdiction.

Domicile

That 'domicile' is a significant concept in the Conventions there is no doubt. However, 'domicile' is not defined in the Brussels Convention, possibly because it had basically the same meaning in the jurisdiction of each of the six original Contracting States, and its meaning was akin to habitual residence. Yet, there was no equation of domicile with habitual residence since ***Art.5(2)*** provided a separate reference to the latter concept! Furthermore, that the traditional English meaning of domicile did ***not*** equate with 'habitual residence' meant that the CJJA 1982 had to include a new definition of domicile for the purpose of assimilating it with the Convention concept of domicile.

Article 52 of the Convention provides a three-stage process for the determination of a defendant's domicile. It provides that:

1. *in order to determine whether a party is domiciled in the Contracting State whose courts are seised of the matter, the [national/English] court shall apply its internal law.*
2. *if a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State.*
3. *the domicile of a party shall, however, be determined in accordance with his national law if, by that law, his domicile depends upon that of another person or on the seat of authority.*

With reference to the CJJA 1982 and the three stage process under Article 52:

(i) Under the ***CJJA 1982, s.41(2)*** provides that a [natural] person *'is domiciled in the United Kingdom, if and only if ... he is resident in the United Kingdom; and the nature and circumstance of his residence indicate that he has* ***a substantial connection with the United Kingdom****.'* ***s. 41 (6)*** then goes on to provide that a presumption of *'substantial connection'* arises where a person has been resident in the *United Kingdom* for the last *three months*. The presumption is rebuttable by proof that there is ***no*** *'substantial connection*'. However, the specification of three months residence and having a substantial connection with the U.K. still does not determine the domicile of the defendant: the U.K. is a composite ***State*** of three different countries and it is necessary to specify the *country* of residence. To this end, ***s.41(3) CJJA 1982*** provides that a person *'is domiciled in a particular part of the United Kingdom, if and only if ... he is resident in that part; and ... the nature and circumstances of his residence indicate that he has a substantial connection*

[9] This was the first point of difference between the 1968 Convention and the 'traditional rules' as noted by ***Collier,*** *supra.* Furthermore, see again his second point with regard to service of a writ out of the jurisdiction being a matter of right

with that part'. If, at this stage, it still isn't entirely clear where the defendant is domiciled, then ***s.41(5)*** provides that he 'shall be treated as domiciled in the part of the United Kingdom in which he is resident'. Confirmation that the courts of the particular country within the U.K., and within which D is domiciled, have jurisdiction over him is provided for by ***Schedule 4*** to the ***CJJA 1982.***

(ii) If D is not domiciled within the U.K., and neither, by the provisions of ***Art.52*** of the ***Brussels Convention,*** is he domiciled in another Contracting State, then ***s.41(7) CJJA*** provides that he 'is domiciled in a state other than a Contracting State if and only if ... he is a resident in that state; and ... the nature and circumstances of his residence indicate that he has a substantial connection with that state'. [**N.B.:** under s.41(7) there is no presumption of substantial connection].

(iii) The 'seat' of a juristic person, [i.e., the 'domicile' of a company / corporation], as provided for in ***Art.53,*** was not a concept known in the traditional English conflict of laws. However, it is now incorporated in the ***CJJA 1982*** under the provisions of ***s.42(3) & (4)***. Thus, a company/corporation has its 'seat' in the United Kingdom if it is 'incorporated in the United Kingdom and has its registered office or some other official address in the United Kingdom ... or its central management and control is exercised in the United Kingdom'. A company has its 'seat' in a particular part of the United Kingdom [e.g. England and Wales], if and only if, *'it has its registered office or some other official address in that part ... or ... its central management and control is exercised in that part; or ... it has a place of business in that part.*'

'This means that a company registered under the Companies Acts with its registered office in England may have its seat not only in England but also in Scotland if its central management and control is exercised there, and also in Northern Ireland if it has a place of business there' per ***Morris.***

Special Jurisdiction and Exclusive Jurisdiction.

Whereas the basic principle and general rule of jurisdiction is that D, who is domiciled in a Contracting State, *'shall, whatever [his] nationality, be sued in the courts of that state'* and that state alone, ***Articles 5, 6*** and ***6A*** provide for circumstances in which a court *other than that of D's domicile* shall have jurisdiction. Accordingly, if P has an arguable case, such that he elects to sue D in that other Contracting State, the jurisdiction of the courts of D's domicile is then *ousted.* Such special (or concurrent) circumstances in which P has a choice of jurisdiction is referred to simply as '*special jurisdiction*.'

Under ***Article 16,*** however, five circumstances are provided for in which courts other that those of D's domicile have ***exclusive jurisdiction.*** In such circumstances the jurisdiction of the courts of D's domicile is ousted: there is not concurrent jurisdiction, simply the replacement of one jurisdiction by another, irrespective of D's domicile and/or P's preferred choice of law.

Special Jurisdiction.

Special jurisdiction exists in total of eleven cases, seven of which are contained in Art.5. Three of the Art.5 cases are of particular significance. They are: (1) Contract; (3) Tort; and (5) a claim arising out of the running of a branch or agency or other establishment.

Art.5(1): Contract

Article 5(1) provides that: in matters relating to a contract, [special jurisdiction may be exercised] in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated.

This article gives rise to five questions for resolution:

(i) What constitutes 'matters relating to a contract?'
(ii) Where is the place of performance?
(iii) What is the obligation in question?
(iv) What is a matter relating to an individual contract of employment?
(v) How is a dispute relating to the existence of the agreement to be resolved.

(i) Matters relating to a contract

The ECJ has decided that to establish the meaning of 'a matter relating to a contract', a Convention or Community concept will be applied as opposed to a meaning given by a particular national law but that the wider meaning which case law has shown to be encompassed by this approach "*is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another*:" ***Case C-26/91, Jakob Hante's*** case [1992] ECR 3697.

Cases illustrating the meaning of 'matters relating to a contract' include:

Martin Peters v Z.N.A.V. (Case 34/82), [1983] ECR 987. Peters, a German construction company, was sued by an association that had legal personality and which had its registered office in the Netherlands. Peters was a member of this association. In essence, as Peters had succeeded in winning a contract, it was subject to a binding rule of the association (ZNAV) that it should pay a sum of money by way of compensation to the unsuccessful members who had tendered for the work and also make a contribution to the upkeep of the association's office. Peters' response to being sued in the Dutch courts for non-payment was to contest jurisdiction of the Dutch courts claim that they should be sued in the courts of their domicile (seat), ie., Germany. The contention was dismissed as it was for the plaintiff to elect where to sue in 'matters relating to a contract.' The matter was referred to the ECJ for a preliminary ruling.

HELD: An obligation to pay money arising from the relationship between an association and its members involved close links of the same kind as are created between parties to a contract. It was a relationship that came within Art.5(l) even though a number of Contracting States wouldn't recognise this relationship as a matter relating to a contract.

Arcado v Haviland (Case 9/87) [1988] ECR 1539. The Belgian Cour d'Appel sought from the ECJ an answer to the question of whether ' ... proceedings relating to the wrongful repudiation of an (independent) commercial agency agreement and the payment of commission due under such an agreement [were] proceedings in matters relating to a contract within the meaning of Art.5(1) of the Brussels Convention ... ?'

HELD: A claim for commission under a commercial agency agreement and, indeed, a claim for damages for the wrongful premature repudiation of the agency agreement were both matters relating to a contract.

(ii) The Place of Performance

The **ECJ** said this was to be established by the national court using its own conflict of laws rules. Accordingly, it is unique in that it is the only instance in which a national law has been used to interpret a provision of the Convention: ***Tessili v Dunlop*** (1976). This decision has frequently been doubted in the light of subsequent cases employing 'Convention concepts'. However, it is submitted that where the proper law of a contract is not subject to an express agreement between the parties it is at least as acceptable to have the *lex fori's* choice of rules determine this issue as for it to be determined under the Convention. Furthermore, this decision has, in effect, been applied in a 1990 case by the French Cour d'Appel (even though no cases were cited in the decision!).

(iii) 'the obligation in question'

De Bloos v Bouyer (Case 14/76) [1976] ECR 1497. In a dispute involving exclusive distribution rights, the Belgian distributor sought redress from the French manufacturer in the Belgian courts under Art.5(1) of the Brussels Convention. Bouyer contested the jurisdiction of the Dutch courts on the basis that they were not domiciled in Belgium. Amongst the issues to be decided was: what was 'the obligation in question?'

HELD: The obligation in question refers to the obligation which constitutes *'the basis of the legal proceedings, namely the contractual obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.*' That reduced to the Bouyer's non-performance in the place of performance of the obligation enabling De Bloos to invoke the special jurisdiction provisions of Art.5(1) of the Brussels Convention.

The **De Bloos** case has been followed in the English case of **Medway Packaging v Meurer Maschinen [1990] 2 Lloyd's Rep 112.** D, a German firm of machinery manufacturers agreed with P, an English firm of machinery distributors, that P should have the exclusive right to distribute D's machinery in England. When

D authorised another firm to distribute its machinery in England a dispute arose between D and P as to whether proper notice of the termination of their agreement had been given by D.

HELD: (CA.) Applying De *Bloos,* it could be said that the obligation to give notice of the termination 'could reasonably be regarded as the principal obligation in this case'. Accordingly, as notice had to be given in England the service of the writ on D was not set aside.

The meaning of 'the obligation in question' has now been refined by the ***House of Lords*** in:

Union Transport Group v Continental Lines [1992] 1 Lloyd's Rep 229. Here, a charterparty required Belgian shipowners to nominate (in London) a vessel to carry telegraph poles from Florida to Bangladesh. In fact the vessel was not nominated and this was a factor in a dispute over a number of issues - one of which was whether the English court had jurisdiction under Art.5(1).

HELD: Where a dispute concerned a number of obligations under the same contract the *principal obligation* was 'the obligation in question'. In this case, that obligation was to nominate (the nomination to be performed in London), the reason being that such nomination was an essential prerequisite both for identifying the subject matter of the contract and for enabling performance of the other obligations under the contract.

(iv) A matter relating to an individual contract of employment

That *the place of performance* of the employee's contract of employment is '... where [he] habitually carries out his work' was added to *Art.5(1)* by the ***Accession Convention 1989***.

The 'obligation in question' is the '*characteristic performance*' of the contract, i.e. the work. Accordingly, the employee will be able to sue the employer in the place where he (the employee) 'habitually carries out his work', if such a place is identifiable. Thus, the effect of the 1989 amendment was to confirm the earlier decisions of ***Ivenel v Schwab*** (1982) and ***Schenavai v Kreischer*** (1987). Whereas, prior to the 1989 amendment, an employee who did not 'habitually carry out his work' in a particular forum may have had to sue his employer in the employer's country of domicile, this restriction has now been relaxed so the employee can sue the business that engaged him where it 'was or is now situated' which, of course, may have nothing to do with the place where it is domiciled.[10]

Mercury Publicity v Wolfgang Loerke (1991) *The Times*, 21 October

In a contract made in England, a German firm had been appointed as the sole advertising agent in Germany by the English firm, Mercury Publicity. The central issue in the dispute that arose between the companies was where was the place of performance of the obligation in question within the meaning of Art.5(1)? Whereas Mercury tried to establish it was in England, the place where payment under the contract was to be made, Loerke tried to establish that it was in Germany on the basis that it was a contract of employment of a commercial agent and as such it came within the wider ambit of a contract of employment in the master-servant relationship.

HELD: (CA) Individual contracts of employment are characterised by 'those cases of a personal nature in the relationship between master and servant where inequality of bargaining power might well become critical and where [denial of recognition of this] might well deprive the employee or agent of the protection of restrictive agreements and of other statutory and union protection which had been negotiated for this benefit'. Accordingly, Loerke was not working under a contract of employment and English law was deemed to be the law most closely connected with the performance of the contract.

Comparative Point: Brussels and Lugano Conventions.

Whereas the Lugano Convention vests jurisdiction in the courts of the 'place of business through which [the employee] was engaged' the Brussels Convention as amended vests jurisdiction in 'the place where the business which engaged the employee was *or is now* situated'.

[10] compare the pre-amended *Art.5(1)* case *of* ***Six Constructions v Paul Humbert*** (1990); the employer had to be sued in Belgium, the country of his domicile See also: ***Effer v. Kanter, Case 38/81***, [1982] ECR 825; and ***Tesam Distribution v. Schuh Mode Team***, (1989) The Times, 24 October (CA)].

Art:5(3): Tort.
Article 5(3) provides for special jurisdiction in relation to torts i.e. 'in matters relating to tort, delict or quasi delict, in the courts for the place where the harmful event occurred'.

As to what is classified as a tort is to be decided in accordance with community concepts: ***Netherlands v Ruffer*** (1980)

Whereas the ***Jenard Report*** did not answer the question of whether 'the place where the harmful event occurred' referred to the place where the act which initiated the damage occurred or the place where the damage took effect, the answer that it was 'both' was given in the decision in:

Bier v Mines de Potasse D'Alsace (Case 21/76) [1978] 1 QB 708. Here, the French defendant was alleged to have poured effluents into the Rhine in France and the ensuing pollution was alleged to have damaged the Dutch plaintiff's property in the Netherlands. Thus, it was necessary to decide where the harmful event occurred if litigation was to proceed.

HELD: Both the French and Dutch courts had jurisdiction.

Art.5(5): Branches and Agencies
Here, ***Art 5(5)*** provides: 'as regards a dispute arising out of the operations of a branch, agency or other establishment, [special jurisdiction exists] in the courts for the place in which the branch, agency or other establishment is situated.'

Accordingly, it was held in ***De Bloos* v. *Bouyer*** (1976) that the appointment of an 'exclusive distributor' in Belgium did not amount to the setting-up of a 'branch or agency or other establishment'. The applicable test is whether the 'branch or agency' is subject to the defendant's direction or control. A more recent case, ***Blanckaert & Willems v. Trost*** (1981), has decided that a 'branch' must appear as 'an easily discernible extension of the parent body'. Furthermore, it was decided in ***New Hampshire Insurance Co. v Strabag Bau*** (1990) that 'branch, agency or other establishment' must be a branch, etc. of the defendant: P's position in that respect is irrelevant.

Jurisdiction over Matters Relating to Insurance and Consumer Contracts
The special jurisdictional rules applicable to matters relating to insurance and consumer contracts are contained in articles 7-12A (Insurance) and 13-15 (Consumer Contracts).

Matters Relating to Insurance: Articles 7-12A
Art.8 provides that the insured may sue the insurer where either of them is domiciled; or, where the defendant is a co-insurer, in the courts of the Contracting State in which proceedings are brought against the leading insurer. If an insurer is not domiciled in a Contracting State, but has a branch or agency or other establishment in one of the Contracting States, then, should a dispute arise out of the operations of that branch or agency or other establishment, he may be sued in that state.

Art.9 provides that in respect of liability insurance or insurance of immovable property, the insurer may be sued in the place where the harmful event occurred.

Art.1O provides that, if the law of the forum permits, the insurer may be joined with the insured in proceedings which the injured party may bring against the insured.

Art.11 provides that irrespective of other provisions, the insurer is permitted to commence proceedings in the court of D's domicile; and if a court has jurisdiction to hear the original claim it also has jurisdiction to hear a counterclaim.

However, whereas the insured person who is domiciled in a Contracting State may sue in that State an insurer not domiciled in any Contracting State, the insurer who counterclaims can only sue the original plaintiff in that State: it is impermissible to enjoin other defendants who were neither party to the original claim nor are they domiciled in the same Contracting State as the original sole plaintiff in the counterclaim.[11]

[11] ***Jordan Grand Prix v. Baltic Insurance Group; Baltic Insurance Group v. Jordan Grand Prix and others***, (1997) *The Times*, 14th November.

With regard to agreements relating to jurisdiction over insurance claims, ***Clarkson and Hill***[12] ***state that:*** *"The effectiveness of a jurisdiction agreement in an insurance contract is determined by Articles 12 and 12A"*. The authors then go on and succinctly address the five situations in which such an agreement can be enforced, viz;

(1) it was entered into after the dispute arose;

(2) the agreement allows the weaker party a wider choice than that permitted by the other provisions of the Convention;

(3) the agreement confers jurisdiction on the courts of the contracting state in which both the policy-holder and the insurer are domiciled;

(4) the policy-holder is not domiciled in a contracting state (unless the insurance is compulsory or relates to immovable property situated in a contracting state);

(5) the agreement forms part of a contract of insurance dealing with major risks as defined by article 12A (such as a contract of marine insurance).

Exclusive Jurisdiction: Article 16.

Article 16 of the Convention gives jurisdiction to a particular court to the exclusion of all other courts and, when it does so, it applies irrespective of the defendant's domicile.[13]

Art.16 is a provision which overrides other provisions of the Convention. Thus, when a court has exclusive jurisdiction, such jurisdiction cannot be ousted by agreement (Art.17) or submission to the courts of another state (Art.18). For example, Article 17(3) provides that: 'Agreements ... conferring jurisdiction shall have no legal force ... if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of article 16.' Furthermore, Article 19 provides that where 'a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another state have exclusive jurisdiction by virtue of article 16, it shall declare of its own notion that it has no jurisdiction'.

There are five types of dispute in which the courts have exclusive jurisdiction:

(1) (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

(b) however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have [exclusive] jurisdiction, provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State.

[Comparative Point: The requirements in the Lugano Convention are that only the tenant need be a natural person and that neither party need be domiciled where the property is situated. Under the Brussels Convention as amended and noted supra, both the landlord and tenant must be natural persons and be domiciled in the same Contracting State: see pp19-20, infra.].

(2) In 'proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or association of natural or legal persons, or the decisions of their organs, the courts of the Contracting State in which the company, legal person or association has its seat' 'shall have exclusive jurisdiction'.

(3) Proceedings in respect of entries in a register: the courts of the place where the register is kept.

(4) Industrial property, the registration or validity of patents, trade marks or designs, or other such interests: the courts of the place where their deposit or registration has been applied for or has taken place.

(5) Enforcement of judgments: the courts of the state where the judgment is to be or has been enforced.

There has been recent litigation on both Article 16(1) and (2). Litigation has clarified the meaning of both sub-articles; and with respect to Art.16(1), case-law has suggested that it has been easier to identify when the contended provision does not apply.

12 *Clarkson, CVM & Hill, J. Jaffey on the Conflict of Laws*. London: Butterworths, 1997, p92.

13 N.B. : Since article 16 applies 'irrespective of domicile', then it applies even if D is not domiciled in a Contracting State

Article 16(1): 'rights in rem in immovable property ...'

Reichert v. Dresdner Bank, Case 115/88, [1990] ECR 27. Mr and Mrs Reichert, who lived in Germany, owned immovable property situated in France. They made a gift of this property to their son. However, the Dresdner Bank, to whom the R's owed a great deal of money, challenged the validity of this disposition: they claimed that it was aimed to defraud them by preventing them from achieving satisfaction of the R's debts. In such circumstances, French law makes provision for this type of case by way of an *action paulienne* which permits the creditors to challenge the validity of acts performed by the debtors. The D Bank sued the R's in France, but the French courts could only have jurisdiction if Article 16(1) applied and so granted them exclusive jurisdiction.

HELD: (ECJ) What is now Article 16(1)(a) is only concerned with actions which determine 'the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest.' The *action paulienne* was a right in personam which did not apply to the 'rules and customs of the place where the property is situated (i.e. the situs]'. [Accordingly, *Article 16(1) did not apply to give exclusive jurisdiction to the courts of the situs*]

An English case on this article is:

Webb v. Webb, Case C-294/92, [1994] ILP 389 In a dispute between father and son, the plaintiff father sought a declaration that property bought in the South of France in the son's name was held on trust for him (the plaintiff father) and that the son be ordered to execute the necessary deeds to vest the property in the father's name. The father had contended that he had provided the money to purchase the property as a holiday home for his wife and himself and that they had used the property regularly as a holiday home over the past twenty years and that they had also paid the outgoings and maintenance costs on the property. The son contended that the French courts had exclusive jurisdiction in this case as, under Art.16(1) of the Brussels Convention 1968, in proceedings with rights in rem in immovable property as their object, exclusive jurisdiction was given to the courts of the contracting State in which the property was situated.

Held (ECJ), dismissing the son's contention, the plaintiff's action had as its object not a right in rem but the establishment of the accountability of the defendant as trustee for the plaintiff. Thus, ***Art.16(1) was inapplicable.*** It was reported (at p403) that: "*The aim of proceedings before the national court is to obtain a declaration that the son holds the flat for the exclusive benefit of the father and that in that capacity he is under a duty to execute the documents necessary to convey the ownership of the flat to the father. The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights as against the son. Consequently, his action is not an action in rem within the meaning of Article 16(1) of the Convention but an action in personam.*" [14]

That the ECJ appears to have created binding precedents, in contrast to the theory of EC Law, and that it is happy to cite Webb as such, was evident in **Lieber v. Göbel** (1994):

Lieber v. Göbel, Case C-292/93; [1994] ECR 2535. The result of a friendly settlement in 1978 was that the Göbels, who were domiciled in Germany, transferred the ownership of an apartment they owned in Cannes, France, to Mr Lieber, who also was domiciled in Germany. Mr Lieber was in possession of the apartment from 1978 until 1987. However, when the settlement was declared void in 1987, the Göbels sought compensation from him in the German courts. Mr Lieber contested the jurisdiction of the German courts, contending that the French courts had exclusive jurisdiction under Article 16(1) of the Brussels Convention of 1968. The German court referred the following question to the ECJ for a preliminary ruling: "Do matters governed by Article 16(1) of the Brussels Convention also cover questions of compensation for use made of a dwelling after a failed property transfer?"

Held (ECJ), that as the object of the settlement was the transfer of ownership of immovable property, it did not constitute a tenancy of immovable property within the meaning of Art.16(1); accordingly, the Court had to consider whether the compensation in question was a right in rem in immovable property within the

[14] See also **Hacker v. Euro Relais; Lieber v. Gobel;** and **Reichert v. Dresdner Bank**. Contrast **Rosler v. Rottwinkel**

meaning of that provision. However, "*The court has consistently held ... that Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of any of them. It follows from [previous cases] and from the judgement in* **Case C-294/92, Webb,** *..., that in order for Article 16(1) to apply, it is not sufficient that the action* concerns *a right* in rem *in immovable property or that the action is connected with immovable property. The action must be* based *on a right* in rem *and not, apart from the exception for tenancies of immovable property, on a right* in personam." Thus, **the claim for compensation was not included in the matters governed by Art.16(1)** and the claim could be heard in Germany.

Article 16(1)(b) was added by the San Sebastian Convention to modify the inconvenience caused by the unamended Article 16(1) which made even short-term holiday letting of immovable property fall within the ambit of this article: **Rosler v Rottwinkel** (1986).

Rosler v. Rottwinkel [1986] Q.B. 33. Here a German landlord let a holiday cottage in Italy on a short-term let. He sued the tenant in the German courts claiming under the terms of the lease for compensation in respect of damage done to the property and sums due for gas and electricity; and also for damages in respect of his own holiday in a neighbouring property which. he alleged, was ruined by the defendant tenants.

HELD: *Article 16* was *applicable*. Accordingly, the Italian courts had exclusive jurisdiction in respect of all the obligations under the lease. These included any action for the recovery of possession; the collection of rent or other charges due; and the cost of necessary repairs. However, issues only indirectly related to the lease, and this included the claim for the ruined holiday, were not within the compass of Article 16.

Now, however, the outcome of the amendment to Art.16(1) of the Brussels Convention by the San Sebastian Convention means that P has a choice to sue either in the Contracting State in which the property is situated or in the country in which D is domiciled, though the possibility of concurrent proceedings in two different Contracting States is avoided by *Article 23* which provides that the court other than the one first seised of the action must decline jurisdiction. (N.B.: That P has a choice of jurisdictions is more in keeping with provisions of special jurisdiction than exclusive jurisdiction).

In 1992, a case on the unamended Art.16(l) decided that a contract between travel organiser and customer was not a 'tenancy' where the organiser did not own the accommodation in question: ***Hacker v. Euro Relais GmbH*** (1992).

Hacker v. Euro Relais, Case C-280/90, [1992] ILP 515. H, who was domiciled in Germany, contracted with E.R., a German firm of travel agents. The terms of the contract provided for, inter alia, H to have the use of a holiday home in the Netherlands and, for an additional payment, a reservation would be made for H's travel to the holiday home. The holiday home was smaller than advertised. This resulted in H incurring additional expenses and returning to Germany earlier than planned. Consequently, H sued in the German courts for a reduction in the price paid and for damages under various heads. The German court at first instance denied that it had jurisdiction over the matter. Nevertheless, a reference was made to the ECJ.

HELD: It was stated that the [unamended] Article 16(1) of the Brussels Convention 'must be interpreted as not applying to a contract concluded in a Contracting State whereby a professional travel organiser, which has its registered office in that State, undertakes to procure for a client domiciled in the same State the use for several weeks of holiday accommodation in another Contracting State which it does not own, and to book the travel'.

An interesting point in Hacker, although not dealt with by the court, was the A-G's opinion that where Article 16(1) is found to apply, then the claim for ancillary damages and the like fell within Article 16(1). This eliminates the possibility of a multiplicity of proceedings over, essentially, one dispute. A further significant point in to emerge from Hacker is that the amended Art.16(1) of the Lugano Convention will aid a plaintiff's case where the letting is for a maximum of six months and it is made by a juristic person such as a travel company. The tenant must be a natural person to invoke this broader jurisdiction provision, however, and neither party need be domiciled in the Contracting State in which the property is situated. The defendant, in such circumstances, is still sued in the courts of the state in which he is domiciled.

In contrast, the amended Art.16(1) of the Brussels Convention now provides for the courts of a Contracting State other than the state where the property is situated to have jurisdiction if: (a) the proceedings involve a let of no more than six months duration; (b) both the landlord and tenant are natural persons; and (c) both the landlord and tenant are domiciled in the same Contracting State. If such circumstances prevail, then action may be taken in the courts of the state where the defendant is domiciled.

[Finally, in 1996 the Court of Appeal delivered judgment on joined cases and decided that actions in respect of misrepresentation and breach of contract under provisions of the Consumer Credit Act 1974 had as their object the striking out of finance agreements, not rights in rem or tenancies of immovable property. Accordingly, the actions could be commenced in England where the deals were financed: the actions did not come within Art.16(1), so the buyers of the timeshares were not required to bring their claims in the countries (Spain & Portugal) in which the property was situated: **Jarrett and others v. Barclays Bank and others,** (1996) The Times, 18th November.]

Article 16(2): 'Corporations'.

Art. 16(2) relates to proceedings principally concerned with the validity of directors' exercise of their powers:

Newtherapeutics Ltd. v Katz [1991] Ch 226. A dispute arose between a U.K. company which did all of its business in France, though under *s.43(2) CJJA 1982* it was still seated in England, and one of its former directors who was domiciled in France. It was alleged that the former director had breached his duty in signing certain variation documents without calling a meeting of the board.

HELD: *(Kinok J*) The substance of the claim came within the ambit of *Article 16(2)* and, thus, within the exclusive jurisdiction of the English court. The principal issue was whether, without a board resolution, the director could *validly* vary the contracts in question. It was not merely a matter which concerned the propriety of the individual director's actions which might have caused harm to the company and in respect of which the director had to compensate the company.

Prorogation of Jurisdiction: Articles 17 & 18.
Prorogation of jurisdiction is the conferring of jurisdiction on a court by the consent of both parties (*Art.17*) or by one of the parties submitting to the jurisdiction of the court after commencement of proceedings by the plaintiff (*Art.18*).

Article 17: Consent of both parties
In certain circumstances it is permissible for the parties to a contract to confer exclusive jurisdiction on the court(s) of a Contracting State to settle any disputes which may arise between them. As noted, such an agreement conferring jurisdiction on a court is the first of the two instances referred to as *prorogation of jurisdiction.* **Article 17(1)** as amended by the ***San Sebastian Convention*** provides that:

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that the court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be:

(a) in writing or evidenced in writing; or
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by the parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

Despite the reference to *'the court or courts of* a *Contracting state (in the singular) [having jurisdiction]*', it was held in ***Meeth v. Glacetal Sarl*** (1978) that an agreement giving jurisdiction to two Contracting States was within Article17. Only one court would actually have exclusive jurisdiction because the court seised of the matter second would defer to the court first seised: Art.23.

Such a 'non-exclusive' choice of jurisdiction clause has now been accepted by the English court in ***Kurz v. Stella Musical*** (1991). Here, a clause which granted jurisdiction to the English courts but did not exclude the jurisdiction of other courts that had jurisdiction for other reasons complied with Art.17 because the word 'exclusive' in Art.17 'does not mean "unique", that the parties are limited to choosing a single jurisdiction. It means only that their choice, whatever it is, *shall ... have effect to the exclusion of the jurisdiction which would otherwise be imposed upon the parties by the earlier articles of the Convention*.' per Hoffman J.

Furthermore, a new article 17(5) has also been added by the **San Sebastian Convention**. It provides that:

In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seise courts other than those of the defendant's domicile or those specified in article 5(1).

[Comparative Point: the Lugano Convention only provides for the parties to submit to jurisdiction after the dispute has arisen, whereas the amended Brussels Convention also permits the parties to submit before the dispute arises providing it is 'the employee [who] invokes it to seise courts other than those of the defendant's domicile or those specified in article 5(1).'] [15]

Jurisdiction via Submission: Article 18

Art.18 provides the courts of a Contracting State with the jurisdiction to hear a case unless, say, it is to be governed by Art.16 or the defendant makes an appearance solely to contest the jurisdiction of that court. That is, Art.18 defers to Art.16 though it displaces an agreement on jurisdiction under Art.17.

Lis Pendens / Parallel Proceedings: Arts.21 & 22.

That, for example, special jurisdiction over an issue could mean that a court in more than one Contracting State is seised of the same dispute at the same time generates a requirement for a rule to determine which court shall proceed with the hearing and which court should decline to hear it or, at least, stay the proceedings. The basic rule relating to proceedings between the same parties, which arises from the same cause of action and which is brought in the courts of more than one Contracting State, is contained in Article 21 of the Brussels Convention (as amended by the San Sebastian Convention). Article 21 provides that if 'proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the courts first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 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' [i.e., in effect, Lis Pendens means 'first come, first served'].

Whereas this is clearly indicative of forum conveniens having no role to play when both sets of proceedings are in the courts of Contracting States, it would appear from s.49 CJJA 1982 and the decision in **Re Harrods** (1991) that if there is a clash between proceedings in a Contracting State and proceedings in a non-Contracting State then the doctrine of forum non conveniens does apply.

There is no doubt, however, that Art.21 applies even if neither party is domiciled in a Contracting State. This was made clear in:

Overseas Union Insurance v. New Hampshire Insurance, Case C-351/89 [1991] ECR 3317 In proceedings which involved insurance companies, neither of which was domiciled in a Contracting State to the Brussels Convention, but both of which were registered in England as an overseas company, and in which it was common ground that the French courts were the courts first seised of the proceedings, the Court of Appeal referred two questions to the ECJ for a preliminary ruling. In reply to those questions, the ECJ Held:

(1) *"Article 21 of the [Brussels] Convention ... must be interpreted as applying irrespective of the domicile of the parties to the ... proceedings"; and*

(2) *"Without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised."* [16]

[15] For case law on individual contracts of employment, refer to the notes under Art.5(1), supra.

[16] See also ***The Sargasso*** (Neste Chemicals v. DK Line); and ***The Tatry***

Arts.16 and 17 must, in fact, prevail over Art.21. If Art.16 didn't prevail, any judgment given by a court that wrongly assumed jurisdiction would not be entitled to recognition or enforcement in any other Contracting State: Art.28(1). That Art.17 prevails over Art.21 was decided by the Court of Appeal in: ***Continental Bank NA v. Aeakos Compania Naviera SA*** [1994] 1 WLR 588.

Related Actions: Art.22.

Article 22 provides that where a number of actions are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings', then a court other than that first seised may either stay its own proceedings (i.e. wait until the proceedings are ended) or may decline jurisdiction if the court first seised has jurisdiction over all the actions and its law permits the consolidation of related actions.

As to whether actions are related for the purposes of Art.22, the House of Lords stated in ***Sarrio v. Kuwait Investment Authority*** (1997) The Times 17th November, that this is a question which should be determined in a broad common sense manner and that, by contrast with the judgment given by the Court of appeal, no distinction is to be drawn between primary (or essential) and non-essential issues. The essence of this case was that the plaintiff, ***Sarrio,*** had commenced its first action in Spain alleging that the defendants owed them money; and the second action was commenced in England where, inter alia, the plaintiffs claimed damages for the alleged negligent misrepresentations during the negotiations for the sale of a business. It was common ground that if the Spanish and English actions were related then the Spanish court was first seised. In Lord Saville's opinion, Art.22 encompassed a range of circumstances from situations almost close enough to fall within Art.21 to situations where it was merely expedient for the actions to be heard and determined together so as to avoid the risk of irreconcilable judgments. His Lordship then continued by noting that since Art.22 was concerned not with the substantive rights and obligations of the parties but with the ancillary and procedural question as to where in the Community those rights and obligations should be heard and determined, then there should be a broad common sense approach to the question of whether the actions were related. Given that the plaintiff had acknowledged that the Spanish court was first seised if the actions were related - and on the broad approach adopted by the House of Lords they were - an order of the English court declining jurisdiction could be made.

Provisional or Protective Measures: Mareva Injunctions; Article 24

Article 24 provides that an application may be made *'to the courts of a Contracting State' for such provisional, including protective, measures [e.g. a Mareva Injunction] as may be available under the law of that State even if, under this Convention, the courts of another Contracting State have jurisdiction in the substance of the matter'.* A Mareva injunction is such a measure available to a plaintiff in an English court, the High Court having the power under *s.37(3)* of the *Supreme Court Act 1981* to grant it. However, whereas under *RSC O.11, r.1(2)* the plaintiff may serve it *without* leave of the court if the defendant is domiciled in another Contracting State, leave of the court under *RSC O.11, r.1(1)(b) is* required if the defendant is *not* domiciled in a Contracting State. This is not the only contrast between the situation at common law (where the defendant is not domiciled in a Contracting State) and the situation under the Brussels Convention and the differences lead to the assertion that the differences are unnecessarily divisive.

The Pursuit of Proceedings in a non-Contracting State.

The House of Lords decided in ***The Siskina*** [1979] AC 210, that the English courts had no basis to entertain an application for a Mareva injunction under *RSC O.11, r.1(1)* unless such a provisional measure was to be granted in support of a claim based on the presence in England of the defendant or his submission to the English courts or some other jurisdictional basis provided for in RSC O.11, r.1(1). In short, at common law, if the defendant is not amenable to the jurisdiction of the English courts, then a Mareva injunction cannot be served on him.

[As this position contrasts with that under the Brussels Convention, it (the common law position) has been criticised as unnecessarily divisive and arbitrary. Nevertheless, neither of two further House of Lords cases in the 1990s has decided to overturn the ***Siskina*** doctrine: ***Channel Tunnel Group v. Balfour Beatty Construction Ltd.,*** **[1993] AC 334; and** ***Mercedes Benz v. Leiduck*** [1996] AC 284.]

Proceedings to be Pursued in another Contracting State.
Given that *Art.24* of the *Brussels Convention* is at variance with the House of Lords decision in ***The Siskina*** (1979) that a Mareva injunction could not be granted by the English courts unless the substantive proceedings were, or were about to be, instituted in England, English law had to be amended to bring it into line with the Convention. This amendment is contained in *s. 25(1) CJJA 1982* which provides that the High Court *'shall have the power to grant interim relief where (a) proceedings have been or are to be commenced in a Contracting State other than the United Kingdom ... and (b) they are or will be proceedings whose subject matter is within the scope of the [1968 Brussels] Convention ...*' In effect, *s.25(1) CJJA 1982* represents a statutory reversal of the decision in ***The Siskina.***

Whereas the leading case on Mareva injunctions, ***Babanaft International v Bassatne*** (1989) dealt with *post-judgment* injunctions, the Court of Appeal said in ***Republic of Haiti v Duvalier*** (1989) that courts can grant, in appropriate cases, *pre-judgment* extraterritorial Mareva injunctions. Furthermore, in ***Derby* v. Weldon (No.1)** (1990) the power to grant a Mareva injunction in respect of assets outside England and Wales, both before and after judgement, was said to be established law.

Babanaft International Co v. Bassatne [1990] Ch 13 {[1989] 1 All ER 433}. Having already secured a Mareva injunction covering the defendants assets in England, the plaintiffs then sought and obtained a mareva injunction to cover the defendants assets outside the jurisdiction. The plaintiffs' solicitors notified more than 40 natural and juristic persons in various countries of the terms of this worldwide injunction. On appeal by the defendants, the Court of Appeal **Held**, in allowing the appeal in part, that: "*It would be improper for the court to grant, after judgment, an unqualified Mareva injunction extending to the defendant's assets outside the jurisdiction because such an injunction would amount to an exorbitant assertion of extraterritorial jurisdiction over third parties; that such post-judgment injunctions should be restricted so as to bind only the defendant personally and should contain a limiting provision to ensure that they did not purport to have an unintended extraterritorial operation and to make it clear that they did not affect third parties*" (*per Kerr LJ).*[17]

Haiti, Republic of, v. Duvalier [1989] 2 WLR 261. The Republic of Haiti, as one of the plaintiffs, commenced proceedings in France contending that the defendants, who were resident in France, had embezzled US$120 million alleged to be the Republic's money. The plaintiffs then sought an order in England to restrain the defendants from disposing of certain of their assets and requiring them to disclose information relating to their assets. This was granted at first instance pursuant to *s.25(1)* of the *Civil Jurisdiction and Judgments Act 1982 (CJJA 1982)* as was service of a writ out of the jurisdiction without leave on the defendants pursuant to *RSC O.11, r.1(2)* . On appeal by the defendants, the Court of Appeal **Held**, dismissing the appeal, that O.11, r.1(2) applied to a claim for interim relief under s.25 CJJA 1982. Accordingly, "*I would construe Ord.11, r.1(2) as giving effect to the obligation of the United Kingdom in England and Wales to make available in aid of the courts of other Contracting States such provisional and protective measures as our domestic law would afford if our courts were seized of the substantive actio*n" (*per Staughton LJ*).

Derby & Co Ltd v. Weldon [1989] 2 WLR 276. The plaintiff companies sought substantial damages for, *inter alia*, breach of contract, negligence and breach of fiduciary duty, against the defendants who were former directors of some of the plaintiff companies. In response to the plaintiffs' seeking Mareva injunctions within and outside the jurisdiction, the defendants denied that they had any, or any valuable, assets within the jurisdiction and they contested the court's jurisdiction to grant an extra-territorial Mareva injunction. At first instance, the plaintiffs succeeded in being granted a Mareva injunction in relation to assets within the jurisdiction but they failed to get one in relation to the assets outside the jurisdiction as this was said to be contrary to the court's practice. On appeal, it was **Held** by the Court of Appeal, that (1) this was a case " *... which cries out for a worldwide Mareva injunction even though it is being sought before judgment. The amount involved and the findings of the judge [at first instance] ... make this clear*" (*per* **May LJ**); and (2) " *... there is every justification for a worldwide Mareva , so long as, by undertaking or proviso or a combination of both, (a) oppression of the defendants by way of exposure to a multiplicity of proceedings is avoided, (b) the defendants are protected against the misuse of information gained from the ordinary order for disclosure in aid of the Mareva, and (c) the position of third parties is protected*" (*per Parker LJ*).

[17] See also ***Republic of Haiti v. Duvalier***; and ***Derby v. Weldon (No.1).***

Apart from the remarkable trio of 1989 cases above, one 1990 case added the relatively minor points that English courts should, as a general rule, confine themselves to assets within the jurisdiction - unless, of course, England was the forum for the substantive dispute between the parties; and that the court wouldn't normally grant an extraterritorial Mareva injunction where the plaintiff was seeking merely to enforce a foreign judgment in England: ***Rosseel v. Oriental Commercial Shipping*** [1990] 1 WLR 1387. Indeed, ***Rosseel*** took a more cautious approach than in ***Derby v. Weldon (No.6)*** [1990] 1 WLR 1139, where the Court of Appeal had decided that, in the exercise of its Mareva jurisdiction, it had the power to order the transfer of the defendant's assets from one jurisdiction to another.

The reluctance to grant an extraterritorial Mareva injunction in relation to the enforcement of a judgment made in a Contracting State can be appreciated by noting that Art.27(2) of the Brussels Convention provides that a judgment shall not be recognised if it was given in default of appearance and/or if the defendant was given insufficient time in which to prepare his defence. The significance of this provision is that Mareva injunctions are frequently made ex-parte and so it would appear that the advantage of surprise obtained by the plaintiff is nullified by his inability to enforce the judgment in other Contracting States. ***Case 125/79, Denilauler v. Couchet Frères***, is the ECJ authority for stating that an ex-parte order that is obtained in one Contracting State is not enforceable in another.

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Workshop Questions

1. Assess whether the English courts have jurisdiction to hear either or both the following cases:

(a) Nik Nax, a clothing manufacturer in Leicester, England, telephoned an order for a large quantity of lace material from Paddy Wacks, an importing company based in Dublin, Ireland. The arrangement was for Paddy Wacks to secure the contract goods from Cottania, a country outside the EC, and then to transport half of it directly to Leicester with the other half being directed to a warehouse in another part of Dublin which Nik Nax rented for storage. A deposit was required and this was paid by Nik Nax. However, the first delivery of the lace material that was delivered was of inferior quality. Nik Nax is concerned that the invoice which accompanied the consignment contains on the reverse a clause that states: "All disputes which arise from this contract are to be litigated in Dublin, Ireland." It is the contention of Paddy Wacks that the sub-standard lace is due to the fault of the consignors who are also based in Dublin. Nevertheless, Nik Nax wishes to institute proceedings in the English courts with a view to recovering its deposit.

AND

(b) Delboy, who lives and works in England, bought two houses last year, one in France and one in Spain. Each cost £70,000. The houses were conveyed into the names, respectively, of his son, Rodney, and his wife, Madonna. Delboy intended that whilst the conveyances would be in the names of Rodney and Madonna, the houses would be transferred to him when he so requested. However, Delboy's relationships both with his son and with his wife have broken down to the extent that neither will complete the transfers as requested by Delboy. Moreover, Madonna has left Delboy and is living with Sting in the house in Spain. Delboy is now seeking declarations that the two houses are held on trust for him and orders that they should be transferred to him. Rodney spends most of the year in England, though at present he is in France. Whereas Madonna now resides in Spain she will be in England next month on a brief holiday.

2. To what extent, if at all, might a Mareva Injunction be used as an effective, provisional measure in maintaining the status quo in international business litigation?

3. The European Court of Justice has consistently held that the concepts of 'matters relating to a contract' in Article 5(1) of the Brussels Convention of 1968 and 'matters relating to tort' in Article 5(3) of the same Convention are both required to be given an independent Community meaning.

   Discuss this observation in the context of Steiner's contention that the Brussels Convention "... cannot be considered as forming part of Community law".

   (*Steiner, J* and *Woods, L*, Textbook on EC Law, 6/e. London: Blackstone Press, 1998, p43)

4. To what extent, if at all, do you agree with the assertion that the coming into force of the Convention on Jurisdiction and the Enforcement of Civil and Commercial Matters (the Brussels Convention) has disadvantaged litigants in the English courts by displacing the simplicity of the traditional common law rules of jurisdiction?

5. Stratospheric Lubrications (SL), a multi-national corporation having its headquarters in Ruritania, contracted with S-Cargo (S-C), a French air cargo company, based in Paris, to supply aviation fuel to S-Cargo's fleet in all European airports. The contract specified that the English courts would have exclusive jurisdiction to settle any dispute which might arise in connection with the contract. Moreover, in the event of dispute arising, it was specified in the contract that the law of Utopia would apply.

   Whereas the contract price had been agreed at $10 per barrel, unforseen circumstances tripled the price of oil with the result that SL claimed *force majeure* and refused to supply any more aviation fuel at the contract price. In response, S-C commenced proceedings in Paris where the legal adviser to SL claimed before a French court that Utopian law permitted the termination of a contract in such circumstances.

   The dispute has now proceeded and SL has relied upon the exclusive jurisdiction clause and contested the jurisdiction of the French court.

   Advise S-C as to the jurisdictional issues involved in this dispute.

[N.B.: The next two questions require a knowledge of jurisdiction of the English courts at common law as well as under the Brussels Convention.]

6. Which, if any, of the following cases does the English courts have jurisdiction to hear and determine?

i) A contract negotiated in London by an Italian travelling salesman for the sale of silk blouses allegedly made in Milan but, so it transpires, really made in Macao. The salesman has authority to transmit orders back to the Italian company which markets the blouses: contracts are then sent to customers by the company. The salesman is paid a small retainer by this, and two other Italian companies and earns 20% commission on sales negotiated.

ii) A contract broken when a Dutch trade union blacks cargo being sent c.i.f. from Japan to England, thus inducing the Japanese seller of the cargo to fail to perform its contract with the English purchaser. The contract was negotiated in Tokyo.

iii) A contract entered into in England between an Irish construction company and an English company to build an apartment block in Spain, the contract expressed to be governed by English law. A question has now arisen as to the title to the land on which building is about to start.

7.i) Does the doctrine of *forum non conveniens* have any part to play in Brussels Convention proceedings?

7.ii) In what circumstances will an English court restrain proceedings being taken in a foreign jurisdiction?