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FINANCIAL MARKETS LAW COMMITTEE

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Legal assessment of problems associated with the Brussels I Regulation and suggested solutions

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CONTENTS

1 Introduction and Executive Summary

a) Introduction

1.1 The role of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2 In November 2004 the Commercial Bar Association ("COMBAR") suggested to the FMLC that it should comment, from a legal certainty perspective, on the then draft Hague Convention on Exclusive Choice of Court Agreements,[1] which it agreed to do. Shortly thereafter, in January 2005, it was suggested to the FMLC by market contacts that an examination should be undertaken of the problems posed for the financial markets by case law emanating from the European Court of Justice ("ECJ") on jurisdiction under the Brussels Convention (now to all intents and purposes the Brussels I Regulation) and contractual choice of court clauses.[2] Work was begun on both issues and, by early 2006, it had become apparent that the questions raised were sufficiently closely related to justify combining the works in progress. A detailed history of the FMLC's engagement with the issues discussed in this paper is set out at Appendix 1.

1.3 This paper provides a comprehensive account of the issues examined by the FMLC in this context and sets out an analysis of the issues, providing a legal assessment of the problems arising and a discussion of potential solutions.

1.4 In summary, the conclusion of the FMLC is that the possible ratification of the Hague Jurisdiction Clauses Convention by the European Community and Member States and the forthcoming review of the operation of the Brussels I Regulation together provide a useful opportunity to implement a workable solution to a significant issue in the international financial markets. That is, the issue of the non-enforceability of exclusive jurisdiction clauses in the face of *lis alibi pendens* in another member state (i.e. one the courts of which are not favoured by the clause).

b) Executive Summary

1.5 Under the Regulation (and its predecessor the Brussels Convention) there is a conflict between the principle respect of the parties' choice of court (Article 23 of the Regulation) and for avoiding parallel proceedings in different member states' courts. The latter aim is met by requiring all other courts to stay their proceedings once the first court is seised , even if it is seised in contravention of

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[1] Subsequently, the Convention of 30 June 2005 on Choice of Court Agreements (the "Hague Jurisdiction Clauses Convention")

[2] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention") and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Regulation" or "Brussels I Regulation").

an exclusive jurisdiction clause (Article 27 of the Regulation). The conflict has been addressed by the ECJ's case law.

1.6 The ECJ's jurisprudence has established: (1) that Article 27 prevails over Article 23; (2) that courts cannot issue anti-suit injunctions in order to restrain parties from bringing proceedings in contravention of an exclusive jurisdiction clause; and (3) that the principle of *forum non conveniens* can no longer be used as a basis for declining jurisdiction in the Community.

1.7 The Regulation and its interpretation by the ECJ have resulted in considerable jurisdictional uncertainty for parties when seeking to rely on or draft exclusive jurisdiction clauses. This uncertainty is particularly prominent and of concern in the financial markets where such clauses are frequently used. Certainty that such agreements will be enforced is key for market participants. The ECJ's decisions have the consequence that parties who see themselves as potential defendants in a court favoured by an exclusive jurisdiction clause have a tactical reason to initiate litigation pre-emptively in a jurisdiction perceived to be less efficient than that in which the favoured courts are situated. In such cases, the inefficiencies are likely to result in wasteful delays and costs. Furthermore, the very existence of the pre-emptive proceedings necessarily wastes the time and resources of both parties if the potential dispute never actually materialises. To the extent that the ECJ's jurisprudence has made this outcome more likely, it has introduced a further layer of uncertainty and risk in the markets.

1.8 This paper suggests a number of solutions to the problems posed by the Regulation and the ECJ's jurisprudence including:

a. ratification of the Hague Jurisdiction Clauses Convention;

b. requiring a court seised to examine whether it has jurisdiction;

c. ensuring judgments obtained in breach of an exclusive jurisdiction clause are unenforceable;

d. by expediting challenges to jurisdiction (and treating these as preliminary issues);

e. allowing the chosen court to proceed despite parallel proceedings; and/or

f. staying all proceedings until the chosen court has declined jurisdiction.

The FMLC recommends that during the forthcoming review of the Regulation,[3] these issues are addressed so as to ensure that the parties' choice is respected.

2 Brussels I Regulation (and Brussels Convention)

a) Exclusive Jurisdiction and Parallel Proceedings - Introduction

[3] Pursuant to Chapter VIII of the Regulation.

2.1 The EU jurisdiction regime now contained in the Regulation is intended to prevent irreconcilable judgments in different member states by preventing parallel proceedings within the Community. It does so in two ways: (a) by designating particular cases in which one court has exclusive jurisdiction; and (b) by providing in other cases that only the court first seised shall exercise jurisdiction.

2.2 Articles 22 and 23 ensure that in certain cases one court has exclusive jurisdiction. Article 22 confers exclusive jurisdiction on the courts of member states having a unique interest in determining particular types of dispute, as where proceedings relate to immovable property within a member state. More importantly in commercial practice, Article 23 confers exclusive jurisdiction upon any court to the jurisdiction of which the parties have agreed. In other cases, Articles 27 and 28 provide that any court but the court first seised shall stay or decline proceedings.

b) Exclusive jurisdiction - Article 23

2.3 Article 23 of the Regulation confers exclusive jurisdiction upon the courts of a member state favoured by a jurisdiction agreement in the following circumstances: (1) if one of the parties to the agreement is Community-domiciled[4]; and (2) if the agreement is: (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.

2.4 Article 23 jurisdiction is exclusive unless the parties have agreed that it shall be non-exclusive. The intended effect of Article 23 is that the courts of any member state other than that exclusively favoured by the parties must decline to exercise jurisdiction

2.5 The ECJ has held that the validity of such an agreement depends merely upon compliance with the requirements specified in Article 23 itself, and not upon the substantive law that would otherwise govern its validity according to the law of the forum.[5] However, it is uncertain whether mere compliance with the formal requirements set out in Article 23 is sufficient where an agreement is challenged on the basis of the bad faith of the party relying upon it.[6]

2.6 Whether there could be significant disagreement about the validity and effect of an Article 23 jurisdiction agreement is itself uncertain.[7] This is perhaps

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4 In a departure from the general principle underlying the Regulation, the defendant need not be Community-domiciled, provided that the claimant is so domiciled.

5 *Benincasa v. Dentalkit* (Case C-269/95).

6 It is possible that the Regulation must be read subject to a Community concept of good faith: *Berghofer v. ASA SA* (Case C-221/84).

7 A point of difference between the Advocate General and the Court of Justice in *Turner v. Grovit* (Case C-159/02).

unlikely in financial contracts, where the agreement is likely to be in writing and clearly exclusive in effect. But disagreement is more likely to arise where the existence of an agreement is said to arise from a course of dealing between the parties, or from trade usage.

2.7 It is implicit in the concept of exclusive jurisdiction that any court but that favoured must decline to exercise jurisdiction. Yet because although this is not expressly articulated in the Regulation, Article 23 confers relatively weak protection on Community jurisdiction agreements. In this respect there is a sharp contrast between the exclusive jurisdiction conferred by Article 22 and that conferred by Article 23. Article 24 of the Regulation has the effect that a court before which a defendant enters an appearance shall have jurisdiction which is "apart" from the jurisdiction conferred by other provisions of the Regulation, saving only that it shall not have such jurisdiction where another court has exclusive jurisdiction by virtue of Article 22 prima facie, this gives rise to a position whereby a court before which a defendant enters an appearance may have jurisdiction concurrent to that conferred by Article 23 but not to that conferred by Article 22. The Regulation goes on, in Article 25, to require a court which is seised of a claim in contravention of the exclusive jurisdiction conferred by Article 22 to decline jurisdiction of its own motion, but there is no parallel provision relating to the exclusive jurisdiction conferred by Article 23. (Although an important passage in the Schlosser Report suggests that a court should decline jurisdiction in these circumstances.[8]) Moreover, in contrast to the priority given to Article 22, a judgment given in apparent breach of an Article 23 agreement remains enforceable. The justification for this position is that it would be contrary to the principle of mutual trust underlying the Regulation if the courts of one member state were to challenge another court's finding that a jurisdiction agreement is ineffective.

2.8 Article 23 applies only where the parties have agreed to the jurisdiction of the courts of a member state. But it remains uncertain whether national courts are permitted (or required) to accord equivalent status to third-state jurisdiction agreements, by virtue of the possible "reflexive effect" (*effet réflexe*) of the Regulation. The issue was not addressed in *Owusu v. Jackson and others*,[9] and it remains uncertain after *Owusu* whether a stay is available in such a case. It is uncertain whether the case is carried by the reasoning *Owusu*, or whether the existence of a third-state jurisdiction agreement distinguishes it. Before *Owusu*, however, the English courts had suggested that a case involving a third-state jurisdiction agreement was one in which it would be justified to decline jurisdiction;[10] a conclusion echoed more recently by the Commercial Court in *Konkola Copper Mines v. Coromin*.[11]

2.9 By way of context, it is convenient here to note the adoption in June 2005 of the Hague Jurisdiction Clauses Convention. This international convention seeks to facilitate the enforcement of parties' exclusive jurisdiction clauses and, although no state has so far ratified and implemented it, the negotiation of this

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8 Schlosser Report on the amended Brussels Convention, [1979] OJ C59/71, para. 22.

9 Case C-281/02.

10 *Arkwright Mutual Inc. v. Bryanston Ince*. [1990] 3 WLR 705, 721.

11 [2005] EWHC 896 (Comm) and see infra Appendix 2.

convention provides an important contextual background to issues raised below. In particular, it is now clear (as a matter of European law) that the EU is exclusively entitled to conclude a convention on jurisdiction and the enforcement of judgments in civil and commercial matters and that this right is not shared by member states. It follows that the if the EU is to take a consistent stance on the effectiveness in its courts and those of member states of exclusive jurisdiction clauses, then the operation of Article 23 of the Regulation must be considered in light of the EU's prospective ratification and implementation of the Hague Jurisdiction Clauses Convention. An account of the negotiation of that convention is provided at Appendix 2. Furthermore, an in-depth discussion of some of its pertinent provisions is set out at Appendix 3.

c) Parallel proceedings - Articles 27 and 28

2.10 Articles 27 and 28 of the Regulation address the problem of irreconcilable judgments originating in different member states, by preventing those parallel proceedings which might give rise to such judgments.[12] Both give preference to the court where proceedings are first initiated. They require proceedings in other courts to cease, by requiring the staying or dismissal of any secondary proceedings.

2.11 Articles 27 and 28 are each concerned with different aspects of the problem of parallel proceedings. Article 27 is concerned with the specific problem of proceedings involving the same course of action and with preventing judgments which will compete for enforcement within Chapter III of the Regulation. Article 28, on the other hand, is concerned with the generic problem of related proceedings, and in principle regulates all cases where there is the potential for inconsistent decisions in related matters in different member states. Article 27 is thus concerned to prevent *conflicting* judgments (those having mutually exclusive legal effects). Article 28 is intended to assist courts to avoid *inconsistent* judgments (those which reach different conclusions, but which are legally compatible). Article 27 is an aspect of the Regulation's regime for the mutual enforcement of judgments between member states. But Article 28 serves the broader goal of ensuring the co-ordination of adjudication in the Community, and promoting uniform decisions.[13]

2.12 At first sight, the Regulation offers a more certain solution to the problem of the recognition and enforcement of pre-existing judgments which are in conflict. Article 34 ensures that only one such judgment shall be recognised. Where incompatible judgments are obtained in different member states, the first in time prevails,[14] as does any judgment obtained in the state where enforcement is sought.[15] However, these rules of priority are not regarded in

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12 *Jozef de Wolf v. Harry Cox BV* (Case 42/76 para. 12 , noted, Hartley, (1977) 2 ELR 146); *Gubisch Maschinenfabrik KG v. Giulio Palumbo* (Case 144/86 para. 8); *Overseas Union Insurance Ltd v. New Hampshire Insurance Co.* (Case C-351/89 para. 16); *Maersk Olie & Gas A/S v. Firma M. den Haan en W. de Boer* (Case C-39/02 para. 31); Jenard Report on the Brussels Convention, p. 41; the Regulation Explanatory Memorandum, paras. 1.1, 2.1, 4.5 (Section 9).

13 *Tatry* (Case C-406/92 Judgment, para. 54; Opinion, para. 28).

14 Article 34(4).

15 Article 34(3). No rule equivalent to Article 34(4) exists in the Brussels Convention.

the scheme of the Brussels regime as a solution to the problem of conflicting judgments but rather as a damage-limitation tool. The mere existence of irreconcilable judgments creates tension between member states, undermining the mutual trust upon which the European jurisdictional regime is based. And, by giving overriding effect to a judgment obtained in the recognising state, Article 34 jeopardises the assumption of comity implicit in the regime. The European jurisdiction regime therefore insists upon a prophylactic solution to the problem and Articles 27 and 28 are designed to ensure that parallel proceedings in the same matter cannot occur.[16]

2.13 In particular Article 27 is designed to avoid the situation in which a court in one member state is obliged to deny recognition to a judgment given in another such state by applying the priority rules of Article 34. It is intended to avoid the inefficiency, and subversion of mutual trust between member states, that would result. Article 27 poses the question: do the two actions in question correspond to the extent that incompatible judgments may be obtained? If the answer is yes, then the court which was seised of the later action must decline jurisdiction. This does not mean, however, that the proceedings need be identical to bring Article 27 into play, only that they overlap sufficiently. They need not be *identical*, but they must be *congruent* which means that Article 27 has a wider implication than would otherwise be the case.

2.14 Articles 27 and 28 apply only to parallel proceedings in the courts of two member states. However, it remains uncertain whether national courts are permitted (or required) to accord equivalent status to pending proceedings before third-state courts, by virtue of the possible *effet réflexe* of the Regulation.[17] The issue was not addressed in *Owusu*, and it remains uncertain after *Owusu* whether a stay is available in such a case. It is unclear whether the case is carried by the reasoning *Owusu*, or whether the existence of pending proceedings in a third- state distinguishes it. Before *Owusu*, however, the English courts had suggested that a case involving parallel proceedings abroad was not one in which it would be justified to decline jurisdiction.[18]

2.15 Article 27 is intended to avoid conflicting judgments being issued by the courts of different member states by deferring any trial of the matter by the court second seised until the court first seised has itself declined jurisdiction. But is Article 27 intended to achieve this objective at the cost of postponing indefinitely the resolution of a dispute by the courts otherwise intended by the Regulation to have jurisdiction over that dispute? In other words, to what extent can the Article be relied upon by an unscrupulous litigant to postpone litigation in courts which would otherwise have jurisdiction? This was the question which was addressed by the ECJ in the case of *Gasser*.[19]

3 Description and analysis of ECJ cases

a) Gasser

16 Erich Gasser GmbH v. MISAT Srl, Opinion, para. 44.

17 For an account of the effect re'flexe, see intra paragraph 3.29.

18 *Arkwright Mutual*, op cit.

19 For further analysis of Articles 27 and 28 see Appendix ……..

3.1 The principal issue in *Gasser* was which court is entitled to determine jurisdiction under the Brussels Convention: is it only the court first seised of a case, all other courts being obliged to stay their proceedings pending the decision by the court first seised; or is a court identified in a jurisdiction agreement between the relevant parties entitled to do so even if it is second seised?

3.2 This issue arose in the context of proceedings between an Austrian manufacturer of children's clothing (Gasser) and an Italian importer (MISAT). On 19 April 2000, MISAT took proceedings against Gasser in an Italian court, seeking declarations that the contract between the two companies had been terminated and that MISAT had duly performed its obligations. MISAT also claimed damages from Gasser. On 4 December 2000, Gasser took proceedings against MISAT in an Austrian court seeking payment of certain invoices. It claimed, amongst other matters, that the Austrian courts had jurisdiction under the terms of an agreement between the parties within Article 17 of the Brussels Convention (now Article 23 of the Regulation).

3.3 The Austrian court referred to the ECJ the question of whether the Austrian court could determine if it had jurisdiction under Article 17 or whether it was obliged by Article 21 (now Article 27 of the Regulation) to await the decision of the Italian court, as the court first seised, on its jurisdiction.

3.4 The ECJ concluded that the Austrian court could not take any steps until the Italian court had decided whether or not it had jurisdiction. The aim of the Brussels Convention was, it said, to prevent parallel proceedings in different contracting states in order to avoid the conflicting decisions that might thereby arise. In order to achieve this, Article 21 laid down a procedural rule based on the chronological order in which courts were seised. This rule required all courts other than the court first seised to stay their proceedings until the jurisdiction of the court first seised had been established and, where it was established, to decline jurisdiction completely. Further, this rule applied even if a challenge to the jurisdiction of the court first seised took an excessively long period, resulting in a breach of the European Convention on Human Rights ("ECHR").

3.5 The ECJ in *Gasser* appeared to consider that the Brussels Convention (and the Regulation) would be undermined by any other decision. The FMLC does not consider that the logic is as inexorable as the ECJ seemed to believe. For example:

a. Article 16 of the Brussels Convention (Article 22 of the Regulation), like Article 17 (Article 23 of the Regulation), provides for certain courts to have exclusive jurisdiction. In *Overseas Union*, the ECJ apparently accepted that a court with exclusive jurisdiction under Article 16 was not obliged to defer to the court first seised by virtue of Article 21. It is not obvious why exclusive jurisdiction under Article 16 should differ in this respect from exclusive jurisdiction under Article 17.

b. In *Gasser*, Advocate General Léger differed from the ECJ, concluding that Article 21 did not require a court second seised to defer to the court first seised where there was no room for doubt as to the jurisdiction of the court second seised under a jurisdiction agreement.

3.6 Further, the FMLC considers that the ECJ was wrong to dismiss without serious discussion the practical difficulties caused by their decision (*Gasser*, paragraph 53). The case of *JP Morgan v Primacom* shows that the effect of the decision is to weaken the legal protection of persons in the Community, undermining one of the core aims of the Brussels Convention (see *Gasser*, paragraph 3).[20] The reason is that the decision assists parties who wish to delay performance of their obligations, to give themselves a better negotiating position in relation to those obligations, or, ultimately, to evade their obligations altogether. It does so by allowing a party to commence proceedings in a court without jurisdiction in the knowledge that it will take time and money to challenge the jurisdiction of that court but, in the meantime, no other proceedings are possible within the EU. Any consideration of the substance of the dispute will, therefore, be delayed.

3.7 This problem is exacerbated by the practice of the courts of some member states of not deciding a jurisdictional challenge as a preliminary issue but, instead, of requiring the parties to deal with both jurisdiction and the substance of the dispute at the same time (as in *Primacom*). A party is therefore compelled to address the substance of a dispute in a court other than the one agreed with its counterparty, which adds hugely to the expense of the proceeding.

3.8 This is a particularly egregious problem if the parties have expressly agreed in a negotiated agreement which court will have jurisdiction to determine their disputes. This is common in the financial markets, where the need for legal certainty is particularly important, and parties consider carefully what jurisdiction is appropriate for the resolution of their disputes (see section 7 below). Having reached agreement, the parties expect the courts to uphold their bargains. Any failure to do so, or any perception that a contract breaker can gain a tactical advantage by initiating proceedings in courts other than those agreed, will undermine confidence in the courts of the member states, and may drive parties to courts outside the EU or to arbitration, neither of which is bound to follow the approach of the Regulation. Yet this is potentially the effect of *Gasser*, to the detriment of all the member states of the EU.

b) *Turner v. Grovit*[21]

3.9 The issue in the case of Turner v Grovit was whether the domestic courts of one member state (the United Kingdom) could issue an anti-suit injunction to restrain proceedings initiated in bad faith in another member state (Spain) and pursued for the sole purpose of intimidating a prospective litigant and preventing him pursuing existing dispute resolution efforts in the first jurisdiction.

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20 *JP Morgan v Primacom*: supra paragraph 16 and infra Appendix 1.

21 Supra n 7.

3.10 Mr Turner was a solicitor recruited to a group of companies controlled by Mr Grovit. In 1997, Mr Turner was transferred from London to Spain, to work for Harada, a company within Mr Grovit's group. Mr Turner resigned shortly after his move to Spain and brought proceedings before an employment tribunal in London against Harada, alleging that he had been unfairly dismissed because of efforts to implicate him in illegal conduct. Harada disputed the English tribunal's jurisdiction, but the tribunal issued a ruling confirming it did have jurisdiction over Harada. Within a very short period of time following this ruling, another of Mr Grovit's companies began proceedings in Madrid for damages resulting from Mr Turner's alleged professional misconduct. Mr Turner, who disputed the Spanish court's jurisdiction, refused to accept service of the Spanish proceedings and sought an anti-suit injunction in the English courts to restrain Mr Grovit and his companies continuing proceedings in Spain.

3.11 The English Court of Appeal took the view that the sole purpose of the proceedings in Madrid was to intimidate and exert pressure on Mr Turner in respect of the pursuit of his claim before the English employment tribunal. The Court of Appeal was of the view that nothing in the Brussels Convention restricted the English court's inherent jurisdiction to issue an anti-suit injunction to prevent such an abuse of process. The injunction ordered by the Court of Appeal therefore required Mr Grovit and his companies not to continue the proceedings in Spain, and to refrain from commencing further proceedings in Spain or elsewhere against Mr Turner in respect of his contract of employment.

3.12 The Court of Appeal decision was appealed to the House of Lords, which referred the following issue to the ECJ: does the Brussels Convention preclude the grant of an anti-suit injunction by an English court restraining a party from commencing or continuing proceedings in the court of another contracting state even where that party was acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts? In referring this question, the House of Lords (whose view was supported by HM Government in submissions to the ECJ) observed that the injunctions at issue did not involve any assessment of the jurisdiction of the foreign court and that they should be regarded as procedural measures.

3.13 The ECJ answered the question referred to it by the House of Lords in the affirmative. The ECJ held that anti-suit injunctions are incompatible with the Brussels Convention, irrespective of their purpose. The ECJ reasoned that as the Brussels Convention is based on mutual trust between contracting states, the Brussels Convention rules may be interpreted and applied with the same authority by the courts of each state. Further, the Brussels Convention does not permit the jurisdiction of a court to be reviewed by a court in another contracting state. In other words, the policy of the Brussels Convention is that each court is equally capable of determining its own jurisdiction - hence, the Spanish court should be left, unhindered by English injunctions, to determine whether the case against Mr Turner in Spain should proceed.

3.14 The ECJ rejected HM Government's submission that an anti-suit injunction does not impinge on the jurisdiction of the foreign court. Any injunction

prohibiting a claimant from bringing an action before the courts of another contracting state "*must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible*" with the principles of mutual trust which underpin the Brussels Convention. The ECJ therefore disregarded the fact that the anti-suit injunction is directed against the defendant *in personam* rather than against the foreign court directly. The ECJ appears to have been of the view that the effect of the injunction, in practice, is to interfere with the foreign court's determination of its own jurisdiction. In short, it was not for the English court to assess the appropriateness of the proceedings before the Spanish court.

3.15 It is clear that, although *Turner v. Grovit* was not concerned with circumstances involving a jurisdiction agreement, the ECJ considers the anti-suit injunction to be generally incompatible with the principles underlying the Brussels Convention. To the extent that the markets were left in any doubt following *Gasser*, it is clear from *Turner v. Grovit* that the ECJ will not permit courts to issue anti-suit injunctions to ensure compliance with an exclusive jurisdiction clause.

3.16 The effect of the judgment in *Turner v. Grovit*, therefore, is that a court may not issue an anti-suit injunction against any person domiciled in a Regulation state (or Brussels or Lugano Convention state), in a case falling within the scope of the Regulation (or Brussels or Lugano Conventions).

c) *Owusu v. Jackson and others*[22]

3.17 The issue in *Owusu* was whether the courts of a member state favoured by the provisions of the Brussels Convention (or Regulation) have a residual power to decline jurisdiction, or stay proceedings, on the grounds of forum non conveniens and the finding that the courts of a non-EU state would be a more suitable forum.

3.18 In *Owusu*, both the claimant and the first defendant were individuals domiciled in England. Mr Owusu's claim was for compensation for injuries sustained while swimming near a villa in Jamaica which he had rented from Mr Jackson, the first defendant. His claim against Mr Jackson was in contract, on the basis that he failed to provide access to a safe swimming area. The remaining defendants, local companies connected in one way or another with the beach in question, were sued in tort.

3.19 The claimant issued proceedings in the English High Court. The defendants then applied to the court under Rule 11(1)(b) of the Civil Procedure Rules ("CPR"), inviting it to decline jurisdiction on the ground that Jamaica was the more appropriate forum for a trial of the dispute. The High Court rejected the applications on the basis that Article 2 of the Brussels Convention obliged it to assume jurisdiction in relation to the claim against the first defendant, since he was domiciled in the UK. The High Court stated that, in theory, it was free to allow the claims against remaining defendants to be tried in Jamaica, since they were domiciled there, but the court decided that those claims should be tried in

22 *Supra* n 9.

England too, since otherwise there was a risk of two sets of proceedings running in parallel (and possibly resulting in incompatible judgments) in the two jurisdictions.

3.20 The defendants appealed and the Court of Appeal referred the case to the ECJ for a preliminary ruling on two questions:[23]

> "*1. Is it inconsistent with the Brussels Convention, where a claimant contends that jurisdiction is founded on article 2, for a court of a contracting state to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that state in favour of the courts of a non-contracting state,*
>
> *(a) if the jurisdiction of no other contracting state under the 1968 Convention is in issue,*
>
> *(b) if the proceedings have no connecting factors to any other contracting state?*
>
> *2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?*"

3.21 In the event, the ECJ chose to answer only the first of these questions, and then only to consider whether the Brussels Convention applied at all in scenarios (a) and (b), and if so, whether the specific doctrine of *forum non conveniens* was compatible with it. The ECJ decided that the Brussels Convention did apply, and that there was no room for *forum non conveniens* to operate where the defendant in question is domiciled in a member state.

3.22 The applicability of the Brussels Convention in these scenarios did not come as a surprise, however, the second half of the court's ruling was more controversial. The reasoning behind it was simple:

a. the rule in Article 2 is clearly mandatory ("…. persons domiciled in a contracting state *shall* ……. be sued in the courts of that contracting state" - *emphasis added*); and

b. when applying the doctrine of *forum non conveniens*, the court has to exercise a wide discretion, which undermines the principle of legal certainty that is the basis of the Brussels Convention.

3.23 The ECJ acknowledged, but seemed untroubled by, the serious problems which would ensue as a result of its ruling. Problems for the parties in this case included the difficulty and expense of:

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[23] The Court of Appeal's reference and the ECJ's decision were made in relation to the Brussels Convention, but they may be taken as applying equally to its successor, the Regulation.

a. litigating in a jurisdiction far from the country where witnesses and evidence are located;

b. assessing the merits of the case according to Jamaican standards;

c. recovering the defendants' costs in England if the claimant's case was dismissed;

d. enforcing any cross-claims between the defendants, and

e. enforcing a default judgment in Jamaica.

3.24 The ECJ arguably failed to appreciate the procedural form of the doctrine of *forum non conveniens*, at one point (paragraph 42) arguing that the doctrine increases uncertainty of jurisdiction for the defendant, whereas, in fact, it only comes into operation if the defendant himself challenges the jurisdiction of the English court. (One of the ironies in this case is that it was the domiciled defendant who was seeking to have the action stayed. It is certainly arguable that one of the reasons why rules of jurisdiction set out in the Brussels Convention provide that a defendant must be sued in his domicile is to ensure that a defendant knows where he will be sued. That being the case, one might have thought that the ECJ would be more sympathetic in the case of a defendant who was willing to forsake the advantages of domicile.)

3.25 The ECJ's reasoning in *Owusu* has been widely criticised, even when its conclusions have been accepted as correct. The misgivings of commentators focus largely on the specific problems described above and the consequences of the European regime sweeping away a doctrine seen as sophisticated and sensitive to the needs of litigants in order to promote abstract principles and a "literalist" approach to EU legislation. However, there is also widespread concern in relation to what was left unsaid in *Owusu*, or at least not explicitly spelled out, regarding the courts' exercise of discretion in contexts other than that of *forum non conveniens*.

3.26 As the defendants argued when the case first came to the Court of Appeal:[24]

> "*If Article 2 of the Convention is mandatory the English court would have to assume jurisdiction to entertain an action against a person domiciled in England, even if the lis was pending in the courts of a non-contracting state or where there is an exclusive jurisdiction clause in a contract conferring jurisdiction on a non-contracting state. Such results would be contrary to the intentions of the Convention.*"

3.27 This reasoning is exemplified in the French case of *Bruno v. Société Citibank*,[25] in which it was held that Article 2 renders a jurisdiction clause ineffective where it purports to confer jurisdiction on the courts of a non-contracting state but the defendant is domiciled in a contracting state. (If the jurisdiction clause had favoured another contracting state, it would have been enforceable as an

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24 [2002] EWCA Civ 877, paragraph 48(5).

25 Court d'Appel, Versailles 1991, 1992 Rev. Cr. DIP 333, n. Gaudemet-Tallon.

explicit exception to Article 2 under Article 17 of the Brussels Convention/Article 23 of the Regulation).

3.28 Owing to a lack of clear authority, the position where other possible exceptions to Article 2 are concerned is even less clear. Nevertheless, the argument can be advanced that the court's discretion is relatively limited and therefore unlikely seriously to undermine the principles of the Brussels Convention. This would generally be true, for example, in cases of *lis pendens* involving the courts of non-contracting states. There is also obvious good sense in not taking the wording of Article 2 literally in cases concerning, for example, immoveable property located in a non-contracting country. This is not to say, though, that such good sense has prevailed in cases involving similar subject matter, such as the adjudication of claims under foreign intellectual property laws and the enforcement of foreign revenue laws.[26]

3.29 However, the best - or at least the most intellectually respectable - general argument post-*Owusu* for allowing implied exceptions to the rule in Article 2 stems from the idea that certain of its provisions produce an *effet réflexe*. This is said to happen where an article carves out an explicit exception to Article 2, e.g., where a dispute concerns the validity of the constitution of a company in a country other than that in which the domicile of the defendant (Article 16(2) of the Brussels Convention/Article 22(2) of the Regulation), but does so only in favour of the courts of another Brussels Convention state. Here, (it is argued), the Brussels Convention clearly *would* have made such an exception in favour of non-contracting states as well, and did not do so only because it could not legally require the courts of a non-contracting state to accept jurisdiction. However, the intention and general policy behind the wording of the Brussels Convention is clear, so the argument runs, and English courts should feel free to use their national powers of discretion to give effect to the policy wherever appropriate.

3.30 This argument from *effet réflexe* is not without its problems, but it does neatly side-step the ECJ's judgment in *Owusu*, which concerned itself exclusively with the *forum non conveniens* doctrine. Since this is a creature of common law, it does not feature anywhere in the Brussels Convention, and so the possibility of an *effet réflexe* did not arise and did not fall to be considered by the court. Nevertheless, it remains a difficult argument to put forward, and the robust - or simplistic, depending on one's point of view - reasoning employed by the ECJ in *Owusu* does not inspire confidence that the court will take it on board when deciding any future reference in this area. As a result, there is continuing uncertainty, not only as to the English courts' ability to enforce exclusive jurisdiction clauses in favour of non-contracting states, but also to use judicial discretion in any way that departs from the strict letter of the law as laid down in Article 2 of the Brussels Convention.

4 Likely effect on the financial markets

[26] See Briggs and Rees, 4th edition, para 2.225.

4.1 It has always been important to achieve jurisdictional certainty when entering into any form of international transaction, and this is all the more the case in relation to the financial markets. The most popular method of attempting to achieve such certainty has been to include clauses specifically providing for a specific jurisdiction, court or law to apply to the agreement or transaction. This is a sensible and commercial method of providing the certainty required.

4.2 The Regulation represents one attempt within the EU at achieving highly predictable jurisdictional rules and a clear and effective mechanism for resolving disputes. Article 23 of the Regulation upholds the primacy of the contracting parties' expressed will in relation to exclusive choice of court clauses. However, Article 27 of the Regulation undermines the desirable effect of Article 23. The effect of the decision of the ECJ in *Gasser*, that Article 27 cannot be overridden by a choice of court clause, is that a party to such an agreement is able to obtain an immediate tactical advantage by issuing proceedings in a different court from that chosen under the agreement, thereby causing costs and delay whilst that court then determines whether it has jurisdiction and potentially even establishing a less favourable jurisdiction.

4.3 *Primacom*, a case of the pre-emptive initiation of proceedings in Germany in contravention of an English jurisdiction clause, is an example of this tactic being applied in the financial markets sector.[27] Whilst *Primacom* is a strong example of the type of tactical abuse of process which Article 27 and the ECJ decision in *Gasser* permit, it must be borne in mind that the German Court system does allow such matters to be dealt with expeditiously. There are other European court systems in which such a determination would be likely to have taken considerably longer.

4.4 *Primacom* highlights, above all, the need for greater certainty for financial sector participants in relation to the enforcement of choice of court agreements and the risks to the financial markets when conclusive choice of court agreements between commercial parties are not respected. Financial markets participants require this certainty in order to be able to manage and price the risk to which they are exposed by their transactions. In this regard, the Hague Choice of Court Convention (see Appendices 2 & 3) is to be welcomed, particularly because it is an international convention and so would apply beyond the EU's member states. By the same criterion – that is, legal certainty - the consequences of the decision in Gasser are to be deplored.

5 Possible Solutions

A) Anti-suit injunctions

5.1 The decision in *Turner v. Grovit* is highly controversial, both as regards its juridical basis, and its practical implications. Many would regard the decision as misconceived. And many would regard the possibility of restraining the abusive conduct of a claimant in foreign proceedings as a valuable tool for ensuring procedural justice, especially in cases involving exclusive jurisdiction agreements.

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[27] *Infra* Appendix 1.

5.2 It is apparent, however, that by appealing to the principle of mutual respect between member states the ECJ rested its decision on a fundamental principle of Community law. If the application of that principle in *Turner v. Grovit* is not beyond criticism, it is also clear that the decision reflects a position commonly held within the Community. Certainly, the practice of granting anti-suit injunctions relies upon a concept of *in personam* jurisdiction, and a concept of procedural justice, which are not universally accepted in other member states.

5.3 It may not be realistic, therefore, to recommend that the decision in *Turner v. Grovit* be reversed or modified by legislation. But the decision reinforces the problems evident in the decision of the ECJ in *Gasser*, and the importance of amending the Regulation to solve those problems.

B) Forum non conveniens

5.4 As described above, many commentators have serious reservations about the correctness of the decision of the ECJ in *Owusu*. From a commercial perspective, the focus of concern is not, however, its correctness, but its effect on the enforcement of exclusive jurisdiction agreements in favour of third (i.e. non-EU) states. If a contract contains an express submission to the exclusive jurisdiction of the courts of a third country, but one party sues the other in courts not favoured by the clause, to what extent, if at all, may the defendant enforce the agreement by seeking a stay of the proceedings?

5.5 How the Regulation might be amended to meet these concerns depends upon the scope of the decision in *Owusu*, which is uncertain. The ECJ explicitly declined to consider the status of third-state jurisdiction agreements, confining its decision to the facts of *Owusu*, in which a stay was sought on the general ground that a court in Jamaica was the *forum conveniens*.[28] Arguably, however, the judgment implies a solution.[29] The ECJ relied upon the broad proposition that the Brussels regime must be applied both literally and uniformly in all member states.[30] This suggests that resort to national rules for declining jurisdiction is never permitted. Because the Brussels regime is silent on the effect of third-state jurisdiction agreements, and because the enforcement of such agreements can only be a matter for national law, this means that such agreements are unenforceable in member states.

5.6 Alternatively, the ECJ's refusal to stray beyond the facts of *Owusu* may simply confirm that the question of third-state jurisdiction agreements remains open. If so, it remains uncertain what the answer should be. Indeed, the question is one of considerable difficulty, to which no clear answer may be possible. For practical purposes, the following alternatives exist:[31]

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28 Judgment, paras. 47-52.

29 Briggs (2005) 121 LQR 535; Fentiman (2006) 43 CMLR 705, 725ff.

30 Judgment, para. 34.

31 See further, Fentiman (2006) 43 CMLR 705.

a. The enforcement of third-state jurisdiction agreements is beyond the scope of the Regulation in any case involving such an agreement. If so, national law applies, unaffected by the Regulation. This view was adopted by the Commercial Court in *Konkola* and finds support in the judgment of the ECJ in *Coreck Maritime GmbH v. Handelsveem BV*.[32]

b. The enforcement of third-state jurisdiction agreements is beyond the scope of the Regulation, provided that the legal vehicle for declining jurisdiction replicates that embodied in Article 23 of the Regulation. If so, national law applies in principle, but not if jurisdiction is declined in such cases on a discretionary basis, as presently in English law. This limitation was considered but rejected by Colman J. in *Konkola*.

c. Whether jurisdiction deriving from the Regulation may be declined is a matter within the scope of the Regulation in all circumstances. Because the Regulation makes no provision for third-state jurisdiction agreements, they are therefore unenforceable in member states. This view has been adopted by the French courts.[33]

d. Whether jurisdiction deriving from the Regulation may be declined is a matter within the scope of the Regulation in all circumstances. Although the Regulation makes no provision for third-state jurisdiction agreements, the Regulation has an *effet réflexe*. Such agreements are enforceable in circumstances which mirror the operation of Article 23. This view is associated with the views of Professor Droz,[34] and has occasioned considerable debate.

5.7 Considerable uncertainty surrounds both the scope of the decision in *Owusu*, and which solution should be preferred assuming that the status of third-state jurisdiction agreements remains open. If the Convention is ratified the position would be clarified in cases where one party is domiciled in a third-state. An agreement in favour of the courts of such a state would be enforceable. But uncertainty would remain if the Convention is not ratified by the Community. Further, if it is ratified, uncertainty would remain where both parties are EU-domiciled.

5.8 Such uncertainty should be removed by an amendment to the Regulation. One of two possibilities might be preferred:

a. The treatment of third-state jurisdiction agreements might be referred to national law. This solution is implicit in the approach of the ECJ in *Coreck*, and was favoured by Colman J.'s in *Konkola*. Such an approach is, however, hard to reconcile with the decision in *Owusu*, as regards both the scope of the Brussels regime, and the importance of uniformity in matters of jurisdiction within the Community. In the event that the Convention is ratified, it would also lead to inconsistency between those cases which are subject to the Convention, and those which are not.

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32 Case C-387/98 [2000] ECR I-9337.

33 *Bruno*, op cit.

34 Droz, "Competence judiciaire et effets des jugements dans le Marché Commun" (1972).

b. The alternative is to adopt the solution prescribed by the Convention, and to provide that this applies in all cases, irrespective of the origin of the parties, and whether or not the Convention is ratified by the Community. If so, a third-state jurisdiction agreement would be enforceable on a non-discretionary basis, subject to specified limitations. Such a solution promotes legal certainty; the acknowledged merit of the Convention solution. In the event that the Convention is ratified, it also ensures consistency in the treatment of third-state jurisdiction agreements before the courts of member states. It also ensures that such matters receive uniform treatment in all member states. As this suggests, it would be preferable to adopt the position contained in the Convention.

C) Lis alibi pendens

5.9 By prohibiting the grant of anti-suit injunctions against claimants in other member states, the decision of the ECJ in *Turner v. Grovit* has removed an important mechanism for enforcing jurisdiction agreements. The remaining, indirect means for avoiding or reducing the problems exposed by *Gasser* are likely to be insufficient. Uncertainty surrounds the effectiveness of relying upon arbitration as an alternative to litigation within the scope of the Brussels regime[35]. And it remains unclear whether exclusive jurisdiction agreements might be enforced collaterally by means of an action in damages in cases subject to the Regulation. Nor is it clear that either solution represents an effective alternative to suing directly in the contractual forum. Again, the Convention, if ratified by the Community, offers a solution which is neither comprehensive nor certain.[36] As noted above, it applies only in cases in which one party is domiciled in a third state, leaving untouched cases such as *Gasser* and *Primacom* in which both parties are EU-domiciled. Where it applies, the effect on the Convention of Articles 27 and 28 of the Regulation is uncertain.

5.10 Given that the operation of the Regulation is under review, there is a clear and pressing case for amending the Regulation, irrespective of any effect the Convention may have within the Community.

5.11 Several amendments to the existing Regulation might be proposed, to operate either independently, or in combination:[37]

Protection in the court first seised

5.12 At present, the victim of a pre-emptive strike such as that in *Gasser* is all but forced to defend proceedings in the first court, by challenging that court's jurisdiction. If it does not, it is uncertain whether the first court will examine

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35 See *The Front Comor* [2007] All ER (D) 249, which referred to the European Court of Justice the question of whether it is consistent with the Brussels I Regulation for a court of a member state to make an order to restrain a person from commencing or continuing proceedings in another member state on the ground that such proceedings were in breach of an arbitration agreement.

36 Hague Conference on Private International Law, Twentieth Session, Final Act, 30 June 2005; Kruger, "The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership" (2005) 55 *ICLQ* 447.

37 Fentiman (2005) 42 *CMLR* 241.

the effect of any purported jurisdiction agreement of its own motion. An important passage in the Schlosser Report on the Brussels Convention suggests that a court should do so.[38] But neither the Brussels Convention nor the Regulation requires this – as it does expressly where Article 22 is involved.[39] This may imply that such protection is not afforded to Article 23 and an absent defendant; an inference apparently drawn by the ECJ in *Gasser*.[40] If, indeed, the ECJ intended to confirm that a defendant must appear and plead Article 23, the effect is to make that party's predicament even worse than might have been supposed. Not only is that party prevented from suing in the contractual forum, it is all but obliged to appear in the court first seised.

5.13 The Regulation should be amended to ensure that a court should of its own motion examine whether the courts of another member state might have jurisdiction under Article 23. This might be achieved by extending to Article 23 the protection already given to Article 22 in Article 25. Such an amendment might perhaps be coupled with a requirement that a claimant should stipulate in proceedings in a member state that any contract between the parties does not contain a jurisdiction clause, or that there are no grounds for arguing that a valid and enforceable jurisdiction exists.

5.14 Such an amendment does not, however, provide a complete solution to the difficulties evident in *Gasser*, although it may emphasise the importance to be attached to Article 23, and it may offer protection in certain cases. In most cases, a defendant is likely to appear to challenge the first court's jurisdiction, to ensure that its challenge is put at its strongest. This is especially likely if in the first court any such challenge is conjoined with a hearing on the merits, in which case the risk of a default judgment (if jurisdiction is asserted) might be too great. As this suggests, a complete solution to the problems illustrated in *Gasser* can only be one in which discourages proceedings anywhere but the contractual forum.

Invalidating non-compliant judgments

5.15 The Regulation might be amended so that any judgment obtained in a member state might be made unenforceable, if the courts of the enforcing state, applying the requirements of Article 23, determine that it was obtained in breach of an exclusive jurisdiction agreement. Possibly, but not necessarily, non-enforcement might be restricted to cases where the enforcing court is also the court named in the agreement. This might be achieved by an amendment to Article 35, which currently provides that a judgment obtained in breach of Article 22 may not be recognised in another member state.

5.16 This solution reflects the position in English law in cases outside the European regime.[41] It deprives a claimant in the non-contractual forum of the fruits of litigation in that forum. And it would inevitably discourage proceedings anywhere but the named court.

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38 Para. 22.
39 Regulation, Article 19.
40 Judgment, para. 52.
41 Civil Jurisdiction and Judgments Act 1982, s.32.

5.17 Such an amendment also pre-supposes that it is legitimate in principle for the enforcing court to substitute its view of that matter for that of the court first seised. The latter assumption contradicts the fundamental principle of mutual trust within the Community, whereby the courts of one member state cannot review jurisdictional findings made in another such state.[42] This principle is suspended where a court is seised in breach of Article 22 rather than Article 23. In such a case recognition of any judgment thus obtained may be denied. Arguably, Article 23 might simply be accorded the same status. A potentially convincing argument for treating Articles 22 and 23 differently in this respect, is that, although courts may differ in their assessment of the validity and effect of a jurisdiction agreement, they will not differ in the application of Article 22. For that reason, there is no risk that the Article 22 court will substitute its conclusion about the effect of Article 22 for that of the court first seised.

5.18 This distinction between Articles 22 and 23 cannot, however, be maintained. As Advocate-General Léger suggested in his opinion in *Gasser*, the application of some (if not all) of the grounds of jurisdiction within Article 22 may be controversial. Moreover, differences of judicial opinion about the application of Article 23 might, in part, be removed by amending the Regulation. Provision might be made to ensure that any jurisdiction agreement is immediately to be treated as valid and enforceable, provided that it has certain formal characteristics, or is in a form specified in the Regulation. The effect would be to make the operation of Article 23 as certain as that of the more obvious provisions of Article 22, such as that conferring exclusive jurisdiction in matters of title on the courts of the state where immovable property is located.

5.19 To simplify the formal requirements for the operation of Article 23 is not, however, a complete solution to the problem of certainty. It presupposes that all jurisdiction agreements will have particular formal characteristics, or should take a specified form. It may be inappropriate, however, to provide that an agreement will be valid under Article 23 only if it takes an approved form. Certainly, if party autonomy is prized, it is unclear why an agreement in a specified form is to given greater effect than one that is not. Yet, if this is not required, there will always remain jurisdiction agreements which take a different form. If so, there will always be cases where the non-recognition of judgments obtained in breach of such an agreement will be problematic.

5.20 It might be suggested that such a solution nonetheless remains viable in cases involving a jurisdiction agreement in an approved form. It is uncertain, however, why the fact that an agreement takes a given form should prevent a claimant in the court first seised from alleging the substantial invalidity of such an agreement, especially where the good faith of the other party is in question, as where fraud or misrepresentation is alleged. As we shall see, it is arguable that compliance with a prescribed form might permit the contractual forum to entertain parallel proceedings. However, it may not justify depriving a judgment obtained in the court first seised of any effect.

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42 Overseas Union Insurance, op cit.

5.21 As this suggests, to provide for the non-enforcement of judgments obtained in breach of an exclusive jurisdiction agreement is not a conceptually complete solution to the problems evident in *Gasser*. Nor would it be a complete solution in practice. Such an amendment would be ineffective in cases where any judgment obtained in the court first seised is capable of recognition or enforcement in that court. In cases such as *Gasser* and *Primacom*, where declaratory relief is sought in the non-contractual forum, it is unlikely that such recognition is contemplated by the claimant, or would be effective. The claimant is likely to contemplate that any negative declaration obtained in that forum will foreclose proceedings for positive relief in any other court. But, if the claimant seeks damages in the non-contractual forum, and if the defendant has assets within the jurisdiction of that court, enforcement in that court may be possible.[43]

Expediting the challenge to jurisdiction

5.22 A different approach is to focus on the procedures regulating jurisdictional disputes in member states. The difficulties evident in cases such as *Gasser* and *Primacom* stem, in part, from the requirement in most member states that a defendant may only challenge a court's jurisdiction at any trial on the merits. Not only do most member states lack a timely, preliminary procedure for challenging their jurisdiction, a defendant cannot challenge a court's jurisdiction without also incurring the cost of defending the merits. A solution would be to establish in member states a uniform mechanism for addressing jurisdictional issues promptly in preliminary proceedings, without the necessity of pleading the merits.

5.23 This approach would minimise both the cost and delay caused by pre-emptive proceedings in the court first seised. However, a defendant might remain exposed to costs even if the procedure for contesting jurisdiction were expedited. Complete protection for the defendant would require allowing a party forced to mount such a jurisdictional challenge to recover its costs in full, in the event that the first court upholds the jurisdiction agreement.

5.24 Such a procedure reflects the dedicated procedure for the enforcement of judgments presently contained in Chapter III of the Regulation. It is uncertain, however, whether it is realistic to propose such a significant change to the procedural law of member states, in which the distinction between interlocutory proceedings and a trial on the merits may be unknown. Unlike the procedures for the enforcement of judgments, which echo the domestic procedures of many member states, such a procedure may be regarded as entirely novel. Unlike those procedures, such an amendment would have implications in cases beyond the scope of the Brussels regime.

5.25 Such difficulties aside, the advantages in such an approach are apparent. The most direct solution, however, may be to ensure that a claimant can always seise the contractual forum, notwithstanding that another court is already engaged. Indeed, if this were possible, the incentive for launching pre-emptive

[43] If so, Article 28 rather than Article 27 would engage. Such proceedings would be related to, not identical with, any proceedings in the contractual forum.

proceedings in another court would largely disappear. In that event, there would be little need to provide for an early challenge to the jurisdiction of the non-contractual forum, because such proceedings would not arise at all. It is undeniable, however, that a dedicated procedure for resolving disputes as to jurisdiction would be a valuable addition to the Regulation, even in cases in which no jurisdiction agreement is involved.

Empowering the contractual forum

5.26 It is possible that any of the above approaches might form part of a multi-layered solution to the problems evident in *Gasser*. But none by itself is a substitute for permitting proceedings in the contractual forum to continue. The Regulation might be amended to permit parallel proceedings in the contractual forum, in addition to any in the court first seised. The named court should be empowered to consider its jurisdiction, irrespective of the fact that another court is seised, and to proceed to address the merits if it considers that the agreement is effective. This might be achieved by an amendment either to Article 23, or to Articles 27 and 28.

5.27 This solution removes at a stroke the problems caused by giving effect to Articles 27 and 28. It allows a party relying upon a jurisdiction agreement to test its case in the nominated court. And it reduces (and may remove) the risk of tactical proceedings in another court, by abolishing the pre-emptive effect of such proceedings.

5.28 But this straightforward solution might be subject to limitations. Arguably, the named court should not be permitted to address its jurisdiction unless the court first seised has failed to do so within a prescribed period of time. This modification responds to the perception that the mischief in *Gasser* arises from excessive delay in the court first seised. But it has the effect of itself delaying a claimant's access to justice in the contractual forum. It is preferable that the contractual forum should be permitted to proceed whenever seised.

5.29 Again, it is possible that some preliminary filter should be introduced to prevent a party from seising a court on the basis of a bogus or misconceived allegation that it has jurisdiction pursuant to Article 23. It could be objected that tactical proceedings in a court which is alleged to have such jurisdiction are as problematic as those (such as *Gasser*), in which the existence of a jurisdiction agreement is denied in the court first seised. In principle, it is possible to conceive of some preliminary procedure whereby the defendant in the alleged contractual forum can object to the seisin of that court, and its competence even to address its jurisdiction. Arguably, for example, that court should be entitled to proceed only upon evidence of the *prima facie* existence of a jurisdiction clause. This approach would be inapt, however, in any legal system in which there is no provision for preliminary proceedings before trial. It may also be regarded as somewhat fanciful. It is unrealistic to suppose that a claimant would attempt to seise a court on the basis of Article 23 without some grounds for arguing that a jurisdiction agreement exists. Those grounds might be weak, and the claim may fail. However, that is for the alleged contractual forum to determine. It is preferable to adhere to the familiar proposition that

any court seised of a matter may consider its jurisdiction, and, if appropriate, proceed to hear the merits.

5.30 To allow the contractual forum to proceed removes the difficulties evident in *Gasser* and *Primacom*. But to do so potentially impairs the operation of the Regulation, by creating the possibility of parallel proceedings in the contractual forum and the court first seised. The avoidance of parallel proceedings is the guiding objective of the Regulation's jurisdiction regime, and was central to the decision of the ECJ in *Gasser* to forbid the contractual forum from proceeding. The integrity of the Brussels regime requires an answer to this problem.

5.31 An immediate response is that the possibility of parallel proceedings, if theoretically possible, is remote and unrealistic. If the contractual forum is permitted to entertain proceedings in addition to those in the court first seised, this is likely to deter pre-emptive proceedings elsewhere. In practice, therefore, the risk of parallel proceedings in two member states is likely to be slight. It may also be unrealistic to suppose that litigants would readily litigate the same issue in two places concurrently. The constraints of the Regulation aside, it is certainly possible that two courts will be seised concurrently, given the likely importance to each party of manoeuvring the dispute into their preferred forum. But the likelihood that proceedings will advance significantly in both places is remote. This is not because both courts are likely to agree that only one has competence – an optimistic argument advanced in respect of proceedings in the Community by Advocate General Léger in *Gasser*.[44] Even if the parties intend to pursue the dispute to judgment, the cost of fighting on two fronts is likely to deter them. However, litigants in costly cross-border disputes seldom have any intention of taking the dispute to judgment, or even to trial – certainly not a trial on the merits. The jostling for position so common in transnational disputes, with each party seeking to seise its preferred forum, is invariably intended to promote settlement, or surrender by the other party. The notion that either is seeking a judgment on the merits is unrealistic.

5.32 Without more, however, parallel proceedings remain a possibility. There are, however, several ways in which this risk might be reduced or removed:

The recognition of jurisdictional findings

5.33 First, the risk of parallel proceedings *on the merits* would be removed if the Regulation were amended to clarify the status of decisions concerning jurisdiction. It is uncertain, though likely, that a decision to assert (or deny) jurisdiction constitutes a judgment within the scheme of the Regulation.[45] If so, it qualifies for recognition as a judgment in other member states, and is subject to the Regulation's provisions concerning non-recognition. The effect is that member states would be required by Article 34 to defer to the first decision in time claiming jurisdiction, thereby ensuring that only one court can entertain proceedings at any time.

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44 Opinion, paras. 77-80.

45 Schlosser Report, para. 191.

5.34 However, to clarify the status of jurisdictional findings begs a conceptual question, which any amendment to the Regulation would need to clarify. Strictly, a court can only ever determine its own jurisdiction. The decision by one court that it has jurisdiction is distinct from any other court's finding that it too has competence. In that sense, the judgments are not irreconcilable, unless it is assumed that only one court may assert jurisdiction in a given matter.

5.35 Any such provision is not, however, a complete solution to the problem of parallel proceedings. It ensures that parallel proceedings on the merits cannot arise. But it permits – indeed, may encourage – a race to judgment on the issue of jurisdiction (assuming that the contractual forum is permitted to proceed, as suggested above). Again, the ECJ has made it an objective to avoid situations in which it is necessary to deploy the Regulation's rules for mediating between competing judgments.[46] In the scheme of the Regulation, those rules are regarded as a problem, not a solution. To amend the Regulation in this way would therefore require tolerance of the possibility of parallel proceedings, and conflicting judgments, in matters of jurisdiction.

Abolishing jurisdictional disputes

5.36 The problem of parallel proceedings evaporates in any case in which there can be no dispute as to which court has jurisdiction. This was recognised by Advocate General Léger in *Gasser,* and informs his conclusion that the contractual forum might be permitted to proceed only if the jurisdiction agreement is clearly effective. The logic of this position is that, if the status of the agreement is truly clear beyond doubt, there is no harm in the contractual forum asserting jurisdiction, because the court first seised will inevitably reach the same conclusion – and decline jurisdiction.

5.37 It is uncertain, however, what the Advocate General's proposal means in practice, and it is noteworthy that the ECJ did not regard it as a solution. If it means that the named court should proceed only if there is no possibility that the agreement could be realistically challenged in the court first seised, the question to be posed is unanswerable. It is hard to see how the contractual forum could (or should) make such a determination.

5.38 A solution may be found in the suggestion that an agreement in a standard form stipulated by the Regulation should be enforced without further deliberation in the courts of all member states. This contemplates that the mere existence of a clause in such a form is conclusive, leaving no opportunity for an allegation that there is no consensus between the parties. It equates the existence of a jurisdiction *clause* with the validity of a jurisdiction *agreement*. Such an approach may encounter difficulties. Some may question whether it is correct in principle that such a formulaic approach could or should prevent disputes about the substantial validity of such agreements, especially if mistake or misrepresentation are alleged. It also leaves unresolved the problem of conflicting views about the effect of agreements which are not in the approved standard form. However, in principle, the proposal that compliance with a standard form guarantees the enforceability of a jurisdiction agreement

[46] *Gasser* Opinion, para. 44.

removes the problem of inconsistent findings on that issue, and with it the risk of parallel proceedings.

Restricting the court first seised

5.39 Provision might be made to restrict or prevent proceedings anywhere but in the contractual forum. This might be achieved by amending the Regulation to require the court first seised to stay its proceedings until the contractual forum has declined jurisdiction. In this way, the contractual forum is given primary responsibility for policing jurisdiction agreements within the Regulation, and the threat of parallel proceedings is removed.

5.40 This possibility was proposed by the United Kingdom in *Gasser*. Although it was rejected as a solution by the ECJ, this does not appear to have been because it is objectionable in principle. To have adopted such an approach would have involved judicial legislation by the ECJ. It would have meant interpolating into the Brussels regime a mechanism which plainly it does not contain. There need be no obstacle, however, to introducing such a mechanism by amending the Regulation.

5.41 The precise form of such an amendment may be a matter for discussion. Any such provision turns on when such a stay should granted. Clearly, the court first seised should not be required to determine definitively whether the contractual forum has jurisdiction. The purpose of such a provision is to minimise proceedings in any but the contractual forum. Nor could it be enough merely that the defendant alleges the existence of a jurisdiction agreement. As Advocate General Léger noted in *Gasser*, such an allegation might be unfounded or tactical.[47] But it would be unsatisfactory if the decision to stay were to require a protracted hearing, as might happen if the defendant were required to demonstrate an arguable case that the agreement is valid. To reduce cost and delay, however, provision might be made for granting a stay on the basis of *prima facie* evidence that a jurisdiction agreement exists.[48] The mere existence of a jurisdiction clause in the documentation might be sufficient for this purpose. Such an approach does not require the non-contractual forum to determine that a jurisdiction *agreement* exists, but only that there is factual evidence of a jurisdiction *clause*.

5.42 Alternatively, any court but the contractual forum might be required to stay its proceedings upon evidence that the contractual forum is seised. This avoids any need to assess evidence for the existence of a jurisdiction clause, or the strength of the case that any agreement is valid and effective. It employs the familiar test, already contained in the Regulation, for determining whether the courts of another member state are seised.[49] A court is seised merely because the first formal step in initiating proceedings has been taken. Such an approach is preferable to one which requires a court to address possibly disputed questions of fact. It offers reassurance to the parties, and to the contractual forum, that parallel proceedings are impossible once proceedings in the contractual forum

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47 Opinion, para. 74.

48 As suggested by the United Kingdom in *Gasser*.

49 Article 30.

are initiated. It means that any delay by the court first seised in considering whether to stay proceedings is irrelevant; whenever it does so, its decision is inevitable from the outset.

5.43 The effectiveness of such a provision might be reinforced by providing in addition that any judgment obtained in the court first seised is unenforceable in another member state, if the contractual forum is seised, and the first court has failed to stay its proceedings.

6 Conclusion

6.1 The effectiveness of such a provision might be reinforced by providing in addition that any The most obvious solution to the problem evident in *Gasser* may have most to recommend it: the simple expedient of allowing the named court to proceed despite proceedings in another member state would, without more, remove the problems revealed by *Gasser* and *Primacom*. To permit proceedings in the named court would allow the wrong-footed party to regain the initiative. Moreover, it is likely to deter the other party from embarking on pre-emptive proceedings at all, by removing the tactical advantages of doing so.

6.2 The deterrent effect of such a provision has particular importance, because it should ease concern about the possibility of parallel proceedings within the scheme of the Regulation. For, if the wrong-footed party can always litigate in the contractual court, the other party would gain little by attempting to pre-empt those proceedings. If any tactical first strike is intended to prevent or delay proceedings in the named court, it would simply fail. To grant the court second seised competence is not, therefore, to tolerate parallel proceedings, but to ensure that proceedings are heard exclusively in the named court.

6.3 If, however, the theoretical possibility of parallel proceedings nonetheless remains, this may be removed, preferably by requiring the court first seised to stay its proceedings until the contractual forum has declined jurisdiction.

6.4 The drafting of such a provision would require particular attention to two different but related matters: (a) the conditions on which the contractual forum might proceed; and (b) the conditions on which the court first seised is required to stay its proceedings. Clearly, that court can only assert jurisdiction over the substance of the dispute having established the existence of a valid and enforceable jurisdiction agreement. Presumably, however, the contractual forum may consider its jurisdiction in any case in which it has been seised. Correspondingly, it is suggested that the first court should be required to grant a stay whenever the contractual forum is seised.

6.5 This solution corrects the anomalies revealed by *Gasser*. It may be, however, that some or all of the other partial solutions described above might also be included in a comprehensive reconsideration of the status of jurisdiction agreements within the Regulation, and may contribute to the stability of such agreements. Such a comprehensive approach may serve to underline the commitment of the Regulation to the enforcement of such agreements. Moreover, some solutions, notably the introduction of a dedicated procedure

for the prompt resolution of jurisdictional disputes, have clear merit, even in cases where no jurisdiction agreement is involved.

Appendix 1 – History of the FMLC's engagement with the issues

1. The text of the draft Hague Jurisdiction Clauses Convention was first brought to the attention of the FMLC at a meeting, in November 2004, of the Commercial Court Users' Committee (convened to discuss a response to a consultation on the convention published by the Department of Constitutional Affairs, and subsequently by COMBAR, by whom the FMLC was asked to endorse its own response to the Department of Constitutional Affairs' consultation.

2. In February 2005, a Working Group was constituted to consider the possible effects of the Hague Jurisdiction Clauses Convention. The Working Group provided suggestions to the FMLC which were incorporated into the FMLC's letter to the Department of Constitutional Affairs dated 6 May 2005.[50]

3. The FMLC's letter, dealt, inter alia, with intellectual property and insurance contracts issues (stating that it was desirable to make it absolutely clear that contracts of insurance or reinsurance are not excluded from the scope of the Hague Jurisdiction Clauses Convention) and, in particular, with the obligations of a court other than the court favoured by an exclusive choice of court agreement. The FMLC was anxious that any public policy exception (to the recognition and enforcement of a commercial choice of court agreement) should be narrow and precisely expressed. It also thought it important that the Hague Jurisdiction Clauses Convention should contain a provision designed to prevent the general recognition or enforcement of a judgment rendered in contravention of an exclusive choice of court agreement.

4. Meanwhile, in January 2005, it had been suggested to the FMLC by market contacts that an examination should be undertaken of the problems posed for the financial markets by case law emanating from the ECJ on jurisdiction under the Brussels Convention (now to all intents and purposes the Brussels I Regulation) and contractual choice of court clauses. In response to this suggestion, early in 2006, the FMLC resolved to draft a letter to the European Commission explaining the difficulties caused by the ECJ decision in *Erich Gasser GmbH v. MISAT Srl,*[51] and the necessity for a solution, both as a practical matter and a legal one, should the Community ratify the Hague Jurisdiction Clauses Convention.

5. The decision in *Gasser* has the effect that a court which is favoured by the parties' exclusive jurisdiction clause must decline jurisdiction, if it is not the court first seised on the matter, until the court which is first seised has declined jurisdiction of its own motion. It is thought that this decision encourages forum-shopping by potential defendants who may initiate litigation pre-emptively in a jurisdiction where court process is known to be particularly slow and where, even a decision on the jurisdiction issue is likely to take years.[52] Since *Gasser*, the ECJ has confirmed its interpretation on several occasions.

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[50] See Appendix 6

[51] Case C-116/02.

[52] The ECJ stated at paragraph 72 of *Gasser* that:

6. For example, in its decision in *JPMorgan Europe Limited v. Primacom*,[53] the English High Court accepted that an English court cannot take any step to resolve a dispute between borrower and lender, even when it is favoured by an exclusive jurisdiction clause upon which the lender relies, if the borrower has first brought a case within the European Union ("EU") in breach of that clause. The FMLC received views that this case is potentially very damaging to the certainty of English law as it applies in the financial markets and was asked to address the issue.

7. The FMLC therefore asked its (by now) expanded Working Group to consider these issues. The members of this Working Group are listed above and the FMLC owes them a debt of gratitude for their significant contribution, which forms the basis of this paper.

> *"it must be borne in mind that the Brussels Convention is necessarily based on the trust which the contracting states accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those states of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction*".

Therefore, any peculiarities of a legal system are irrelevant.

It was suggested during *Gasser* that the ECJ should recognise an exception to Article 21 of the Brussels Convention (Article 27 of the Regulation) whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where:

1. the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another contracting state which enjoy jurisdiction under the Brussels Convention; and

2. the court first seised has not decided the question of its jurisdiction within a reasonable time.

This suggestion was not taken on board by the ECJ despite the existence in several jurisdictions of the following problems: (a) the court has the discretion as to whether to decide the jurisdictional issues before, together with, or even after, the merits. This may mean that the parties have to defend on the merits before jurisdiction is declined; and (b) a determination by the Supreme Court, under leapfrogging interlocutory procedures, that the state's courts do not have jurisdiction does not automatically stay proceedings before the judge of first instance. This may lead the parties to have to defend themselves in front of two courts before jurisdiction is determined.

53 [2005] EWHC 508 and see Appendix 1.

Appendix 2 – Context: negotiation of the Hague Jurisdiction Clauses Convention

1. Since 1992, the Hague Conference on Private International Law has been working on an international convention on jurisdiction to improve the enforcement of foreign judgments in civil and commercial matters.

2. The Hague Jurisdiction Clauses Convention was adopted on 30 June 2005 and, since then, has been open for signature, ratification and accession.

3. No state has so far signed or ratified the Hague Jurisdiction Clauses Convention nor acceded to it. Formal consultations and preparations to join the Hague Jurisdiction Clauses Convention are currently underway. An Explanatory Report providing information on how to interpret the Hague Jurisdiction Clauses Convention's provisions has been prepared by Professors Trevor Hartley and Masato Dogauchi and is available to national courts.

4. The conditions and requirements for the Hague Jurisdiction Clauses Convention to come into force are found in the final clauses (in Chapter V) of the convention. The Hague Jurisdiction Clauses Convention needs only two contracting states to enter into force. It is open to all states and they can sign and ratify it or accede to it at any time.

5. The Hague Conference on Private International Law has indicated that it cannot tell when the Hague Jurisdiction Clauses Convention will enter into force but it is hoped that it will be in the near future considering the support that has been shown.

a) Constitutional issues surrounding signature, ratification and implementation: Community v. member states

6. When the text of the Hague Jurisdiction Clauses Convention was negotiated, it was not clear whether the subject matter fell within the exclusive competence of the EU (which would mean that the European Commission would participate in the negotiation of the Hague Jurisdiction Clauses Convention on behalf of the EU) or whether it was a matter of "mixed-competence" (which would mean that individual member states could negotiate alongside the Commission). Since the position was unclear, a joint-process was adopted which meant that the EU and member states co-operated during the negotiation of the Hague Jurisdiction Clauses Convention so that the text would reflect the input of individual member states as well as the European Commission.

7. Although some member states were present during the negotiation process, it was not intended that they should speak unless it was to develop an idea put forward by the Commission.

8. The ECJ has since ruled that the EU is exclusively entitled to conclude a convention on jurisdiction and the enforcement of judgments in civil and

commercial matters and that the right is not shared by member states.[54] The ECJ stressed in its opinion that where common rules have been adopted, member states no longer have the right to undertake obligations with non-member countries that affect those rules.

9. The decision to sign-up to the Hague Jurisdiction Clauses Convention as negotiated will be a co-decision of the European Council and the European Parliament alone. The Commission is in the process of preparing an impact assessment of signing-up to the convention. This work is expected to be completed during the Autumn of 2007, with a launch of the proposal for ratification of the Hague Jurisdiction Clauses Convention to take place in the first half of 2008.

b) Focus-issues in the Hague Jurisdiction Clauses Convention

10. To prepare for the last round of negotiations, the Commission published a Consultation Paper (in August 2004) analysing some of the important aspects of the Hague Jurisdiction Clauses Convention and seeking reactions from interested parties. In addition, a Public Hearing took place in January 2005 in Brussels which focused on the most important questions raised by the Consultation Paper. Further, as noted above, the Department of Constitutional Affairs undertook its own consultation process on 28 October 2004.

11. In the December 2004 draft of the Explanatory Report, Professors Hartley and Dogauchi noted the interrelationship between the convention and the Regulation. It is noted that although the convention would apply where the chosen court is situated outside the EU or where one or both of the parties are outside of the EU (and thus, gives effect to the parties' choice in these situations), it would not apply where both parties are resident in the EU (and where the chosen court is situated in the EU). In such cases, the convention would not apply to the choice of court agreement (and the problems associated with the ECJ cases would continue to be of concern).

[54] Opinion of the ECJ of 7 February 2006 on the competence of the EU to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Appendix 3 – Specific comments on the text of the Hague Jurisdiction Clauses Convention

a) Chapter I – Scope and Definitions

1. The Convention aims to maximise the effectiveness of exclusive choice of court agreements in the context of commercial transactions and thereby to parallel the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

2. There are three key obligations on the courts of the contracting states: (i) the chosen court in a contracting state must hear the dispute (see section b below); (ii) all courts in other contracting states are, subject to limited exceptions, obliged to decline jurisdiction (see section b below); and (iii) judgments given by the chosen courts must be recognised and enforced by courts in other contracting states (see section c below).

3. The Convention applies only in "international cases" to exclusive choice of court agreements "concluded in civil or commercial matters" (Article 1). A case is international unless the parties are resident in the same contracting state and the relationship of the parties and other elements relevant to the dispute are connected only with one state (the location of the chosen court is not considered a connecting factor). It is unclear if a case is deemed international in the event of the parties residing in the same contracting state at the time the agreement is concluded but not when proceedings are commenced.

4. Exclusive choice of court agreements are agreements in writing or in any other form of recorded communication, which designate the courts of one contracting state to "the exclusion of the jurisdiction of any other courts" (Article 3). The exclusive choice of court agreement is an agreement independent of the other terms of the contract. Its validity cannot be contested merely on the grounds that the contract is invalid.

5. Article 22 provides that judgments given by courts designated in non-exclusive choice of court agreements may be recognised and enforced in other contracting states if the chosen court state and the state where enforcement is sought have both made a declaration as to non-exclusive choice of court agreements and if there is no other judgment or pending proceeding on the same matter.

6. The Convention does not apply *ratione personae* to agreements where one of the parties is acting primarily for personal, family or household purposes (this provision appears to be referring to consumers) nor to agreements related to employment contracts. The exclusion of consumers from the Convention will narrow the scope of the Convention significantly.

7. The Convention does not apply *ratione materiae* to a number of matters, including: disputes relating to immoveable property, various company law questions, and intellectual property rights other than copyrights.[55]

8. The scope of the jurisdiction which may be conferred by the Convention is narrower than that of the New York Convention. For example, the jurisdiction of the courts can be excluded, pursuant to the provisions of the New York Convention, in favour of arbitral tribunals, which can, in many jurisdictions, decide disputes concerning competition issues (*c.f.* point (h) above).

9. One of the issues arising during the debate preceding the Convention was the need to make clear that insurance contracts, even though they may relate, for instance, to contracts of carriage, are not excluded from the scope of the Convention. Article 17 provides that contracts of insurance or reinsurance are not excluded from the scope of the Convention on the grounds that the contract of insurance or reinsurance relates to a matter to which the Convention does not apply.

10. Furthermore, proceedings are not excluded from the scope of the Convention where a matter excluded under Article 2 arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under Article 2 arises by way of defence does not exclude the proceedings from the applicability of the Convention, if that matter is not an object of the proceedings.

11. Proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto. Privileges and immunities of states or of international organisations, in respect of themselves and of their property, are not affected by the Convention.

12. The Convention does not apply to arbitration and related proceedings.

13. A provision that may potentially limit the scope of the Convention is Article 21. This provision enables contracting states to make a declaration that the Convention will not apply to certain specific matters (Article 21).

b) Chapter II – Jurisdiction

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[55] The full list of excepted matters is: a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust (competition) matters; i) liability for nuclear damage; j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship; l) rights *in rem* in immovable property, and tenancies of immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of intellectual property rights other than copyright and related rights; o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; and p) the validity of entries in public registers (Article 2).

14. Courts of a contracting state designated in an exclusive choice of court agreement have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that state. A chosen court cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state (Article 5).

15. However, where a declaration to such effect has been made by a contracting state, courts of that state may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no other connection between that state and the parties to the dispute (Article 19).

16. Courts of contracting states other than those of the chosen court must stay or dismiss proceedings to which an exclusive choice of court agreement applies unless: a) the agreement is null and void under the law of the state of the chosen court; b) a party lacked the capacity to conclude the agreement under the law of the state of the court seised; c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seised; d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or e) the chosen court has decided not to hear the case (Article 6).

17. During the debate which preceded the Convention, a request[56] was made that the exception above at subparagraph d) be deleted since it does not add anything of substance and it is covered by subparagraph c). If the court chosen suspended/dismissed the proceedings that would lead to a serious injustice because the case would not even be heard. The Explanatory Report will, hopefully, assist in identifying those situations captured by subparagraph c) that are different from the cases under subparagraph d).

18. Interim measures of protection are not governed by the Convention (Article 7).

c) Chapters III, IV and V – Recognition and Enforcement, General Clauses and Final Clauses

19. Judgments of contracting states designated in an exclusive choice of court agreement must be recognised and enforced in other contracting states unless recognition or enforcement can be refused on specific grounds (Article 8).

20. No review of the merits is permitted. The court addressed is bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. This exception could lead to tactical non-appearances by defendants.

21. However, Article 8 provides that such review may be necessary for the application of the provisions of Chapter III on recognition and enforcement.

22. In particular, Article 9 provides that recognition or enforcement may be refused if:

    a. the agreement was null and void under the law of the state of the chosen court, unless the chosen court has determined that the agreement is valid;

[56] See, *inter alia*, FMLC's letter to the Department of Constitutional Affairs dated 6 May 2005.

b. a party lacked the capacity to conclude the agreement under the law of the requested state;

c. the document which instituted the proceedings or an equivalent document, including the essential elements of the claim: i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the state of origin permitted notification to be contested; or ii) was notified to the defendant in the requested state in a manner incompatible with fundamental principles of the requested state concerning service of documents;

d. the judgment was obtained by fraud in connection with a matter of procedure;

e. recognition or enforcement would be manifestly incompatible with the public policy of the requested state, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that state;

f. the judgment is inconsistent with a judgment given in the requested state in a dispute between the same parties; or

g. the judgment is inconsistent with an earlier judgment given in another state between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested state.

23. Furthermore, recognition or enforcement may be postponed or refused if the judgment is the subject of review in the state of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

24. Moreover, where a matter excluded under Article 2 or Article 21 arises as a preliminary question the ruling on that question cannot be recognised or enforced under the Convention (Article 10).

25. Finally, recognition or enforcement of a judgment may be refused if and to the extent that the judgment awards damages (for instance, exemplary or punitive damages) that do not compensate a party for actual loss or harm suffered (Article 11).

26. Recognition is permitted of a severable part of a judgment, as opposed to an entire judgment (Article 15).

27. As noted above in the context of the scope of the Convention, Article 17 also provides that recognition of a judgment in respect of liability under the terms of contracts of insurance or reinsurance may not be refused on the ground that the contract of insurance or reinsurance relates to a matter to which the Convention does not apply or an award of damages to which Article 11 might apply.

28. A further possible limitation to recognition and enforcement of a judgment is if the requested state has made a declaration that it will refuse recognition or enforcement when the parties reside in the requested state and all other elements of the disputes, other than the location of the chosen court, are connected only with the requested state (Article 20).

29. It is important to note that, under Article 26, the Convention does not affect the application of treaties, concluded either before or after the Convention, concerning jurisdiction or recognition or enforcement of a judgment. However, the judgment cannot be recognised or enforced to a lesser extent than under the Convention. Further, the Convention does not affect the application by a contracting state of a treaty, whether concluded before or after the Convention, in a case where none of the parties is resident in a contracting state that is not a party to the treaty. However, the Convention does not affect the application of a treaty that was concluded before the Convention entered into force in the contracting state if the application of the Convention would be inconsistent with the obligations of that contracting state to any non-contracting state.

Appendix 4 – An Illustration of the Difficulties: *JPMorgan v. Primacom*

a) Introduction

1 The Primacom Group ("Primacom") is a group of companies based in Mainz, Germany, consisting of Primacom AG ("PAG"), a German company whose shares are listed on the Deutsche Börse, a key subsidiary, Primacom Management GmbH ("PMG", another German company), and, under PMG, various subsidiaries operating in the field of cable TV and internet services.

2 At the relevant time, Primacom was financed by two lending facilities, a senior loan and a second secured loan under a second secured facility agreement ("SSFA"). A dispute arose between Primacom and the SSFA lenders (the "SSL"s), for whom JPM acted as agent.

3 Under the SSFA, PAG was granted a loan facility, which it on-lent to PMG. PMG acted as guarantor of the loan. The SSFA was expressly governed by English law and contained (for the benefit of the banks) an exclusive jurisdiction clause in favour of the courts of England. In addition, the parties agreed that England was the *forum conveniens*.

4 Among the contractual agreements concluded between the parties at the time of entering into the SSFA, there was a share pledge agreement under which, in support of its obligations under the guarantee, PMG pledged to the lenders its shares in the German and Dutch operating subsidiaries that comprised the underlying assets of Primacom. The pledge agreements under which the shares in the German subsidiaries were pledged were governed by German law and contained a jurisdiction clause in favour of the courts of Frankfurt am Main, Germany.

5 The relationship between the SSFA and the senior loan was governed by an intercreditor agreement. Amongst other things, this imposed upon the SSLs (for the benefit of the senior lenders) certain standstill periods, restricting for certain periods of time the SSLs' rights of action for any non-compliance by Primacom with the covenants and other provisions of the SSFA.

6 Under the SSFA, if Primacom failed to comply with its obligations (e.g. to pay interest), the SSLs were entitled to serve notices specifying an Event of Default, accelerating the loan and requiring immediate repayment of principal. The effect of the intercreditor agreement was to impose a 60 day standstill on the acceleration of the loan and a 180 day standstill on making demand under the guarantee.

7 Such default mechanisms and intercreditor arrangements are standard in the international lending market.

b) Commencement of proceedings

8 By June 2004, Primacom was in an uncertain financial position. A restructuring proposed by the SSLs, in conjunction with the then management of Primacom, was rejected by shareholders and management was replaced.

9 On 30 June 2004, PAG failed to make a quarterly interest payment under the SSFA. Just before the end of the standstill period under the intercreditor agreement, PAG paid the overdue interest but stated that it did so "under reserve" (without stating the nature of the "reserve").

10 On 30 September 2004, PAG failed to make the next quarterly interest payment and, again, paid "under reserve" just prior to the end of the standstill period.

11 In early December 2004, PAG issued proceedings against JPM and the SSLs in Mainz and Frankfurt, Germany. In the Mainz proceedings, PAG and PMG sought an order that, amongst other things, the SSLs were not entitled to interest or to claim the repayment of principal under the SSFA either at all or for a period of time until Primacom was no longer in "financial crisis" (within the meaning of a particular German statutory provision on equity replacement). Primacom argued that the SSFA was void under German law because, amongst other things, the interest rate was usurious, the covenants too restrictive, and the agreement otherwise offensive to German law notions of good morals. Further, Primacom argued that the loan was equity-replacing and therefore unenforceable until the end of the companies' crisis.

12 In Frankfurt, PMG brought proceedings under the share pledge agreement, repeating the reasoning made in the Mainz proceedings and claiming that the share pledges were, as a consequence, void and/or unenforceable.

13 The proceedings were issued without warning, without first airing the matters at issue in correspondence (as would be expected in England under the CPR) and, as the English High Court later held, in breach of the exclusive jurisdiction clause and with the intention of frustrating any possible attempt by JPM and the SSLs to obtain appropriate relief in the English courts.

14 The SSLs commenced certain proceedings in England. Rumours were circulating that Primacom was attempting to dispose of its most significant asset (a Dutch company, Multikabel NA) without first obtaining the consent of the SSLs as required under the SSFA. The concern was that Primacom was attempting to restructure itself in breach of its loan covenants. When Primacom failed to provide appropriate undertakings, an interim injunction was sought by the SSLs in the English High Court and this was granted (and later extended) (the "Injunction Proceedings").

15 In January 2005, Primacom having failed to make the next interest payment (due 31 December 2004) the SSLs commenced proceedings seeking various declarations as to the consequences of the non-payment of interest (the "Declaratory Proceedings").

16 In February 2005, the SSLs also commenced proceedings seeking the specific performance of covenants requiring PAG to provide certain information, specifically, a report being prepared by PriceWaterhouseCoopers ("PWC") on the over-indebtedness status of the company (which Primacom was preventing PWC from providing to the SSLs) (the "PWC Proceedings").

17 Primacom challenged the jurisdiction of the English High Court to hear these matters based on the *lis alibi pendens* provisions of the Regulation, claiming (broadly) that the proceedings commenced in Mainz and Frankfurt related to the validity of the SSFA as a whole – so that until the German courts had determined their own jurisdiction - the English courts could not hear any disputes related to the SSFA.

18 Following a hearing in March 2005, the English High Court allowed the Injunction Proceedings and PWC Proceedings to proceed, but stayed the Declaratory Proceedings. The court held that, although it was difficult to see how the German courts could find that they were entitled to exercise exclusive jurisdiction in the face of the exclusive jurisdiction clause in the SSFA, they were the courts first seised. In accordance with Article 27 of the Brussels Convention and the principles enunciated by the ECJ in *Gasser* and, given that the object of the Declaratory Proceedings was the same as in the German proceedings, the Declaratory Proceedings were stayed. However, neither the object nor the cause of action were the same in the Injunction Proceedings and the PWC Proceedings so they were not stayed. Furthermore the Injunction Proceedings and the PWC Proceedings raised no possibility of inconsistent or irreconcilable judgments with the German proceedings.

c) Consequences of Primacom's actions

19 Primacom's actions had a number of consequences:

20 First, as the English court held, it meant that unless or until the courts of Mainz and/or Frankfurt declined jurisdiction, the English courts had no jurisdiction to hear claims by the SSLs to the payment of interest or principal. In effect, the SSLs were deprived of their ability to enforce the loan.

21 Second, since there is no automatic procedure in Germany for the early determination of disputes about jurisdiction (to hold a hearing on the question of jurisdiction first is in the court's discretion), there was no way of ensuring that the German courts would reach any early determination of whether they had jurisdiction. The standard procedure is for the German court to set a timetable for parties to submit their pleadings.[57] Hearings typically take place only months later, once written pleadings have been submitted by both parties.[58]

22 As a result, the SSLs were put to the time and cost of assembling their substantive defence to the claim, involving obtaining opinions on complex matters of German law as well as investigating and addressing the factual background to the dispute. In effect, they were required to undergo the

[57] According to German statutory provisions of civil procedure the defendant has to file a statement of intention to defend (*Verteidigungsanzeige*) within two weeks upon service of the statement of claim. After at least another two weeks he has to file a statement of defence (*Klageerwiderung*). The time limit for the statement of defence can be extended upon petition of the defendant one (usually) or two (after the claimant has been heard on the petition for extension) times. Extensions are usually given for about a month per extension.

[58] Contrast this with the English procedure, illustrated by the English court hearing Primacom's challenges to English jurisdiction within a few weeks of the relevant proceedings being commenced.

process of justifying an English law governed loan by reference to German law notions of public policy which were never intended or envisaged by the parties to be applicable to the loan.[59] This raises wider issues of legal certainty.

23 Third, it is important to underline that, in this type of situation, the passage of time of itself presents serious risks. If a company's credit is deteriorating, and its creditors are prevented from enforcing their rights (or even prevented from having their rights determined by a court), they risk suffering increasing and irrecoverable losses.

24 Fourth, in this case it was clear (following the English court's decision) that Primacom had not cast its German proceedings sufficiently widely to encompass all possible causes of action under the SSFA, so that the SSLs still had some (limited) means of protecting their rights on specific matters. Following the English court's decision on jurisdiction, Primacom began to amend the German proceedings so as to widen the net covered by the issues raised in those proceedings.

25 It is not outside the bounds of possibility that a party in a similar position could in another case find a means of effectively blocking all causes of action under an agreement. It is notable that proceedings commenced in England (e.g. protectively) on a basis that was too broad compared with the matter in dispute might well be liable to be struck-out, whereas, in some continental European jurisdictions the risk of strike-out would be much lower in procedural terms.

26 Finally, the effect of Primacom's actions, together with the provisions of the Regulation, was to proliferate the issue of legal proceedings. Each time that a party wished to raise an issue with the other party, the appropriate step was to first commence proceedings on that issue before raising the matter in correspondence.

27 The German courts both held their first hearings in September 2005 (10 months after the proceedings were issued). Both courts accepted that the question of jurisdiction should first be considered and they either ruled (Mainz) or indicated in the oral hearing (Frankfurt) that they had no jurisdiction to hear the matters put before them. Shortly afterwards, it was announced that Primacom and the SSLs had entered into a settlement. Absent the settlement agreement, Primacom would have been entitled to invoke automatic rights of appeal on the question of jurisdiction, so that this issue may not have been finally determined for at least a further year. In the meantime the English courts would still not have been able to hear the proceedings to enforce the loan.

Appendix 5 – An Illustration of the Difficulties: *Konkola v. Coromin*

[59] This had to be done even in circumstances where it was apparent that the German courts should ultimately decide that they had no jurisdiction to consider these matters, because the Mainz judge - erroneously - thought after having taken a first look at the case, that the question of jurisdiction (validity of the jurisdiction clause) was connected to the substantive law question of the validity of the contract as a whole. The judge later admitted in the oral hearing that he had not considered the European law on the validity of a jurisdiction clause if one party asserts that the contract is void.

a) Introduction

1 In the case of *Konkola*, the English High Court considered the impact of the ruling of the ECJ in *Owusu* on an exclusive jurisdiction clause in favour of a non-contracting state. In *Konkola*, the claimants brought proceedings against Coromin seeking an indemnity under certain insurance arrangements for an incident at a mine in Zambia. In turn, Coromin brought Part 20[60] proceedings against a number of its reinsurers domiciled in the UK and other contracting states (including Switzerland).

2 The particular issue in *Konkola* arose out of the Part 20 proceedings brought by Coromin. The reinsurers claimed that the reinsurance contract between them and Coromin included an exclusive jurisdiction clause in favour of Zambia. Therefore, they applied to the court for the English proceedings to be stayed in favour of proceedings to be brought in Zambia in accordance with the clause. Coromin argued that, even if there was an exclusive jurisdiction clause in favour of Zambia, the English court was not able to decline jurisdiction under Article 2 of the Regulation over a defendant domiciled in England. This submission was based on an extension of the reasoning in *Owusu*.

3 The judge decided the reinsurers' application on the basis that the reinsurers had not established that there was an exclusive jurisdiction clause in favour of Zambia.[61] However, the judge also considered Coromin's arguments in relation to whether the English court had the jurisdiction to stay the English proceedings brought by Coromin in favour of another forum in a non-contracting state designated by an exclusive jurisdiction clause. The judge held that such jurisdiction did exist and therefore declined to extend the principle laid down in *Owusu* to similar circumstances involving an exclusive jurisdiction clause.

b) The issue in *Konkola*

4 As noted above, in *Konkola* the reinsurers sought to rely on an exclusive jurisdiction clause in favour of Zambia, which was a non-member state in the context of the Regulation and a non-contracting state in the context of the Lugano Convention. Coromin sought to negate the effect of such a clause (if one existed) by arguing that Article 2 of the Regulation sets out a mandatory rule that requires a party to be sued in the state of his domicile.[62] Coromin further argued that this mandatory rule could only be departed from if there was a basis to do so in the Regulation; it was argued that none existed.

5 Central to Coromin's argument was the scope of Article 23 of the Regulation, which provides for the recognition of exclusive jurisdiction clauses. However,

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60 These proceedings are third party proceedings, Part 20 referring to the section of the English CPR under which such proceedings are brought.

61 This ruling was upheld by the Court of Appeal: [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437.

62 Article 2(1) provides: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." As was noted by the judge, this provision applies to circumstances involving the relationship [Query –change to "choice"] between the courts of a contracting state and those of a non-contracting state.

it was argued that this article only applies to exclusive jurisdiction clauses where the parties have agreed to the jurisdiction of the courts of a member state. Therefore, there is no basis for departing from the mandatory rule in Article 2 of the Regulation in the particular circumstances of *Konkola*, since the exclusive jurisdiction clause in question gave jurisdiction to the courts of a non-member state and therefore Article 23 did not apply.

6 On this basis, Coromin argued that, just as the Regulation made no express provision for the departure from the domicile rule in Article 2 on the grounds of *forum non conveniens*, there was no provision in the Regulation for the departure from the domicile rule where prosecution of the claim in the place of the defendant's domicile would be in breach of an exclusive jurisdiction clause in favour of a non-member state. It was also argued that the reasoning in *Owusu*, which strongly favoured certainty and predictability for the rules of jurisdiction, could similarly be deployed in the *Konkola* case. Coromin sought to draw an analogy between the discretionary nature of the concept of *forum non conveniens* and the discretion that exists under English law in relation to the enforcement of an exclusive jurisdiction clause.

c) The analysis in *Konkola*

7 The judge in *Konkola* noted that the case before him shared two important features with *Owusu*: First, the choice of jurisdiction was between the courts of a member state and a non-member state. Second, the methodology for resolving the choice was either to adopt the strict jurisdictional regime of the Brussels Convention/Regulation (i.e. Article 2) or the discretionary regime under the common law.

8 The judge went on to note that in *Owusu* the basis for rejecting the discretionary approach of the common law was that this methodology was inconsistent with the objectives underlying the Regulation. However, in *Konkola*, it was noted that there was a difference between a case such as *Owusu*, where the methodology that lead to the courts of a non-member state having jurisdiction relied on the concept of *forum non conveniens* and a case when such jurisdiction was founded on an exclusive jurisdiction clause. In the latter case, there was a methodology recognised by the Regulation (i.e. Article 23) that was analogous, although confined in the Regulation to give effect to exclusive jurisdiction clauses in favour of the courts of member states.

9 The judge in *Konkola* therefore distinguished *Owus*u, since in that case the concept sought to be relied upon to overrule Article 2 of the Regulation was not one reflected anywhere in the Regulation itself. In contrast, the Regulation recognised the concept of an exclusive jurisdiction clause and specifically overruled Article 2 in the case of clauses that conferred jurisdiction on the courts of member states. Therefore, the judge held that *Owusu* had not disturbed the approach to the applicability of foreign jurisdiction clauses under English law, such that the English court would have jurisdiction to grant a stay of proceedings in favour of proceedings brought in the courts designated by the exclusive jurisdiction clause, where the courts in question were the courts of a non-member state.

10 In reaching his conclusion, the judge held that the discretionary nature of the rules in relation to the enforcement of exclusive jurisdiction clauses in English law did not preclude the recognition of an exclusive jurisdiction clause in favour of the courts of a non-member state. The judge observed that the central principle behind the Regulation was to establish rules of jurisdiction that were certain and predictable. The Regulation itself recognised that exclusive jurisdiction clauses fulfilled this objective. Therefore, although there may be some element of discretion under English law in relation to the enforcement of exclusive jurisdiction clauses, the conclusion established by the Regulation that such clauses did provide certainty and predictability was not undermined by minor differences in the quality of this certainty under the laws of the various different member states.

Appendix 5 – FMLC letter to the Department of Constitutional Affairs dated 6 May 2005

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6 May 2005

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The remit of the Financial Markets Law Committee ("FMLC") is to identify areas of uncertainty in the legal framework of the wholesale financial markets and to address, where necessary, the possibility of a solution. One of the cornerstones of certainty in the financial markets is the enforceability of commercial contracts and the FMLC supports initiatives which promote the international legal recognition and enforcement of commercial contracts according to their own terms. Of particular importance in the global context within which the financial markets operate are the contractual terms by which participants in those markets agree to submit to a particular jurisdiction and/or choice of law. For this reason, the FMLC broadly supports the Draft Hague Convention on Commercial Choice of Court Agreements.

In February of this year, the Commercial Bar Association (COMBAR) wrote to the FMLC asking the Committee to endorse and comment on its response to the DCA's October 2004 consultation on the Draft Hague Convention on Commercial Choice of Court Agreements (itself based on a European Commission consultation on the same subject). The purpose of this letter is to do exactly that. Since receiving the draft COMBAR response we have been fortunate to obtain copies of additional responses put forward by Mr Justice Aikens on behalf of the Commercial Court judges and Lord Justice Mance on behalf of the ex-Commercial Court judges now in the Court of Appeal. This letter makes occasional reference to these responses. Many of the comments put forward in this letter are based on suggestions made by the FMLC Issue 106 Working Group chaired by Mark Huleatt-James and the Committee is grateful for the assistance it has received. Members of the Working Group (below) had a number of detailed comments to make on the provisions of the Draft Convention and it is possible that they may choose to put these comments to you independently but the FMLC has decided to restrict its observations to general points, focusing on those likely to be of particular concern to the wholesale financial markets.

Overall, the FMLC endorses COMBAR's general approach and, in particular, its comment that

> the general aim of the project, namely to make exclusive choice of court agreements as effective as possible, is one which is to be encouraged strenuously…

On specific points set out in the DCA letter and the COMBAR response, the FMLC has the following comments to make. (The comments relate to the text of the Draft Convention available at http://hcch.e-vision.nl/upload/wop/jdgm_wd110_e.pdf)

Article 1.2 Definition of "International"

We support Mr Justice Aikens' comment that both suggested insertions, which appear in the draft text in square brackets, should be incorporated so that both conditions must be satisfied before a case is deemed NOT to be international. In other words, we are in favour of conferring the widest possible scope on the Convention.

Article 2.2 (k) Intellectual Property

Intellectual Property is not the chief concern of the wholesale financial markets. However, the FMLC generally supports the COMBAR position on this issue.

Article 2.2. Should The Convention Cover Insurance Contracts?

We support the COMBAR position, namely, that it is desirable to make it absolutely clear by express wording that contracts of insurance or reinsurance are not excluded from the scope of the Convention merely because they relate to one of the excluded matters listed in Article 2.2.

Article 6 Proceedings Suspended Or Dismissed - Determination of IP Rights

Article 6 relates to proceedings involving Intellectual Property rights and provides that proceedings may be stayed pending a determination of the validity of those rights. We share COMBAR's opinion on this issue. The Article is oddly drafted and the limiting effect of the wording from "in particular" to "validity" is unclear. As the COMBAR response points out, Article 6 imposes a limitation on the general rule in Article 5 that might be read as very broad, in effect driving a coach and horses through the policy of the Convention. We think that Article 6 should be clearly and expressly limited to cases about intellectual property rights, enabling the court in such a case to stay or suspend proceedings in order to make a ruling on the validity of the intellectual property right in question.

Article 7(C) Obligations Of A Court Not Chosen – Breach Of Public Policy Exception

Article 7(c) provides that a court other than the court favoured by an exclusive choice of court agreement must stay or dismiss proceedings unless giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy. In a footnote to the draft text, three alternative formulations are proffered, reflecting various policy options.

COMBAR's view is that the draft as it currently stands is preferable to the alternatives in the footnote, including the one singled out by the DCA letter for comment (creating a public policy exception for cases where, under the mandatory rules of the forum, the parties would not be able to agree to exclude the jurisdiction of the courts of the forum). The FMLC agrees that the alternative formulation, which refers to the "mandatory rules of jurisdiction" of the court not favoured by the choice of court agreement, is too vague to offer the desirable legal certainty. We would echo the point made by COMBAR that the public policy exception should be narrow and precisely expressed because it operates as a limitation on the general principle that commercial choice of court agreements should be recognised and enforced.

Article 7(D) Obligations Of A Court Not Chosen – Frustration Exception

Article 7(d) provides that a court other than the court favoured by an exclusive choice of court agreement must stay or dismiss proceedings unless "for exceptional reasons, the agreement cannot reasonably be performed". A footnote to the text suggests that a decision on whether or not to delete the provision will be forthcoming. The FMLC feels strongly – as COMBAR do not – that this subparagraph should be deleted. The subparagraph does not add anything of substance because, as Mr Justice Aikens points out, events which frustrate a jurisdiction agreement are covered by the public policy wording of para (c) (i.e. if the agreement cannot be performed, the case cannot be heard by the chosen court and enforcement of the agreement would amount to a very serious injustice – tantamount to a refusal of justice). Moreover, to single out these cases of injustice for separate treatment, could give rise to the inference that Article 7 (c) is a broad general provision, by contrast, which is not restricted to exceptional cases of injustice. Finally, it is not clear what role the word "reasonably" plays and how it is intended to be interpreted.

Articles 10(2) And 10(3) – Incidental Questions – Intellectual Property Rights

Articles 10(2) and 10(3) relate to intellectual property rights. The FMLC shares COMBAR's view on these provisions. We note that Article 10(3) may be unnecessary in the light of the Brussels Regulation (EC/2001/44), Article 22.4.

Article 11 – Judgments In Contravention Of Agreement

Article 11 provides that the general principle of the convention is to apply to judgments. If a judgment is given in contravention of a jurisdiction agreement, it will not be recognised or enforced in another state. We agree with COMBAR that Variant 2 of the alternatives set out in paragraph 175 of the Explanatory Report is to be preferred. This is also the Variant preferred by Mr Justice Aikens and Lord Justice Mance.

Article 20 – Asbestos Matters

Article 20 provides that a state may disapply the provisions of the Convention to agreements in asbestos-related matters by making a declaration to that effect. A footnote to the text notes that some delegations have proposed that this optional derogation should be extended to agreements relating to natural resources and joint ventures.

The FMLC agrees with the general point made by the DCA and supported by COMBAR that flexibility of this type should only be allowed to the extent that it becomes necessary and only in a way that minimises its damaging effect on the convention's general principle.

If further optional derogations are to be allowed, they must be by reference to carefully-defined subject matter and the convention should require the state concerned to make a specific declaration to which publicity could be afforded. The FMLC accepts that the demand from other negotiating states for further "flexibility" is significant and may be hard to resist but, insofar as possible, we would oppose a derogation for jurisdiction clauses in joint venture agreements.

Nicholas Browne-Wilkinson

Appendix 6 - ??????????????????????????

1. Articles 27 and 28 do not expressly confer substantive jurisdiction upon the court first seised. They merely regulate the behaviour of the court second seised. However, in effect, they confer upon the court first seised sole competence to determine in which member state proceedings should be brought - except it seems where the court second seised has exclusive jurisdiction under Article 22. If the first court asserts jurisdiction, no other court may hear the case. If it does not, only then may the second court consider its own jurisdiction. In that sense, the articles confer *procedural* jurisdiction upon the first court. That is, jurisdiction to determine jurisdiction. Article 27, by giving primacy to any decision concerning jurisdiction in the first court, prevents any other court from considering or asserting jurisdiction. Indirectly, therefore, it regulates the power of the second court to examine its competence.

2. Article 27 gives precedence to the first court in two ways: by requiring (not merely permitting) the second court to decline jurisdiction if the first court asserts jurisdiction; and by requiring the second court to stay its proceedings to allow the first court to determine its competence.

3. Article 27(2) ensures that, if the jurisdiction of the court first seised is established, any other court must cede jurisdiction to that court. The exclusive jurisdiction of the court first seised to resolve any jurisdictional conflict is thus confirmed. Of greater practical importance is Article 27(1), which requires any court but that first seised to stay its proceedings until the jurisdiction of the court first seised is established. The purpose of Article 27(1) is, in effect, to confer upon the court first seised exclusive jurisdiction to determine in which member state proceedings might be brought. By contrast, by giving primacy to the established jurisdiction of the court first seised, Article 27(2) is, in effect, a rule concerning the recognition of foreign judgments – foreign judgments within the Community establishing jurisdiction.

4. Article 27 allows the court second seised no discretion, nor does the required stay or dismissal depend upon the defendant's application. It is expressly required that a court must of its own motion stay its proceedings under Article 27(1). And it is no doubt implicit in the peremptory language employed that it must of its own motion decline jurisdiction under Article 27(2).

5. The operation of Article 27 thus depends upon the answer to four questions: (1) when is each court seised? (2) when are two actions congruent, such that there is a risk of irreconcilable "decrees, orders or decisions"?[63] (3) when is a court's jurisdiction established, such that another court can determine whether to lift a stay under Article 27(1), or cede jurisdiction under Article 27(2)? and (4) what rules of evidence and procedure govern the second court's actions?

6. Article 28 permits (but does not require), the second court to stay its proceedings whenever there are related proceedings in two states, and to decline jurisdiction if both actions may be consolidated in the first court.

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[63] The definition of a judgment in Article 32.

7. Article 28(1) confers upon the courts of member states discretion to stay their proceedings if a related action is pending before a court previously seised. In principle, two actions are related when likely to yield inconsistent judgments, although it is unnecessary that they should conflict, in the sense that they each compete for recognition. Article 28(2) confers a discretion to decline jurisdiction, where both actions are pending at first instance, if the procedural law of the court first seised law allows the actions to be consolidated. Importantly, however, it does not require a court to take either course. The second court may opt to allow its proceedings to continue.

8. The rationale underlying Article 28(2) is that the second court should in principle dismiss an action which may be consolidated with another action pending in the first court. But, as the requirements for the operation of Article 28(2) confirm, this is possible only in particular circumstances. It is feasible only in those cases where the first court has jurisdiction over both actions, and where its proceedings are at first instance, because only then is consolidation possible. There may, however, be a risk of inconsistent judgments beyond cases where consolidation is possible. The same issues may arise, and thus a risk of inconsistency between two court's findings, even if the actions are not capable of consolidation, and even if the first action has reached the appellate stage. So Article 28(1) confers a broad power on the second court to stay its proceedings in any case involving related proceedings.

9. Under Article 27, the second court has no choice but to desist, if the preconditions for staying or dismissing proceedings are satisfied. By contrast, Article 28 confers upon the second court discretion to stay or dismiss proceedings. Arguably, there may be, in effect, a presumption that the second proceedings should cease,[64] but the second court may choose to allow its proceedings to continue, if it considers that the 'presumption' in favour of the court first seised is rebutted.

10. The operation of Articles 27 and 28 is facilitated by Article 30, which (in effect) defines the moment at which a court becomes seised as that at which the first legally relevant step in the proceedings is taken.

11. Article 30[65] provides a common, Community definition of seisin. The effect of Article 30 is that a court is seised of a dispute for Regulation purposes when the first authoritative step is taken in the initiation of proceedings under the national law of the member state in question. A court is seised, and Article 27 and 28 activated, immediately that proceedings are initiated. That a court is seised does not mean that it has determined whether it has jurisdiction.

12. Because the procedures for initiating proceedings are different between member states, Article 30 reflects these differences by supplying two mutually exclusive definitions of seisin. Each captures the essence of the two distinct approaches to seisin accepted in different member states. Article 30(1) applies in those member states where proceedings are initiated by the filing of the claim with the court. It provides that a court is seised "*when the document instituting*

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64 *Owens Bank Ltd. v. Fulvio Bracco Industria Chemica SPA* (Case C-129/92 para. I-117).

65 The Regulation Explanatory Memorandum, 20.

proceedings or an equivalent document is lodged with the court". Article 30(2) applies in those member states where service of the claim represents the formal commencement of proceedings. It provides that a court is seised "*when it is received by the authority responsible for service*".

13. As a deterrent to frivolous or vexatious proceedings, Article 30 requires that a court will be seised at the time that proceedings were formally initiated, only if, subsequently, the necessary initiation procedures have been completed. Article 30(1) provides that a court is only seised by the filing of the claim if, subsequently, the claim is served. Article 30(2) provides that a court is only seised by service of the claim if, subsequently, the claim is filed.

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