UNDERSTANDING THE ENGLISH RESPONSE TO THE EUROPEANISATION OF PRIVATE INTERNATIONAL LAW

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A. INTRODUCTION

On matters of private international law, it may sometimes appear that, in more than one sense, the English speak a different language to most of the rest of Europe. They may often appear to be ill at ease with civilian concepts; and to struggle to accept them, or accommodate them within the parameters of English law. The purpose of this article is to examine the underlying reasons for the attitudes of many English courts and writers to the Europeanisation of private international law and consider some of the major ways in which this approach may impede further harmonisation progress in the European Union. The article does not suggest that all of these rationales are justified, nor that all of the objections can realistically be accommodated in a harmonised EU legal system where England represents just one of the legal systems within a single Member State. But the article does seek to foster understanding of the views that are prevalent in England, in order that this might promote a fuller appreciation of the challenges that must be faced to promote greater co-operation in this area of law between English lawyers and those in the rest of the European Union.

The article begins by looking at the way in which English courts deal with questions of classification of European autonomous private international law concepts. It goes on to consider at length the underlying reasons why English scholars often appear unenthusiastic about the harmonisation of private inter-

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1 The intent of this article is not, of course, to suggest that the views described are universally, or overwhelmingly shared by English lawyers. It is to identify attitudes that are commonly encountered in England.

2 The focus of this article is on the English reaction to European private international law. It does not attempt to provide a Scottish perspective on the subject. Nevertheless, the focal point necessarily shifts to the United Kingdom as a whole when describing its position as a Member State, especially in the context of its decision making process as to whether to opt into European private international law initiatives.

3 Indeed, the principal purpose of this article is not to present a personal viewpoint on European harmonisation.
national law; and the problems that the often fundamentally different substantive legal backgrounds of different Member States can create. It then analyses the role of the European Court of Justice (ECJ), and the reception of its decisions and approaches by private international law specialists in England. Finally, the article looks at the typical English response to ECJ decisions with which it is uncomfortable – namely to find ways to restrict the ambit of the decision and to reinvent the common law’s influence.

B. Positive Beginnings – Application of European Autonomous Meanings in English Courts

Let us start on a reasonably positive note. One of the results of the Europeanisation of private international law has been to introduce autonomous definitions of legal concepts. In this world, phrases such as “matters relating to contract”\(^4\) or “matters relating to tort”\(^5\) do not bear the meanings ascribed to them in domestic law, or even the meanings that national courts have ascribed to them for private international law purposes.\(^6\)

By and large,\(^7\) the attitude of the English courts to these European concepts is an embracing one; and scholars are happily kept busy speculating how particular English causes of action or legal issues can be accommodated within autonomous definitions.\(^8\) The attitude does not appear to be one of antipathy. There appears to be acceptance that, if European instruments are to be given a uniform interpretation, then European concepts are an inevitable consequence.\(^9\)

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\(^6\) L Collins (gen ed), Dicey, Morris and Collins, The Conflict of Laws (London, Sweet and Maxwell, 14th edn, 2006), observes at para 11-062 that: “The object of interpreting the terms autonomously is to ensure that the Judgments Regulation and the 1968 Convention are fully effective, and to ensure their uniform application, so as to avoid as far as possible multiplication of the bases of jurisdiction in relation to the same legal relationship and to reinforce legal protection by allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued”.

\(^7\) But there are points of difficulty. For instance, A Briggs and P Rees, Civil Jurisdiction and Judgments (London, Lloyd’s of London Press, 4th edn, 2003), 29, n 40, note that “the rule of French law, echoed in the Regulation, to the effect that remedies in contract and tort/delict may not overlap . . . leads to exclusivity in definition of jurisdictional categories which is not always easy for a common lawyer to grasp”. In English law, it may be possible to bring concurrent claims, for example, for breach of contract and negligence.

\(^8\) Literature abounds on the meaning and application of the various Articles of the Regulation; but for a useful account comparing English case law on the Brussels Convention with that of other European jurisdictions, see J Newton, The Uniform Interpretation of the Brussels and Lugano Conventions (Oxford, Hart Publishing, 2002).

\(^9\) “To put forward an argument in a case which relies upon a term in the Regulation being given a meaning derived from the idiosyncrasy of national law is to advance an argument which is structurally vulnerable to attack”: Briggs and Rees, supra n 7, 29.
Admittedly, there may be concern about the lack of guidance in Regulations as to the meaning of these concepts. If the espoused aim of autonomous concepts is to promote legal certainty, then they may have the opposite effect, in national courts, at least until sufficient jurisprudence is built up, and may lead, and indeed often have led, the English courts into interpretations of the Brussels Convention and Brussels I Regulation which turn out to be at variance with those of the ECJ, or other national courts.

But certainly, the English courts have been willing to engage in meticulous analysis of ECJ authorities in order to classify matters before them to determine if they fit within the rubric of an autonomous concept. In doing so, they have been prepared to reach conclusions on the application of those concepts which are at variance with the approach that would be taken in English domestic law. To take just one example, in *Agnew v Lansforsakringsbolagens AB*, the House of Lords ruled that a claim to avoid a contract of reinsurance on the ground that the defendant had not complied with the duty to make fair presentation of risk was a “matter relating to contract” within the meaning of Article 5(1) of the Lugano Convention, even though, as a matter of English domestic law, the defendant’s obligation would have been considered non-contractual. Lord Woolf observed as follows:

> "When interpreting a Convention which applies to a variety of jurisdictions, the less technical distinctions on the basis of domestic law which are adopted the better. They are inclined to produce the very uncertainty which the Convention was designed to remove. They result in satellite procedural litigation which is unproductive and expensive, both in monetary terms and in the delay to the legal proceedings which results. They make the language of the Convention incapable of being applied without resorting to an ever-increasing volume of authorities which will become progressively more difficult to reconcile. . . . I look generally at the issues which are involved in this case and I ask myself whether there is any feature of those issues which make it inappropriate for this jurisdiction to be seized of the dispute. Looking at the issues through the eyes of an English lawyer, I find the situation to be one where:

> (a) If the plaintiffs did not seek to rely on the non-disclosure, there would undoubtedly be a contract which would have a close connection with the London
reinsurance market with which the courts of this jurisdiction are very familiar;
(b) The obligation for disclosure is one which arises under the general law rather than an express term of that contract. However, the obligation arises because it is commercially highly desirable. If the obligation did not exist under the general law the parties would either have to include a term in the contract to the same effect or negotiate on terms which would be more financially burdensome to the insurer who is seeking reinsurance. In addition, to draw a distinction between the requirements of the general law and requirements of the contract is highly artificial. It is far from uncommon for the parties to a contract of reinsurance to include obligations expressly which the general law also requires.”

Earlier, in *Kleinwort Benson Ltd v Glasgow City Council*, the House of Lords ruled that an obligation to restore benefits following a contract that was declared * ultra vires* and void did not fall within Article 5(1). The issue of how to accommodate restitutionary claims within the private international law landscape is an issue that had already been much debated in England. A majority of their Lordships adopted the principle that a claim can only come within Article 5(1) if it is based on a particular contractual obligation, ie the obligation whose performance is sought to enforce in the judicial proceedings. The House of Lords held that even if the claim did relate to contract, it must also be founded upon a *contractual* obligation. There was no contractual obligation to form the basis of the claim in the instant case. Article 5(3) was also found to be inapplicable, since this presupposed the existence of an actual or threatened harmful event; and no such harmful event could, in any meaningful sense, be identified. Rather, the claim was restitutionary; and neither Article 5(1) nor 5(3) could be applied. The judgments of their Lordships, four of whom delivered lengthy rulings on the subject, reveal a painstaking approach to the analysis of ECJ jurisprudence and a scholarly attempt to determine whether the claim fell within the parameters of the relevant provisions of the Brussels Convention.

Of course, in some cases, application of European concepts to match English causes of action is distinctly difficult. This is particularly the case where the underlying cause of action in English law has no counterpart in other Member

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15 [1999] 1 AC 153. The case concerned an English company and a Scottish authority. The ECJ refused to entertain a reference in this matter, on the basis that it was concerned with matters internal to one Member State, the United Kingdom: see Case C346/93 [1995] ECR I–615. The case was decided under the so-called “modified Convention” applicable to the allocation of jurisdiction between courts in the United Kingdom: see the Civil Jurisdiction and Judgments Act 1982, part 2 and schedule 4. These rules are similar, but not identical, to the rules in the Brussels Convention. S 16(3)(a) states that: “In determining any question as to the meaning or effect of any provision contained in Schedule 4 . . . regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention or Chapter II of the Regulation and to any relevant decision of that court as to the meaning or effect of any provision of that Title or that Chapter.”


17 At 167–71 (per Lord Goff); 181 (per Lord Clyde); and 189 (per Lord Hutton). Lord Nicholls and Lord Mustill dissented.
States. Equitable doctrines, and claims arising in the law of trusts, are particularly complex. For example, English law employs legal concepts such as the constructive trust to deal with abuses of relationships of trust and confidence, e.g. a solicitor making an unauthorised profit from his relationship with his client. A constructive trust may arise in various instances, as where, for instance, there is a specifically enforceable contract; or to redress certain forms of wrongdoing; or to reverse unjust enrichment. Doubtless, the drafters of the Brussels Convention had the detailed application of such concepts far from their minds. As a result, trying to work out what to do with them in the Brussels I Regulation context is distinctly difficult. Even so, the English courts have been prepared to soldier on. For instance, a claim for so-called dishonest assistance in a breach of trust, which has no apparent counterpart in the civilian world, was regarded as a claim based upon compensation for wrongdoing, and so classified in Casio Computers Co Ltd v Shino as a matter relating to tort for the purposes of Article 5(3).

There is also considerable uncertainty as to how to deal with such equitable claims under Regulation (EC) 864/2007 on the Law Applicable to Non-Contractual Regulations (the “Rome II” Regulation). Article 1(2)(e) of the Regulation excludes from the Regulation’s scope non-contractual obligations arising out of the relations between settlors, trustees and beneficiaries of a trust created voluntarily. The term “trust created voluntarily”, which also appears in Article 3 of the Hague Convention on the Law Applicable to Trusts, is not a recognised term of art in trusts law. It creates a string of very difficult questions as to whether various types of constructive trusts fall within the parameters of the Regulation. Moreover, it might be wondered whether the Regulation should apply to the obligation to hold property on constructive trust, as the Regulation is concerned with the law of obligations.

18 For a detailed study, see T Yeo, Choice of Law for Equitable Doctrines (Oxford University Press, 2004).
19 The constructive trust is used in English law as a mechanism by which a person is compelled to hold property on trust for another.
20 Even when Art 5(6) on trusts was inserted into the Convention upon the accession of the United Kingdom, constructive trusts were not envisaged to come within its scope: see the Schlosser Report [1979] C59/107, para 117.
24 Had the Regulation excluded express trusts only, then matters would have been considerably clearer.
25 The same is true of so-called “resulting” trusts, which may arise where, for instance: (i) a person contributes to the purchase price of property in circumstances where there is no apparent intention to make a gift, but where he is not registered as its legal owner; or (ii) a person declares a trust over property but fails to state exhaustively who the beneficiaries are, so that the remaining property “results back” to him.
26 It is suggested that the better answer is that the trust arises in response to a breach of a non-contractual obligation, and it is the nature of the obligation itself which appears to determine whether the Rome II Regulation applies.
Conversely, from an English perspective, it will be interesting to see how courts of other Member States will react when applying the Rome II Regulation if confronted with a non-contractual claim allegedly governed by English law, where the claimant argues that the appropriate remedy is the imposition of a trust. Article 15(c) of the Regulation suggests that the remedy to be awarded for breach of that obligation is a matter for the *lex causae*; but an English lawyer may legitimately wonder how states which do not even have the (perhaps less difficult to grasp) concept of the express trust will get on when forced to get to grips with an English constructive trust. Even so, whilst it is easy to find instances where the exercise of applying autonomous definitions to English law concepts can be problematic, this does not in itself appear to be a significant impediment to harmonisation.

C. Why do the English appear to have such difficulty with European harmonisation of private international law?

But whilst the intellectually satisfying exercises of trying to fit English concepts within the essentially civilian rubric of European Regulations is one which the English courts embrace, there is, nonetheless, a most uneasy relationship between English courts and scholars and the ideologies embodied in EU private international law. This friction manifests itself both in the commonly encountered English reactions to EU legislative initiatives, and in responses to decisions of the ECJ. Let us now consider some of the factors which underlie and explain the reasons for this difficult relationship.

1. A Fundamentally Different Regime of Jurisdiction

The Brussels I Regulation allocates jurisdiction using detailed, fixed rules of jurisdiction. At the heart of the Regulation is the defendant domicile rule. Special protection is provided to insured parties, consumers and employees. The regime confers very little discretion upon judges as to whether to take jurisdiction. At its heart is the doctrine of mutual trust, whereby the courts of each Member State are equally competent to interpret the Regulation.

By contrast, the English common law rules of jurisdiction, onto which the Brussels Convention was overlaid, are of a diametrically opposed nature. They are characterised by the existence of relatively few detailed provisions on jurisdiction; and still fewer rules of an inflexible nature. No specific rules to
protect consumers, insured parties or employees exist. At the heart of the English common law of jurisdiction is the doctrine of *forum conveniens*, which enables a court to stay proceedings commenced as of right at the behest of the defendant who can demonstrate that the natural forum for the litigation lies in a foreign court.\(^{32}\) Even where more detailed provisions on jurisdiction do exist, as under the Civil Procedure Rules, Practice Direction B to Part 6, paragraph 3.1\(^{33}\) for service of the claim form on a defendant who is outside the jurisdiction, the claimant must still demonstrate that England is the proper place for trial;\(^{34}\) and the judge has a discretion whether to permit service out.\(^{35}\) The flexibility of the English system aims to ensure that litigation takes place in the forum that is most convenient, expedient and cost effective, even if the very flexibility of that system can lead to some uncertainty and more argument as to the appropriate place for resolution of a dispute.

Even more crucially, English courts start from the premise that, where parties have contractually agreed as to the forum for litigation, no breach of that clause should, in the absence of strong reason, be tolerated;\(^{36}\) and the armoury of the court should be available to prevent a claimant from committing a breach of contract by litigating abroad.\(^{37}\) English lawyers tend to think that something has gone wrong if a regime of jurisdiction is applied so rigidly as to deprive the parties of those rights.

With two such differing regimes of jurisdiction coexisting in English law, it is, perhaps, not unsurprising that they do not always sit side by side harmoniously. As we shall see, English lawyers often crave the discretion to determine whether to exercise jurisdiction that the Brussels I Regulation denies them.

### 2. A Scepticism as to the Need for Legislative Solutions

But the differences between the English common law and civilian approaches run deeper than this. Common law rules of jurisdiction and choice of law have largely been developed by the courts and the doctrine of precedent. Many English lawyers start from the basis that those rules work reasonably effectively and there is no need for the hand of any legislature to interfere with them. On...

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\(^{32}\) See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

\(^{33}\) Until 1 October 2008, these provisions were found in Civil Procedure Rules (CPR) Part 6.20.

\(^{34}\) CPR Part 6.37(3).

\(^{35}\) See *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438.

\(^{36}\) Where there is a foreign exclusive jurisdiction clause, this will normally lead to English proceedings being stayed: *The Eleftheria* [1970] P 94; *The El Amria* [1981] 2 Lloyd’s Rep 119; *The Sennar (No 2)* [1985] 1 WLR 490.

\(^{37}\) The court will normally be willing to issue an anti-suit injunction where proceedings are instigated in the courts of a non-Member State in breach of an English jurisdiction clause: see *British Airways Board v Lakes Airways Ltd* [1985] AC 58; *Sohio Supply Co v Gaitai (USA) Inc* [1989] 1 Lloyd’s Rep 588; *The Angelic Grace* [1993] 1 Lloyd’s Rep 87; *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd’s Rep 425.
this view, legislation is to be resorted to only where necessary to provide a systematic overhaul of a particular area of law.

Indeed, the attitude that exists in England is one that is sometimes not just suspicious of EU Regulations and Directives, but one that is suspicious of the need for any legislative intervention in the field, even by the UK Parliament. Some commentators would simply prefer private international law to be left to the courts and the development of rules through the English doctrine of precedent. One author has observed of legislation that:

"its purpose and function have traditionally been remedial: the legislature provides a statute in the same way that a doctor provides a brace or other surgical appliance to correct some defect in the body."38

Lord Wilberforce once observed, in the context of the proposed replacement of the English common law rules on choice of tort by what is now the (rather uninspiringly named) Private International Law (Miscellaneous Provisions) Act 1995, Part III, that the:

"subject of conflict of laws is essentially one which ought to be left to the judges. It has been developed by the judges over the years and, on the whole, the judges have done a very good job. There are very few cases where injustice has been seen to be done. One does not want this part of the law frozen into the lapidary phrases of the Parliamentary draftsmen, however well drafted they may appear to be. It is better to leave it to the judges."39

Earlier, another distinguished commentator had lamented the advent of the Rome Convention on choice of law in contract, which "substitutes statutory rules for judicially developed experience and thus creates problems of statutory interpretation, where formerly there existed flexible and fruitful judicial evolution based on argument and derived from principles, precedents and experience".40

Such strong views may not be entirely justifiable. Frequently, legislation may bring clarity and coherence to a subject. Nonetheless, codification to provide order and structure is not a particularly cherished goal in English law; especially if there is a risk that the ensuing legislation might be construed rigidly to defeat the interests of the parties. Legislative intervention is not necessarily considered by many private international lawyers in England to be a virtue. Where possible, many would prefer to leave the development of the law to the courts.


3. The Need for European Initiatives

Some of the views expressed in England about the ever-increasing influence of European harmonised rules relate to very fundamental questions about the steady erosion of national rules of private international law and the declining influence in this field of the English common law. Many English writers consider that the common law provided private international law rules which, whilst certainly not perfect, generally worked reasonably well in their application. They have not proved a hindrance to England’s status as a leading venue in which to conduct international commerce; indeed, the flexibility of the rules is thought by many to be a part of their attraction. It may be a cliche: but if the common law, as developed by the courts, is not broken, then why, it might be asked, does it need to be fixed?

Some scholars argue that certain EU initiatives have been introduced without a proper attempt to understand the impact that they would have on national legal systems.41 Briggs observes that:

“even if the law [introduced by the legislative organs of the European Union] ... was not invariably objectionable, it was not always necessary, was made with little apparent concern for the shockwaves it would cause when it came whomping down into the national legal system it was set to transform. And as often as not it appeared to be bereft of credible justification in European law.”42

Where, as tends to be the case, the European solution is characterised by codification of the law, by detailed rules and a lack of discretion, it is a case of chalk meeting cheese. It is inevitable that a very considerable period of adjustment to the new European rules and methodologies will be required in England.

As Briggs suggests, European initiatives might be accepted more readily by English writers if it was apparent to them why they were necessary. It is said that harmonisation is a virtue and that it provides certainty43 to the citizens of the European Union as to their legal rights. But it is, perhaps, less clear to what extent this is proven. How many citizens really do think about questions of jurisdiction, or of choice of law, when planning their transactions? Some no doubt do; the lobbying that accompanies any reform initiatives from the European Union demonstrates that. But it is not clear how many individuals have the private international law of the European Union close to their heart. And does their need for harmonisation clearly extend beyond contract law to non-contractual obligations; or, to, for example, succession law? There is a marked lack of hard empirical information about the effects in practice of

41 Although it might equally be said that English critics have not always fully attempted to understand the rationale for a particular European initiative.
divergences between different national regimes. Furthermore, the adoption of EU-wide solutions, where they lead to results that are seen to be commercially unattractive, may make England a less attractive place in which to do business; and a less attractive choice as a forum in which to litigate. Rightly or wrongly, the English reaction is often not to accept that ever more harmonisation is per se desirable; and to expect a more detailed and persuasive case for reform to be presented.

4. **The Need for Further Evidence as to the Impact of Possible Reforms**

A related point is that when the Commission does identify matters for its citizens which have important internal market ramifications, such as the choice-of-law rules for consumer contracts, it may be thought unfortunate for it to propose to alter existing rules dramatically without an impact study. In 2005, the Commission proposed to reshape the choice-of-law rules for consumer contracts in its proposed Regulation on the Law Applicable to Contractual Obligations (the “Rome I” Regulation) and to abolish the right of the parties to choose the governing law. Instead, it proposed that the law of the consumer’s habitual residence should apply to the exclusion of any choice of law by the parties. It justified its proposal in the following manner:\(^\text{44}\)

“It also seems fair in economic terms: a consumer will make cross-border purchases only occasionally whereas most traders operating across borders will be able to spread the cost of learning about one or more legal systems over a large range of transactions. Finally, in practice this solution does not substantially modify the situation of the professional, for whom the initial difficulty in drafting standard contracts is to comply with the mandatory provisions of the law in the country of consumption; under the Convention, the mandatory provisions are already those of the country of the consumer’s habitual residence. Regarding other clauses, which the parties are free to draft as they wish, the freedom of the parties to draft their own contract is the rule that continues to prevail; it therefore matters little whether they are governed by the law of one or other party.”\(^\text{45}\)

This sort of poorly researched and justified argument did not attract much support in England. Rather, it tended to fuel the suspicions of those who felt that private international law was being shaped in committees with insufficient understanding of the practical realities of transnational commerce. The Commission’s proposal on consumer contracts was one reason for the UK’s initial opt-out from the Rome I Regulation; and having been only latterly dropped from the Regulation text, complicated the route to the UK’s ultimate

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\(^{44}\) COM (2005) 650 Final. The final version of the Regulation ((EC) No 593/2008) can be found in [2008] OJ L 177/6. The Regulation will apply to contracts concluded after 17 December 2009 (see Art 28).
participation in the project.\footnote{On which, see “Rome I – Should the UK Opt In?”, Ministry of Justice Consultation Paper CP05/08, 2 April 2008. See the press release of the Justice and Home Affairs Council’s 2867th session on 24 and 25 July 2008 (11653/08 (Press 205), 26, in which the UK’s desire to opt back into the Regulation is noted. See also the letter of 25 June 2008 by the Rt Hon Lord Woolf, Chairman of the Financial Markets Law Committee, to Bridget Prentice MP supporting the opt-in. The letter is available at http://www.fmlc.org/papers/LtrtoPrenticereRome1.pdf. On 7 November 2008, the Commission issued its Opinion welcoming the UK’s request to opt back into the Regulation: see COM (2008) 730 Final.} As with the Brussels I Regulation,\footnote{The attitude of English courts towards ECJ decisions interpreting the Brussels I Regulation is considered further in section E infra.} the UK’s starting point with the Rome I Regulation is that party autonomy should be upheld; and that a compelling case must be made for any derogation from this principle. This is why the UK baulked at the Commission’s proposal to remove the freedom of the parties to choose the law applicable to consumer contracts, even though the parties might have negotiated freely:

“The Commission’s proposal caused widespread concern in those business sectors, in particular the small business and e-commerce sectors, which routinely provide goods and services to consumers in the European Union. It was felt that the new rule would represent a change that was not justified by the generally satisfactory operation in practice of Article 5 of the Convention. Such a change would place a requirement on businesses to research the entire law of contract in every country where goods and services were to be supplied to consumers. Fears were expressed that such a burden of ‘due diligence’ would interfere with the operation of the internal market and in some instances even deprive consumers of goods and services currently sold to them by overseas suppliers.”\footnote{“Rome I – Should the UK Opt In?”, supra n 45 (emphasis in original).}

5. Legal Basis

(a) Article 65 EC

Another concern that has often been expressed in England relates to the legal basis for many recent European initiatives in the field of private international law. It is not always clear how some of the EU’s initiatives adopted pursuant to Article 65 EC can be said to be “necessary for the proper functioning of the internal market”\footnote{Emphasis added.} within the meaning of that provision. For instance, Sir Lawrence Collins, general editor of the leading English work \textit{Dicey, Morris and Collins, The Conflict of Laws},\footnote{And now a judge of the Court of Appeal.} said of the Rome II Regulation when it was in its drafting stage that:

“It is fanciful to suppose . . . that a regulation to harmonise private international rules for non-contractual obligations is ‘necessary for the proper functioning of the internal market’.”\footnote{Evidence to House of Lords’ European Union Committee examining the proposed Regulation: see HL Paper (Session 2003–2004) 66, Evidence, 46.}
The European Union Committee of the House of Lords was equally unconvinced, and felt that the Commission had failed to show why reform was necessary for the completion of the internal market.51 One writer has wryly observed that:

“[T]he concreting over of the common law conflict of laws is the one activity which never seems to require an environmental impact assessment.”52

It does not convince English sceptics simply to be told in the preamble to a proposed Regulation that a particular measure is necessary for this purpose. For instance, Recital (6) to the Rome II Regulation states that:

“The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.”

This is not an explanation of the need for such a Regulation. It would be helpful for a properly articulated case to be produced as to why a reform is necessary; and, indeed, what is understood in the European institutions by the word “necessary” in this context.53 Otherwise, English sceptics are not going to be convinced.

Many English lawyers struggle to understand why the principle of subsidiarity cannot be respected more widely. This is particularly so in areas of family law and succession, where it cannot plausibly be argued that any effects on the internal market are direct. If they exist, any such effects are indirect only, and relate to the incidental activities of citizens of the EU. Conceivably, they may make their movement across borders more attractive and help them to assert their rights by reference to a single set of rules; but it might be thought just as likely that most citizens will be indifferent to the contents of such Regulations and that they will have no effect on their behaviour; or again, it may be that it will primarily be wealthy citizens, who have regular access to skilled lawyers with private international law know-how, that will consider the impact of such laws. This hardly encourages the view that harmonisation is in the interests of the citizens of Europe at large.54

52 A Briggs, The Conflict of Laws (Oxford University Press, 1st edn, 2002), preface, v. In the 2nd edn (2008), preface, vi, he observes that “Of course, no empirical research sustains so implausible an assertion [that the internal market requires European harmonised rules] but we are here in the realm of faith rather than reason. The one market in which there is to be no competition, no freedom of (or point in) movement, is that of dispute resolution.”
54 One might speculate that many of those citizens might prefer EU resources to be invested elsewhere in producing more tangible benefits to them.
(b) The Lisbon Treaty

If enacted, Article 81 of the Lisbon Treaty would extend the influence of the European Union over matters of private international law still further. Article 81(2) refers to the adoption of measures by the European Parliament and the Council “particularly when necessary for the proper functioning of the internal market, aimed at ensuring”. The wording suggests that an initiative need not unequivocally be necessary for the promotion of the internal market.

Moreover, Article 81(3) would forestall arguments as to the propriety of intervention in areas of family law. It provides that:

“Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure.”

This still amounts to a rather imperfect conflation of the internal market with matters of family law. It might well extend the influence of the EU still further in matters of private international law; and it would certainly make arguments as to the inappropriateness of family law measures more difficult. Whatever the views of English lawyers may be as to the EU harmonisation process, it is only likely to gain more momentum in the future.

6. Preserving What Is Familiar? The UK Response to the Rome I Regulation

It is tempting to think that a typical English desire is for greater flexibility and discretion than the European harmonised rules permit. But if this is true in the case of the Brussels I Regulation, it is not invariably so. Sometimes, it seems

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55 For the consolidated text of the Treaty, see [2008] OJ C115/01.
56 But the United Kingdom would retain the right to decide whether to opt into initiatives in this area. See Protocol 21 to the Lisbon Treaty.
57 Emphasis added.
58 Art 81(3) goes on to state that: “The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.” However, s 6(1) of the UK European Union (Amendment) Act 2008 states that: “A Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless Parliamentary approval has been given in accordance with this section . . . (d) the provision of Article 81(3) of the Treaty on the Functioning of the European Union (family law) that permits the application of ordinary legislative procedure in place of special legislative procedure.”
59 Whatever the fate of the Lisbon Treaty.
60 Inevitably, discussion here refers to the UK response as a whole, rather than to England specifically. But there is no reason to doubt that the UK response is representative of a commonly encountered feeling in the English legal community.
simply that the English want what they have always had; and will be sceptical of any material changes to the law.

Take the case of the Rome I Regulation initiative on the law applicable to contractual obligations. The Commission’s Proposal, which proposed the abolition of the displacement provision in Article 4 and its replacement by a series of fixed rules for determining the governing law, was not acceptable to the UK and was one reason for its initial opt-out from the Regulation. It would have led to predictable but rigid solutions. In some cases, the law applicable to the contract in the absence of choice would clearly not have been the law of the country of closest connection to the contract. It is easy to imagine a case where a service provider is resident in, for instance, Spain, but providing those services in England to an English customer. Doubtless, the prospects of having to apply Spanish law in such a case did not appeal. The commercial certainty of knowing, without going to court, what the applicable law of the contract is, was apparently not as important in English eyes as retaining an element of flexibility. But why should this be so? A law of closest connection test always has the merit of providing flexibility, and was the test used by the English courts before the advent of the Rome Convention. But it also has the considerable demerit of introducing uncertainty, especially as only a court can determine the matter. And it is, let us recall, a frequent concern expressed in England that the European initiatives fail to provide commercially attractive solutions. It is easy to see why commercial interests of the UK are fostered by the forum non conveniens doctrines, which prevents courts from being clogged up with cases of tenuous connection, but it is a little less apparent that the flexibility of Article 4, which may promote litigation where there might otherwise have been none, is of the same ilk. It may rather be that, largely for the reasons already outlined in this article, many people in the UK are, at heart, suspicious of change in the field of private international law. A common UK response to European initiatives is to try to defend much of the law that it has previously known. This is, of course, a generalisation – the UK is perfectly prepared to support some modernising initiatives, notably in opting in to the Rome II Regulation – but this response may well lie at the core of some of its reactions to EU legislation.

Indeed, it is easy to see a tension between the UK reaction to the Commission’s proposals on the applicable law in the absence of choice and its responses to the Commission’s proposals on the application of third-state mandatory rules. Article 8(3) of the Commission’s Proposal had stated that:

62 The Commission’s proposed Art 4(1)(b) stated that: “a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence”.
64 Council Doc 13035/06, Add 4 [22.9.2006].
“Effect may be given to the mandatory rules of the law of another country with which
the situation has a close connection. In considering whether to give effect to these
mandatory rules, courts shall have regard to their nature and purpose in accordance
with the definition in paragraph 13 and to the consequences of their application or
non-application for the objective pursued by the relevant mandatory rules and for the
parties.”

Whilst the proposed rules on the applicable law in the absence of choice were
regarded as overly rigid, the proposed Article 8(3) was criticised as leading to an
unacceptable level of uncertainty, and so giving rise to increased costs and
litigation.65 The UK even felt that this could drive business abroad to jurisdic-
tions, such as New York, which embraced party autonomy more extensively.66
Whilst this echoed the concerns that the UK had about Article 7(1) of the Rome
Convention, against which the UK enacted a reservation,67 the arguments
against Article 8(3) of the Rome I Regulation may seem a little impressionistic –
especially in view of the criticism that the Commission has itself received for
failing to undertake an impact study on other key proposals, such as its proposed
reform of choice-of-law rules for consumer contracts.68

It is, of course, true, that the discretion contemplated in Article 8(3) was much
greater than the discretion currently afforded to a judge under Article 4(5) of the
Convention. The judge has no choice as to the legal test he will apply under
Article 4(5), or any true discretion as to whether to apply a particular law or not.
But, at heart, the jury must be out as to how much harm Article 8(3) would have
done in the UK. It is not obvious that other jurisdictions have been beset by
commercial uncertainty, or have found that the effect of Article 7(1) of the
Convention has been to drive commerce outside of their country.

Moreover, it is not true to say that English courts have no history of giving
some form of effect to mandatory rules of another state. In case law which
pre-dates the Convention, the English courts have given effect to the mandatory
rules of so called “friendly foreign states”.69 It is also suggested that English
courts adopt an overriding principle that they will not compel performance of a
contract that has become illegal by the law of the place of performance.70 The

65 A Dickinson, “Third-Country Mandatory Rules in the Law Applicable to Contractual Obliga-
53. But for a more favourable view of third-country mandatory rules, see A Chong, “The Public
Policy and Mandatory Rules of Third Countries in International Contracts” (2006) 2 Journal of
Private International Law 27.

66 Letter from Baroness Ashton of Upholland, Parliamentary Under Secretary of State, to Lord
Grenfell, Chairman of the House of Lords Select Committee on EU Law, 16 May 2006.


68 See section C4 supra.

69 See eg Foster v Driscoll [1929] 1 KB 470; Regazzoni v KC Sethia (1944) Ltd [1958] AC 301; Lemenda

70 Ralli Bros v Compania Naviera Sota y Aznar [1920] 1 KB 614. It is not clear from the case itself
whether this is a rule which overrides the governing law, since the contract in that case was
governed by English law.
The English Response to Europeanisation of Private International Law

The difference, of course, is that the English principles were of narrower application. Furthermore, the English interest was not in the application of foreign law as such; it was in preserving its own political relationships with foreign states; or in preventing what it perceived to be the unfairness of compelling a party to perform when performance was illegal in the designated state for performance. But, nonetheless, the application of those laws gave rise to considerable uncertainty as to the scope of English public policy.71

The UK has now accepted72 the final text of the Rome I Regulation,73 Article 9(3) of which provides that:

“Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

The Ministry of Justice’s view is that, first and foremost, this revised provision should be supported because it is not much different to what English law has previously known:

“79 The final result of these negotiations is Article 9(3). This focuses on the discretionary application of certain rules of the country where the contract is to be or has been performed, which render the contractual performance unlawful. There is currently authority under English law (see Ralli Bros v Cia Naviera Sota y Aznar [1920] 2 KB 287) that in similar circumstances, where the contract is governed by English law, it is to be unenforceable in accordance with the English law relating to the frustration of contracts. There is no conclusive English authority as to the situation where the law applicable to the contract is not English law. There is, however, another line of authority (see Foster v Driscoll [1929] 1 KB 470) under which illegality of contractual performance, in terms of the breach of a foreign law, may also prevent enforcement of a contract on the basis that to do so would be against the comity of nations and therefore contrary to English public policy.

80 The Government’s initial assessment of Article 9(3) is that it represents a satisfactory outcome to the negotiations on this provision. Not only does it generally reflect the English law position in the light of the Ralli Bros decision, and to that extent should not introduce any significant additional uncertainty into the law, it also constitutes an improvement in terms of legal certainty over the existing law.”74

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72 See the press release of the Justice and Home Affairs Council’s 2887th session on 24 and 25 July 2008 (11653/08 (Press 205)), 26, in which the UK’s desire to opt back into the Regulation is noted.
73 Which can be found in [2008] OJ L 177/6.
74 “Rome I – Should the UK Opt In?” Ministry of Justice Consultation Paper CP05/08, 2 April 2008.
This sort of argument illustrates that a significant aspect of the English response to European initiatives is concerned with preserving something that is familiar: whether that something is a broad, discretionary approach; or a more rigid and restrictive rule.75

7. A Lack of Appreciation as to the Scale of Europeanisation

It seems that some English lawyers did not appreciate the potential degree of impact upon national rules of private international law presented by the European Union, and by the advent of Article 65 EC.76 Certainly, it was not obvious to many onlookers that national laws of private international law on such matters as maintenance or matrimonial property might be displaced by European Regulations. For Regulations concluded pursuant to Article 65 EC, the removal of the right of Member States to enact new Conventions in fields covered by European Regulations has restricted national autonomy still further. Opinion 1/03,77 which asserts the inability of national states to negotiate the Lugano Convention, is another inroad into national autonomy. A state that wishes to compete in an international marketplace in which its interests are best served may not necessarily appreciate the loss of its seat at the negotiating table.78 The view that the EU acting as a whole may have more clout in matters of private international law than individual Member States acting individually does not seem to have convinced everyone.

In such a climate, the United Kingdom is likely to be circumspect about opting into new European private international law initiatives, and so ceding exclusive competence to the European institutions to act on its behalf in a particular area. The United Kingdom has already exercised its right not to opt in to the negotiations on the proposed private international law Regulations on divorce and on maintenance.79 It may continue to do so when it is not satisfied as to the internal market justification for an initiative or where it is not happy with the content of the Commission proposal.

75 Whilst this tendency is likely to be present in most Member States, it is notably marked in the UK.
76 Albeit that this impact is reduced by the UK’s right not to opt-in to initiatives undertaken pursuant to Art 65 EC.
77 Opinion C-1/03 [2006] ECR I-1145.
79 Along, of course, with its initial decision not to opt-in to the Rome I Regulation. As it happens the Divorce Regulation has been blocked by other Member States, notably Sweden; and the UK intends to use its power under Art 4 of the Protocol to opt-in to the final version of the Maintenance Regulation adopted by the Council in November 2008.
D. FUNDAMENTAL DIFFERENCES IN THE SUBSTANTIVE LEGAL BACKGROUND: THE PROPOSED REGULATION ON SUCCESSION AND WILLS

All of the factors considered above may help to explain the attitude and reactions of many English lawyers to European private international law legislative reforms. There is, however, one other crucial factor that receives perhaps less attention, at least from private international law scholars. It is well known that English law has a very different private international law background and outlook to civilian states. It is also clear that some areas of English domestic law, such as the law of equity and trusts, are difficult to accommodate within the rubrics of European private international law instruments. But, at least as importantly, European private international reforms can potentially have a very significant effect upon the domestic law of England itself. This can be highly problematic, as the existing substantive law is often dramatically different in England to other parts of Europe. In turn, this can make some proposed private international law Regulations seem rather alien, and focused on providing solutions that are more suited to civilian states. To add a further layer of difficulty, there are marked substantive differences even within the United Kingdom; in particular, the law of England is often significantly different to the law of Scotland in a given area. This can make the adoption of a UK common position on a particular European proposal all the more difficult.

The current work on the proposed EU Regulation on Succession and Wills is a good case in point. It envisages a very wide-ranging Regulation applicable to all aspects of the succession process. But it appears to proceed from assumptions as to the substantive law background that are unfamiliar to English law. In particular, English law does not have any rules of forced heirship by which a party has a legal right to a share of the deceased’s assets. By contrast, Scotland does have rules of forced heirship; as do most other EU countries. English law embraces the freedom of testators to do as they wish with property that they own. Other jurisdictions place a far greater value on seeing that immediate family members are looked after, and that a significant percentage of the deceased’s wealth is retained by immediate family members.

See the discussion in section B supra.


Although relatives of the deceased may make an application to the court for a discretionary entitlement under the Inheritance (Provision for Family and Dependants) Act 1975 where the deceased died domiciled in England and Wales.
A further complicating factor is that, in England, a great deal of property is left by testators on trust. The trust is used to facilitate the creation of different forms of interest that can, for instance, be conferred on successive generations. The trustee holds the legal title to the property but does not enjoy the beneficial rights in it; and it does not form part of his personal estate. The trustee is required to administer the trust for the benefit of those specified in the will. It goes without saying that this form of testamentary disposition is not used in most other EU states; and, of course, that certain civilian concepts, such as the usufruct, find no role in English law. Any attempts by Member States to recognise and/or register those foreign property rights unknown in the domestic legal system are likely to cause significant difficulty.

Another key difference is that English law is very concerned about the protection of lifetime gifts and dispositions on trust made prior to the deceased’s death. In particular, it is important that there be protection against so called “clawback”, whereby those assets are considered still to form part of the deceased’s estate on death. As with other substantive areas of English law, the primary concern is to protect legal certainty and the security of transactions. But, just as importantly, England operates in a fiercely competitive trust investment industry. If there is a real risk that inter vivos dispositions on trust will be susceptible to clawback claims on death arising by virtue of the law applicable to succession, then there is a concern that this will simply drive investors offshore. If so, then rather than fostering the internal market, the effect would be exactly the reverse.

English law also has a process of administration of estates, which it distinguishes from the question of who succeeds to the estate. In England, property is first vested in an executor (if named in the will) or an administrator (if not) appointed by the court, who will deal with outstanding liabilities before distributing the estate. The administrator or executor requires a grant of letters of administration or of probate (as the case may be) in order to act. Any English grant vests all property located in England in the representative and also any moveables once brought here if not vested in another person by the lex situs first. English courts apply the lex fori to the admissibility of debts and order of collection. This judicial process is an integral part of the English legal system; and the process seeks to ensure that the rights of creditors are properly protected before the property is distributed.

But the Commission appears to favour a straightforward application of the law applicable to succession to all aspects of the devolution of a deceased’s property. Such a rule would fundamentally alter the process of handling the deceased’s estate, and would have implications way beyond the confines of private international law. It would affect the day-to-day practice of English probate practitioners. The view of the UK Government is that:
“On the question of the proper scope of the law applicable to the succession the UK Government considers that the applicable law should not extend to matters of the administration and distribution of the estate, or to the definition of the property comprised in the estate. This will prevent disruption of well functioning national administrative systems, such as the probate and land registries. It will also avoid interference with the operation of national property law by incompatible rules of another Member State as to reserved heirship or freedom of testamentary disposition. It would be totally unacceptable to the Government of the UK if the law applicable to the succession undermined perfectly valid lifetime gifts, including trusts, or interfered with the operation of testamentary trusts. In the UK Government’s view no further choice of law rules are necessary in relation to trusts.”

This, in turn, makes the proposed European Certificate of Inheritance problematic for the United Kingdom. At present, the precise form and status of the certificate remains unclear. It may be, however, that the proposed certificate would act like a form of succession passport, to be used to demonstrate the entitlements of heirs under the will across the European Union; and even as a basis for amending domestic property registers. The idea that a party could obtain a document proclaiming his rights over the deceased’s estate from, for instance, a French notary, and use this to assert its rights in England even in respect of assets which were disposed of by the deceased on trust before his death, is one that cannot readily be embraced by the UK Government.

Sometimes, private international law can act as a middle ground between no harmonisation and complete harmonisation of the substantive laws of Member States. But in many cases, private international law reforms can have funda-

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85 Ibid, at para 26: “[T]he certificate proposed would have to be compatible with systems of administration and distribution of estates that are fundamentally different. A certificate designating an heir (in the civil law sense) would not be effective to entitle that person to possession of property in UK jurisdictions where a grant of representation, or equivalent, in favour of an executor is required so that the executor can administer and distribute the estate. Unless a means can be found to overcome the differences, the certificate would have to perform different functions in different systems. This might make it confusing and cumbersome.”

86 The European Parliament recommends that the Certificate should have “binding effect” and be drawn up according to a standard model “and shall constitute appropriate title on the basis of which the acquisition of the property inherited may be entered in a public register of the Member State in which the property is located, without prejudice to compliance with the rules of that Member State on the functioning of such registers and the effects resulting from the information contained therein”: see Resolution of the European Parliament of November 2006, P6_TA(2006)0196, Recommendation 7.

87 Although it should be noted that Dörner and Lagarde had in mind only that a legal presumption that the certificate was correct, subject to proof to the contrary in legal proceedings: “Étude de Droit Comparé sur les Règles de Conflits de Juridictions et de Conflits de Lois Relatives aux Testaments et Successions dans les États Membres de l’Union Européenne”, available at http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/testaments_successions_frpdf.pdf, esp 5. On the other hand, however, they envisage that the Certificate would be sufficient evidence for national land registries to register the rights of the heir as owner.
mental consequences for the national legal orders of Member States. When English lawyers feel that harmonisation initiatives in private international law are insufficiently sensitive to their national rules of substantive law, then there is a risk that an atmosphere of alienation from the proposed Regulation will ensue.

This is why the process of drafting Regulations in private international law is one that needs to be conducted with the input of national substantive law experts in the given area. Otherwise, the danger is that technical private international law instruments will be drafted by private international law specialists who may not be sufficiently “close to the ground” to understand the differences that they may, in practice, be making to the legal landscape or to the operation of the internal market. So, if one is to reform the private international law of succession, one might contemplate apparently worthy initiatives such as widespread recognition of judgments, a European Certificate of Inheritance and application of the lex successionis to all questions concerning the devolution of the estate on death. All of these initiatives support the Commission’s private international law aims of uniformity and free movement of judgments. But one might first pause to wonder why it is that the English have always maintained a strict delineation between the administration of the estate and succession law.

What barriers have prevented it from automatically recognising the status of administrators appointed abroad? How, in practice, are estates administered in England? How is tax liability settled, and when? How are the assets comprising the estate of the deceased determined in England? How effectively does the current law work for an English client who might have a holiday home in Spain?

These questions require extensive consultation with practitioners to understand how probate practice operates. Moreover, there is an obvious danger that the voices that will be heard loudest from the substantive law community will be the most powerful, and those representing the largest organisations and wealthiest clients. It is, of course, very much harder to engage with the individual, local practitioner. But a proper mix of the substantive and private international law experience is required to help determine if any prima facie need for an EU Regulation can be identified and, if so, the appropriate content of the rules. Otherwise, there is a risk that private international law solutions may emerge that, in the eyes of practitioners, appear to be rather divorced from reality.

E. THE EUROPEAN COURT OF JUSTICE

The focus of this article so far has been on reactions to the legislative processes of the European institutions. But it is equally important to consider the English response to the interpretative role performed by the ECJ. It is to this subject that we now turn.
1. The ECJ’s Interpretation of the Brussels I Regulation

If a Regulation is deemed to be necessary to improve the functioning of the internal market,\(^{88}\) then it is understandable that there will be a feeling of frustration if the application of that Regulation does not achieve those espoused aims. If that Regulation is interpreted and applied by the ECJ in a literal and inflexible way, which values certainty and uniformity above what many English lawyers would see as the needs of litigants and of international commerce, then it is likely to lead to disaffection in England – particularly where the result is perceived to be damaging the interests of England on the global stage as a venue in which to litigate complex and high-value commercial claims.

Many English lawyers therefore tend to struggle to understand\(^ {89}\) a number of recent ECJ judgments on the Brussels I Regulation. In particular, there is widespread bemusement as to how the ECJ’s decision in *Erich Gasser GmbH v MISAT Srl*\(^ {90}\) can serve the interests of the internal market.\(^ {91}\) In that case, the ECJ held that where proceedings have been commenced in Italy, in ostensible breach of an Austrian jurisdiction clause, the Austrian courts were powerless to act unless and until the Italian courts decided that they lacked jurisdiction. The court-first-seised mechanism prevented the Austrian courts from acting. The principle of mutual trust was considered by the ECJ to be a bedrock of the Regulation, and it meant that the Austrian courts would have to accept the finding of the Italian courts as to the construction of the clause as conclusive, however long it took the Italian court to reach those findings. But in seeking to uphold mutual trust and the strictures of the court-first-seised mechanism, it may feel as if the ECJ has shot the whole of the European Union in the foot. The *Gasser* decision allows a claimant greatly to reduce the effectiveness of a jurisdiction clause by instigating proceedings, even in bad faith, in a forum other than that previously agreed by the parties. The courts of the contractually agreed forum are rendered powerless unless and until the procedural wheels of the court seised crank into motion and it decides that it does not have jurisdiction. By then, much time, and even more commercial confidence, will have been lost in the value of contractual agreements on jurisdiction.

Rather, one might suppose that if the parties had chosen the English courts as the forum with exclusive competence to resolve disputes between them, then they would naturally want and expect the English courts also to determine

\(^{88}\) Art 65 EC. If adopted, this would be replaced by Art 81 of the Lisbon Treaty. Both are considered further in section C5 supra.

\(^{89}\) Or, at least, to accept.


\(^{91}\) See the views of The Rt Hon Lord Mance in “Exclusive Jurisdiction Agreements and European Ideals” (2004) 120 Law Quarterly Review 357.
whether the jurisdiction clause is binding on the facts. The idea that a decision such as Gasser can in any sense be presented as complementary to the internal market is deeply puzzling for most English writers. Many feel that, in its efforts to construe the wording of the Brussels I Regulation rigidly and literally, the ECJ has lost sight of the initial rationale for the Regulation rules. Article 23 of the Regulation, which confers jurisdiction on the courts of a Member State chosen by the parties, is, at its heart, a provision designed to respect party autonomy.

“It may comfort theoreticians that the Community has rules of ideological purity and logical certainty. But the result can only be practical uncertainty, with large scope for tactical manoeuvring.”

For similar reasons, the decision in Turner v Grovit has had a very negative reception in England. The effect of that decision is that English courts may not issue an anti-suit injunction to restrain proceedings in the courts of another Member State in matters falling within the scope of the Regulation. It is not that English lawyers struggle to understand the argument that anti-suit injunctions are predominantly a creature of the common law, and that their application would lead to different results in England to other Member States; nor do they fail to understand the sentiment that mutual trust is a cornerstone of the Regulation. What most English writers cannot understand and accept, however, is what they perceive to be the prizing of these goals above all other values. The effect is that an English court cannot restrain proceedings commenced in breach of contract, and therefore use one of its key weapons to ensure that parties are kept to the terms of their commercial agreement. The result is considered to be commercially unattractive; and divorced from the realities of the law in practice. It has created concern in England that parties will prefer to choose a forum of a non-Member State which can offer greater protection to the contractual bargain that has been struck. There is also a certain level of puzzlement as to how, where a claimant starts proceedings in a forum where

92 See the Financial Markets Law Committee Paper, “Issue 107 – Brussels I Regulation Article 23 Cases: Legal Assessment of Problems Associated with the Brussels I Regulation and Suggested Solutions”, July 2008. One of its key recommendations is: “the amendment of the Regulation to empower a court favoured by a jurisdiction clause to consider its jurisdiction, irrespective of the fact that another court may be seised, and to proceed to address the merits if it considers the agreement to be effective” (para 1.7).

93 The equivalent provision to Art 17 of the Brussels Convention, which was in issue in Gasser.

94 Where the requirements of formal validity in that Article are satisfied.

95 See Mance, supra n 91, 360.

96 Case C-159/02 [2005] ECR I–5365.


98 Although the origins of this principle are not wholly clear: see Briggs, supra n 42, 281. See also A Dickinson, “Trust and Confidence in the European Community Supreme Court?” guest editorial for January 2008, available at www.conflictoflaws.net, who questions whether the ECJ is itself worthy of the trust of Member States.
excessive delay will result, the ECJ can insist upon the application of the court-first-seised rule, even though the case may raise issues about the right to a fair trial under Article 6 ECHR.99

Indeed, there is concern that a Regulation designed to foster mutual trust and confidence between Member States can act as a charter for the most cynical of forum shoppers. English law has a doctrine of abuse of process to prevent the abuse of the rules of jurisdiction.100 It also acts to prevent the pursuit of proceedings that are vexatious or oppressive by issuance of anti-suit injunctions.101 The court-first-seised mechanism, as it has been applied by the ECJ, is not in itself an adequate means to deal with litigation that is commenced in bad faith. This, no doubt, played a major role in the English Court of Appeal’s earlier decision in Turner v Grovit102 to grant an anti-suit injunction to restrain proceedings commenced unconscionably in Spain. The argument that the Regulation rules themselves are the protection that is provided against such proceedings is, in the eyes of many English lawyers, unconvincing.

A further illustration of the ECJ’s refusal to control the commencement of proceedings in bad faith is provided by one of its more recent judgments in Freeport plc v Arnoldsson.103 In that case, one question asked of the ECJ was whether Article 6(1) of the Regulation, which deals with co-defendants, could be used where it was apparent that the only ground for starting proceedings against the first defendant was to bring other defendants into the jurisdiction. Article 6(1) states that a person domiciled in a Member State may also be sued:

“where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

One may be forgiven for thinking that nothing in Article 6(1) provided an answer to the issue before the ECJ. But the ECJ held that the Regulation’s silence on this matter must mean that it provided no protection in this respect:

100 Admittedly, English courts have not yet been prepared to rule that the ECHR must curtail or amend English common law rules of jurisdiction either. But where the ECHR can be used to support an exception to the rigid rubric of the Brussels I Regulation, its use becomes rather more appealing to an English lawyer.
101 See Henderson v Henderson (1843) 3 Hare 100.
102 The leading case is Société Nationale Industrielle Aerospatiale v Lee Kow Lai [1987] AC 871.
103 [2000] QB 345. The reasoning of the Court of Appeal was endorsed by the House of Lords, albeit that it accepted that the restraint of unconscionable behaviour was not necessarily compatible with the Brussels Convention and felt compelled to make a reference to the ECJ [2002] 1 WLR 107.
104 Case C-90/06, [2007] ECR I-8319.
In those circumstances, the answer to the question referred must be that Article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.104

An obvious retort to this conclusion is that, however closely the proceedings might be connected with each other, that does not mean that the claims should be heard in the courts of the one forum that the claimant, who may be engaging in blatant forum shopping, should decide to pick; especially if the first defendant is the proverbial “man of straw” used only as a prop to bring other parties within the jurisdiction. The decision also creates a major inroad into the defendant domicile rule.

There is more general unease in England about the impact of the court-first-seised mechanism. Admittedly, this principle addresses the problem of irreconcilable judgments in different Member States.105 But, to many English lawyers, it seems difficult to understand why this should be cherished above all other virtues in the litigation process. There is, in any event, no possibility of preventing irreconcilable judgments between a Member and a non-Member State. Indeed, the ECJ’s refusal to countenance application of the forum non conveniens doctrine in favour of the courts of a non-Member State in Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)106 only serves to promote the existence of parallel proceedings and irreconcilable judgments between Member and non-Member States.

Moreover, those who take the view that a client’s interests and costs are best protected by seeking to negotiate a settlement of a dispute may feel troubled by a mechanism which instead makes any good lawyer think immediately about whether to issue proceedings so as to benefit from the court-first-seised rule and take control of the jurisdiction battle; and even to launch proceedings for a declaration of non-liability in circumstances where the prospect of an action being instigated and successfully pursued against that party are remote.107 When the court-first-seised mechanism sweeps all before it, including damaging the effectiveness of commercial agreements on venue, then many will feel that

104 Para 54.
105 At least in matters falling within the scope of the Regulation.
107 Even if the court ultimately refuses to grant the declaratory relief, the applicant will have succeeded in rendering that forum first seised and so prevented the other party from instigating proceedings in any other Member State.
something has gone seriously awry. The idea\footnote{See eg the Jenard Report, [1979] OJ C59/22: “Adoption of the ‘special’ rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it.”} that the particular Articles of the Regulation are sufficiently precise to ensure that litigation always takes place in the most suitable forum, or indeed in a forum that is at all suitable, is not terribly compelling. That forum may require witnesses and evidence from overseas, expert evidence about the application of foreign law and translation of evidence.

There is no doubt that reactions to the decisions of the ECJ in \textit{Gasser}, \textit{Turner} and \textit{Owusu} in England have been overwhelmingly negative. Hartley observes that:

“These three decisions by the European Court have caused something of a crisis of confidence among English lawyers. The view is gaining ground that the European Court cannot be trusted to give reasonable decisions in private-law cases. It seems unwilling to take practical considerations into account and to consider the needs of litigants. This is a worrying development.”\footnote{T Hartley, “The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective: General Course on Private International Law” (2006) 319 Recueil des Cours 9, 183.}

At heart, the differences and tensions between English law and the ECJ’s construction of the Regulation belie a difference of outlook between the approaches of the English courts and the ECJ. In particular, there is a marked tendency in England to regard rules of jurisdiction as designed to protect the rights of the parties to the dispute. This rights-based approach may lead to different expectations as to what rules of jurisdiction should be formulated and how they should be interpreted.

\section*{2. The English Conception of International Litigation as Protecting the Parties’ Rights}

One English author, Briggs, has noted that English law is built on notions of rights and obligations.\footnote{A Briggs, “The Impact of Recent Judgments of the European Court on English Procedural Law and Practice” (2005) II 124 \textit{Zeitschrift für Schweizerisches Recht} 231.} He argues that:

“English lawyers tend to understand and describe the jurisdiction rules of the common law in terms of private rights and obligations. . . . [Whereas the ECJ] tended to elucidate the jurisdictional rules in question as though they are directions to courts which specify whether there is jurisdiction (in which case it must be exercised when a claim is made in admissible form) and when there is not (in which case it may not be exercised). There is no separate sense that the jurisdiction rules are to be understood and analysed in terms of private rights and obligations. There is no discrete sense that claimants have a right to enforce agreements on jurisdiction, or that it is the right of an individual defendant to defend in the courts where he is domiciled.”\footnote{A Briggs, supra n 42, 57–8. See also E Peel in de Vareilles-Sommières (ed), supra n 43, ch 1.}

\begin{thebibliography}{9}
\footnotesize
\bibitem{108} See eg the Jenard Report, [1979] OJ C59/22: “Adoption of the ‘special’ rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it.”
\bibitem{111} A Briggs, supra n 42, 57–8. See also E Peel in de Vareilles-Sommières (ed), supra n 43, ch 1.
\end{thebibliography}
Briggs suggests that the ECJ in *Gasser* and *Turner* demonstrated that it essentially regarded rules of jurisdiction as a matter of public law; an exercise of examining the wording of a Regulation that had passed through the legislative process in a literalistic manner and determining which court the Regulation decreed to have competence. If the Regulation were silent as to the existence of a particular power, that must be because the Regulation does not permit the exercise of such a power.

But an English lawyer may tend instead to start not with the text of the Regulation, but with a question about the preservation of the parties’ legal rights. So, in a case such as *Gasser*, a typical English reaction is to ask why a party with a contractual right to sue or be sued in the courts of a given state should not be entitled to the support of the designated courts to uphold the bargain. Even the most diehard opponent of the decisions in *Gasser*, *Turner* and *Owusu* must accept that nowhere does the Regulation confer the powers on the English courts to issue anti-suit injunctions, stay proceedings on *forum non conveniens* grounds, or circumvent the court-first-seised rule so as to protect a contractual bargain. But many an English lawyer will also take the view that these powers are not expressly excluded by the Regulation either; and that there is a strong argument in principle for their retention. The English instinct to protect the commercial needs of the parties is far stronger than its inclination to adopt a literal approach to the construction of the Regulation or to place the political value of mutual trust between Member States at the forefront of its priorities.

Returning to the ECJ’s decision in *Owusu*, it is not obvious to all English observers why a case need be heard in the English courts when it could be heard at a lesser cost and inconvenience in a non-Member State, where the defendant’s rights might be better protected. If a party is injured in a diving accident in Jamaica and, indeed, the defendant wants his rights to be safeguarded in that foreign forum, it is not necessarily attractive to those immersed in the common law tradition for the claim to have to proceed in a less appropriate forum such as England. As the ECJ itself noted and accepted in *Owusu*:

“The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, *inter alia* as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant’s action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.”

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112 See Hartley, supra n 109. Hartley produces an appendix (at 184) in which he outlines the backgrounds of the judges in *Gasser*, *Turner* and *Owusu*. He concludes that “It will be seen that, with few exceptions, they have almost all been involved in public law, public administration, diplomacy and politics. Only a few have had any apparent experience in private-law litigation, or indeed commercial-law activities of any kind. This might explain why they gave the judgments they did.”

113 Para 44.
The Court of Justice noted these difficulties, but simply countered that, since the Brussels regime is mandatory, nothing could be done to address them.\textsuperscript{114} This amounts to a restatement, not a justification for the decision. The initial jurisdictional value that led to the enactment of Article 2 of the Regulation was the protection of the rights of the defendant. To many an English lawyer, there is an instinctive feeling that, where the defendant is happy to waive those rights by seeking a stay of proceedings, he should be free to do so. But what was a principle designed to protect private rights has become a Community rule for the allocation of jurisdiction between the courts of Member States. The concern is no longer to determine which solution would best protect the rights of the defendant; it is to see what the legislature has decreed. The ECJ did not engage with arguments of litigation expediency and convenience, or the rights of the parties. In the ECJ’s eyes, rules are rules; and that is that.

A more recent example of a similar, literalistic approach by the ECJ is Laboratoires Glaxosmithkline v Jean-Pierre Rouard.\textsuperscript{115} In that case, the ECJ held that where an employee brings an action against two employers from the same group of companies (which are closely related) the Regulation will not permit the employee to invoke Article 6(1), so as to ensure that the co-defendants are sued in the same court. This ran contrary to the recommendation of the Advocate General. It is, arguably, a typical ECJ judgment on the Brussels I Regulation, which looks at the literal wording of the Regulation and not at the reasons underlying the rules. An English lawyer might tend to reason that the employment rules are there to provide additional protection to the employee and cannot have been intended to remove from this more vulnerable group the right to rely upon Article 6(1). But the ECJ construed the employment contract rules literally. Those rules did not in terms preserve the application of Article 6(1) and so, the ECJ reasoned, it must follow that employees had no right to rely upon that provision. The view of the Advocate General that this was simply a lacuna in the text, and that there was no evidence of a legislative intention to deny employees the right to invoke Article 6(1), was not accepted by the ECJ. The curious result is that the supposedly weaker party is forced to instigate proceedings in two different states, when a "normal" person would not have had to do so. An English lawyer might regard this decision as failing to ensure that the rights of the employee are properly protected. The English often look to the courts for a teleological construction of legislation that reflects the apparent spirit and intention of the legislator, and struggle to understand the more literal approach of the ECJ to the construction of legislation. This, no doubt reflects a fundamental difference in perception as to the nature and the role of courts in interpreting legislation.

\textsuperscript{114} Para 45.

3. The Quality of the ECJ’s Reasoning

This leads us on to a further important issue. The English reaction to ECJ decisions would undoubtedly be less strong if they could see in the ECJ’s judgments a sound process of reasoning that explains the need for a particular solution. But sometimes it is the quality of the ECJ’s reasoning which attracts strong criticism amongst English writers. This is particularly the case where the ECJ makes very basic errors about the application of common law doctrines.

In Owusu, the ECJ, when winding its way to its inevitable conclusion that the doctrine of forum non conveniens could not be invoked, reasoned that:

“a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued.”

Unfortunately, the ECJ failed to appreciate the disingenuous nature of this reason: for English courts only grant a stay if the defendant himself asks for it. There is no question of it doing so of its own motion; and a defendant who asks for a stay is hardly then likely to object that, if the court grants it, his legal certainty about whether the English court will hear the case or not is compromised. In making such a basic error, the ECJ invited criticism upon itself from English scholars.

Nor is this an isolated example of the ECJ not getting to grips with concepts of English law. In Webb v Webb, sole legal title to land in France was held by a son, whose father had paid the entire purchase price. The father subsequently sought a declaration that: (i) the son held the land on trust for the father; and (ii) an order that the son convey title to the land. The son argued that the case could only be heard in France, as it had as its object a right in rem in immovable property, within the meaning of what is now Article 22(1)(a) of the Brussels I Regulation. The Court of Justice disagreed, in part on the basis that the claim to an interest under a trust did not have as its object a right in rem, but rather a right in personam. The ECJ allowed itself to be bamboozled by literature which traced the historic origins of the law of equity and trusts. But today, at least as a matter of English trusts law, a beneficial interest has a defined, proprietary nature, in that it can be asserted against all third parties, save those who purchase the property in good faith. Moreover, a party who is solely entitled under a trust is

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116 Gasser and Turner had already shown that the ECJ would not condone the application of an English common law doctrine where the Regulation provided no express basis for its survival.

117 Para 42.


119 “The idea that the equitable owner has a single right in personam, or has a vast bundle of single rights in personam, but nothing more, flies in the face of legal sense”: Briggs and Rees, supra n 7, 73.
permitted as matter of English law to terminate that trust and claim the property absolutely. By doing so, he is now able to circumvent the strictures of Article 22(1) of the Regulation and avoid having to sue in the courts of the state where the immovable property is situated.

On other occasions, the concern may be that the ECJ has changed direction, without acknowledging that it has done so. A recent example is the decision of the ECJ in *Freeport plc v Arnoldsson*. In its earlier ruling in *Réunion Européenne SA v Spliethoff’s Bevraachtingskantoor BV*, the ECJ had said the following about the application of Article 6(1) of the Brussels I Regulation:

"48 . . . the Court held in *Kalfelis* that, for Article 6(1) of the Convention to apply there must exist between the various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

49 In that connection, the Court also held in *Kalfelis* that a court which has jurisdiction under Article 5(3) of the Convention over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.

50 It follows that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected."

In *Freeport*, the ECJ said that that this broad statement in relation to different claims belonging to differing legal categories referred only to Articles 5(1) and (3); and that there need not be identical legal categories for Article 6(1) to apply:

"Having regard to the foregoing considerations, the answer to the first question must be that Article 6(1) of Regulation No 44/2001 is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision."

The result does constitute a significant inroad into the defendant domicile principle; but it is also pragmatic and attractive. Where there genuinely are sufficiently close connections between the claims brought against different defendants, there seems little reason not to have a single court resolving both claims. It would be undesirable for the fact that they happen to belong to different legal categories to obstruct that outcome. But whatever one’s view on the conclusion of the ECJ on this point, and even accepting that the court might, for good reasons wish to depart from the strictures of the *Réunion* ruling, one can stand perplexed at how the ECJ can say one thing in *Réunion*, and then say something quite different in *Freeport* without acknowledging that it has changed course.

120 See *Saunders v Vautier* (1841) 4 Beav. 115.
121 Case C-98/06, [2007] ECR I–8319.
123 Emphasis added.
124 *Freeport*, para 47.
Some English lawyers, used to the common law system of precedent, feel that they are entitled to reasoned explanations for any departures from previous ECJ judgments. For instance, Dickinson comments on the Freeport decision that:

“Had the Court said ‘we went further than both the decision and the terms of the 1968 Convention required’ or even ‘we went further than the decision required and we can see why it has caused confusion and dissatisfaction in some quarters’, its decision in Freeport would not have raised doubts. By deploying a judicial sleight of hand, however, the Court calls into question, once again, whether it is deserving of our common trust as the arbiter of an increasingly broad civil justice regime under EC law.”

The combination of the different interpretative approach of the ECJ, the absence of a common law style system of precedent, and certain ECJ judgments which do not show a sufficient understanding of English law doctrines have doubtless all contributed to the often less than enthusiastic reaction to ECJ decisions in England.

4. The Nature of ECJ Judgments

There is also a much more fundamental issue that appears to inform some of the reactions to the ECJ in England. This concerns the very nature of the ECJ and the form of its judgments. Of course, this is a very large subject and one not confined to private international law. One cannot do justice to it here. Nonetheless, if one seeks to understand the reactions of English private international lawyers to the ECJ, it is important to recognise that the nature of the ECJ itself plays a significant role in many writers’ minds.

The English come from a legal tradition where the individual judgments of all members of the court are published. It is not uncommon to see full judgments of three members of the Court of Appeal; or five or more members of the House of Lords. Dissenting opinions may be expressed. A judge may also comment by way of *obiter dictum* on matters not strictly necessary to resolve the matter at hand but which may be persuasive in the future. Many English lawyers, rightly or wrongly, believe that the “public face” of the English court, represented by its judgments, gives the impression that issues have been dealt with in great length. It goes without saying that the quality of the judgments are not of a uniform standard. Indeed, it is certainly not suggested that English judgments are in some sense “better” than ECJ judgments. Sometimes, there can be difficulty in determining what exactly is the *ratio* of the case, particularly where judges concur with one another but give different reasons for their decisions. But what is clear is that English judgments are fundamentally different in nature to

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125 Dickinson, *supra* n 98.
126 Although not every judge will give a full judgment in each case, they have the right to do so.
those of the ECJ; and that some English lawyers may feel uncomfortable with the more often than not rather briefer, single ECJ judgment.

For instance, one current member of the House of Lords has written extra-judicially that:

“The European Court of Justice . . . modelling its practice on the French Conseil d’état . . . usually [adds] only terse reasoning to explain its conclusion. The brevity is probably a function of the rule of unanimity²² and of the committee-style approach which govern the formulation of such judgments.”³³

His Lordship goes on:

“The general position at common law is . . . one of individual freedom of expression, contrasting with a civil law practice of unanimity in most German and French courts and in the European Court of Justice.”³³

He then comments that:

“it is worth asking why different legal systems place such different emphasis on the virtues of self-expression, on the one hand, and disciplined certainty, on the other? The explanation probably lies deep-rooted in different conceptions of the nature of law and of judging: more particularly as to (a) the role of judges: are they seen as independent arbiters serving the parties or more as state functionaries charged with administering state-imposed law? (b) the approach to decision-making: do judges, as in the common law, start from the bottom up, with the facts, or, as in civil law countries, tend to start from the top down, with the particular rule seen as applicable in the context? (c) the place where the law is found: is it found in case-law or in a code? (d) the most important influences on the law: are they practitioners or academics? and (e) the value of pragmatism and flexibility as opposed to fixed and easily applied rules.”³³

It should be stressed that this subject cannot be addressed at length here, and that nothing is suggested by the present author as to the respective merits of the ECJ and the English courts’ forms of judgments. The only point being made for

³² Of course, there may be dissenting views expressed by some of the judges. But only one judgment is produced and any dissenting opinions amongst the judges are not apparent.

³³ The Rt Hon Lord Mance, “The Common Law and Europe: Differences of Style or Substance and Do They Matter?” Holdsworth Presidential Address, University of Birmingham, 24 November 2006, 5.

³⁴ Ibid., 8. See also his Lordship’s comments, supra n 91, 36–4: “The European Court operates under the civil law tradition of unanimity. It . . . operates in relatively large committees (13 members in Erich Gasser) and with a substantial workload. Its judgments are the product of compromise, often perhaps amounting to a small common denominator, reflected in phrases reproduced thereafter without elaboration. The argument for this approach is that it provides clear-cut guidance that the building of a new Europe requires. The risk is that it leads to jurisprudence that is both obscure and rigid. Does the present approach strike the right balance? English appellate jurisprudence may be open to the comment that too little attention is paid to aligning, or eliminating, individual judgments. . . . But freedom of expression can be a real stimulus, and the possibility of individual judgments is of true value. In the European Court of Justice no such possibility exists.”
present purposes is that unfamiliarity gives rise to discomfort amongst some English private international lawyers; and that this factor must be acknowledged in any attempt to analyse the responses of some English writers to the decisions of the ECJ in matters of private international law.

5. Delay in the ECJ

There is also concern expressed in England that the advent of European Regulations, rather than speeding up the mechanism for legal redress, has sometimes had the opposite effect. Some of these problems of delay have resulted from ECJ decisions. Thus, the condoning in *Gasser* of the so-called “Italian torpedo” of instigating proceedings in a forum other than that designated by jurisdiction agreement can slow proceedings down very considerably. Similarly, the *Owusu* ruling means that a case may have to be resolved in a forum with jurisdiction under the Regulation where proceedings are slow; or where considerable evidence is needed of foreign law that will substantially increase costs and result in further delay.

But just as seriously, a party who commences proceedings in the courts of England which raise a moot issue of private international law, rather than suing in the courts of a non-Member State, runs the risk that this can result in a very considerable delay for the matter to be referred to, and decided by, the ECJ.\(^{131}\)

One writer has wryly noted that:

“By way of example, of the four decisions of the ECJ in 2006 concerning the Brussels Convention, two (Case C–4/03, *GAT* and Case C–539/03, *Roche Nederland*) had been referred to the ECJ in 2003. Little wonder, therefore, that a reference to the Court is seen in some quarters as a useful way to gum up proceedings (a ‘Luxembourg torpedo’, perhaps) and focus the claimant’s mind on settlement.”\(^{132}\)

That may suit those whose very aim is to prolong litigation for their own ends; but it does not present the courts of Member States, or the ECJ as expedient fora in which to obtain resolution of a dispute.\(^{133}\)

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131 This issue is, of course, not one confined to private international law and it is not intended to address it fully here. It should, nonetheless, be recognised that the issue informs the reactions of some English private international lawyers to the referencing process.

132 Dickinson, *supra* n 98.

133 One positive development is Council Decision 2008/79, which amends the Protocol on the Statute of the Court of Justice and allows for an urgent reference procedure in matters relating to the area of freedom, security and justice. See [2008] OJ L24/42. The first decision under this procedure was delivered in Case C–195/08 PPU *Rinau v Rinau*, judgment of 11 July 2008; the reference itself was lodged on 14 May 2008. But, as against this, the Treaty of Lisbon proposes the removal of the current Article 68 EC, by which references to the ECJ may only be made by a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law. This might lead to more references being made to the ECJ and cause further delays; although it might also streamline matters in many cases and mean that the parties do not first have to pass through the appellate courts of a Member State.
6. The ECJ’s Decisions as to the Ambit of the Brussels I Regulation

We considered above some of the concerns expressed in England about the extent of legislative harmonisation in the EU, and saw that not everyone initially appreciated the ambit of the EU’s legislative competence pursuant to Article 65 EC. But, of course, concerns about the ambit of European Regulations do not always become fully apparent until many years after that Regulation enters into force, when a matter of interpretation comes before the ECJ.

To return to *Owusu v Jackson*, the ECJ devoted most of its judgment to the question of the applicability of the Brussels Convention where a dispute had connections only to one Contracting State and one non-Contracting State. The relationship between EU rules of jurisdiction and third states is a complex one; but the English courts had assumed that the Convention could not restrict the ambit of common law powers in its relations with non-Contracting States.

The ECJ, however, simply observed that:

> “the consolidation as such of the rules on conflict of jurisdiction and on the recognition and enforcement of judgments, effected by the Brussels Convention in respect of cases with an international element, is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject.”

This does not sufficiently explain why uniform rules of jurisdiction are required to regulate the allocation of jurisdiction between a Contracting and a non-Contracting State, in a situation where there may be no prospect of there being proceedings affecting the courts of any other Contracting State.

More recently, in *Color Drack GmbH v Lexx International Vertriebs GmbH*, the ECJ has extended the perceived ambit of the Regulation yet further. In that case, an Austrian buyer sought to recover the costs of unsold stock that he had returned to a German seller. Several places of delivery in Austria had been stipulated under the contract. The ECJ not only found that Article 5(1) of the Regulation was still applicable in such a case (which seemed obvious), but went on to determine which court had jurisdiction within that single Member State, Austria. The Advocate General had expressed the convincing view that the question of which courts within a Member State had jurisdiction was a matter of the “procedural autonomy of the Member State on whose territory the goods have been delivered”. He suggested that only if that state did not lay down

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136 Para 94.
137 Especially if there is no prospect of any judgment delivered requiring recognition in the courts of another Contracting State.
139 Para 128.
rules on the matter might the plaintiff choose where, within that state, to sue. For reasons that are unconvincing, however, the ECJ determined that the objectives of predictability and certainty demanded that it identify a single forum within Austria that had jurisdiction. It is ironic that, having decided to address this matter, purportedly so as to promote the internal market and the needs of its citizens, the ECJ then proceeded to adopt a test that is so vague and ill-defined that it seems almost certain to lead to much more uncertainty than ever previously existed. It held that “In such a case, the point of closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria.”\textsuperscript{140} What these unarticulated economic criteria are, and how they are to be determined, are quite unclear. A straw has been left to blow in the wind.\textsuperscript{141} Some may feel that they are entitled to expect a more compelling basis for the encroachment upon the autonomy of a Member State to allocate jurisdiction internally.

\textbf{F. The English Tendency to Reassert the Role of the Common Law}

These, then, are some of the reasons for the often frosty reception that EU private international law initiatives receive in England. It is, perhaps, a typical English response to the harmonisation process, and, in particular, to ECJ judgments which restrict the role of the common law, immediately to consider at length what, if anything, remains of English doctrines and how they might nonetheless be preserved. Wounded by a further blow to national autonomy, or to perceived English commercial interests, the natural tendency of many English lawyers is to try and salvage something from the situation by drawing upon the flexibility and ingenuity of the common law.

1. Restricting the Ambit of \textit{Owusu} v \textit{Jackson}

Let us first take the doctrine of \textit{forum non conveniens}. The ECJ in \textit{Owusu} declined to answer the question whether the power to stay proceedings in favour of the courts of a non-Contracting State survives in other contexts in which reflexive effect might be given to the Convention rules. In particular, questions arise as to the power to stay where: (i) there is an exclusive jurisdiction clause in favour of the courts of a non-Member State; (ii) parallel proceedings are taking place in a non-Member State; or (iii) had the facts arisen in a Member State they would

\textsuperscript{140} Para 40.
have conferred exclusive jurisdiction on that state’s courts under Article 22 of the Regulation.

The typical, immediate English reaction has been: (i) to bemoan the decision in Owusu; but (ii) to look for ways of limiting its impact and preserving the role of common law powers. It took the English courts only a matter of weeks after the decision in Owusu to state that the case did not restrict the application of the forum non conveniens doctrine where proceedings were brought in England in breach of an exclusive jurisdiction clause for the courts of a non-Member State. There was some basis for this view. The Schlosser Report remarks that the Convention is silent on the permissibility of a stay in such circumstances; and the Court of Justice in Coreck Maritime GmbH v Handelsveem BV, in a rather unclear passage, suggested that the impact of such a clause should be determined by a state’s own private international law rules. In Konkola Copper Mines plc v Coromin, it was said obiter that a stay for the designated forum, Zambia, could in principle be granted. Colman J said that: “The Convention by Article 17 recognises that character of certainty and party autonomy by superimposing it on the domicile rule.” He reasoned that these virtues of certainty and promoting party autonomy should not be abandoned where the jurisdiction clause is in favour of the courts of a non-Contracting State.

Not only that, but English writers do not necessarily consider that the doctrine of forum non conveniens would have to be applied on a strict reflexive basis. For instance, if the right to stay persists in the case of parallel proceedings in a non-Member State, then one might expect that, reflecting the terms of Article 27 of the Regulation, any such stay would only be available where the foreign court is first seised. But English writers are not convinced. For instance, Fentiman states that:

142 See E Peel, supra n 106; Briggs, supra n 106; Harris, supra n 106; R Fentiman, “Civil Jurisdiction and Third States: Owusu and After” (2006) 43 Common Market Law Review 705.
143 Judgment was handed down in Konkola on 10 May 2005; judgment in Owusu had been given on 1 March 2005.
144 But see the decision of the Irish High Court in Goshawk Dedicated Ltd & Ors v Life Receivables Ireland Ltd [2008] IEHC 90, where it ruled that the power to stay proceedings was not available, even when the courts of the non-Member State were first seised.
145 Schlosser Report, [1979] OJ C59/71, para 176. Schlosser suggests that the court’s “decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own lex fori”.
148 Albeit that Colman J declined to stay in favour of the courts of Zambia on the facts.
149 Konkola, para 99.
150 See also the Financial Markets Law Committee Paper, supra n 92, which recommends “an amendment to the Regulation to provide that jurisdiction clauses favouring third countries are enforceable in Member States’ courts on a non-discretionary basis, regardless of the parties’ domicile(s)”, (para 1.9). It is likely that the EU will ratify the Hague Convention on Choice of Court Agreements 2005 at the time of the revision of Brussels I. If so, then any non-discretionary acceptance of exclusive jurisdiction clauses favouring third countries is only likely to be for courts in Contracting States to the Hague Convention.
It might be objected that Articles 27 and 28 cannot correspond with the staying of actions on forum conveniens grounds. Most obviously, they relate only to cases where prior proceedings are pending. Does this mean that English law cannot correspond with those provisions? Or does it mean that English law can only operate when another court is already seized? Arguably, prior seisin is not required. It could be said that both regimes are at root concerned with the same objectives, but give effect to that concern in different ways. In English law the mechanism is discretionary, but in Regulation and Convention a simple chronological approach is adopted as the only alternative to a discretionary approach. In that sense, the ‘court first seized’ rule is not a reflection of any commitment in principle to favouring the first court, but simply a method – the only available method – for avoiding parallel proceedings and inconsistent judgments. To use the language of Konkola, it is a matter of methodology, not principle.  

The point of the present discussion is not to rehearse the various arguments for and against the residual availability of stays in cases not falling strictly within the parameters of the Owusu ruling. It is simply to make a point about a common trait of the English lawyer’s mentality: one which looks for ways of limiting the influence of unpopular ECJ decisions.

2. Restricting the Ambit of Turner v Grovit

Of course, some onlookers may feel that the English courts have made their own problems by referring the cases of Owusu and Turner to the ECJ. If the ECJ is asked whether a common law power is compatible with the Brussels I Regulation, the English court, one might think, should anticipate what the answer will be. But, where a genuine question about the scope of the Regulation arises, there may be no other realistic option.

Most recently in West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor), the House of Lords sought clarification from the ECJ as to the ambit of the ruling in Turner v Grovit. It referred to the ECJ the question of whether English courts can issue anti-suit injunctions when proceedings are brought in the courts of another Member State in apparent defiance of an English arbitration agreement. But, realising that it was exposing itself to the vagaries of the ECJ decision-making process, Lord Hoffmann delivered a speech in which he indicated that, in his view, the clear answer which the ECJ should give was that the power to grant anti-suit injunctions survived here. His Lordship’s judgment, which accords with earlier English authority, involves a consideration of the arbitration exclusion in the Brussels I Regulation and its

151 Fentiman, supra n 142, 732. Both Peel, supra n 106 and Briggs, supra n 106 also argue for a test that is not strictly reflective of the Regulation but which confers a broader discretion on the court to stay in favour of the courts of a non-Member State.


153 As a court from which there was no appeal, it was obliged to do so.

meaning and scope. It argues that the arbitration exclusion is to be broadly construed; and that, as a result, the regime of mutual trust does not extend to matters falling outside the scope of the Regulation. But, perhaps above all, Lord Hoffmann’s judgment is one that urges the ECJ not to adopt a mechanical approach to a question of profound commercial significance. It is a call for realism by the ECJ. It asks the ECJ to recognise that if the sanctity of arbitration agreements cannot be protected, then their value will be greatly diminished; and commercial confidence in London (or, indeed, any other venue in a Member State) as a seat of arbitration would be greatly affected. Lord Hoffmann observed that:

"Whether the parties should submit themselves to such a jurisdiction by choosing this country as the seat of their arbitration is, in my opinion, entirely a matter for them. The courts are there to serve the business community rather than the other way round. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of arbitration has to offer. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies. In proceedings falling within the Regulation it is right, as the Court of Justice said in Gasser and Turner v Grovit, that courts of Member States should trust each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate."

The Advocate General, however, was distinctly unpersuaded by these arguments. In her Opinion, the issuing of anti-suit injunctions in this circumstance is not permissible. The Advocate General’s approach focuses on the subject matter of the foreign proceedings. She reasoned that as long as these are civil and commercial within the meaning of Article 1(1) of the Regulation, it matters not that they give rise to a preliminary question as to the validity of the arbitration clause. She bolstered this conclusion by reference to Article II(3) of the New York Convention, which requires a national court to refer a matter to arbitration if, inter alia, it is seised of an action in respect of which there is a valid arbitration agreement. 


156 At para 20.

157 This is a reference to P Schlosser, “Anti-Suit Injunctions zur Unterstützung von Internationalen Schiedsverfahren” [2006] Recht des Internationalen Wirtschaft 486.

158 Case C–185/07 Allianz SpA (formerly Riaunun Adriatica Di Scarta SpA) and Others v West Tankers Inc, Opinion of AG Kokott, 4 September 2008.
agreement. The New York Convention does not stipulate that only the courts of the seat of arbitration may rule upon the validity of the arbitration clause.

Nevertheless, it might be said that the Advocate General’s approach is not entirely compelling. The validity of the arbitration clause might be a preliminary issue, but it is the question which determines whether the substantive proceedings fall within the ambit of the Regulation and the competence of the foreign courts at all. If they do not, then one might doubt why the regime of mutual trust should operate. It might be thought rather artificial to talk of the subject matter of a dispute falling within the jurisdiction of the courts of another Member State if there is a valid arbitration clause that ousts the jurisdiction of the courts and so, in turn, ousts the rules of the Regulation which would otherwise have applied. To say, as the Advocate General did, that the subject matter of the claim in the foreign court was tort is arguably to miss the point; the question is whether the litigation fell within the parameters of the Regulation at all: if not, the rules in that Regulation for allocating jurisdiction in, inter alia, tort matters had no application. The Advocate General might more profitably have focused upon the exact ambit of the arbitration exception and whether this extended to circumstances in which the arbitration clause was in dispute. Furthermore, the Advocate General’s approach did not address at any length the fact that the English proceedings clearly had arbitration as their subject matter.

As to the broader, pragmatic arguments of Lord Hoffmann, the Advocate General simply responded that: “To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law.” This, however, is not the point. Lord Hoffmann was saying that where Community law is genuinely unclear, the ECJ should interpret it in such a way as to provide solutions which are economically sound; and clearly, the law was anything but clear in this case. The Advocate General went on to claim that:

“The interpretation advanced here respects individual autonomy, however, and also does not call into question the operation of arbitration. Proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration.

If it follows from the national court’s examination that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. It is true that

159 Paras 55–6.
160 Nor, of course, have the English courts treated this as a positive rule conferring competence upon foreign courts to determine the validity of an English arbitration agreement. It may be seen merely as a provision which compels the court which is interpreting the arbitration agreement to uphold it; without saying anything as to which national courts should interpret it.
161 Other than the supervisory court jurisdiction of the state where the arbitration has its seat.
162 Para 66.
the seising of the national court is an additional step in the proceedings. For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.163

Unfortunately, this reasoning does not sufficiently address the fact that a party considering choosing London as the seat of arbitration may not be prepared to run the risk of having to wait for what may be months or years whilst the other party, perhaps in bad faith, starts proceedings in the courts of another Member State and the foreign court makes up its mind whether it has jurisdiction or not. Nor might that party want to be forced to participate in those foreign proceedings. The Opinion is likely to be seen in many English eyes as placing mutual trust and the rigidity of the Regulation’s court-first-seised mechanism ahead of the needs of those who agree to arbitrate.

Notwithstanding the Opinion of the Advocate General, the outcome of the West Tankers has been more difficult to predict than the references in Gasser, Turner or Owusu, since it raises questions as to the applicability of the Regulation, as opposed to seeking to read residual powers into the Regulation. English lawyers have been aware of the very obvious possibility that the ECJ would adopt a similar approach to the Advocate General and hold that if the subject matter of the foreign proceedings is civil and commercial, then no English court can grant an order which indirectly interferes with the competence of the courts of a Member State to exercise jurisdiction under the Regulation. Such an outcome would be greeted with something bordering on despair; but not with surprise.

3. The Regulation as an Unlikely Source for the Extension of Common Law Powers

Sometimes, the English desire to preserve the role of the common law can have unforeseen consequences. Where it does, the creative ability of the common law can be seen, even where the reasoning of the English court may not be unimpeachable. It is not, for instance, obvious how anything in the judgment in Turner v Grovit, or anywhere else in the ECJ’s jurisprudence, can be used as a springboard to extend the reach of the anti-suit injunction. But recently, the English courts have done exactly that, and used the anti-suit injunction purportedly to reinforce the Regulation.

In Samengo-Turner v J&H Marsh & McLennan (Services) Ltd,164 the appellants were individuals domiciled in England who had been employed as reinsurance brokers. The appellants had given the first respondent company notice to

163 Paras 67–8.
terminate their contracts of employment with a view to going to work for a competitor. The New York proceedings were started a month later and were founded on the terms of an incentive award granted to the appellants under a bonus agreement, pursuant to which they undertook obligations to repay the award if they engaged in activity that was detrimental to the company and to provide information to enable the company to determine whether they had complied with the terms of the award. The appellants claimed that the New York proceedings related to their contracts of employment and had been brought by their employer in a non-Member State so that the provisions of the Brussels I Regulation could be circumvented. Article 20(1) of the Regulation states that an employer may only sue an employee in the state where the employee is domiciled. But the New York court had rejected a challenge to its jurisdiction because of an exclusive New York jurisdiction clause in the bonus agreements between the employer and the employee. That jurisdiction clause was not, however, valid in the courts of England, since, under Article 21 of the Regulation, the clause would need to have been agreed after the dispute had arisen.

Tuckey LJ observed that allowing the proceedings to proceed in New York, when the Regulation conferred exclusive jurisdiction on the English courts, was an unacceptable option, which could lead to parallel proceedings. He observed that:

"The premise for the remedy [of the anti-suit injunction] is that this party should not be litigating in that court and so the principles of comity are not offended by granting an injunction which does no more than require that party to comply with his legal obligations and ensure for the claimant that he does so."165

Tuckey LJ went on to find that the employee had a statutory right under the Regulation to be sued in England. He concluded that:

"Doing nothing is not an option in my judgment. The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction. The only way to give effect to the English claimants' statutory rights is to restrain those proceedings."166

The reasoning is open to question. The Regulation provides that the only Member State whose courts are competent is that of the employee’s domicile. It does not say anything about the competence of the courts of a non-Member State; nor could it possibly seek to do so. The outcome is a curious one. The English court was acting to protect Regulation rights; but it did so by using the armoury of the common law. In doing so, it invoked a power that would not have generally been available in other Member States, and so undermined the uniformity of

165 Para 40.
166 Para 43.
protection for Regulation rights. Some may see this decision as fiercely supportive of the Regulation and its aims; others as an example of yet another way in which the English will find new ways to reassert their common law powers even where the ECJ has tried to curtail them.\footnote{See also Masri v Consolidated Contractors International Co SAL [2008] EWCA Civ 625. In that case, the Court of Appeal held that where an EU domiciliary had submitted to proceedings in England, and so conferred jurisdiction upon an English court under the Brussels I Regulation, this enabled the English court to grant an anti-suit injunction to restrain that party from pursuing proceedings in the courts of a non-Member State without having to establish a separate basis of jurisdiction for the injunction. Collins LJ said (at para 99) that: “The judgment debtors’ submission to the English jurisdiction in those proceedings is a sufficient basis for the imposition of the anti-suit injunction, and the claim for the injunction does not require . . . any separate basis of jurisdiction . . . under the Brussels I Regulation.” See also the earlier proceedings in the Court of Appeal in the same case: [2008] EWCA Civ 303.}

4. Actions for Damages for Breach of Jurisdiction Clauses

Another issue currently exercising the minds of English courts and writers is whether the effects of recent, unpopular ECJ decisions which fail to offer sufficient protection to jurisdiction agreements can be softened by actions for damages in the English courts to provide a remedy for breach of contract. This may be seen as an alternative means to enforce the obligations contained in the parties’ private, contractual agreement.\footnote{See also Briggs, supra n 42, ch 8; L Merrett, “The Enforcement of Jurisdiction Agreements within the Brussels Regime” (2006) 55 International and Comparative Law Quarterly 315; D Tan and N Yeo, “Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?” [2003] Lloyd’s Maritime and Commercial Law Quarterly 435; C Tham, “Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye” [2004] Lloyd’s Maritime and Commercial Law Quarterly 46.} This issue has arisen in the English courts in the context of anti-suit injunctions to restrain breaches of contract where the claimant has instigated proceedings abroad in a state other than that chosen by the parties.

The permissibility of a claim to recover costs incurred by a party against whom an action was commenced abroad in breach of contract was accepted by the English Court of Appeal in Union Discount v Zoller.\footnote{[2001] EWCA Civ 1755, [2002] 1 WLR 1517.} In that case, the appellant entered into a contract with Zoller. The contract contained an exclusive jurisdiction clause for the courts of England. Zoller nonetheless commenced proceedings in New York. The appellant contested the jurisdiction of the New York court and the claim was struck out there. The English Court of Appeal stated that the costs for the New York action could be recovered in England, as they had not been sought in New York. Although this was a principle of limited scope, in A/S Svendborg D/S v Akar\footnote{[2003] EWHC 797.} the High Court held that the costs were available even if they could be recovered abroad.

\begin{footnotesize}
\footnote{[2001] EWCA Civ 1755, [2002] 1 WLR 1517.}
\footnote{[2003] EWHC 797.}
\end{footnotesize}
A claimant may, however, seek to recover more than simply his costs for having had to participate in proceedings in a non-designated forum. He may claim that he has been forced to pay a higher sum of damages in that state than in the agreed forum. In Donohue v Armeo Inc, counsel for the respondent conceded that damages would be available as a remedy for breach of a jurisdiction clause. Although their Lordships did not need to decide the point, Lord Hobhouse said that:

"[Counsel for the respondent] acknowledged that some breaches of the exclusive jurisdiction clause have taken place and will continue, if the appeal is allowed and the injunction refused, and he likewise recognized that, if this leads to Mr Donohue incurring a greater liability or being put to a greater expense (eg, for unrecovered costs) in New York than would have been the case in London, Mr Donohue may have a claim in damages against the defendants for breach of contract – breach of the exclusive jurisdiction clause . . . I am prepared to accept this submission and proceed on the basis that, if Mr Donohue can hereafter show that he has suffered loss as a result of the breach of the clause, the ordinary remedy in damages for breach of contract would be open to him."172

In Sunrock Aircraft Corp Ltd v Scandinavian Airline Systems Denmark-Norway-Sweden, the Court of Appeal said that “It is established that damages can be awarded for a loss incurred by the failure to comply with the terms of an exclusive jurisdiction clause . . .”.174

What is much less clear is to what extent, if at all, this emerging line of authority could be extended to contexts in which the Brussels I Regulation applies. But there is a feeling in some quarters that, if the effect of Gasser is to render an English court powerless to exert jurisdiction where proceedings are commenced in the courts of another Member State in breach of an apparent English jurisdiction clause, then some other suitable recompense should be available to protect the contractual rights and obligations of the parties.

How far this principle will extend remains to be seen. Suppose, for instance, that a contract between the parties contains a jurisdiction clause for the courts of England. Notwithstanding this, the claimant starts proceedings in Italy. Might the defendant to those proceedings bring an action in England for damages against the claimant in the Italian proceedings for wrongly starting proceedings against him in breach of the jurisdiction clause? If the Italian court ultimately finds that it has no jurisdiction, then an action for the costs incurred in ensuring the dismissal of the Italian proceedings, and, perhaps, for the costs the delay

172 At para 48. See also Lord Bingham’s views at para 48. Lord Scott appeared to limit the availability of damages to costs. For more recent developments, see A v B (No 2) [2007] EWHC 54 (Comm), [2007] 1 Lloyd’s Rep 358; National Westminster Bank plc v Rabobank Nederland [2007] EWHC 1056 (Comm).
173 [2007] EWCA Civ 882
174 At para 37.
causes, may seem to be compatible with the Regulation and the Gasser ruling. Joseph argues that if the court first seised found that it lacked jurisdiction, the claim for damages should be permitted.

If the Italian court did take jurisdiction, could an action for breach of the jurisdiction clause still be brought in England? It seems unlikely that this would be permitted, since the finding of the foreign court that the jurisdiction clause was not effective is, presumably, one which binds the English court pursuant to the principle of mutual trust; and the judgment of the foreign court would be entitled to recognition in England. But even here, the matter is not beyond question. The foreign court may have taken jurisdiction on the basis that although there was a consensus between the parties, the formality requirements of Article 23 were not met, as where the jurisdiction clause is not evidenced in writing. That is not to say that the clause was not the subject of an agreement between the parties.

“The foundation for this argument is that there is a distinction between two issues: whether the jurisdiction agreement is effective in law to prorogue or derogate from the jurisdiction of a court, and whether there was a private and binding agreement on seising a court with jurisdiction, or on the issue of proceedings.”

Briggs argues that the fact that the clause does not prorogue jurisdiction because it fails to satisfy Article 23 of the Brussels I Regulation does not prevent it from being a valid, private agreement between the parties. Hence, the action in the English court would not be revisiting the Italian’s court’s finding that Article 23 was not satisfied; it would simply be enforcing a private agreement between the parties. This, though, must be reasoning that is unlikely to appeal in many other Member States. There is a powerful counterargument that the jurisdiction clause, if found by a foreign court not to be compliant with Article 23, is without legal effect; and that if it is without legal effect, it cannot be the subject of an action for damages, particularly where the aim of that action for damages is indirectly to circumvent the foreign court’s decision and the ruling in Gasser.

One might also consider a case where proceedings are brought against an English domiciliary pursuant to Article 2 of the Regulation, in circumstances where there is a jurisdiction clause for the courts of a non-Member State, such as New York. If the ECJ ultimately rules that a stay cannot be granted in this situation, then an English court is forced to sanction a breach of contract. But this sanction is on the basis that the rules of the Regulation require this result, not on the basis that the private bargain between the parties is invalid. In such

175 D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (London, Sweet & Maxwell, 2005), para 14.13. Briggs, *supra* n 42, 332 argues that even if the Italian court has ruled that the defendant could not recover its costs, this should not be considered inconsistent with an action for damages for breach of the jurisdiction clause in the English courts.

176 Briggs, *supra* n 42, 334.

177 See the discussion in section F1 *supra*. 
circumstances, one might wonder if the court might make allowances in costs, or reduce the level of damages, to reflect the loss suffered by the defendant from the claimant’s breach of contract. Although this seems a rather curious approach, involving as it does the forum providing a remedy for itself having condoned a breach of contract, it is not manifestly incompatible with the Brussels I Regulation. This is particularly so as the claim for damages is triggered by breach of an agreement to sue in a non-Member State, a situation where the Regulation offers no basis upon which to enforce the contractual agreement.

This is an area of law that will undoubtedly develop considerably in the coming years. But the very fact that this debate occurs in England at all shows the unease that exists as to the capacity of the Regulation, and of the ECJ, satisfactorily to protect commercial agreements on jurisdiction.

5. Case Management Stays

There are other ways in which the English common law may limit the impact of the ECJ’s authority. Although the English courts have been frustrated by the Owusu decision in their attempts to stay proceedings brought under the Brussels I Regulation in favour of the courts of non-Member States on forum non conveniens grounds, this has not prevented the English courts from continuing to stay proceedings on other grounds. Of course, the option to stay exists under Article 28 of the Regulation where related proceedings are pending in the courts of another Member State. But there exists in English law a broader right to stay proceedings on so-called “case management” grounds, on the basis that complex international litigation can be more effectively handled if proceedings in different jurisdictions are effectively co-ordinated to reduce waste and irreconcilable judgments.

Section 49(3) of the Supreme Court Act 1981 confers jurisdiction on the High Court or the Court of Appeal to stay proceedings “where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings”. In the leading case of Reichhold Norway ASA v Goldman Sachs International,178 English proceedings were stayed where parallel proceedings were taking place in a Norwegian arbitration. In the Court of Appeal, Lord Bingham quoted a passage from the first-instance judgment of Moore-Bick J,179 where the latter said that:

“In such circumstances the parties to the individual actions no longer enjoy the unfettered right (if indeed they ever did) to determine how the proceedings should be conducted; it is recognised that the court is entitled to impose on them procedures which it considers appropriate in the light of the nature and content of the litigation as a whole.”

179 [1999] 1 All ER (Comm) 40; quoted at 179 of the report in the Court of Appeal.
Although this in itself may appear rather unexceptional, the reasoning has been extended to cases involving court proceedings. Where parallel court proceedings are instigated in different states, one option is to instruct the claimant to choose between them. Briggs and Rees\textsuperscript{180} state that where proceedings are brought in more than one state, “If the two actions are for practically identical relief, the likelihood is that the claimant will be put to his election and required to choose one and submit to the staying or dismissal of the other.”\textsuperscript{182}

In \textit{Racy v Hawila,\textsuperscript{183}} the claimants brought parallel proceedings in England and Lebanon and were required to elect between them and not to pursue both. The Court of Appeal held that ordinary \textit{forum non conveniens} principles were not applicable. Parker LJ, in dismissing the appeal, ruled that:

> “The real question here then is should these actions be allowed to proceed simultaneously and, if not, which should proceed first, and what mechanism should be produced in order to produce a sensible and just result? That being so, the issue becomes essentially one of case management . . . This is simply another case in which the judge concluded that justice and the efficient management of the case required that Mr Racy be put to his election as to which of the two actions to pursue first. He was, in my judgment, plainly right to take the view that it would be oppressive to Mr Hawila to have to face both actions simultaneously. The solution which the judge adopted of putting Mr Racy to his election as to which action to proceed with first is plainly a solution which was open to him in the exercise of his wide discretion in the interests of case management.”\textsuperscript{184}

The question for present purposes, however, concerns the compatibility of the case management stay with the Brussels I Regulation. Take the case where identical proceedings are commenced in England and Jamaica against a defendant domiciled in England. The ECJ judgment in Owusu may suggest that the English court has to hear the case. But could the claimant be directed to elect between proceedings in England and Jamaica? The argument would be that the court is not deciding which of the two is the natural forum; it is seeking to prevent waste, and to promote the expediency of the litigation process. It might be argued that this reflects, albeit loosely, the values in Article 28 of the Brussels I Regulation, which, of course, applies to related proceedings in different Member States. Article 28 is, in part, a mechanism to prevent irreconcilable judgments; but it is also a way of structuring litigation to bring about overall litigation convenience and efficiency. It might be suggested that case management stays promote some similar virtues; and even that the need for such a mechanism is


\textsuperscript{181} Briggs and Rees, \textit{supra} n 7, 431.

\textsuperscript{182} Citing \textit{Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd} [1989] 3 All ER 65.

\textsuperscript{183} [2004] EWCA Civ 209.

\textsuperscript{184} Paras 62–4 of the judgment.
greater in relation to parallel proceedings in non-Member States, since the decision in Owusu may encourage the pursuit of parallel proceedings in a Member and a non-Member State.

In Kongress Agentur Hagen GmbH v Zeehaghe BV\(^{185}\) the ECJ ruled that the Brussels I Regulation does not affect matters of procedure; but that procedural rules must not impair the effectiveness of the Regulation. This is a difficult line to tread.\(^{186}\) But it is clear that the English courts still seek to manage litigation by relying upon their inherent powers of case management.

Nor do the English courts invoke these powers only where the parallel proceeding are in a non-Member State. In Prifti v Musini,\(^{187}\) the football club Real Sociedad brought a claim under an insurance policy in Spain against its insurers, Musini, in relation to the injury of a player. The insurers argued there was an exclusion clause in the policy relating to pre-existing conditions, the validity of which was disputed. The reinsurers, Prifti, brought an action in England seeking a declaration that they were not liable to the insurers in respect of any claim brought. The reinsurers then sought a stay of those proceedings pending the outcome of the Spanish proceedings. Although Christopher Clarke J stressed the extraordinary nature of a claimant seeking a stay of proceedings he had instigated in England, in circumstances where the defendant insurers has resisted the jurisdiction of the English court unsuccessfully and were now happy for the issue to be resolved here, he granted the stay on case management grounds. This was largely because if there was a valid exclusion of pre-existing conditions clause in the main insurance policy, the English proceedings would be largely redundant. The case was expressly decided on case management grounds and not on the basis of Article 28 of the Regulation.\(^{188}\)

Whilst English courts are likely to remain sensitive to the need not to use the case management stay so extensively as to grant permanent stays of English proceedings,\(^{189}\) or otherwise undermine the Owusu decision, this constitutes another important, flexible weapon available to the English courts to limit the effects of an ECJ judgment. Once again, it shows the inclination of the English courts to adopt flexible structures that are at odds with the more certain but also more rigid rules of the Brussels I Regulation.

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\(^{186}\) For discussion of this issue in the context of anti-suit injunctions, see A Layton, “The Prohibition on Anti-Suit Injunctions and the Relationship between European Rules on Jurisdiction and Domestic Rules of Procedure” in de Vareilles-Sommières (ed), supra n 43, ch 4.

\(^{187}\) [2005] EWHC 832 (Comm).

\(^{188}\) Indeed, Article 28 was not even mentioned in the judgment.

6. Conclusion

The above discussion illustrates that, however far the EU harmonisation process might go, and however much the ECJ might seek to curtail the application of the English common law, the English tendency to preserve and to reinvent the common law is very strong. Whatever the future for the European harmonisation process might hold, it is highly unlikely that it will lead to the total abrogation of the common law rules, or prevent a great deal of ink being spilled by English writers in considering new ways to limit or circumvent the impact of ECJ rulings which restrict the impact of the common law.

G. Conclusion

It is clear that there is no simple explanation which shapes the attitudes of English lawyers to European private international law initiatives. Profound differences, both in substantive law and private international law tradition, coupled with a reluctance to give up those traditions, are obviously key factors. Some of the English reactions may be somewhat anachronistic or overstated. Nonetheless, it is clearly the case that many English academics and practitioners have difficulties in understanding what was wrong with the common law, and why it needs to change. They also crave more rigorous justifications from the Commission as to the advantages of reform, and, indeed, the legal basis for it. Moreover, the English courts’ conception of private international law as concerned to safeguard the parties’ rights and to provide commercially expedient solutions is at odds with the clear, certain, but inflexible structures put in place by successive European Regulations.

Ultimately, some of the tensions between England and the European institutions are of an almost intractable nature and reflect different legal traditions and cultures. Others can doubtless be improved by greater mutual understanding. But simply hoping that that understanding will emerge, or that the English will gradually become more pro-harmonisation in the field of private international law, is a rather forlorn hope. Something has to happen to change the script. In part, the situation may improve somewhat as English lawyers who have grown up professionally in a legal landscape of European Regulations become more prevalent. But this needs to be a bilateral process. From the perspective of many English writers, a rather simple, yet significant starting point would be the publication of rigorously argued and researched documents by the Commission which consider the case for reform, and whether it is needed for the promotion of the internal market; and which show due appreciation of the substantive law background of the Member States on which the Regulation will be imposed. Doubtless, in some cases, there is also scope for higher-quality;
better-reasoned ECJ judgments, which do not, sometimes erroneously, pass
dismissive judgment on English doctrines.

The diminishing influence of the English common law in Europe, which has
formed the cornerstone of common law regimes around the world, and
continues to exert a key influence in much of the commonwealth, and on the
conduct of international commerce, is not altogether easy for many English
lawyers to accept. For the United Kingdom as a whole, the position of being just
one of twenty-seven Member States is something that it does not, perhaps, find
easy. It would be satisfying to end this discussion by expressing the conviction
that things will improve markedly in the years to come. But it is, perhaps, more
helpful to call for sober reflection on the current state of affairs, and its
underlying causes.