"Forum Shopping and Anti-Suit Injunctions: A Brief Overview (and update)"

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1. Preamble:

1.1. The subject of this paper is "Forum Shopping, Anti-Suit Injunctions and EU law: A Brief Overview (and update)". This is substantially but not wholly an English perspective.

1.2. This paper is based upon a talk I gave in January 2006. It has now been slightly amended and updated for two reasons. First, the "FRONT COMOR" was heard by the House of Lords in early December 2006. Judgment was issued on 21 February 2007. The case will now progress to the European Court of Justice. Secondly, from 1 January 2007 there are two new members of the European Union, Romania and Bulgaria. How will these developments affect planning of the defence (or prosecution) of claims, in particular choice of forum? The legal landscape in this field (at least with regard to arbitration clauses) may be about to undergo another shift.

1.3. For these reasons, perhaps it is time to review strategy in cases where the dispute is subject to either an English Jurisdiction Clause or an English Arbitration Clause.

1.4. The main body of this paper has been broadly designed so that you can dip into any section or point of interest, or alternatively read the whole narrative. This paper is an overview and deliberately states the simplified picture. It is, in particular, not a substitute for advice in any particular case.

1.5. The paper is divided into the following sections:

1.6. In Annex 1 (page 13) you will find a snapshot comparison of the key points addressed in this paper where in respect of an English Arbitration Clause or jurisdiction clause the "competing forum" is a court in either (a) a non EU/EFTA Country or (b) a EU/EFTA Country. In Annex 2 you will find abstracts from the Brussels Convention and Regulation 44/2001.

1.7. I hope you find this paper of interest and of use.

2. Introduction

2.1. This topic is potentially very large. I have therefore decided to focus only on disputes which may arise under written agreements or contracts. Although this paper is generic, and not purely marine focused, such contracts might include say bills of lading, charterparties, or policies of insurance for marine risks. I will not, other than in passing, be looking at actions which might arise under the general law, for example actions in tort such as negligence.

2.2. They say that a verbal agreement is not worth the paper that it is written on. So how are parties to agreements or contracts to proceed to ensure that the terms they agree are best secured or enforced? They need to do three things:

- First, be most careful in drafting and finalising contract terms;
- Secondly, ensure that those terms include a jurisdiction agreement or an arbitration clause to pre-empt or at least minimise the prospect of jurisdictional disputes (this is one point addressed by the Contract Certainty initiative in the London insurance market). But as we will see, this is unlikely to be enough in isolation.
- Thirdly, take vigorous action when a dispute arises. But what action can they take, when and is their liberty in any way limited?

2.3. This can be an area of some complexity. In setting out this overview I am not, therefore, analysing each question down to the last detail. Neither am I (for the sake of brevity) setting out a catalogue of authorities and references (touching only on some which may be of particular interest and relevance).

2.4. Broadly I would be looking at the matter in this way:

- First, what is forum shopping and why is it important?
- Secondly, is forum shopping in breach of a High Court jurisdiction clause permitted?
- Thirdly, is forum shopping in breach of a London arbitration clause permitted?
- Fourthly, are there any differences between:

  (a) **the wider picture**: that is forum shopping as between the English courts/Arbitration Tribunals and courts in other Sovereign States, worldwide; and (by contrast)

  (b) **the narrower picture**: forum shopping internally within "Europe" (that is to say as between the English courts/Arbitration Tribunals and courts of Member States of the European Union and/or EFTA Contracting States (Iceland, Norway and Switzerland).

2.5. To the question "is forum shopping dead"? I think we will see that the answer must be an emphatic "no", notwithstanding, perhaps, the efforts of the European Union legislators.

3. Forum Shopping

What is Forum Shopping?

3.1. Forum shopping is an attempt to secure for a party the most favourable jurisdiction in which a dispute can be heard. There is a whole range of criteria to consider when seeking to make an assessment of what is the most favourable jurisdiction. I will turn to some of these briefly below.

3.2. Suffice to say, the most favourable jurisdiction will not necessarily be the same for all disputes nor in all circumstances. It all depends on the particular interests of the party engaged in a potential dispute; and so far as lawyers are concerned, who they represent.

Why is Forum Shopping important?

3.3. The criteria to consider essentially fall under two heads: First, legal factors and secondly practical factors. I have picked just a few as examples.

Legal Factors

I am setting out here a few of the legal factors.

- **Quality of justice**: this may be somewhat elusive and subjective. The quality of justice, like beauty, lies in the eye of the beholder. On the one hand, a party might want a dispute referred to a court which seeks to apply the law strictly, or which has a long tradition and a profound expertise in resolving technical disputes. The objective might be to ensure that the precise terms of the bargain struck (when the contract was made and long before the dispute arose) should be applied to their full effect.

  Conversely, another party, perhaps fearful of the precise application of those same terms, might wish to refer the dispute to a court with lesser expertise expressly in the hope that that court might reach quite another result.

- **Procedural remedies**: Some legal systems, essentially common-law systems (US procedure is probably the most rigorous and exhaustive), require at some stage for the parties to provide a comprehensive and mutual exchange of documents (including electronic "documents") by way of disclosure (discovery). Other judicial systems, in particular the civil law nations as I understand it, do not require disclosure but rather production of a much narrower category of documents.

- **Costs**: In the common-law systems (with the notable exception of the US, save exceptional circumstances) the successful party should, in addition to obtaining judgment in his favour, be entitled to recover a substantial percentage of the legal fees and disbursements which he has incurred in pursuing or defending an action (subject only in England and Wales to issues of "proportionality" under the Civil Procedure Rules, implemented in 1999 following the Woolf Report). Recoverable legal costs in the English system might be in the region of 60% or 70% of the total cost incurred. The position in other legal systems, again the civil law nations, as I understand it, is that only certain small fixed costs are recoverable, and the great generality of legal fees and disbursements are not recoverable.

Practical Matters

There could then be various practical matters, for example:-

- **Speed or slowness**: Speed can be very important to one and wholly unimportant to another. Indeed, one party might see considerable advantage in ensuring that a dispute is referred to a jurisdiction whose systems and procedures may inevitably entail significant delay.

- **Enforcement**: Even when Judgment (or Final Award) is obtained, this is not necessarily the end of the matter. If the winner is holding security for his claim, he should be able to enforce that judgment quickly against that security. But it is certainly not unknown that significant disputes are taken to Judgment (or a final Arbitration Award) without any security being held. In those circumstances, the place where the action is brought may be highly important. Thus:

  (a) If the losing party has cash or assets within the jurisdiction of that court (tribunal) they could be an easy target for the winner, but

  (b) Conversely, if the losers' cash assets and properties are only to be found elsewhere abroad there can often be difficulties in seeking to enforce a judgment (or Award) issued in one Sovereign State against such assets in another, particularly if that State is outside Europe.

  The position as to enforcement is rather different comparing Judgments to Arbitration Awards. One of the most significant advantages of arbitration is that Arbitration Awards, at least in respect of commercial matters, can (provided formalities are respected) be readily enforced over a very wide range of Sovereign States under the terms of New York Convention of 1958. According to UNCITRAL as at November 2006, 139 nations had signed, ratified, or acceded to the New York Convention. This process is ongoing; for example Pakistan one of the original signatories, who signed the Convention in 1958, ratified it in July 2005. The UAE and Montenegro became parties in 2006.

  Such practical and legal advantages and disadvantages only fall to be considered, of course, if there is a basis to assert jurisdiction in the court of choice in the first place.

What tools / remedies are available?

3.4. Where there is a written agreement containing an English jurisdiction clause or a London arbitration agreement what steps might be available to one party who either fears that an action might be brought in the courts of another foreign state in breach of that jurisdiction agreement or arbitration clause: alternatively to a party who faces proceedings which have already been commenced in such a foreign court?

Broadly there are these:

(a) Challenge the jurisdiction of that court, without submitting the substantive dispute to the jurisdiction of that foreign court (if this is possible under the local procedural rules of that court; be careful);

(b) Apply to the English High Court of Justice for an anti-suit injunction;

(c) Launch a pre-emptive strike by commencing proceedings for declaration of non-liability, if no "competing" action has yet been started; or if such "competing" proceedings have already been started, then launch parallel proceedings here;

(d) If (a) fails, if (b) is unavailable and if (c) is unavailable or not chosen for some reason, consider fighting the action in that foreign court on the merits and then, perhaps, seek to oppose enforcement of any final judgment issued. But beware: first in respect of non-EU/EFTA judgments there may be the difficulty of estoppel and second Article 34 Regulation 44/2001 may preclude such a strategy for EU judgments. I return to EU law a little later.

The first of these stratagems (challenge to jurisdiction) is by no means simple. Sir Peter Gross in a recent article on anti-suit injunctions observes:

"…Navigating the tightrope between too little involvement in local proceedings and a default judgment, on the one hand, and unintended submission [to the jurisdiction of the foreign court] on the other is an exceptionally difficult exercise. It looks easy - do no more, it is said, than preserve objections to jurisdiction. But many systems, by linking substantive proceedings and jurisdictional challenge, make that easier said than done."

What are anti-suit injunctions?

3.5. **Jurisdiction**: Anti-suit injunctions (or restraining orders) are a key tool in the armoury of the litigant. Anti-suit injunctions have been granted by the English Courts for approximately 170 years. The modern jurisdiction is conferred on the English Courts by section 37 of the Supreme Court Act 1981. An anti-suit injunction can restrain a party from either commencing or pursuing proceedings in a foreign court.

3.6. **Effect**: Anti-suit injunctions are neither directed at nor effective against the foreign court, but rather against individuals or companies. They take effect *in personam.* But in reality, if a party can be effectively restrained from commencing or pursuing an action in a foreign court by an injunction issued by the English Court, can it be said that the English Court is effectively purporting to police the exercise of jurisdiction by that foreign court? This was never welcomed by the courts of Member States (nor perhaps elsewhere).

3.7. **An aside**: I am focusing in this paper only on the situation where an opponent threatens to or has commenced proceedings in breach of a written agreement (contract); that is in breach of a (exclusive) jurisdiction clause or in breach of a London arbitration clause. As an aside, anti-suit injunctions are potentially available where one party seeks to restrain another from commencing or pursuing proceedings in another jurisdiction where he considers that that is an inappropriate jurisdiction in which the dispute should be heard; in other words an injunction sought on the basis of "forum non conveniens". But note that the English courts will refuse to issue such an injunction against a party where the battle is between two foreign courts (that is, does not involve the English Courts) but where one of the parties is here (and therefore amenable to the jurisdiction of the English courts).

3.8. **Discretion**: Anti-suit injunctions are a discretionary remedy. Generally it is said that the power to issue injunctions is to be exercised with caution and only where the interests of justice so require. However, there is a distinction to be made between:

- First, those cases where proceedings are brought abroad in breach of a jurisdiction clause or an arbitration clause on the one hand; and

- Second, those cases where an anti-suit injunction is only sought on grounds of "forum non conveniens" on the other.

3.9. In the breach of contract cases (which we are looking at here), it is generally said that a good reason is needed to show why an anti-suit injunction should not be granted, ("ANGELIC GRACE" ([1995] 1 Lloyds Rep 86). But the granting of an injunction is not a foregone conclusion. In one recent case Colman J rather than granting an injunction as requested where competing proceedings were pending in Russia and England ordered the parties to mediate their dispute. (C -v- RHL ([2005] EWHC 818); an indication of the zeitgeist and the increasing significance of mediation).

3.10. **Breach**: What are the consequences of breach of an anti-suit injunction? In other words what if the defendant, notwithstanding the granting of that order, decides to commence or to continue to pursue an action abroad? This would certainly amount to a contempt of the English Court and the consequences of contempt may be that the non-compliant party could be potentially arrested or alternatively fined. This is a powerful disincentive to a party who is domiciled, resident, or a regular visitor to England. But if the defendant is domiciled abroad, never comes within the physical jurisdiction of the English court and has no cash assets or property here, (and never will) can it be said that the consequences of breach are somewhat illusory? This is an area in which it is wise to proceed with caution. Breach of an injunction is never something to take lightly.

3.11. Against this general background I am now going to compare two contrasting situations. In both cases I am looking at proceedings brought (or threatened) in breach of an English jurisdiction clause or London arbitration clause.

(a) First we will look at the wider picture: where a legal opponent threatens or starts proceedings in a foreign non-European Court; and

(b) Secondly, we will consider the narrower picture: where a legal opponent threatens or starts proceedings in a European Court (or EFTA) court.

I have summarised that which follows on one page, at a glance, in Annex 1. Bear in mind that Annex 1 is a deliberate simplification of the position and each case needs to be reviewed carefully on its merits.

4. The wider picture: outside Europe

Litigation: Opponents start action in non-EU (non EFTA) foreign Court

4.1. What if an opponent threatens or start court proceedings abroad in breach of an English jurisdiction clause what can or should the other party do?

4.2. First, on the assumption that that party does not wish to submit the dispute to the foreign court he can, subject to the rules of that foreign court, challenge its jurisdiction (but be very careful, for the reason I have given).

4.3. Secondly, he can issue proceedings here, either at the conclusion of the jurisdictional challenge abroad or alternatively straight away, before the English Court (on the merits i.e. to prosecute or defend the substantive claim). At the same time he can apply for an anti-suit injunction.

4.4. Thirdly, if proceedings continue in the foreign court (because the challenge to jurisdiction fails for whatever reason) he would be at liberty to challenge any attempt to enforce the foreign judgment here. This will not, of course, be a complete answer to the problem if the opponent can use his foreign judgment and seek to enforce that judgment in any other jurisdiction where the "offended" party has cash, assets or property. It is by no means certain that any court in a third foreign state will decline to permit enforcement of the foreign judgment obtained in breach of contract, simply because an English court has issued an anti-suit injunction. It may therefore be necessary to pursue an ugly and costly rush to judgment and then a complex battle over enforcement.

4.5. Finally, the offended party might seek to recover as damages in the English proceedings both the costs of defending the foreign action brought in breach of contract (i.e. in breach of the jurisdiction clause) and perhaps any other losses (however difficult to quantify and subject to the difficulty of estoppel).

Arbitration: Opponent starts action in non-EU non-EFTA foreign court

4.6. The position is similar if one party threatens to start or continue proceedings in a foreign court in breach of a London arbitration clause.

4.7. Again, in these circumstances the "offended" party can (if the rules of that court permit) challenge the jurisdiction of that court on the basis of the breach of contract. Again, be careful. Additionally, he may rely on the terms of the 1958 New York Convention to seek a stay in the proceedings in the foreign court. The prospects of success in the challenge to jurisdiction in these circumstances might therefore be better.

4.8. Secondly, the offended party can start an arbitration here (either as pre-emptive action, supported by court proceedings, or competing proceedings). He may also seek an anti-suit injunction from the English court, in aid of that arbitration.

4.9. Thirdly, if it is not possible to stop the foreign proceedings in their tracks, by challenge to jurisdiction, it may be possible to challenge the enforcement of any foreign judgment in England and Wales. But the same difficulty arises as before; it might be possible for the opponent to succeed in enforcing his judgment against cash assets or property of the offended party in any third State, although the New York Convention might reduce this risk. As indicated above, many States are parties to the New York Convention, but obviously not all. Further, bear in mind that there are limits to the scope of the New York Convention and derogations to accession/ratification filed by certain States (further detail in this area is beyond the scope of this paper).

4.10. Finally, as before, the costs of defending the foreign proceedings may be sought as damages, perhaps in the London arbitration or perhaps by separate action in court; likewise perhaps any further losses.

5. The narrower picture: "Europe"

The impact of an EU law: a little background

5.1. The original members of the European Union subscribed to the Brussels Convention of 1968. This Convention was intended to set out a fairly mechanistic, simple, clear-cut code to reduce or eliminate jurisdictional disputes which might arise between the courts of Member States. The Convention governs not only:

- choice of jurisdiction (making certain particular provision in respect of certain types of insurance and consumer and employment contracts), but also
- the recognition and enforcement of judgments obtained.

5.2. The Brussels Convention was amended at the time of accession to that Convention of the United Kingdom. At that time the United Kingdom required the expansion of one of the provisions in the Convention dealing with (exclusive) jurisdiction which lies at the heart of this paper (Article 17). The expansion was intended to embrace jurisdiction agreements made:

- In the form according to the parties' established practice; or
- (In international trade or commerce) made in accordance with a usage which they knew or ought to have known and which was widely known to and regularly observed by parties to such contracts in the particular trade or commerce.

It seems likely that these amendments were made with at least half an eye on Bills of Lading and Charterparties and perhaps policies of (marine) insurance.

5.3. The late Sir Michael Kerr chaired the United Kingdom's pre-accession negotiating team. He records in his memoirs **"As Far as I Remember"** that the revision to the exclusive jurisdiction provision was **"One of the cornerstones of the treaty for the UK"** and says (apparently) that the ultimate agreement to this amendment was secured by a narrow margin; by four votes to three (which makes an interesting tale in itself). I doubt however, that that negotiating team envisaged how the Convention (and thus its successor Regulation) would be interpreted by the European Court of Justice – see further below.

5.4. The Brussels Convention has been succeeded by European Union Council Regulation (EC) 44 / 2001 which in many respects makes substantially similar (but not identical) provision. That Regulation came into force on 1 March 2002 and is directly effective in all Member States (except Denmark) including the ten new members. And also now consider the position of Romania and Bulgaria. Denmark remains bound by the Brussels Convention and not by the Regulation. The Lugano Convention makes similar provision on jurisdiction for EFTA nations. (*If you want to review quickly some of the provisions of the Brussels Convention and Regulation I have appended extracts at Annex 2 to this paper).*

The impact of the EU law

5.5. Broadly, the Convention and Regulation both provide that an EU defendant should be sued in their country of domicile. But even that basic rule allows some "forum shopping" because (as one small example) a claim for declaration of non-liability where the "natural" defendant "attacks" the "natural" plaintiff is capable of founding jurisdiction.

5.6. The Convention and Regulation then restrict the ability of the courts of Member States to determine the jurisdiction of any other court in another Member State. This is said to be based upon the principle of comity or "mutual trust". But, in effect you will see it requires the court of one state to give "full faith and credit" to the court of another.

How does the Regulation Scheme work?

5.7. With limited exceptions (in respect of certain insurance, consumer and employment contracts which are outside the scope of this paper) the Convention (and Regulation) is intended to guarantee the general validity of jurisdiction clauses, effectively conferring exclusive jurisdiction on the chosen court, (unless otherwise agreed) (Article 17 Convention / Article 23 Regulation).

5.8. So far so good. But, it is not so simple; both Convention and Regulation also provide that where proceedings between the same parties in respect of the same cause or matter are commenced in two Member States, the court "first seized" shall determine if it has jurisdiction and any proceedings commenced later in time must be stayed until the first court has made that determination (Article 21 Convention / Article 27 Regulation). (There are similar provisions where there are "related" proceedings, which can be a further source of complication, procedural mischief and and tactical manoeuvring).

Litigation: What if Opponent is first to start action in another EU Court?

5.9. So, against that background, what then happens if in respect of an agreement which contains an exclusive English jurisdiction clause an opponent starts an action in court in say Poland? Let us assume that the action is between the same parties and in respect of the same subject matter. Let us assume for the sake of argument that it is an action by an insured against an insurer (which falls outside the specific provisions as to jurisdiction set out in the Convention / Regulation on insurance matters). Can the insurer (later in time) then commence and continue a competing action in the English Courts in respect of the same claim?

5.10. In other words, does the provision in the Convention / Regulation securing the effectiveness of (exclusive) jurisdiction clauses (Article 17 Convention / 23 Regulation) take precedence over a provision dealing with competing actions in two different Member States? (Article 21 Convention / 27 Regulation)?

5.11. Surprising though it may be, it is now clear from the European Court of Justice decision in Gasser –v- Misat ([2003] AER 148) that Article 21 Convention / 27 Regulation (competing proceedings) takes precedence over Article 17 Convention / 23 Regulation (jurisdiction clauses). In the example given, therefore, the English based insurer will find that any competing proceedings commenced in England must be stayed; even if (as was alleged in Gasser) the delay in the other court is or might be egregious: (and even though : *"**justice delayed is justice denied***".)

Can you get an Anti-Suit injunction?

5.12. What about another line of attack? Will it nonetheless be possible to obtain an anti-suit injunction to prevent the party acting in breach of the jurisdiction clause from pursuing his action in Poland?

5.13. No. It is plain from the decision in Turner -v- Grovit ([2004] AER 485) that the European Court of Justice considers that the grant of an anti-suit injunction in these circumstances would be contrary to the spirit and intention of the Brussels Convention (though perhaps not its express terms). The European Court considers

that such an injunction would run counter to the principle of "mutual trust" in the legal and judicial systems of other Member States which underpins the whole fabric of the Convention (and Regulation).

5.14. Moreover, the European Court was at pains to point out that it would be irrelevant whether the opponent, who had commenced proceedings in breach of a jurisdiction clause, was acting in bad faith expressly for the purpose of frustrating any legitimate existing proceedings commenced pursuant to the jurisdiction clause.

Implications of Gasser & Turner

5.15. So, to recap, the Court "second seized" (second in time) must stay its proceedings and await the outcome of proceedings in the first court. And no anti-suit injunction can be granted to restrain proceedings in that first court.

5.16. This creates an obvious risk of tactical litigation. As one commentator has observed analysing the combined effect of Gasser and Turner:

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

5.17. First, there is a hazard that the Court "first seized" may be persuaded to accept jurisdiction (by fair means or foul).

5.18. Secondly, even the necessity of challenging the jurisdiction in the first court might lead to inordinate delay. Certain jurisdictions are said by the commentators to be notorious in respect of delay.

5.19. Thirdly, on any view there are likely (certain) to be duplicate expenses in seeking to resolve jurisdictional disputes.

5.20. Fourth, notwithstanding the fact that all Member States, with the exception of Denmark (bound to the similar terms by the Brussels Convention), are bound by Regulation 44 / 2001 and therefore should in the last analysis give effect to a choice of jurisdiction pursuant to article 17 Convention / 23 Regulation, there is no certainty. There is the risk of what one might call "home advantage", the risk of anomalous results. For example, a jurisdiction agreement might be found to be non-existent, ineffective or not binding for reasons which might (at least on an English legal analysis) be considered without merit. (For example, not set out in full, in writing; attached to a contract but not physically incorporated; set out in "boiler plate" text / small print on the back of a document; not signed by both parties). The court reaching that finding might then go on to hear the case on the merits and reach an equally anomalous result / judgment.

5.21. In all this, the work of the European Commission gives pause for thought. Prior to the accession of the then ten new Member States the European Commission instigated a Monitoring Report on the legal and judicial systems of each of those ten accession states (but not the original Members). I have abstracted below just a couple of comments derived from the Monitoring Reports. In certain of those States it is said:

- The legal and judicial system lack the confidence of even their own public; and moreover
- There were grounds for concern about judicial corruption.

For example one EU Monitoring Report says this:

…"Efforts are still needed to improve the efficiency and transparency of the judiciary, so as to enhance the reliability of the quality of judgment… In general, the level of public trust in the efficiency and fairness in the judicial system remains low and the perception of corruption by the public is high… Corruption is perceived to be increasing from a relatively high level. It is considered to affect all spheres of public life. There has been very little progress in combating corruption, and the existing perception has been borne out in various [recent] high profile corruption cases…"

This is grim reading if the action is started first in this Member State and you are the defendant and are powerless to stop it.

Arbitration: Opponents starts action in other EU Court/EFTA Court

5.22. Is the position any different where an opponent starts an action in the court of another EU (EFTA) State in breach of a London arbitration clause? At present, at least, it seems that there is a clear difference.

5.23. Article 1 (2) (d) of the Regulation provides that the Regulation shall not apply to "arbitration". An identical provision is set out in Article 1 (4) of the Brussels Convention. In these circumstances, the court "second seized" is not compelled to stay its process pending the outcome of proceedings commenced in a foreign court in breach of an arbitration clause. The court "second seized" is therefore at liberty to decide the question of jurisdiction.

5.24. Furthermore, an anti-suit injunction would be available on application to the English Court to protect a London arbitration agreement. (**Through Transport -v- New India** ([2005] 1 Lloyd's Rep 67); The "**FRONT COMOR**" ([2005] EWHC 454).

5.25. But this does not mean that proceedings commenced in the foreign court would necessarily stop, nor that there would not be at a later stage a rush to Judgment or an Award and subsequently a battle over the enforcement over a conflicting foreign Judgment and an English Arbitration Award. Even if such battles might ultimately be resolved in favour of the party holding the Award, additional delay and cost seems almost certain (though the New York Convention may diminish the risk).

5.26. Clearly there remains the hazard of tactical manoeuvring and seeking leverage in settlement (which might be either a very good thing or a very bad thing, depending on your perspective).

5.27. But the law in this area may be on the cusp of change. The "FRONT COMOR" was heard by the House of Lords on 5th-7th December 2006. Judgment was issued on 21st February 2007. As predicted, the House of Lords has (unanimously) remitted the case to the European Court of Justice. The question to be referred is according to Lord Hoffman:

"Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an Arbitration Agreement?"

The case in favour of the continuation of this jurisdiction is articulated in a short and very clear Judgment by Lord Hoffmann. He concludes, amongst other things, that:

"In cases concerning Arbitration, falling outside the Regulation, it is in my opinion…necessary that Member States should trust Arbitrators….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 to litigate."

Lord Mance observes, in supporting the opinion of Lord Hoffmann that current English authority is in support of Lord Hoffmann's view, whereas European academic opinion exists both for and against that view[1].

It now remains to be seen whether the "Arbitration clause exclusion" which I have described will continue to be "effective". Perhaps certain English lawyers will be surprised (as they were by **Gasser -v- Misat** and **Turner -v- Grovit**?) If there is such a risk there is all the more need to look at commencing pre-emptive proceedings to secure favourable jurisdiction.

6. Conclusions

Where proceedings are contemplated:

In "Europe"

6.1. A party who fears commencement of proceedings within EU/EFTA in a dispute in breach of an English jurisdiction clause may be well advised to launch a pre-emptive strike in the English courts by way of application for negative declaratory relief. In this way the "natural" defendant becomes the plaintiff.

6.2. This should effectively prevent the opponent from commencing proceedings in the court of another EU (or EFTA) State. Those proceedings would then be second in time and, if the Convention / Regulation is applied, must be stayed.

6.3. If the "natural" defendant waits until proceedings in breach of the jurisdiction clause have been started elsewhere in the European Union (or EFTA) he may be too late; or at the very least put to a procedural and tactical disadvantage.

6.4. The law with regard to arbitration clauses is uncertain. So any party who fears the commencement of proceedings elsewhere in the EU/EFTA in breach of a London arbitration clause should also consider commencing proceedings before the English court for a declaration that the agreement to arbitrate is valid and consider starting arbitration proceedings, as a pre-emptive strike. He should also consider applying for an anti-suit injunction in support of the English arbitration proceedings.

Outside "Europe"

6.5. Where a party fears the commencement of proceedings in a dispute in breach of an English jurisdiction clause or a London arbitration clause, and where those proceedings would be commenced outside the EU/EFTA, it might still be appropriate to launch an action in the English courts as a pre-emptive strike. However, if such pre-emptive proceedings are not started the procedural difficulties will certainly be less than those arising from competing proceedings within "Europe."

Where proceedings have been started:

6.6. If proceedings have already been brought in breach of an English jurisdiction clause outside the EU/EFTA, or in breach of the London arbitration clause either inside or outside the EU/EFTA, the "offended party" can still commence proceedings in the English courts or before an English Arbitration Tribunal and will not be debarred from pursuing them. But beware the position with regard to arbitration may be about to change.

[1] A recent example of the contrary view is a short article by Professor Philippe Delebecque of the University of Paris – 1 (Pantheon – Sorbonne) which is published in the Gazette de la Chambre (see (www.arbitrage-maritime.org). Professor Delebecque touches in particular on the controversy over the enforceability of Arbitration Clauses as between Shipowners and receivers of cargoes under Bills of Lading.

6.7. If proceedings have already been brought in breach of an English jurisdiction clause inside "Europe" no proceedings can be brought here until the foreign court in those first proceedings has decided if it has jurisdiction and will hear the case. Any English proceedings started in these circumstances must be stayed.

Anti Suit Injunction:

6.8. At present, the remedy of an anti-suit injunction is available to protect a party who wishes to abide by a London arbitration clause when he faces threatened or existing proceedings inside or outside the EU/EFTA. But beware a change in Europe.

6.9. The remedy of an anti-suit injunction is available to protect the party who wishes to abide by an English jurisdiction clause when faced with competing proceedings threatened or commenced, outside the EU/EFTA. No such injunction is available to prevent proceedings within Europe.

Damages:

6.10. A party who wishes to abide by an English jurisdiction clause or a London arbitration clause can, if faced with competing proceedings brought in breach of such a clause, include an action for damages in the action brought in the English court or before London arbitrators for the purpose of seeking to recover additional legal expenses incurred as a consequence of the breach. An action could also be brought to recover any further losses suffered, however difficult to quantify.

Final observation:

6.11. Parties who wish to abide by English jurisdiction clauses or English arbitration clauses (and who wish to ensure that their counterparties do likewise) should, in the light of these concerns, review their cases carefully and if necessary act promptly and vigorously.

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This paper has been prepared by Rhys Clift, Partner with Hill Dickinson LLP. The contents of this paper are not intended to be a substitute for specific legal advice on individual matters. If you wish to discuss any issues raised in this paper, or for further information or advice please contact:

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ANNEX 1

Bullet Point Guide: Forum Shopping and Anti-Suit Injunctions

Type of Clause	EU/EFTA Countries	Non EU/EFTA Countries
English Jurisdiction Clause	Beware Court "first seized" rule. Consider pre-emptive strike. No Anti-Suit Injunction available.	Consider pre-emptive strike. Anti-Suit Injunction available.

Type of Clause	EU/EFTA Countries	Non EU/EFTA Countries
English Arbitration Clause	Court "first seized" irrelevant (but for how long)? Consider pre-emptive strike. Anti-Suit Injunction available (but for how long)?	Consider pre-emptive strike Anti-Suit Injunction available

Note: *This table sets out "snapshot" guidance at a glance. The table must be read in conjunction with the paper to which it is annexed.*

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ANNEX 2

Abstracts from European law materials

Section 1

The Brussels Convention 1968 as amended provides so far as relevant:

Article 1 – *"This Convention shall apply in civil and commercial matters whatever the nature of the Court or Tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to … Arbitration."*

Article 17 – *"If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction…"*

Article 21 – *"Where proceedings involving the same cause of action and between the same parties are brought in the courts have different Contracting States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."*

Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court."

Section 2

Council Regulation (EC) No. 44 / 2001 provides so far as relevant:

Article 1(1*) – "This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters."*

(2) - The Regulation shall not apply to: paragraph (b) arbitration".

Article 23 – *"If the parties, one or more of whom is domiciled in a Member State have agreed to the Court or that a Courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise".*

Article 27 – Paragraph 1 : *"Where proceedings involving the same cause of action and between the same parties are brought in the Courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established"*.

Paragraph 2 – Where the jurisdiction of the Court first seized is established, any Court other than the Court first seized shall decline jurisdiction in favour of that Court.

Chapter III headed "Recognition and Enforcement" in Articles 32-52 inclusive makes specific provision about recognition and enforcement of judgments.

Article 34 (4) provides:

"Judgment shall not be recognised:

***Paragraph 4** – If it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed."*

Rhys Clift – February 2007