DECISIONS OF BRITISH COURTS DURING 2016 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

B. PRIVATE INTERNATIONAL LAW

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I. Applying foreign limitation law under the Foreign Limitation Periods Act 1984: Iraqi Civilians v Ministry of Defence

Historically, English Courts applying foreign law disregarded limitation rules of the foreign law that was otherwise applicable, on the grounds that these were matters of procedure for the lex fori. That changed with the enactment of the Foreign Limitation Periods Act 1984 (FLPA), s 1 of which provides as follows:

Application of foreign limitation law.

(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings ...; and (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

... (4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

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2 Iraqi Civilians v Ministry of Defence [2016] UKSC 25, [2016] 1 WLR 2001: Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lords Mance, Sumption, and Reed JJSC (aff'ing [2015] EWCA Civ 1241, [2016] 1 WLR 1290). One of the authors was instructed as Junior Counsel for the Iraqi Civilians; any opinions expressed in this note are those of the authors alone.
The law of a country relating to limitation is defined by s 4 of FLPA as follows:

so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include ... references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period...

For this purpose, the ‘relevant law’ means ‘the procedural and substantive law applicable apart from any rules of private international law, by the courts of that country’ (s 4(2) FLPA).

In Iraqi Civilians, the Supreme Court considered the meaning of these statutory provisions for the first time. It held that their effect is to require the English Court to ascertain the relevant foreign limitation law and then transpose it to the context of English proceedings; and that a legitimate consequence of the process of transposition is that facts which the foreign law of limitation would treat as relevant to foreign proceedings can be treated as irrelevant where proceedings are brought in England.

A group of more than 600 Iraqi civilians had brought claims against the Ministry of Defence in tort, alleging unlawful detention and/or physical maltreatment at the hands of British armed forces between 2003 and 2009. A preliminary issue arose as to whether the claims had been brought in time in accordance with Iraqi limitation law. Article 232 of the Civil Code of Iraq provided for a limitation period of three years from the day on which the claimant became aware both of the injury and of the person who caused it. Applying this rule, most of the claimants’ claims would have been brought out of time. The claimants relied, however, on article 435 of the Iraqi Civil Code, which suspended the running of time on one or other of the following grounds:

by a lawful excuse such as where the plaintiff is a minor or interdicted and has no guardian or is absent in a remote foreign country, or where the case is between spouses or ascendants and descendants, or if there is another impediment rendering it impossible for the plaintiff to claim his right.

The claimants relied on the latter clause, maintaining that the British invasion of Iraq amounted during the material period to an ‘impediment rendering it impossible’ for them to ‘claim’ their ‘right[s]’ in an Iraqi Court. The impediment arose in consequence of Coalition Provisional Authority Order 17 (CPA 17), which had and still has the force of law in Iraq, and which granted immunity to coalition forces in Iraq (including British forces) from Iraqi legal process. In response, the Defendant contended that article 435 of the Iraqi Civil Code was inapplicable, because it had always been possible for the claimants to sue in England.
At first instance, Leggatt J considered that the answer to the preliminary issue turned on the meaning of article 435 of the Iraqi Civil Code and specifically its territorial scope. He accepted the claimants’ expert evidence to the effect that an Iraqi Court would construe article 435 as referring to impediments in Iraq. He therefore found that there was such an ‘impediment’ given CPA 17, with the effect that the limitation period under article 232 of the Iraqi Civil Code was suspended. The Court of Appeal held that Leggatt J had erred in treating the matter as depending on the territorial scope of article 435 as a matter of Iraqi law. Rather, Tomlinson LJ (with whose judgment Lord Dyson MR and Vos LJ agreed) held that the relevant question was one of English private international law, and specifically, the meaning of ‘the law of that other country relating to limitation’ under FLPA, s 1(1). The Court of Appeal held that CPA 17 was not such a law; it was a mere procedural bar to proceedings in Iraq, which had no relevance in an English Court. Accordingly, there was no ‘impediment’ under article 435 of the Civil Code that fell to be applied in an English Court.

In the Supreme Court, Lord Sumption (with whose judgment Lord Neuberger, Baroness Hale, Lord Mance and Lord Reed agreed) held that the Court of Appeal had reached the right result but for the wrong reasons. He held that the relevant question was how an English Court should apply foreign limitation law. He explained that that involved a process of transposition, and that in some cases it would be necessary to ignore in English proceedings facts that would be treated as relevant under the applicable foreign limitation law:

13 The real question is whether it is legally relevant when the claimants have brought proceedings in England what impediments might have prevented similar proceedings in Iraq. The judge, as I have observed, regarded that as depending on the territorial ambit of article 435 as a matter of Iraqi law. On that footing it is obvious that a procedural time bar arising under Iraqi law applied only in Iraq. But in my opinion, this was not a question of Iraqi law but of English law. In English proceedings, the relevant law is the Foreign Limitation Periods Act 1984. Where the cause of action is governed by a foreign law, the Act requires an English court to ascertain the relevant rules of the foreign law of limitation and then to apply it to proceedings in England. Because the foreign law of limitation will have been designed for foreign proceedings, that necessarily involves a process of transposition. There may be facts which the foreign law of limitation would treat as relevant to foreign proceedings but which are irrelevant to proceedings in England.

14 It is sometimes said that the ascertainment of foreign law involves asking what the foreign court would decide. That is of course true, but the English court is concerned only with what the foreign court would decide to be the relevant foreign law. It is the function of the English court to apply that law to the relevant facts. In just the same way, where the foreign law confers a discretion on the foreign court, an English court exercising that discretion

Ibid.
under section 1(4) of the 1984 Act would do so ‘in the manner in which it is exercised in comparable cases’ by the foreign court, but taking account of those respects in which because the proceedings are being brought in England the facts are not comparable.

15 It follows that where the Iraqi law of limitation depends for its operation on some fact about the proceedings, the relevant fact is that applicable to the actual proceedings, viz those brought in England, and not some hypothetical proceedings that the claimants have not brought in Iraq, and in this case could not have brought in Iraq. We are concerned with impediment and impossibility affecting the bringing of legal proceedings. That depends on the personal situation of the claimants in relation the relevant proceedings, namely those brought in England.

Adopting that approach, Lord Sumption held that when article 435 of the Iraqi Civil Code was transposed into the context of English proceedings, it was irrelevant whether the claimants were impeded from claiming their rights in Iraq; what mattered was whether the claimants could have claimed those rights in England during the material period.

II. Submission to the jurisdiction of a foreign court: Vizcaya Partners Ltd v Picard & Anor

Vizcaya v Picard was another case arising out of the fraudulent Ponzi scheme operated by Bernard Madoff. It involved a claim by the trustee of one of Mr Madoff’s insolvent companies to enforce in Gibraltar a default judgment obtained from a New York Court in avoidance proceedings against one of the investors who had been paid out before the fraud was discovered (Vizcaya, a BVI company). In support of its claim, the trustee contended that Vizcaya had impliedly submitted to the New York Court’s jurisdiction so that its judgment would be entitled to recognition as a matter of Gibraltar private international law on the recognition and enforcement of judgments in personam.

Dismissing Vizcaya’s application for reverse summary judgment, the Gibraltar Court held that the contention had a real prospect of success. It relied in this regard on two factors in particular. First, the presence of a New York governing law clause (clause 10) in the customer agreements that Vizcaya entered into with the relevant Madoff entities. Second, the evidence that had been adduced of New York law, to the effect that by agreeing to New York law to govern a contract a party becomes subject to New York jurisdiction in respect of it. Vizcaya appealed to the Privy Council. Following argument, the matter settled.

The Privy Council nonetheless gave judgment on account of the issues of public and international importance that the appeal raised. Giving the advice of the Board, Lord Collins took the opportunity to clarify the ‘content and scope of the rule that a foreign default judgment is enforceable against a judgment debtor who has made a prior submission to the jurisdiction of the foreign court (as distinct from a submission by appearance in the proceedings)’⁵. Among other matters requiring clarification was the question whether submission for the purposes of the rule had to be express or could be implied in an appropriate case. Following a detailed review of English authority stretching back to the nineteenth century, and various Commonwealth authorities too, Lord Collins identified the applicable principles as follows:⁶

First, the question is whether the judgment debtor agreed to submit to the jurisdiction of the foreign court. Second, the agreement does not have to be contractual in nature. The real question is whether the judgment debtor consented in advance to the jurisdiction of the foreign court. Third, it is commonplace that a contractual agreement or a consent may be implied or inferred. Fourth, there is no reason in principle why the position should be any different in the case of a contractual agreement or consent to the jurisdiction of a foreign court. Fifth, on analysis in context the authorities which deny the possibility of an implied agreement (especially Sirdar Gurdyal Singh v Rajáh of Farídkote⁷) really meant that there had to be an actual agreement (or consent).

Lord Collins explained that because what is required is an actual agreement to submit, that cannot be inferred from such matters as:⁸

1. the mere fact of being a shareholder in a foreign company or a member of a foreign partnership…;
2. the fact that the contract which was the subject of the foreign proceedings was made in the foreign country…;
3. the fact that the contract was governed by the law of the foreign country…;
4. the fact that the contract was to be performed in the foreign country…; or
5. the fact that the result of the contract being governed by the foreign law gives the foreign court jurisdiction under its own law.…

In the light of these principles, there was no basis for the Gibraltar Court’s conclusion that the trustee’s case was arguable. That case rested on the contention that an agreement to submit to the New York court’s jurisdiction was to be implied from the following facts and matters:⁹

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⁵ Ibid, [3]. As explained at [5] to [8], the rule was settled at common law in the nineteenth century, was placed on a statutory footing in the UK by the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, and is still applied or provides the background to statutory recognition schemes in various foreign countries, British dependencies, and Commonwealth countries.

⁶ Ibid, [56].

⁷ [1894] AC 670.

⁸ Vizcaya Partners Ltd v Picard & Anor (n 4), [58].

⁹ Ibid, [62].
the account agreements were deemed to be entered into in the state of New York and were to be performed in New York through securities trading activities that would take place in New York; the Vizcaya account was held in New York, and Vizcaya wired funds from its Bank Safra account to the BLMIS account in New York for application to its account with BLMIS and the conduct of trading activities in New York, and invested in BLMIS; Vizcaya purposefully availed itself of the benefits of conducting transactions in New York, out of which the action arose…

None of these matters provided a basis for implying an actual agreement to submit. Nor did the New York law evidence that was before the Gibraltar Court. Having summarised that evidence, Lord Collins explained why it did not avail the trustee as follows:

68 [the] evidence is therefore that under New York law: (1) the choice of New York law to govern the contract is effective to apply New York substantive law to all matters relating to the Account Management Documents; (2) the contractual relationship would have been governed by New York law even in the absence of an express choice; (3) Vizcaya agreed to the jurisdiction (or specific jurisdiction) of the New York courts by agreeing to the Account Management Documents which established an agency relationship and by carrying on business in New York (or transacting business in New York); (4) specific jurisdiction is established under the New York CPLR over a non-domiciliary who transacts any business within New York.

69 Even as a matter of New York law the evidence does not state that a choice of law carries with it an agreement to the jurisdiction of the New York court, since it only does so, according to the evidence, if there is also transaction of business in New York. All that is being said is that in the factual circumstances of the case the New York court has jurisdiction under the long arm statute.

70 Most relevant for present purposes, there is no suggestion that there is a term implied as a matter of fact or as a matter of law that Vizcaya consented to the jurisdiction of the New York court. For a term to be implied as a matter of fact, the trustee would have to adduce evidence of New York law, not on what the contract means, but that there is a rule of interpretation or construction, on the basis of which the Gibraltar court could conclude that clause 10 in the context of the choice of law and the deemed place of contracting amounts to a choice of jurisdiction. For a term to be implied as a matter of law, the expert would have to show what relevant terms are implied under New York law. There is no relevant evidence under either head. The statements that Vizcaya agreed to the jurisdiction of the New York court by agreeing to New York as the governing law and by transacting business in New York say no more than that these factors justified the assumption of jurisdiction under [New York law].

There was accordingly no evidential basis for the Gibraltar Court’s conclusion that by agreeing to New York law as the governing law of the customer agreements, Vizcaya had also agreed by implication to the jurisdiction of New York courts over it in respect of disputes arising out of those agreements. The appeal was accordingly allowed.

10 Ibid, [69]–[70].
For good measure, Lord Collins noted that the trustee’s argument in any event faced formidable difficulties. Even if an agreement to submit could be implied, it would only have extended to disputes relating to the customer agreements. That was not the nature of the avoidance proceedings in New York.

III. Anti-suit injunctions to enforce arbitration clauses: The Yusuf Cepnioglu

English Courts will ordinarily grant an anti-suit injunction to restrain a party from pursuing proceedings in breach of an arbitration clause unless there is a strong contrary reason. In such a case, there is no need to show that the respondent’s conduct in pursuing the foreign proceedings is independently vexatious or oppressive; it is ordinarily sufficient that the foreign proceedings are being pursued in breach of the applicant’s contractual rights under the arbitration clause. In The Yusuf Cepnioglu, the Court of Appeal held that the same approach applies where the respondent is not a party to the contract containing the arbitration clause, but is asserting rights thereunder.

The owners of the Yusuf Cepnioglu (the ‘Owners’) were insured by the claimant (the ‘P&I Club’) against third party claims on terms providing for English law and London arbitration (the ‘Policy’). The vessel having grounded, the Defendant charterers (the ‘Charterers’) commenced Turkish proceedings. They did so under Turkish legislation that conferred on them a right as victim to sue the P&I Club directly. The P&I Club applied to the English Court for an anti-suit injunction to restrain the Turkish proceedings.

The Judge granted the injunction. He held, in summary, that: (i) the rights being asserted in the Turkish proceedings were properly to be characterised as Owners’ contractual rights under the Policy; (ii) as Charterers were not party to the Policy, an anti-suit injunction could not be made on the ground that they were pursuing the Turkish proceedings in breach of contract, with the result that the approach of an granting anti-suit injunction unless strong contrary reason was shown was inapplicable; but (iii) Charterers’ conduct was nonetheless vexatious and oppressive and it was appropriate to grant the anti-suit injunction on that ground.

13 Donohue v Armco [2001] UKHL 64, [2002] 1 All ER 749 [24].
The Court of Appeal agreed with the Judge’s characterisation of the rights being asserted in the Turkish proceedings but held that he erred in concluding that it was necessary to show vexation and oppression in order to justify anti-suit injunctive relief. The correct approach was instead to treat the case as analogous to those in which foreign proceedings are being pursued in breach of contract and to grant anti-suit relief in the absence of any strong contrary reason. In this, the Court followed its decision in *The Jay Bola*¹⁴ rather than its later decision in *The Hari Bhum (No 1)*,¹⁵ which had been criticised.¹⁶ The Court held that Charterers could not assert Owners’ contractual rights under the Policy without recognising the contractual obligation to arbitrate to which those rights were subject. The P&I Club was to be regarded as having an equitable right to require Charterers to arbitrate and that right would be enforced by injunction unless strong contrary reason was shown.

The Supreme Court has granted Charterers permission to appeal.

IV. Issue estoppel and *forum non conveniens* waivers: *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd*¹⁷

The English proceedings in *Standard Chartered Bank* were part of a multi-jurisdiction dispute between entities operating a Tanzanian power station and the bank that financed it. This gave rise to proceedings in England, Tanzania, and New York. One of the issues for the Court of Appeal was whether the English proceedings should be stayed for Tanzania on *forum non conveniens* grounds notwithstanding the presence in the relevant agreements of clauses that expressly waived any objection on those grounds to the English Court exercising its jurisdiction. Another issue was whether that question was determined by an issue estoppel arising from proceedings in New York, which had been dismissed on the ground that Tanzania was the more appropriate forum.

Simplified somewhat, the background was as follows. A Tanzanian company entered into a facility agreement to finance the construction of a power plant in 1997 and its then 30% shareholder (the ‘Shareholder’) enter into a shareholder support deed and a charge of shares. The loan facility and security were sold to a Hong Kong subsidiary of Standard Chartered Bank (SCB), an English company. A Malaysian subsidiary of


¹⁵ *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1)* [2005] 1 All ER (Comm) 715.


SCB was appointed as the facility agent. The facility agreement and shareholder support deed contained English law and non-exclusive English jurisdiction clauses. The agreements also contained *forum non conveniens* waivers and an express acceptance of the possibility of current proceedings in different jurisdictions.

The power plant was the subject of some scandal in Tanzania: it stopped functioning in 2007 but then re-opened in 2009; there were allegedly unauthorised transfers of funds; and, in November 2014, the Public Accounts Committee of Tanzania found there had been corrupt payments made to ministers including the Attorney General. The Tanzanian company defaulted on the facility agreement, and the Hong Kong subsidiary of SCB appointed an administrative receiver over its assets. Litigation ensued.

In June 2013, the Shareholder brought proceedings in tort against SCB (but not its subsidiaries) in New York. Upon SCB’s application, the New York proceedings were dismissed on *forum non conveniens* grounds in favour of Tanzania. Prior to the judgment of the Court in New York, the Shareholder sold its shareholding to a third party, which sale, the SCB subsidiaries alleged, was in breach of the charge over the shares. In November 2013, the Shareholder commenced proceedings in Tanzania against SCB, and SCB’s Hong Kong and Tanzanian subsidiaries, raising essentially the same arguments that were put before the New York court. In December 2013, the Hong Kong subsidiary of SCB then brought proceedings in England, claiming (among other things) sums due from the Tanzanian company under the facility agreement, and declaratory and injunctive relief against the Shareholder and new shareholders. The Defendants applied for a stay of the English proceedings on the basis that Tanzania was the most appropriate forum or on case management grounds. They also applied for a stay on grounds of issue estoppel and abuse of process, in the light of the position taken by SCB and the subsequent decision of the court in New York.

Flaux J (as he then was) refused to grant a stay on any of these grounds. He held that the contractual waivers were not determinative because a stay could in any case be granted by the Court if: (i) very strong or exceptional grounds were demonstrated; and (ii) those grounds could properly be described as unforeseen and unforeseeable at the time of agreement. Flaux J nonetheless concluded that such grounds were absent on the facts before him. He found that it was foreseeable that proceedings might be brought in both Tanzania as well as in England, and held that the Tanzanian proceedings were not sufficiently near trial for a stay to be justified. He also rejected the arguments on issue estoppel and found that there was no abuse of process.

The Defendants appealed. The SCB subsidiaries opposed the appeal. They also contended by respondent’s notice that Flaux J had erred in
concluding that a case could ever be stayed on *forum non conveniens* grounds notwithstanding a contractual waiver of such grounds.

The Court of Appeal upheld Flaux J’s judgment. Longmore LJ (with whose judgment Black and Hamblen LJJ agreed) assumed in the Defendants’ favour the correctness of Flaux J’s conclusion that a stay could in principle be granted notwithstanding the contractual waivers provided that strong or exceptional grounds were demonstrated. He upheld that Flaux J’s conclusion that there were no such grounds. In the result, there was also no need to determine the point raised by the respondent’s notice.

As to the question of issue estoppel and abuse of process, Longmore LJ again upheld Flaux J’s conclusion. He set out the three requirements for an issue estoppel identified in *The Sennar (No 2)*;18 that is (i) the judgment in the earlier proceedings must be a final and conclusive judgment on the merits from a court of competent jurisdiction; (ii) the parties or privies in the earlier action and the later action must be the same; and (iii) the issue in the later action must be the same issue as that decided in the earlier action. Longmore LJ held that there was no such estoppel because SCB, which had been party to the proceedings in New York, was not the same party as the Hong Kong and Malaysian subsidiaries of SCB who were litigating in London, nor were the subsidiaries to be treated as the privies of SCB for the purpose of any issue estoppel. The subsidiaries may have had a general commercial interest in the outcome of the New York proceedings but that, on its own, was insufficient. Longmore LJ noted that, if the New York proceedings had concluded that SCB was or was not liable to the Shareholder, the Hong Kong subsidiary would not have been bound by such a conclusion: ‘[i]t would, therefore, be curious if [the Hong Kong subsidiary] could be bound by interlocutory decisions along the way’.19 Further, the issue litigated in New York was ‘which country was the appropriate forum for VIP’s claim in tort against SCB?’ This was not the same issue as that arising in England, which was ‘which country was the appropriate forum for the subsidiaries’ contractual claim against the [S]hareholder?’ In the absence of an issue estoppel, there was no other reason why there would have been abuse of process by the subsidiaries.

Finally, there arose the question of a stay on case management grounds. As to that, Longmore LJ held that such a stay could in principle be granted notwithstanding the contractual waivers provided that it was one of those ‘rare and compelling cases’ where such a stay was necessary for example to promote orderly litigation.20 There was, however, no reason to interfere with the exercise of Flaux J’s discretion that case

18 *The Sennar (No 2)* [1985] 1 WLR 490, 499.
19 Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd (n 17), [36].
20 Longmore LJ referring in this regard to the guidance of Lord Bingham CJ (as he then was) in *Reichold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173.
management considerations at the time the stay application was made did not justify a stay.

V. Jurisdiction in matters relating to individual contracts of employment: *Bosworth v Arcadia Petroleum Ltd* 21

The European instruments on jurisdiction in civil and commercial matters contain special provisions applicable to ‘matters relating to individual contracts of employment’, in articles 18 to 21 of the Brussels I Regulation,22 articles 18 to 21 and Lugano Convention23 and articles 20 to 23 of the Brussels I Recast Regulation.24 These special provisions confer protection on employees as weaker parties by (among other things) requiring that they be sued by their employer in their state of domicile in respect of matters relating to their contract of employment.

An important question that arises in relation to these provisions is their scope, i.e. what claims do they cover; and in particular, do they cover claims that are not characterised as claims under the employment contract as a matter of applicable national law? The Court of Appeal in *Bosworth* addressed this issue in relation to claims for conspiracy, breach of fiduciary duty, dishonest assistance and knowing receipt.

The basic facts were these. The claimants (three members of the Arcadia Group and the owner of the group) brought proceedings in England alleging that they were the victims of a fraud committed by Mr Bosworth and Mr Hurley (respectively, the *de facto* CEO and CFO of the group at the material times) along with eight other Defendants. It was common ground that Messrs Bosworth and Hurley were employees of two of the claimants at various times. The gist of the claim was that the defendants had siphoned off sums from the Arcadia Group for their own benefit and to the detriment of the Group.

Messrs. Bosworth and Hurley challenged the English Court’s jurisdiction. Being domiciled in Switzerland, they relied upon articles 18 and 20 of the Lugano Convention (which do not materially differ from the equivalent provisions under the Brussels I Regulation and Recast Regulation, so far as the scope of the ‘individual contract of employment’ provisions is concerned). The claimants’ original statement of case had included claims against Messrs. Bosworth and Hurley for breach of their employment contracts. These had been removed by the time the matter

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23 IE Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988.
came before Burton J at first instance. The bulk of the jurisdiction challenge failed. Burton J’s essential reasoning was that ‘this is a case relating to alleged wrongs caused by a combination of wrongdoers, not a claim relating to an individual contract of employment’, and accordingly nothing stood in the way of the ‘sensible course’ of all the alleged co-conspirators being tried together. This was subject to one qualification: Burton J held that the ‘individual contract of employment’ provisions did apply to the claims by the two claimant employers alleging breach of fiduciary duty during the respective periods of employment. Accordingly, he concluded that the Court had no jurisdiction in this limited respect but dismissed the balance of the jurisdiction challenge.

Messrs Bosworth and Hurley appealed. Their essential contention was that the touchstone for the scope of the ‘individual contract of employment’ provisions was whether the claims against them could have been pleaded as breaches of their employment contracts. Any other test, they said, would mean ‘ceding the jurisdictional issue to the pleader’s choice’ by allowing claimants to sidestep the dedicated jurisdictional provisions by tactically removing their contractual claims. Applying their proposed test, Messrs Bosworth and Hurley noted that on the facts, the claims against them could have been (and previously had been) pleaded as claims for breach of contract.

In response, the claimants submitted that the test was not a mechanistic question of how the claims could have been pleaded; rather, it was ‘a test of substance as to the character of the conduct complained of’. Applying that test, the claims against Messrs Bosworth and Hurley were as a matter of substance ‘free-standing, independent claims’. Further, the claimants submitted that if Messrs Bosworth and Hurley were right in their contention that it was necessary to ask whether the claim could have been pleaded in contract, then the conspiracy claim could never be heard as against all conspirators in a single jurisdiction and ‘(t)hat was not a result that a rational legal system could have intended’.

The Court of Appeal dismissed the appeal in its entirety. Gross LJ (with whose judgment Gloster and Macur LJJ agreed) dealt separately with the conspiracy claim and the claim for breach of fiduciary duty before ruling briefly that the same reasoning applied to the claims for dishonest assistance and knowing receipt. As for the conspiracy claim,

25 Bosworth v Arcadia (n 21), [10] and [19].
26 Ibid, [20].
27 Ibid.
28 Ibid, [21].
29 Ibid, [23].
30 Ibid.
31 Ibid, [24].
32 Ibid.
33 Ibid, [25].
34 Ibid, [22]–[74].
35 Ibid, [75]–[100].
36 Ibid, [101].
Gross LJ first analysed English case law on the employee-protective provisions in issue, and principally the High Court decision in *Switchenbank Foods v Bowers*37 as later overruled by the Court of Appeal in *Alfa Laval Tumba v Separator Spares International*.38 The *Switchenbank* decision had adopted a formalistic test based on ‘legal relevance’. But the Court of Appeal in *Alfa Laval* rejected that approach, Longmore LJ explaining that the correct approach was the following:

[i]t is much better to stick with the actual words of article 18(1) and ask oneself the question ‘do the claims made against an employee relate to the individual’s contract of employment?’

This is a broad test which should be comparatively easy to apply. Sir Andrew Morritt C indicated in argument that (without proposing a test of any kind) it might in many cases be helpful to ask whether the acts complained of by the employer constitute breaches of contract by the employee. If so, the claims would be likely to “relate” to the contract of employment. If not, not.39

Gross LJ proceeded to consider the case law of the Court of Justice of the European Union on the matter,40 and concluded that this was not inconsistent with the English authorities.41

Having analysed the authorities, Gross LJ rejected the touchstone proposed by Messrs. Bosworth and Hurley because that test (ie whether the claims against them could have been pleaded as breaches of their employment contracts) was ‘mechanistic and of potentially unacceptable width’.42 Neither the domestic nor the European jurisprudence required the adoption of such a mechanistic test.43 As Gross LJ explained the position as follows:

the correct approach as a matter of English law is to consider the question whether the reality and substance of the conduct [complained of] relates to the individual contract of employment, having regard to the social purpose of Section 5 [of the Lugano Convention].44

Applying this test, Gross LJ concluded that the conspiracy claim did not relate to the employment contracts of Messrs. Bosworth and Hurley. This was because (i) the key to the alleged fraud lay in the defendants’ *de facto* roles as CEO and CFO rather than in their contracts of employment;45 (ii) any connection with the contracts was tenuous and

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39 *Alfa Laval* (n 38), [24]–[25] per Longmore LJ.
41 *Bosworth v Arcadia* (n 21), [63](ii).
42 Ibid, [64](i).
43 Ibid, [65]–[66].
44 Ibid, [65].
45 Ibid, [68].
immaterial because the contracts merely provided the opportunity for the allegedly nefarious activity and would not feature at all in the resolution of the claims; (iii) while it would go too far to say that every conspiracy necessarily falls outside the special provisions on employment, on the facts it was a relevant consideration that two of the claimants and eight of the defendants to the conspiracy claim were not parties to any employment contract; (iv) the facts of *Alfa Laval* were distinguishable because in that case there was ‘no wider-ranging conspiracy, free-standing and outside the contracts of employment’; (v) having regard to the ‘policy and social purpose’ of the ‘individual contract of employment’ provisions, Messrs. Bosworth and Hurley were employees but ‘(i)t does not, however, follow that there is a policy interest in shoe-horning the conspiracy claims against them into the framework of Section 5 [of the Lugano Convention]’; and (vi) in sum, there was nothing standing in the way of the ‘sensible course’ adopted by Burton J at first instance (namely, for all of the alleged co-conspirators being tried in the same jurisdiction).

As regards the claim for breach of fiduciary duty, here Messrs. Bosworth and Hurley made a different argument. As noted above, the one respect in which Burton J had found in their favour at first instance was by holding that the ‘individual contract of employment’ provisions applied to the claims by the two claimant employers for breaches of fiduciary duty during the respective periods of employment. Messrs Bosworth and Hurley argued before the Court of Appeal that this did not go far enough, and that the claims for breach of fiduciary duty by all claimants and in respect of all periods of time fell within the ‘individual contract of employment’ provisions. Their contention was as follows:

the claims for breach of fiduciary duty were contractual in nature even for the ‘non-employing entities’ because they follow from the Appellants’ assumption of offices... The Appellants, as Arcadia Group CEO and CFO, had provided services and performed functions not limited to the employing entity; they were provided on group-wide basis. For the purposes of Art.18 [of the Lugano Convention], the separate corporate entities were to be disregarded—it was the Group which mattered as a socio-economic entity. 50

In support of that contention, Messrs Bosworth and Hurley sought to rely on two English authorities holding that, on the facts of those cases, the ‘employers’ included the corporate counterparties to the employees’ bonus contracts and not just the counterparties to the main contracts of

46 Ibid, [69].
47 Ibid, [70].
48 Ibid, [71].
49 Ibid, [72].
50 Ibid, [77].
employment: *Samengo-Turner*\(^{51}\) and *Petter*.\(^{52}\) Gross LJ distinguished these authorities, on the basis that Messrs Bosworth and Hurley did not have any binding contractual bonus arrangements with any other members of the Arcadia Group.\(^{53}\) As Gross LJ emphasised, *Samengo-Turner* and *Petter* ‘do not stand for some wider proposition as to disregarding the separate corporate personality of different entities in a group of companies’.\(^{54}\) Accordingly, Gross LJ dismissed the appeal in respect of the claims for breach of fiduciary duty, applying the same focus on substance: ‘it is necessary to guard against over-elaboration. The starting point is to consider the reality or substance of the matter, as a matter of fact’.\(^{55}\)

The Supreme Court has granted permission to appeal.

VI. Lis Pendens and the date of seisin: *Barclays Bank Plc v ENPAM*\(^{56}\)

Where proceedings are brought between different Member State courts, articles 27 and 28 of the Brussels I Regulation give priority to the court first seised. That is so even if the case involves an exclusive jurisdiction agreement for another court.\(^{57}\) The European legislator has since recognised the potential for this to permit ‘abusive litigation tactics’ and has accordingly made amendments under the Brussels I Recast Regulation.\(^{58}\) *Barclays Bank plc v ENPAM* was decided before these amendments came into force. It involved an attempt by the claimant bank (Barclays) to obtain in England relief in respect of proceedings brought first in Italy by an Italian pension fund (ENPAM) in breach of English jurisdiction clauses.

The relevant finance agreements contained English jurisdiction clauses and indemnities under which ENPAM agreed to indemnify Barclays against the consequences of any breach of the agreement. In June 2014, ENPAM commenced proceedings in Italy with two heads of claim. The main claim was brought in tort for damages for breach of the duty of good faith and failure to comply with Italian financial regulations; the secondary claim was for a declaration that, as a result of such misconduct, the agreements between the parties should be declared null

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\(^{51}\) *Samengo-Turner v J\&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [2007] 2 All ER (Comm) 813.

\(^{52}\) *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2015] CP Rep 47.

\(^{53}\) *Bosworth v Arcadia* (n 21), [89].

\(^{54}\) Ibid.

\(^{55}\) Ibid, [94].


\(^{57}\) Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2005] QB 1.

\(^{58}\) Art 31(2) of the Brussels I Recast Regulation provides for an exception to the basic ‘first seised’ rule where there is an exclusive jurisdiction clause in favour of a Member State court and proceedings have been commenced in that court.
and void or cancelled. In September 2014, Barclays commenced pro-
cceedings against ENPAM in the English Commercial Court seeking
damages for breach of the jurisdiction clauses and to enforce the indem-
nities. ENPAM responded by applying for an order to stay the English
proceedings under article 27 or 28 of the Brussels I Regulation.

At first instance, Blair J refused to stay the English proceedings, and
granted summary judgment on Barclays’ claim. Blair J held that the
proceedings did not involve the same cause of action within the meaning
of article 27; he noted in this regard that, in the Italian proceedings,
ENPAM had not expressly alleged that the jurisdiction clauses were
affected by Barclays’ alleged illegal conduct, and had not sought relief
in respect of such clauses. And, he refused to exercise his discretion to
stay proceedings under article 28, because he did not think the common
issues were substantial and he was satisfied that the English jurisdiction
clauses were applicable. ENPAM appealed.

Pending its appeal in England, ENPAM filed a further pleading in
Italy. This included a specific averment that the jurisdiction clauses in
the agreements were invalid. ENPAM alleged that, under Italian pro-
cedural law, this amendment to the claim took effect as from the date of
the original claim. It therefore sought permission to adduce it as fresh
evidence before the Court of Appeal.

For the purposes of article 27(1), the Court of Appeal had to determine
whether the Milan court became seised of the claim in respect of the
jurisdiction clauses only from the date of the amendment, or from the
time that the Milan action commenced. This question had not been
determined previously, although Rix LJ had indicated in obiter dicta,59
and the editors of Dicey, Morris & Collins agreed,60 that a court would
become seised of an amendment only upon the amendment being made;
however, Lord Clarke had commented in The Alexandros T that the
matter was not acte clair.61 Moore-Bick LJ (with whose judgment
Tomlinson LJ and Arnold J agreed) followed Rix LJ’s approach:

I think that the expression “proceedings involving the same cause of action and
between the same parties” in Article 27 is to be read as a whole and that such
proceedings do not come into existence, and the court is not seised of the rele-
vant claim, until the cause of action has been raised in proceedings before the
court, whether originally or by amendment.62

As a result, the amendment to the claim in Italy came ‘too late to affect
the issues in the appeal’.63

59 FKI Engineering Ltd v Stribog Limited [2011] 1 WLR 3264, [84].
60 Dicey, Morris & Collins, The Conflict of Laws (15th ed, Sweet & Maxwell 2012), Vol I, pp 579-
580, paras 12–69.
61 Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (“The Alexandros T’)
[2013] UKSC 70, [2014] 1 All ER 590, [72].
62 Barclays Bank v ENPAM (n 56), [19].
63 Ibid.
The Court of Appeal then considered whether the (unamended) claim in Italy and the claim in the English proceedings involved the same cause of action. The Court applied the principles set out in *The Alexandros T*, and concluded that the causes of action were different: they had neither ‘le même objet’ (the same end in view) nor ‘la même cause’ (the same facts and rules of law relied upon as the basis for the action); the factual basis of the claims was different, and the remedial aim of the proceedings was different. Nor did the Court see any reason to overturn the judge’s decision not to stay the English proceedings under article 28.

Finally, ENPAM challenged the judge’s granting of summary judgment on the English proceedings on the basis that such a binding decision would infringe the European principle of mutual trust between the courts of Member States. However, this issue had already been addressed by the decision of the Court of Appeal in *The Alexandros T*, in which it was held that granting summary judgment did not so interfere with the foreign court’s jurisdiction; Longmore LJ specifically rejected any analogy between ordering summary judgment and granting an anti-suit injunction. It followed that ENPAM’s appeal failed in its entirety.

The Supreme Court has granted permission to appeal.

VII. Foreign mandatory rules: *Banco Santander Totta SA v Cia Carris de Ferro de Lisboa SA*65

In *Banco Santander*, the claimant bank brought proceedings in England seeking payment of sums due under long-term interest rate swap agreements expressly governed by English law. The Defendant counterparties, who were Portuguese transport companies, raised in their defence certain allegedly mandatory provisions of Portuguese law. This defence failed at trial and before the Court of Appeal. The case sheds light on two important questions: (i) when are the mandatory rules of one legal system applicable despite the parties’ choice of a different governing law; and (ii) what amounts to a ‘mandatory’ rule of law for this purpose?

In *Banco Santander*, these two questions arose under the Rome Convention because the relevant swap agreements were all concluded prior to 17 December 2009. The centrally relevant provision is article 3(3) of the Rome Convention, which provides as follows:

66 Ie the Convention 80/934/ECC on the Law Applicable to Contractual Obligations, which opened for signature in Rome on 19 June 1980.
The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called ‘mandatory rules’. Article 3(3) of the Rome I Regulation is in similar terms:

Despite the change in terminology, recital 15 of the Rome I Regulation confirms that ‘no substantial change is intended as compared with article 3(3) of the [Rome Convention]’. Accordingly, the decision in Banco Santander will no doubt be instructive for new cases that fall to be dealt with under the Rome I Regulation.

The Defendants in Banco Santander sought to rely on two allegedly mandatory rules of Portuguese law at trial. These were the Portuguese rules on ‘games of chance’ and article 437 of the Portuguese Civil Code. Article 437 of that Code entitles a contractual party to terminate or modify a contract if there has been an abnormal change of circumstances as follows:

Abnormal change in circumstances
1. If the circumstances on which the parties based their decision to enter into a contract have undergone an abnormal change, the injured party is entitled to termination of the contract or to modify it in accordance with principles of equity if fulfilment of that party’s obligations under the contract would be a serious breach of the principles of good faith and if the abnormal changes do not form part of the risks covered by the contract.
2. If termination is requested, the counterparty may oppose by stating that it accepts modification of the contract in accordance with the previous paragraph.

Blair J rejected all of the defences raised.67 He concluded that the ‘elements relevant to the situation’ under article 3(3) of the Rome Convention included all matters which pointed to situation having an international character rather than a purely domestic one.68 On the facts of the case, the relevant elements included several which pointed to an international situation, Blair J explaining that:

because of the right to assign to a bank outside Portugal, the use of standard international documentation, the practical necessity for the relationship with a bank outside Portugal, the international nature of the swaps market in which the contracts were concluded, and the fact that back-to-back contracts were concluded with a bank outside Portugal in circumstances in which such hedging

68 Ibid, [404].
arrangements are routine, the court’s conclusion is that article 3(3) of the Rome Convention is not engaged because all the elements relevant to the situation at the time of the choice were not connected with Portugal only. In short, these were not purely domestic contracts. Any other conclusion, the court believes, would undermine legal certainty.69

In light of this conclusion, the further question regarding the ‘mandatory’ character of the relevant rules of Portuguese law did not strictly arise for decision. But, given that he had heard full argument, Blair J recorded his finding that article 437 of the Portuguese Civil Code was not mandatory because as a matter of Portuguese law it was open to an injured party to waive the application of article 437 after circumstances had arisen that would entitle the party to rely on it. His reasoning in this regard is instructive regarding the proper construction of article 3(3) of the Convention:70

[i]t is sufficient to take a rule out of article 3.3 of the Rome Convention, in the court’s judgment, if the rule can be disapplied by agreement between the parties whether ex ante or ex post. To take the present case, this distinguishes article 437 of the Civil Code, which deals with change of circumstances, from article 1245, which invalidates gaming and betting contracts. [The claimant] accepts that this is mandatory. Plainly, parties cannot contract out of rules applicable to gaming and betting contracts in any circumstances.

This conclusion seems consonant with commercial sense. All modern legal systems have to provide for the situation in which following the parties’ agreement, there has been a fundamental change of circumstances. Depending on the precise provision, outcomes may be different, but at least in the context of financial contracts like swaps, there seems no reason why the issue should not be referred to the law chosen by the parties.

The Defendants appealed to the Court of Appeal only in respect of article 437 of the Civil Code. Their grounds of appeal were in summary that the judge erred: (i) in principle, by adopting an overbroad approach to the ‘elements relevant to the situation’ under article 3(3) of the Rome Convention; (2) in his application of article 3(3), by taking into account a number of irrelevant factors; and (3) in his conclusion that the possibility of ex post waiver deprives article 437 of the Civil Code of its mandatory character.

The Court of Appeal rejected grounds (i) and (ii) and therefore upheld the Judge’s decision as to the ‘elements relevant to the situation’ under article 3(3) of the Rome Convention. Accordingly, the appeal was dismissed. On the further question concerning the ‘mandatory’ character of article 437 of the Civil Code, the two reasoned judgments in the Court of Appeal expressed divergent obiter views. Sir Terence Etherton MR (with

69 Ibid, [411].
70 Ibid, [506]–[507].
whose judgment Sir Martin Moore Bick agreed) considered that article 437 was mandatory and the judge had erred on this point. Longmore LJ gave a short judgment setting out his doubts on the point and declining to express his own concluded view given that the point did not arise for decision.

Turning first to the ‘elements relevant to the situation’ under article 3(3) of the Rome Convention, the essence of the Defendants’ contention was that the relevant elements are ‘confined to objective elements which, in the absence of the express choice of law by the parties, would be relevant and determinative of the proper law applying conflict of laws principles, and so connections which are not specific to a particular legal system are irrelevant’.71 The Defendants relied in this regard on the approach of Paul Walker J in Dexia Crediop SpA v Comune di Prato.72 There it was held that the use of the standard ISDA form (the same form used for the swap agreements in Banco Santander) was not an relevant element under article 3(3) since, absent the express choice of law provision, the standard form is not of itself connected to a particular country.

The Master of the Rolls (with whom Longmore LJ agreed on this point) rejected the Defendants’ interpretation of article 3(3) for six main reasons.73 First, although the Rome Convention is defined in article 1(1) to apply to ‘any situation involving a choice between the laws of different countries’, it does not follow that the only factors that can be ‘relevant’ under article 3(3) are those which determine the choice between laws.74 Second, article 3(3) is ‘properly to be approached as a limited exception to the policy or principle or starting point of party autonomy and, as such, it is to be construed narrowly’.75 Third, the defendants’ proposed interpretation would create a ‘much wider exception to the fundamental principle of party autonomy encapsulated in article 3(1) than that for which [the claimant] contends and which the judge found’.76 Fourth, the language of article 3(3) does not support the defendant’s interpretation: if the intention had been to limit the relevant elements to those which determine the applicable law in the absence of express choice then ‘the drafter could have used the familiar and simple conflict of laws language of ‘close connection’, which one finds in article 4’, but conspicuously did not do so.77 Fifth, to the extent that Paul Walker J in Dexia had adopted a different approach, the Master of the Rolls respectfully disagreed.78 Finally, the defendants’ attempted analogy with the 1955 Hague Convention on the Law Applicable to International Sales of Goods took the matter no further.79 For all

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71 Banco Santander (n 65), [28].
72 [2015] EWHC 1746 (Comm).
73 Banco Santander (n 65), [41]–[57].
74 Ibid, [42]–[43].
75 Ibid, [46].
76 Ibid, [51].
77 Ibid, [53].
78 Ibid, [54].
these reasons, the Master of the Rolls rejected the defendants’ interpretation and concluded as follows:

I agree with the judge’s conclusion [2016] 4 WLR 49, at para 404, that the inquiry under article 3(3) includes elements that point directly from a purely domestic to an international situation. Expressing the same point in a different way, I accept [the claimant’s] submission, that the only question under article 3(3), so far as relevant to this part of the appeal, is whether the situation is purely domestic.80

The Master of the Rolls proceeded to uphold the judge’s application of article 3(3) to the facts of the case, noting in particular that the application of article 3(3) is an ‘evaluative exercise’ and that the court should be ‘particularly cautious’ about interfering with an evaluation by ‘an expert and specialist court, the Financial List’.81 Accordingly, the appeal was dismissed. The situation was not a purely domestic one and so the defendants could not avail themselves of article 3(3).

The question whether article 437 of the Portuguese Civil Code was a ‘mandatory’ rule for the purposes of article 3(3) of the Rome Convention accordingly did not arise. However, the Master of the Rolls expressed the obiter view that the possibility of ex post waiver does not deprive a rule of its mandatory character:82

I do not agree with the judge that an ex post agreement not to rely on article 437, following the occurrence of a particular risk, means that it is derogable for the purposes of article 3(3). Derogation, in the context of article 3(3) of the Rome Convention, involves a disapplication of the rule of law in question. An ex post waiver of a right to rely on article 437 is not a disapplication. It is simply a voluntary refusal to enforce rights which have arisen.

On this point, however, Longmore LJ sounded a ‘note of caution’ in his short judgment:

I think there is something to be said for the view that a force majeure provision of a national law (such as article 437) is not necessarily a provision which is non-derogable within the terms of article 3(3) of the Rome Convention. It effectively fills a gap which the parties have left unexpressed in their agreement; if filling every such gap is to be regarded as non-derogable provision, that would mean that much of a country’s contract law would have to be regarded as non-derogable. That may indeed be the case but I would prefer to leave the matter undetermined until a case arises which truly raises the point as an essential matter for decision.83

79 Ibid, [55]–[56].
80 Ibid, [57] (emphasis added).
81 Ibid, [67].
82 Ibid, [73].
83 Ibid, [79].
Accordingly, it will be a matter for another court in another case to grasp the nettle and authoritatively determine whether a rule susceptible to ex post waiver is mandatory for the purposes of article 3(3) of the Rome Convention (or the successor provision in the Rome I Regulation).

VIII. Special jurisdiction under article 5(3) of the Brussels I Regulation over claims for the tort of conspiracy: *Actial Farmaceutica LDA v De Simone*84

Article 5(3) of the Brussels I Regulation confers special jurisdiction ‘in matters relating to tort’ on the ‘courts for the place where the harmful event occurred or may occur’. The ‘harmful event’ has been interpreted by the CJEU such that a claimant may sue a defendant at his option in the courts for either the place where the damage occurs or the place where the event giving rise to it occurs.85 In *Actial Farmaceutica*, the question arose how this was to be applied to claims for economic torts arising from a scheme alleged to have as its ultimate aim the injuring of a business in England.

The claims revolved around a probiotic food product devised by an Italian Professor. In May 2006, the Professor and Actial entered into an agreement. Actial contended that the effect of the agreement was to grant it the sole right to make and sell the product in the UK. In June 2006, Actial entered into an exclusive distribution agreement with Ferring UK (an English company). Under the terms of that latter agreement, Actial agreed to sell (or have another party sell) to Ferring UK the product, and Ferring UK agreed to purchase all of its requirements of the product as supplied to Actial through its distributors across Europe. In the proceedings, Actial alleged that, in 2014, the Professor and an Italian company under his control, Mendes Italy, embarked on a dishonest scheme to (i) cut off supplies of the product to Actial by preventing it from obtaining supplies from its American supplier; (ii) remove Actial as a designated supplier and so prevent it from fulfilling its obligations to Ferring UK under the distribution agreement; and (iii) require Actial to purchase stock from Mendes Italy, in breach of fiduciary duties owed to Actial by the Professor. The Defendants challenged jurisdiction.

The principal issue arising was whether article 5(3) of the Brussels I Regulation allocated English special jurisdiction on the ground that the ‘harmful event’ in the sense of damage had occurred in England. At first instance, Mr Andrew Hochhauser QC (sitting as a Deputy High Court Judge), concluded that there had been no such damage in England so there was no English jurisdiction over the relevant claims.

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84 *Actial Farmaceutica LDA v De Simone & ors* [2016] EWCA Civ 1311: Lewison, Christopher Clarke, and Flaux LJJ (aff’ing [2015] EWHC 836 (Ch)).

He noted that, in cases of economic loss, the search is for the place where the harmful event directly had its effect on the immediate victim and where the original damage is manifested.\(^{86}\) He found that the original damage caused by the alleged conspiracy and wrongful interference with contractual relations was the non-delivery on the Professor’s instructions of supplies of the product in bulk to Actial’s packing agents in Italy or the Netherlands, for onward distribution to all of Actial’s distributors in every country in which they supplied the product. While there was indirect damage resulting from Actial’s inability to supply Ferring UK, that damage was one stage removed. Mr Hochhauser QC also rejected an argument that he should apply the approach adopted in \textit{Shevill},\(^{87}\) an international libel case in which jurisdiction under article 5(3) was limited to damage sustained in each particular jurisdiction, on the basis that the possibility of such a ‘mosaic’ approach to jurisdiction does not displace the need to search for the location of the original damage. Actial appealed.

Before the Court of Appeal, Actial’s principal argument was that the Judge should have asked where the ‘jurisdictionally significant harm’ occurred and found that that was in the United Kingdom given that: (i) the United Kingdom was Actial’s largest market; and (ii) the principal aim of the alleged conspiracy was to prevent Actial selling the product here. Actial also suggested that the focus on the packaging agents was misplaced, because they were no more than a conduit for the supply to the United Kingdom. Focusing on the words ‘where the harmful event occurred or may occur’ in article 5(3) (emphasis added), Actial asked the Court to focus on the potential harm, which was said to be the possible distribution by the Professor in the UK of a rival product. Moreover, Actial invited the Court to apply \textit{Shevill}, in order to recognise that, if the Professor cut off supplies of the product at source as he allegedly had done in the present case, Actial would suffer damage in each of the markets where it sells the product so that it can sue in the courts of each of those countries.

The Court of Appeal rejected Actial’s appeal and upheld the reasoning of the first instance judge in full. Flaux LJ (with whose judgment Christopher Clarke and Lewison LJJ agreed) began by noting that article 5(3) is an exception or derogation from the fundamental principle set out in article 2 that defendants should be sued in the courts of the place of their domicile and, accordingly, that it is to be restrictively interpreted. It followed that special jurisdiction under article 5(3) was justified only if there were a particularly close connecting factor between a particular dispute and the courts of a Member State other than that in which the defendant is domiciled. Flaux LJ identified that the jurisdictionally significant harm occurred at the initial point of non-delivery of the product:\(^{88}\)


\(^{88}\) \textit{Actial Farmaceutica} (n 84), [34].
In the present case, the harmful event was the alleged conspiracy by which the Professor and Mendes Italy sought to prevent Actial from trading by cutting off supplies to it of [the product]. In my judgment, the damage which is closest in causal proximity to that harmful event is the non-delivery of [the product] in bulk to Actial’s packaging agents in Italy and the Netherlands. That is the jurisdictionally significant harm. The subsequent damage suffered because, as a consequence, Actial was unable to supply its distributors, whether Ferring UK in the UK or another distributor in whatever territories were supplied with the Product is just that, consequential or indirect damage.

Flaux LJ considered that there was an apt analogy between this case and authorities concerning breach of contracts for carriage. For example, in Réunion Européenne,89 in which a consignment of peaches became overripe during carriage, the CJEU held that the place where the harmful event occurred for the purpose of a claim in tort against the carrier was the place where the carrier was to deliver the goods. Flaux LJ reasoned that the same conclusion would have been reached, irrespective of whether the goods had been lost en route, stolen, or otherwise prevented from reaching their destination (including by instructing the supplier not to deliver the goods). In any such example, the jurisdictionally significant harm occurred in the place where the product was not delivered.

As regards Shevill. Flaux LJ considered the analogy to be inapt, because there the direct damage occurred in multiple jurisdictions:90

In the case of an international libel through the media . . . the injury caused by the defamatory publication occurs in each place where the publication is distributed. Not only is there no prior damage or injury until publication takes place, wherever that is, but the event giving rise to the damage is the publication, so the harmful event and the damage occur simultaneously in the same location. By contrast, in the present case, direct and immediate damage was suffered when [the product] was not delivered to the packaging agents and the damage suffered by reason of Actial’s inability to sell to its distributors in the UK or in other territories was indirect or consequential damage.

Flaux LJ was also unpersuaded by the invitation to focus on the ‘potential harm’ of distribution of a rival product in the UK as a consequence of the conspiracy. He noted that the same reasoning was applicable: any financial loss suffered by Actial as a consequence of loss of sales in the United Kingdom through the distribution and promotion of the rival product would be, so far as those matters are concerned, at best indirect or consequential damage. Allegations that a conspiracy had as its intention or ultimate aim damage in a certain jurisdiction thus will not suffice for article 5(3); the Court’s focus will remain closely on where the original damage actually occurred.

90 Actial Farmaceutica (n 84), [39].