European Law

The lis pendens provisions of the Brussels Convention and anti-suit injunctions

by Jeffrey Terry

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In *BNFL v Comex SA* (1998), (unreported, 9 March 1998) HHJ Thornton QC, Official Referee, was called upon to grant an anti-suit injunction to restrain a French company from litigating a suit against an English defendant before the Tribunal de Commerce de Marseilles (TCM); he did not shrink from the task. The case highlighted both the principles upon which an anti-suit injunction will be granted and the operation of the 'lis pendens' provisions in art. 21 and 22 of the Brussels Convention.

The aim of this paper is to examine, through a discussion of the *BNFL* case, the sort of procedural issues which are likely to occur when parallel proceedings are being litigated in convention states and to discuss, in particular, the operation of art. 21 and 22 as this is to be understood in the wake of this decision and the recent decisions of the House of Lords and the Court of Appeal in *Sarrio v Kuwait Investment Authority* [1998] 1 Lloyd's Rep 129 and *The Happy Fellow* [1998] 1 Lloyd's Rep 13 respectively.

THE *BNFL* CASE

The background facts in the *BNFL* case may be shortly stated: the procedural manoeuvrings rather less so. The English subsidiary of Comex SA (CNSL) agreed to manufacture equipment for BNFL under what may conveniently be described as the first agreement. Its obligations were guaranteed by the French parent (SA). Following delivery, an issue arose as to whether the equipment was built to specification and suitable for its purpose. Under a distinct agreement (the second agreement) SA agreed to take the equipment back to Marseilles for tests in order to determine whether the contentions of BNFL were well-founded or not. Under the second agreement, SA was to bear the cost of dismantling, testing and transportation if BNFL's contentions were well-founded: BNFL was to bear the cost if not. Perhaps predictably, the parties were still unable to agree on whether the machine was built to specification and suitable for its purpose, even after the further tests in Marseilles.

BNFL initially suggested arbitration to resolve the matters in dispute pursuant to an arbitration clause in the first agreement but the English solicitors, first instructed on behalf of both CNSL and SA, contended that the Official Referee's Court in London would be the appropriate forum and BNFL accordingly commenced proceedings against both CNSL and SA before the Official Referee in June 1997. SA then changed its solicitors and the new solicitors challenged the jurisdiction of the English courts, contending that:

- SA was domiciled in France;
- that the guarantee pursuant to which SA was sued was governed by French law under the Rome Convention; and
- that the place of performance of the guarantee was in France.

It was, by this stage, apparent that CNSL would be financially unable to honour such obligations as it might be found to have to BNFL and that BNFL's only effective remedy was likely to be against SA under the guarantee.

Following the issue of its summons seeking a declaration in England that the correct venue for proceedings against SA under the Brussels Convention was in France, but before its determination, SA commenced its own proceedings to recover the costs incurred under the second agreement before the TCM. BNFL then issued an application before the TCM under art. 21 and/or 22 of the Brussels Convention inviting it to decline jurisdiction and/or to stay the French proceedings pending determination of the English proceedings. Thus began a series of 'leapfrog' hearings before the courts of two different states as the parties sought to have the merits determined before the courts of the state of their choice.

The first matter to reach a hearing, in December 1997, was SA's application to the Official Referee for a declaration that the English court did not have jurisdiction to hear the claim against SA. That matter was resolved fairly shortly in BNFL's favour. The judge took the view that, whatever the position might otherwise have been, the exchanges between the solicitors prior to commencement of the English proceedings, in which SA had then taken the stance that the matter should be determined before the Official Referee rather than referred to arbitration, amounted to an agreement to submit to the jurisdiction of the English courts. SA's summons was dismissed accordingly.

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That, however, was far from being an end of the matter. SA continued to press the French proceedings and issued a further summons in England contending that the English proceedings should be stayed under art. 21 of the Brussels Convention. Put shortly, SA contended that, by the defence which it served in England, following the ruling that the English court had jurisdiction, it had raised the same issues as were already the subject of the French proceedings. The

TCM was, therefore, first seised of what were described as the 'Marseilles issues' and the English court should defer to the French court accordingly since resolution of these issues would largely, if not completely, determine the outcome of the English proceedings brought under the first agreement and the guarantee.

The second hearing took place before the TCM in January 1998: judgment was delivered on 19 February 1998. On the hearing of BNFL's application objecting to the jurisdiction of the French courts and/or contending that there should be a stay, the TCM took the line that it would defer any decision on jurisdiction until the parties had filed submissions on the merits. It adjourned to 3 March 1998 for this to be done.

In the meantime the scene shifted back to England. On 20 February, the day after delivery of the French judgment, SA's application to stay the English proceedings pending determination of the French proceedings came on for hearing. The matter was adjourned part-heard to 26 February and, during the adjournment, concerned that the approach of the French Court would result in large costs being incurred in filing submissions on the merits in France, BNFL sought an anti-suit injunction restraining SA from continuing with the French proceedings. This fell to be heard at the same time as the adjourned hearing of SA's summons on 26 February.

Before considering how the court dealt with these matters, it is instructive to consider the lis pendens provisions of the Brussels Convention generally.

SAME CAUSE OF ACTION – SAME PARTIES

Article 21 provides that, where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 21 is designed to prevent the possibility of inconsistent verdicts 'in so far as possible and from the outset' (*Gubisch v Palumbo* [1987] ECR 4861;) and 'must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in contracting states' (*Overseas Union Ins v New Hampshire Ins* [1991] ECR I-3317) .

The phrase 'same cause of action' is construed broadly and in an autonomous sense. It does not mean what a common lawyer would naturally understand it to mean. Thus, where a seller commenced proceedings in Germany for the unpaid purchase price of goods and the buyer commenced proceedings in Italy for rescission of the contract of sale, art. 21 was held to apply on the basis that the 'cause of action' was the same contractual relationship (*Gubisch v Palumbo*). Similarly, a claim by an insured in France for payment was held to be the same cause of action as a claim by the insurer for a declaration of non-liability brought in England (*Overseas Union Ins v New Hampshire Ins*).

The English text speaks only of the 'same cause of action': the French of the same *'cause'* and *'objet'*. The German text, like the English, does not differentiate between the terms 'cause of action' and 'object' or 'subject matter' but it has been held that:

'it must be construed in the same manner as the other language versions which make that distinction.'(*Gubisch v Palumbo*)

So must the English text. This was made clear in *The Tatry* [1994] ECR I-5439 where the ECJ expressed the view that:

- The *'cause of action'* comprises the facts and the rule of law relied on as the basis of the action; and
- The *'object of the action'* means the end the action has in view (the Court of Appeal applied this double test of 'cause' and 'objet' in *The Happy Fellow* [1998] 1 Lloyd's Rep 13, at p. 17, col. 2).

Even if art. 21 applies and the English court is second seised, art. 21 will be overridden by art. 17 if there is an exclusive jurisdiction agreement conferring jurisdiction on the English courts (*Continental Bank v Aeakos* [1994] 1 WLR 588; *Banque Cantonale v Waterlily* [1997] 2 Lloyd's Rep 346).

RELATED ACTIONS

Article 22 provides that, where related actions are brought in the courts of different contracting states, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of art. 22, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The scope of art. 22 has been recently considered by both the House of Lords and the Court of Appeal in *Sarrio v Kuwait Investment Authority* [1998] 1 Lloyd's Rep 129 and *The Happy Fellow*.

CONFUSION

In *The Happy Fellow* Saville LJ observed: 'Article 21 is concerned with proceedings and Article 22 with actions'. The difference between these is not entirely clear. In *BNFL v Comex*, HHJ Thornton QC expressed the view that 'proceedings' is intended to be a narrower concept than 'actions' but was not required to consider the difference between the two concepts.

Sarrio is instructive both as to the relationship between art. 21 and art. 22 and also as to the broad scope of art. 22. The Court of Appeal had taken a restrictive view of art. 22 holding that it was necessary to differentiate between the primary issues, which were those necessary to establish a cause of action and other, secondary issues; it was only if the two actions overlapped on the primary issues that a risk of irreconcilable judgements arose. The House of Lords decisively rejected this view, Lord Saville stating:

'The actions, to be related, must be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of Article 21) to cases where, although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question ... I take the view that to attempt to analyse actions so as to distinguish between different kinds of issues would be likely to add to the complexity of applications under Article 22 and thus to the expense and delay in dealing with them ... For these

reasons, I am of the view that there should be a broad common sense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in Article 22 and refraining from an over sophisticated analysis of the matter.'

WHEN IS A COURT SEISED?

It is clearly important for the operation of both art. 21 and 22 to know when a court is 'seised'. Both articles proceed on the basis that one court will be first seised and another second seised.

In *The Happy Fellow* Saville L J observed:

'Article 21 is concerned with proceedings and Article 22 with actions. The questions are whether the proceedings involve the same cause or object or whether the actions are related. It is thus a misreading of the Convention to ask which Court is first seised of issues which are or might be raised within the proceedings or actions. If such were the case, then the articles would achieve precisely the opposite of their intended purpose, which is to achieve the proper administration of justice within the community, since the courts of one country would have to decline jurisdiction in respect of some issues and the courts of another country in respect of others, a recipe not merely calculated to produce irreconcilable judgements but also to encourage the multiplicity of proceedings in different countries of the community'

Accordingly it is suggested that the correct approach is to focus on when the relevant sets of proceedings or actions were commenced. In order to do this one must apply the relevant national law in order to decide when the proceedings became 'definitively pending' (*Zelger v Salinitri (No 2)* [1984] ECR 2397). In England the English court is seised for this purpose on service of the writ but not before (*The Sargasso* [1994] 3 All ER 180).

RESOLUTION OF THE POSITION IN BNFL V COMEX SA

Applying the broad European concept of a 'cause of action' for the purposes of art. 21, the court concluded that the causes of action in England and France were the same, notwithstanding that, in England, BNFL was suing on the first agreement and the guarantee and, in France, SA was suing on the second agreement.

Accordingly, it became necessary to determine which court was the first seised for the purposes of the lis pendens provisions. HHJ Thornton QC held that the 'issue-orientated' approach urged by SA, separating out the Marseilles issue and contending that it was first raised in France was not permissible in the light of the reasoning of the Court of Appeal in the *Happy Fellow* and the House of Lords in *Sarrio*. A simple 'tie-break' approach of which proceedings were commenced first was all that was called for. Since the English proceedings had started first chronologically, the English courts were the first seised for the purposes of art. 21. Accordingly the English court was entitled to proceed and the onus was on the TCM to decline jurisdiction.

Given the stated intention of the TCM to proceed to consider jurisdiction following submissions on the merits, however, ought the court to interfere by the grant of an anti-suit injunction? The key to this part of the problem lay in the court's earlier holding that there had been an exclusive jurisdiction agreement for the purposes of art. 17 by the earlier invitation of SA, accepted by BNFL, to proceed before the official referee. Applying the decision of the Court of Appeal in *Continental Bank v Aeakos*, HHJ Thornton held that, even if the English courts had been second seised for the purposes of art. 21, the prima facie effect of this would be overridden by the exclusive jurisdiction agreement and that, where the parties had reached such an agreement, it was appropriate that the party intending to proceed in a different jurisdiction in breach of the agreement should be restrained by injunction from doing so.

The court was not deterred from the grant of the injunction by considerations of comity and fear of offending the TCM. It was SA which was to be restrained not the French court. HHJ Thornton expressed the view that:

'There are no, or only slight, considerations of comity when a defendant initiates proceedings in France in clear breach of an Article 17 agreement that has only just been entered into and which had been the basis of the plaintiff initiating the earlier English proceedings in the first place'.

CONCLUSION

It is suggested, with all due respect to the Tribunal de Commerce de Marseilles, that its decision to defer any ruling on jurisdiction until after the filing of submissions on the merits led to considerable unnecessary expense for the parties and failed to apply the fundamental principles of the Brussels Convention, which are designed to prevent multiplicity of proceedings in different contracting states.

Armed with only the same material, the English court had no difficulty in determining that art. 21 applied and that the English court was first seised. If, instead of deferring its decision, the TCM had so ruled in January 1998 and declined jurisdiction in favour of the English court, which was already seised of the issues (or, at least, stayed the French proceedings until after the English action had been concluded under art. 22 so as to avoid any risk of conflicting judgments), none of the later procedural wrangling would have been necessary and the English court would not have been called upon to take the extreme step of granting an anti-suit injunction.

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For the convention to work properly, the courts of the contracting states must be astute to prevent multiplicity of proceedings and be ready to concede jurisdiction in favour of the courts of another contracting state in which proceedings have already started, without delay. If the courts of a contracting state fail to do this, they are not only doing the litigants a disservice but are failing to act in accordance with the international treaty obligations imposed by the convention. If the treaty obligations are swiftly and effectively observed, the need to risk jeopardising the comity of nations by the grant of anti-suit injunctions in one contracting state preventing the continuance of proceedings in another should rarely, if ever, arise.

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