OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 20 November 2003 [1]

Introduction

1. This request for a preliminary ruling from the House of Lords ought to serve to dispel all doubt as to the validity in the light of the Brussels Convention [2] of what are commonly known as 'anti-suit injunctions'. These are injunctions whereby a party is prohibited — and non-compliance constitutes contempt of court — from commencing or continuing proceedings before another judicial authority, even one abroad. In the present case, the purpose of the injunction is to prevent abuse of process by such a party in the form of vexatious litigation.

The facts of the case before the national court

2. As explained by Lord Hobhouse of Woodborough in the order for reference, the facts giving rise to this request for a preliminary ruling can be summarised as follows.

3. Gregory Paul Turner, who is of British nationality and is a solicitor entitled to practise under English law, was employed as legal adviser to a group of companies by one of the companies in the group.

The group, known as the Chequepoint Group, is managed by Mr Grovit and comprises several companies, incorporated in a number of countries, including, apart from China Security Ltd, incorporated in Hong Kong, which had employed Mr Turner under contract, Harada Ltd, whose registered office is in the United Kingdom, and Changepoint SA, whose registered office is in Spain.

His role as an adviser included dealing with and advising on real property and commer-

1 — Original language: Spanish.

2 — Convention on the enforcement of judgments in civil and commercial matters (hereinafter 'the Brussels Convention' or simply 'the Convention'). Consolidated version relevant to this case published in OJ 1990 C 189, p. 2.

cial matters, representation in proceedings in the United Kingdom and other tasks of a legal nature relating to the group.

4. Mr Turner worked in London. However, in May 1997 he asked for a transfer to the group office in Madrid, a request to which his employer acceded. In November of that year he was put on Harada Ltd's payroll, under the same conditions of employment. Mr Turner was thus to continue to perform the same tasks as those previously carried out by him.

5. After working in Madrid for 35 days, Mr Turner asked to terminate his contact with Harada and instituted proceedings against that company before the Employment Tribunal, London, which has jurisdiction in such matters. He claimed that efforts had been made to implicate him in illegal conduct involving irregularities relating to deductions in respect of social security. Such machinations were, in the claimant's view, tantamount to unfair dismissal.

6. The Employment Tribunal dismissed an objection of lack of jurisdiction raised by Harada and that decision was upheld on appeal.

On conclusion of the proceedings, the Employment Tribunal awarded Mr Turner damages.

7. In the meantime, in July 1998, Changepoint and Harada commenced proceedings against Mr Turner before a court of first instance in the Spanish capital, claiming compensation for damage caused to them as a result of unsatisfactory professional conduct.

Mr Turner received the writ of summons around 15 December but refused to accept service.

In the statement of claim, formulated at a later stage, he was called on to pay a very considerable sum (more than ESP 85 million) for failing properly to provide to Changepoint SA the services required by his contract. Seven examples were given of allegedly inadequate fulfilment by Mr Turner of his obligations, it also being contended that he had improperly disappeared from the Madrid office without giving notice and had then made a claim in the United Kingdom on the basis of unfounded allegations which concealed the truth from the English tribunal.

8. Mr Turner never entered an appearance in the Spanish proceedings. On 18 December 1998 he asked the High Court in London[3] to restrain Mr Grovit, Harada and Changepoint from continuing the proceedings commenced in Spain. On 22 December the High Court granted his application by issuing an interlocutory injunction.

In February 1999 the High Court declined to renew the injunction, whereupon Mr Turner applied to the Court of Appeal which, on 28 May, made an order requiring the defendant together or separately to:

'(1) take all necessary steps forthwith to discontinue or to procure the discontinuance of the claims made against the Claimant in proceedings commenced by one or more of the Defendants in the Court of First Instance, Madrid, Court 67, under Proceedings number 70/98;

(2) be restrained until further Order from taking, or procuring any other person or persons to take, any step in the action commenced by one or more of the Defendants in the Court of First Instance Madrid, Court 67, under Proceedings number 70/98, except to carry out paragraph 3(1) of this Order hereinabove;

(3) be restrained until further Order from commencing or continuing or procuring any other person or persons (including any company directly or indirectly controlled by the Respondents or any of them, or any company within or associated with the Chequepoint Group of companies, and further, in respect of the 1st Defendant, any company of which [he] is a Director) to commence or continue any further or other proceedings against the Claimant (arising out of his contract of employment) in Spain or elsewhere, except that this paragraph shall not apply to proceedings commenced or continued in England and Wales.'

9. The Court of Appeal took the view that the sole purpose of the proceedings commenced in Madrid was to intimidate and exert pressure on a party and it therefore considered that it was entitled to require Changepoint and Harada, by injunction, not to continue the foreign proceedings. It can be inferred from the judgment of the Court of Appeal that it considered that, in the absence of an injunction, the defendants would continue to behave improperly.

10. The defendants appealed to the House of Lords.

3 — A superior court with authority to issue injunctions (see point 11 below).

The applicable domestic law

11. Restraining orders, like the injunction issued in the main proceedings, now have as their legal basis section 37(1) of the Supreme Court Act, which in broad terms states:

'The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so.'

The Court of Appeal has similar powers on an appeal from the High Court.

12. United Kingdom judicial decisions limit the cases in which it is appropriate to grant an injunction. It is necessary to establish that the addressee of the injunction has engaged in wrongful conduct and that the applicant has a legitimate interest in seeking to prevent it.

13. Such protection is available to victims of abuse of process, that is to say those who are the butt of unscrupulous behaviour in the form of vexatious or oppressive proceedings, regardless of whether they are brought in England and Wales or abroad.

The question on which a preliminary ruling is sought

14. By order of 13 December 2001 the House of Lords referred the following question to the Court of Justice for a preliminary ruling under Article 3(1) of the Protocol of 3 June 1971 on the interpretation of the 1968 Brussels Convention:

'Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?'

The views of the House of Lords

15. According to the order for reference, the Court of Appeal, in exercising its power in this case, does not purport to determine the jurisdiction of a foreign court but its action is justified because the addressee of the injunction is subject *in personam* to the jurisdiction of the English court. Accordingly, the restraining order is directed solely against the party appearing before the court from which it emanates, not against the foreign court.

Proof that restraining orders do not involve an appraisal of the jurisdiction of a court of another State is the fact that they are usually issued when the foreign authority has, or is willing to assume, jurisdiction to hear a case.

Nevertheless, since such orders indirectly affect the foreign court, the jurisdiction must be exercised with caution and only if the ends of justice so require.

16. Similarly, if there are proceedings before an English court which it is unconscionable for a party to pursue, such proceedings will be stayed.

Although it can be inferred from the foregoing that the issue of an injunction is not based on the consideration that the claim has been brought in an inappropriate court (doctrine of *forum non conveniens*), the view is expressed in the order for reference that the question whether or not the foreign forum was an appropriate forum is of importance in evaluating the abusive conduct complained of and affects the decision whether or not to grant the remedy of a restraining order.

17. The House of Lords states that when an application for a restraining order is considered it is necessary to verify that the applicant has a legitimate interest, such as a contractual right not be sued in a particular jurisdiction (for example, owing to the existence of an exclusive jurisdiction clause or an arbitration clause).

18. Consequently, the essential features which prompted the Court of Appeal, under English law, to make the order in the present case are:

(a) The applicant is a party to existing legal proceedings in England;

(b) The defendants have in bad faith commenced and propose to prosecute

proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings pending in England;

(c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants.

19. For the rest, no provision of the Brussels Convention precludes the adoption of decisions of this kind. On the contrary, they are conducive to effective attainment of one of its objectives, namely to limit the risk of irreconcilable judgments.

20. The order also states that it is a matter for the English — and not the Spanish — court to decide, after analysing the information available to it, whether the proceedings being conducted abroad might adversely affect the normal conduct of the action before it.

21. Finally, it rejects the view that the principle of equality as between the courts of the Convention countries might be undermined as a result of the fact that not all of them are empowered to issue restraining orders. According to the House of Lords, it is not the purpose of the Convention to require uniformity but to have clear rules governing international jurisdiction.

22. By way of corollary, it adds that if the question of interpretation fell to be decided by the House of Lords alone, it would take the view that there was no incompatibility with the Convention.

Proceedings before the Court of Justice

23. The request for a preliminary ruling was received at the Registry of the Court of Justice on 30 April 2002. At the appropriate stage in the procedure, a public hearing was held on 9 September 2003.

24. Oral argument was presented by the defendants in the main proceedings, by the United Kingdom, German and Italian Governments and by the Commission.

Analysis of the question referred to the Court

25. The defendants in the national proceedings, and likewise the German and Italian Governments and the Commission, maintain that injunctions of the kind at issue in these proceedings are not reconcilable with the Brussels Convention.

Of those who presented oral argument, only the United Kingdom Government aligns itself with the view of the referring court, which considers them to be compatible.

26. Such restraining orders date back to the 15th century, although their significance has evolved, always being linked to the concept of equity and inspired by the views of common-law judges. According to the United Kingdom Government, anti-suit injunctions (namely, orders to discontinue or preclude proceedings) are not addressed to a judicial authority of another State, but to a person amenable to the jurisdiction of the court which issues them. For that reason, like the House of Lords, it considers that the term 'anti-suit injunction' is a misnomer and prefers the term 'restraining orders'. In its view, therefore, they do not represent a pronouncement by an English court as to the jurisdiction of its foreign counterpart, but rather a procedural measure of an organisational nature similar to that approved by the Court of Justice in the *Van Uden* case.[4] The Brussels Convention does not limit the measures which a court may issue in order to protect the subject-matter of proceedings before it.

27. In the present case, the aim was to ensure that consideration of the action brought by Mr Turner would not be undermined by a multiplicity of obstructive procedural measures issued at the request of the defendants.

28. The United Kingdom Government adds that only an English court can give a decision on the need to preserve the integrity of proceedings conducted in England.

29. Finally, it states that orders of this kind help to attain a Brussels Convention objective, namely that of reducing the number of courts with jurisdiction to consider the same dispute.

30. The arguments against compatibility with the Convention put forward in the course of these preliminary proceedings stem from the idea that one of the pillars of that international instrument is the reciprocal trust established between the various national legal systems, upon which the English restraining orders would seem to cast doubt.

4 — Case C-391/95 *Van Uden Maritime* [1998] ECR I-7091.

31. That view seems to me to be decisive.[5] European judicial cooperation, in which the Convention represents an important landmark, is imbued with the concept of mutual trust, which presupposes that each State recognises the capacity of the other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration.[6] No superior authorities have been created to exercise control, beyond the interpretative role accorded to the Court of Justice; still less has authority been given to the authorities of a particular State to arrogate to themselves the power to resolve the difficulties which the European initiative itself seeks to deal with.

32. It would be contrary to that spirit for a judicial authority in Member States to be able, even if only indirectly, to have an impact on the jurisdiction of the court of another Contracting State to hear a given case.[7]

33. A further inherent feature of the principle of mutual trust is the fact that issues determining the jurisdiction of the judges of a State are dealt with in accordance with uniform rules or, which comes to the same thing, that each judicial body is, for such purposes, on an equal footing with the others.

For that reason, I am not persuaded by the submission that nothing in the Brussels Convention expressly prohibits the adoption of judicial measures such as those at issue here. The Convention seeks to provide a comprehensive system, for which reason it is appropriate to ask ourselves whether a measure which has an impact on its field of application is compatible with the common rules which it establishes. The question must be answered in the negative.

A comparative review shows that only legal systems within the common-law tradition allow such orders. An imbalance of this kind goes against the scheme of the Convention, which does not incorporate any mechanism capable of resolving a conflict between a restraining order from an English

5 — This view is shared by leading authors. See: Dohm, Ch.: 'Die Einrede ausländischer Rechtshängigkeit im deutschen internationalen Zivilprozeßrecht', Berlin, 1996, p. 207; Jasper, D.: *Forum Shopping in England und Deutschland*, Berlin, 1990, p. 90; Jayme, E. and Kohler, Ch.: 'Europäisches Kollisionsrecht 1994: Quellenpluralismus und offene Kontraste', *Praxis des internationalen Privat- und Verfahrensrechts* (IPRAX), 1994, p. 405, in particular at p. 412.

6 — By way of illustration, the second recital in the preamble to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states: 'Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute'. The 17th recital adds: 'By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation'.

7 — A situation which would also infringe upon the subjective right, which a litigant may infer from the Covention, to determine which court to seise. See, to that effect, Kropholler, J.: *Europäisches Zivilprozeßrecht*, 7th ed., Heidelberg, 2002, pp. 345 and 396 ff.

court, prompted by the abusive nature of the foreign proceedings, and a possibly conflicting assessment which the Spanish court might arrive at. It is difficult to accept that a State which issues an injunction of this kind could unilaterally attribute to the jurisdiction which it is protecting an exclusive character. If all European courts arrogated such a power to themselves, chaos would ensue. If that power were exercised only by English courts, they would be taking it upon themselves to exercise a distributive function which the Brussels Convention entrusts to less flexible, but more objective, criteria, which it imposes on everyone in the same way. [8]

Nor does the Convention contain any rule to resolve a situation in which two judicial authorities of States which allow such orders issue contradictory injunctions, [9] even though the situation has in fact arisen between different States belonging to the common-law system. The classic example is the *Laker Airways* case, in which there was a clash between various English and North American judicial authorities. [10]

34. The United Kingdom Government, following the House of Lords, insists, of course, that the orders at issue are not concerned with the jurisdiction of the Spanish court; they are addressed only to the party which commenced proceedings with the sole object of frustrating the conduct of another action pending in another court.

That analysis is formally correct. Nevertheless, it is undeniable that, as a result of a litigant being prohibited, under threat of a penalty, from pursuing an action before a given judicial authority, the latter is being deprived of jurisdiction to deal with the case, and the result is direct interference with its unfettered jurisdictional authority. Although English legal writers followed that view for some time, more recently authors have recognised that that argument is no longer valid since, for a court to hear a case, it is necessary for the plaintiff to exercise his right of action. [11] If he is deprived of the opportunity to do so, the result is interference with the jurisdiction of the foreign judge by reason of the fact that he is not permitted to hear or decide the case. It has been recognised in American legal literature [12] and case-law [13] that the

8 — Muir-Watt, H., *Des conceptions divergentes du droit fondamental d'accéder à la justice dans l'espace conventionnel européen*, Revue général des procédures, No 4, October-December 1999, p. 761.

9 — To the same effect, see: Hau, W.: *Zum Verhältnis von Art. 21 zu Art. 22 EuGVÜ*, IPrax, 1996, p. 44, in particular at p. 48. Hartley, T. C.: 'Anti-suit injunctions and the Brussels Jurisdiction and Judgments Convention', *International and Comparative Law Quarterly*, January 2000, volume 49, part I, p. 171. Although he vigorously defends such orders, he explicitly concedes that the application of the Convention rules has its own mechanism, of which such measures do not form part.

10 — See Hartley, T.C., 'Comity and the Use of Anti-suit Injunctions in International Litigation', *American Journal of Comparative Law*, Volume 35, Summer 1987, p. 496 et seq.

11 — Jackson, D. C. acknowledges in *Enforcement of Maritime Claims, LLP*, 3rd edition, 2000, that 'It is, however, now recognised that it does reflect indirect interference in the power of the relevant foreign court'.

12 — Bermann, G.A., 'The use of anti-suit injunction in international litigation', *Columbia Journal of Transnational Law*, vol. 28, 1990, pp. 630 and 631.

13 — In the case of *Peck* v *Jennes* 48 U.S. (7 How.) pp. 612, 624-625, cited by Collins, L., *Essays in International Litigation on the conflict of Laws*, Clarendon Press, 1994, p. 112, the following is stated: '... as the Supreme Court held over a century ago, there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself'.

distinction between an order *in personam* addressed to a litigant and an order addressed to a foreign court is indeed a very fine one.

35. The effects of restraining orders are similar to those produced by application of the doctrine of *forum non conveniens*, whereby a decision may be made not to hear actions which have been brought in an inappropriate forum. Likewise, restraining injunctions, however much they are addressed to the parties and not to a judicial authority, presuppose some assessment of the appropriateness of bringing an action before a specific judicial authority. However, save in certain exceptional cases which are not relevant here, the Convention does not allow review of the jurisdiction of a court by a judicial authority of another contracting state. [14]

36. Moreover, the system of mutual recognition of decisions given in the Contracting States without the need for recourse to any procedure whatsoever, provided for in Article 26 of the Convention, although subject to the exception relating to public policy (Article 27(1)), expressly excludes the question of jurisdiction from the scope of the latter (Article 28), so that the paradoxical situation could arise whereby a judge who had issued an anti-suit injunction might be obliged to grant an order for enforcement of a judgment delivered in spite of his having expressly imposed a prohibition. The English court, at some time or another, must verify the jurisdiction of the foreign court before issuing the restraining order, and that clearly goes against the letter, spirit and purpose of the Brussels Convention.

37. Finally, it is argued that restraining orders are remedies of a procedural nature, an area not covered by the Brussels Convention. Such measures are precautionary or protective and their compatibility with the European system is beyond all doubt.

It is true that the Convention contains hardly any provisions governing procedure. As a result, the Contracting States are free to organise proceedings brought before their judicial authorities. Nevertheless, they must make certain that the provisions thus adopted do not run counter to the philosophy of the Convention. In other words, the legislative autonomy available to States in procedural matters is subject to limits deriving from respect for the general scheme of the Convention. [15]

14 — Case 351/98 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 24.

15 — See Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 20.

Conclusion

38. In view of the foregoing considerations, I suggest that the Court of Justice give the following answer to the question referred to it by the House of Lords:

The Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as precluding the judicial authorities of a Contracting State from issuing orders to litigants restraining them from commencing or continuing proceedings before judicial authorities of other Contracting States.