F.S Dethridge Memorial Address: The Modern Maritime Judge – Policeman or Salesman

The Hon Mr Justice David Steel
The Admiralty Judge for England & Wales

THE HON. MR JUSTICE DAVID STEEL

Educated:	Eton College and Keble College, Oxford	
Called to Bar:	1966	
Practice:	Coudert Bros, New York	1966 to 1967
	2 Essex Court	1968 to 1998
	Admiralty Junior	1978 to 1981
	QC	1981
	Head of Chambers	1994 to 1998
	Lloyd's arbitrator	1981 to 1998
	Chairman COMBAR	1990 to 1991
	Wreck commissioner	1981 to 1998
	Lord Chancellor's Committee on legal education and conduct	1994 to 1998
	Bencher Inner Temple	1991
Judicial Appointments:	Recorder	1991
	High Court	1998
	Commercial Court	1999
	Admiralty Judge	1999
	Presiding judge of Western Circuit	2002

The Stuart Dethridge Memorial Address

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The Hon. Mr. Justice David Steel

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In a recent lecture, Lord Mustill sought to answer the rhetorical question: "What are judges for?" He acknowledged that a judge's life was a thankless one:

> *Under-administered, under-supported, urged into an administrative new dawn without the technology to make it practical, in many instances grossly overworked, doggedly tracking the zig-zags and reversals of penal policy and under a constant drizzle of ignorant and lazy media comment.*

He could only cheer himself up by recognising that at least the job was not dangerous. Nonetheless, he hoped that judges would respond to the great challenge of building bridges between the old and the new commercial world, a challenge made all the greater by the accelerating rate of change "not towards internationalism but non-nationalism" since in cyber commerce national boundaries were becoming almost irrelevant. And into this space judges were to be thrown to bring order by "filling up the crannies, clearing up the doubts".

But judges are now expected to be rather more than judges. One outcome of the abolition of exchange controls, taken with the development of

electronic banking, has been to make the international transfer of funds easy and almost instantaneous. This has brought great benefits to both the honest and the dishonest. In turn, it has reinforced attention on steps that might be taken to prevent defendants from frustrating the effectiveness of judgments by moving funds, particularly from one country to another. My first topic is the remarkable development in freezing injunctions and some of the concerns brought in its wake. As international boundaries become increasingly undermined by global trading, judges have been involuntarily recruited as forensic policemen.

But judges are not just expected to be policemen: they are also salesmen. They are perceived to be in partnership with the lawyers, the users and the court service so as to provide a dispute resolution service for the international community. It should not be forgotten that commercial litigation is an important economic resource in its own right: for instance it represents some £800 million of invisible exports into the UK per year. This figure is not surprising given that 80% of all cases in the Commercial and Admiralty Courts have a foreign party and 60% of cases no English party at all. Although unexpressed, judges are expected to play their part in ensuring that the economic benefits are at least retained if not improved. My second topic is to indicate how these expectations can sometimes come up against the newly developed forensic tools to prevent forum shopping.

Injunctions to restrain dissipation or removal of assets

The origins of this order are to be found in two decisions of the English Court of Appeal in 1975 where injunctions were granted prohibiting the defendants from disposing of money prior to trial by removing it from the

jurisdiction. Those cases were **Nippon Yusen Kaisha v. Karageorgis [1975] 1 WLR 1093** and **Mareva Compania Naviera SA v. International Bulk Carriers SA [1975] 2 Lloyd's Rep 509.** It was the latter case, no doubt to the relief of the Karageorgis family, but to the displeasure of the late Mr. Geoffrey Brice QC, the innovative counsel concerned, that the Mareva injunction derived its name. In the new post-Woolf world, they have been redesignated as freezing orders.

In order to obtain a freezing order, the claimant must show that it has at least a good arguable case on the merits and that there is a real risk dissipation of the defendants' assets so that the judgment would be unsatisfied if the injunction was not granted. The scope of these freezing orders has been considerably extended over the last twenty-five years. For instance, following a series of decisions in the Court of Appeal, it became well established that injunctions and ancillary disclosure of orders could be granted in relation to assets abroad. Furthermore, whilst at one stage relief was refused when the proceedings did not incorporate any claim for substantive relief, statutory jurisdiction to grant such free standing interlocutory relief was due course accorded and is now available in support of proceedings brought in any jurisdiction in the world.

Similar forms of order have found favour here and in Canada, New Zealand, Singapore and Hong Kong. But the contrast with the position in the United States, the world's dominant economy, remains startling. Whilst there are many states of the Union in which a claimant may be able to obtain an attachment of assets within the state pending trial, the criteria for such an order are usually significantly more stringent than those in England. For example, it is commonly the case that the claimant

must establish that, but for the order, he will sustain irreparable injury rather than simply establish that there is a risk of dissipation. More significantly, there are, I believe, no state jurisdictions that, in the absence of a proprietary claim, would respond to an application to grant what in effect would be the equivalent to an out-of-state, let alone world-wide, freezing injunction.

As regards the federal jurisdiction, the disparity between the approach in England as compared with that in the United States is exemplified by the relatively recent decision of the United States Supreme Court in **Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc.** 119 Sup Ct 1961 (1999). By a majority of 5 to 4, it was decided that the federal courts had no power under the Judiciary Act of 1789 to grant an interlocutory injunction to restrain a defendant from disposing of its assets pending the determination of an action.

Ironically, I rather doubt whether, contrary to the assumptions of both the majority and the minority, an English court would have granted an extra-territorial freezing order on the facts of **Groupa Mexicana**. Here was a defendant, without assets within the jurisdiction, seeking to restructure its debt in the face of employee compensation and revenue claims. But what is so interesting is the difference between the majority and the minority on the question of policy rather than the issue of statutory construction.

The English perception of the value of the jurisdiction was picked up in the minority judgment of Justice Ginsberg:

> *But as the facts of this case so plainly show, for a creditor situated as Alliance is, the remedy at law is worthless, absent the*

provisional relief in equity's arsenal. Moreover, increasingly sophisticated foreign haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that the defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity.

The contrary view was expressed with characteristic force by Justice Scalia in the majority opinion in **Groupa Mexicana** as follows: -

The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law - rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim...More importantly, by adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws- including those relating to bankruptcy, fraudulent conveyances, and preferences.

The practical outcome in the face of these disparities of judicial policy is that a significant number of applications are now being made to the English courts by American claimants seeking extra territorial freezing orders against American citizens and/or encompassing assets within some or all of the states of the United States. This has given rise to a new set of problems.

Last year a Swiss bank was served with an English world-wide freezing order which had been granted in support of substantive proceedings in

New York. Those proceedings involved claims for damages relating to an alleged misappropriation of $34 million by the defendants from the claimant. The relevant defendants were domiciled in the US. The only connection with England was a credit balance held with a commodity trading company in London. The defendants took no steps to have the order set aside. But the order had been notified to the Swiss bank with which the relevant defendants were reported to have had a long-standing relationship. The reaction of the bank was that it was being placed in a potentially impossible position. On the one hand, it was obliged as a matter of Swiss law to operate the accounts in accordance with the instructions of their clients but to do so might constitute a contempt of the English court.

The bank's suggestion was to include in the order a provision that the bank should be entitled to comply with "what it reasonably believes to be its obligations under the laws of the state where the assets are situated". This was opposed by the claimants who feared that the bank would only too readily comply with the instructions of persons anxious to spirit away the proceeds. I concluded that the interests of certainty and comity coincided so as to support the bank's submission; see **Bank of China v. NBM** [2002] 1 Lloyd's Rep 1. This view was approved by the Court of Appeal: [2002] 1 WLR 844.

During the course of the hearing, it was emphasised that a light touch was required because there were intrinsic difficulties with enforcement of such orders when neither the defendants nor the bulk of their assets were situated within the jurisdiction. It was not long before this issue was presented to me in a striking form. Proceedings were commenced early this year in the Southern District of New York whereby Mororola

Corporation sought to recover no less than $1.8 billion which it alleged had been fraudulently misappropriated by a Turkish group of individuals and companies. Following an inter partes hearing in April, the judge handed down a striking judgment given the fact that proceedings were only at an interlocutory stage:

> *When business deals go sour, both sides are apt to cry "fraud" and courts know better than to take such Claims at face value. But here we have the unusual case where every preliminary indication is that the defendants, behind a façade of legitimacy, engaged in repeated acts of fraud and chicanery, and thereby perpetrated, and continue to perpetrate, a rather massive fraud."*

The judge in New York duly ordered the defendants to deposit the shares that Motorola claimed were the security for its substantial loan in the court registry. When the defendants failed to comply with the order to deposit the shares, Motorola applied to the Commercial Court in London for a world-wide freezing order in support of the US proceedings. It was apparent at that stage that three of the individual defendants were resident in Turkey (although having substantial property in New York). However one of them also had a house in London which had been for sale for over a year. The fourth individual defendant was resident in London and had property there.

The freezing order was duly granted on an ex parte application but during the course of argument the judge, Mr Justice Moore-Bick, raised doubts as to how far it was appropriate to go when most of the defendants were neither resident nor had assets in the jurisdiction. He expressed concern that the Commercial Court would, by virtue of its power to grant ancillary

freezing orders and its reputation in the field of international dispute resolution become the world's forensic policeman.

The defendants made a substantive application to set aside the orders which came back before me a month later. The primary challenge was to the expediency of granting relief in support of the US proceedings when, it was submitted, there was no sufficient link with English jurisdiction. It seemed to me that the absence of residence and assets with in the jurisdiction was an important but not decisive considerationIndeed, there was already a notorious case in which such relief had been granted despite the absence of residence and assets. In **Republic of Haiti v. Duvalier** [1990]1 QB 202, the only connection with England was the presence of a firm of solicitors who were suspected of having knowledge of the whereabouts of assets secreted by the former dictator. Since one of the primary objects of the order was to ascertain the whereabouts of the assets in circumstances where the defendant has exercised considerable resources and skill in seeking to move the assets out of the reach of the courts the situation "demanded international co-operation": see Staughton LJ at p. 217.

However, in the meantime, the argument that there was a need for some material connection with the jurisdiction received a boost from the decision of the European Court in **Van Uden Maritime BV v. Deco-Line** [1999] 2 WLR 1181:

> 40. *It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the*

contracting state of the court before which those measures are sought.

On the facts of the Motorola case, it appeared to me that relief was clearly expedient given the residence of one defendant in the jurisdiction, the ownership of a house in London by another defendant, the close knit activity of all the defendants in pursuing the fraudulent conduct and their tenacious determination to keep their assets from the grasp of the court. As a matter of justice, the situation "cried out" for a freezing order: see Kerr J in **Babnaft Int. Co. v. Bassatne** [1990] Ch 13 at p.33. I await to see whether the Court of Appeal agree.

But there was a threshold issue. How far can it be expedient to grant relief where the primary court cannot or will not grant such relief? Thus, the defendants in Motorola argued that, since the New York court could not grant world-wide freezing order, it followed that it was inexpedient for any other court to grant such an order by way of ancillary relief. Millett LJ dealt with this proposition in **Credit Suisse Fides Trust SA v. Cuoghi** [1998] QB 818 at p. 827:

But I do not accept that interim relief should be limited to that which would be available in the court trying the substantive dispute, or that by going further, we would be seeking to remedy defects in the laws of other countries. The principle which underlies Article 24 is that each contracting state should be willing to assist the courts of another contracting state by providing such interim relief which was available if its own courts were seized of the substantive proceedings. By going further than the Swiss courts would be prepared to go in relation to a defendant outside

Switzerland, we would not be seeking to remedy any perceived deficiency in Swiss law, but rather to supplement the jurisdiction of the Swiss courts in accordance with Article 24 and priciples which are internationally accepted.

But judicial reservations in this field remained and re-emerged in **Refco Inc. v. Eastern Trading Company** [1999] 1 Lloyd's Rep 159. Refco is one of the largest futures brokers in the world. They instituted proceedings in the US District Court of Illinois against members of a Dubai family for the recovery of substantial losses incurred by them on foreign exchange transactions. An ancillary ex parte Mareva injunction had been granted to the plaintiffs by the English court and the legitimacy of that order was challenged by the American defendants. At the inter partes hearing, the judge (Rix J) took the view that the English court should exercise caution and place itself in a subordinate role in exercising its jurisdiction to grant ancillary relief.

In fact, the court in Illinois had demonstrated a pretty sanguine attitude. There had already been an application in the United States whereby the defendants had sought to enjoin Refco from prosecuting their Mareva proceedings in England. The US judge concluded that the claimants were perfectly entitled to seek the assistance of a foreign court in securing assets. However, the English judge was troubled by the fact that the interim relief being sought in England was not available in the United States. In the result, he came to the conclusion that the English Court should not entertain a concluded view on the merits of the application before the matter had been addressed in the court seized of the merits of the case.

In the event, no application was made to the Court in Illinois on the grounds that it was bound to fail. Yet, the majority in the Court of Appeal expressed disagreement with the reluctance of the judge to grant an injunction simply because the court in Illinois was not minded to do so or was not empowered so to do. Morritt LJ expressed himself in the following way at p. 173:

> *I can well understand the good sense of that conclusion expressed by Mr. Justice Rix if the Court in Illinois had applied the same principles as those applicable in England. In that event, the grant by the latter of relief which has been refused by the former would be to ignore the subordinate role of the latter and to set up conflicting decisions. But where... the principles are substantially different I do not see why it should make a difference that the foreign Court has jurisdiction but is, in principle, unable to exercise it as opposed to a case where it has no jurisdiction at all.*

This approach was perceived as all the more appropriate given that the American judge had expressly deferred to the English courts with regard to the provision of collateral relief. This provoked the minority view as expressed by Millett LJ at p. 175:

> *The jurisdiction of national Courts is primarily territorial, being ordinarily dependent on the presence of persons or assets with the jurisdiction. Commercial necessity resulting from the increasing globalisation of trade has encouraged the adoption of measures to enable national courts to provide assistance to one another, thereby overcoming difficulties occasioned by the territorial limits of their respective jurisdictions. But judicial comity requires*

restraint, based on mutual respect not only on the integrity of one another's process, but also for one another's procedural and substantive laws. The test is an objective one. It does not depend upon the personal attitude of the judge of the foreign court or on whether the individual judge would find our assistance objectionable. Comity involves respect for the foreign court's jurisdiction and process, not respect for the foreign judge's feelings. A court which is invited to exercise its ancillary jurisdiction to provide assistance to the court seized of the substantive proceedings need feel no reluctance in supplying a want of territorial jurisdiction but for which the other court would have acted. But it should be very slow to grant relief which the primary court would not have granted even against persons present within its jurisdiction and having assets there.

In the light of this difference of view, this space needs watching.

But the continuing adoption by the English courts of a favourable policy towards such orders does not dispose of other concerns, particularly where no fraud is alleged. Despite its name, the function of the injunction is not to preserve assets for the satisfaction of a particular claim, let alone to effect a quasi-winding up of the defendant's company. Its only legitimate purpose is to prevent the defendant from abusing its dispositive powers so as not to pay the plaintiff's claim in due course. Put another way, the injunction does not accord any priority to, or security interest in, the defendant's assets and, accordingly, the defendant is allowed to make payments to his creditors in the normal course of business. In short, the injunction ought only to bite on the "spare" assets

of the defendant. This is more easily said than done, both in theory and in practice. Let me explain.

The standard form of freezing order used to provide that it would lapse if the defendant posted security for the claim. This logically followed from the fact that, thereafter, there would be no risk of dissipation whereby the claimant's claim might go unsatisfied. But if the defendant has sufficient spare funds to secure the claim without difficulty, it would be a rare case that the claimant were be able to establish a risk of dissipation in the first place. But if the defendant has limited spare resources but is in effect forced to post security to rid himself of the practical complications of a freezing order, he thereby restricts his scope for legitimate business activity and directly affects the interests of other creditors. In other words, the claimant is thereby obtaining a degree of priority to which he is not entitled.

A good example has very recently emerged in **Flight Line Ltd v. Edwards sub nom In Re Swissair** Ch D CompaniesCourt (NeubergerJ) 2nd August 2002 where a creditor who had agreed to the discharge of a freezing order on terms that provided for the payment of a sum of money into a bank account in joint solicitors names was held to be secured creditor in regard to that sum.

More importantly, the practical effects of a freezing order can be very damaging. The very fact that the order has been made results in potential damage to the defendant's commercial standing. Furthermore, where the defendant is relying upon a line of credit from his bank, this can often immediately dry up, with devastating consequences out of proportion to the vice that the order is intended to address. It is true that the terms of

the order allow the personal defendant to spend money on ordinary living expenses, including legal advice. But before expending money on living expenses, the defendant, whether personal or corporate, must disclose the source of those monies so that the claimant can police the disclosure of his assets required by other provisions of the order. But what are "ordinary" living expenses? Chauffeur's wages? School fees? Holidays in the Caribbean? Bets on the Grand National?

The order also expressly allows the defendant to deal with or dispose of his assets "in the ordinary and proper course of business". In contrast, here there is no requirement to disclose the source of the funds, presumably on the basis that such a requirement would put the claimant in the position of controlling the defendant's business affairs. But the liberty can afford less financial freedom than at first blush might appear. The claimant and his lawyers can still cramp the style of the defendant – particularly if points are taken at the margin between personal and business expenditure.

Much more significant is the usual reaction of banks to notification of a freezing order. It is commonplace for banks to react to such an order by refusing to honour any further instructions, this despite the provision in the order that "no bank need enquire as to the application or proposed application of any money withdrawn by the defendant if the withdrawal appears to be permitted by the order." But how is a bank even to know whether the defendant "appears" to be using the funds for legitimate business purposes? The banks in practice tend to adopt the stance that no transfers will be performed unless the bank is satisfied that the transaction is indeed in the ordinary course of business. This can be highly damaging

and heightens the risk that such orders can become instruments of oppression.

Let me take stock. The value of such orders is particularly obvious in cases concerning the recovery of the proceeds of white-collar crime (albeit the cost can often exceed the recovery). Although consistency will not be achieved on both sides of the Atlantic, in my view the English courts have sound reasons for maintaining the jurisdiction even at the risk of being perceived as policemen of the international trading community. But there remain considerable concerns about over-ready use of freezing orders, concerns that are well outlined in the explanations for adopting a contrary policy in the US decisions. Whilst this form of order is here to stay, we must strive, however, to limit the potential for injustice in those cases involving defendants, personal or corporate, who are simply financially stretched.

Forum non Conveniens

The phrase "forum shopping" was, I believe, first coined by an American judge in the 1960's. On one view it reflects no more than the outcome of the duty of lawyers to seek to litigate their claims in the forum most favourable to their clients. Lord Denning had no problem with it, so long as the shopping was done in England:

> *He can seek the aid of our courts if he so desired. You may call this forum shopping if you please but if the forum is England, it is a good place to shop for both the quality of the goods and the speed of the service*: **The Atlantic Star** [1973] QB 364

You will remember the reaction of Lord Reid in the House of Lords, however, was sharp:

> *With all respect that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races....There was a time when it could reasonably be said that our system of administration of justice, though expensive and elaborate, was superior to that in most other countries. But today we must, I think, admit that, as a general rule, there is no injustice in telling a plaintiff that he should go back to his own courts:*[1974] AC 436.

Until that decision, when jurisdiction had been founded as of right, it was the practice of the English court only to grant a stay in cases where it would have been vexatious, oppressive or an abuse of process to allow the proceedings to continue. In **The Atlantic Star**, the House of Lords took the first step towards replacing this rather insular doctrine with a forum non-conveniens approach (a decision which Lord Diplock thought was "initially accepted with reluctance, particularly by the judges of those English courts, Admiralty and Commercial, to which foreigners so often voluntarily resort"). In 1978, the House of Lords firmly introduced into English Law a broad doctrine enabling the Court to stay cases where trial elsewhere would be more appropriate: **McShannon v. Rockware Glass Ltd** [1978] AC 795. The conversion was complete by 1984 when Lord Diplock in **The Abidin Daver** [1984] AC 398 observed that:

> *The essential change is that...judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly is, in the field of law within which this appeal is concerned, indistinguishable form the Scottish legal doctrine of forum non conveniens.*

The current practice of the English courts, reflecting this sea change, is that contained in **Spiliada Maritime Corp. v. Cansulex Ltd** [1987] AC 854 which affords a power to stay proceedings on the basis that England is an inappropriate forum in circumstances where the defendant shows that there is another court with competent jurisdiction which is clearly and distinctly more appropriate than England for the trial of the action and that on balance it is not unjust that the claimant be deprived of the right to a trial in England.

But, in conducting the balancing exercise, it is not appropriate to draw invidious comparisons with the practice and procedures of other jurisdictions (unless the claimant would not receive a fair trial at all): see **Amin Rasheed Corp v. Kuwait Insurance** [2002] 1 AC 50 at p. 67. In particular, the House of Lords condemned as unsustainable any suggestion that the Commercial Court had a special status as the "curia franca of international commerce".

However there is no reason why a court should not encourage its use in a legitimate manner. The immediate question might be: why? Court calendars are crowded enough already. The reason is obvious: money. The financial importance of encouraging forum shopping is apparent from the statistics that I gave earlier and is confirmed by a press release issued by the Lord Chancellor's department in March 2001 announcing

acceptance of a proposal for the construction of a new commercial court "to safeguard Britain's position in a highly competitive world market."

In the result these proposals have sunk under the raft of other initiatives to reinvigorate public services in the field of heath and education. The Commercial Court must continue to sell itself and it is not immune from the temptation to do so.

Nonetheless, a side-effect of the recognition of the doctrine of forum non conveniens has been to clip the wings of those seeking to sell London as a neutral forum for the resolution of international disputes. Further limitations have now been imposed with regard to disputes concerning domiciliaries of the European Union. As you will know, the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Commercial Matters introduced an entirely new philosophy so far as courts in contracting states are concerned. There is no place for the exercise of Spiliada discretion. A set of jurisdictional rules have been established at the price of rigidity. Thus, for instance, the English courts have jurisdiction if the defendant is domiciled in England, if the claim concerns a contract performed in England or if it concerns a tort committed in England. Furthermore, any court other than the court first seised of the proceedings involving the same cause of action between the same parties is required to decline jurisdiction.

In the result, applications relating to jurisdiction are matters with which the Commercial Court has become only too accustomed. Of course there are a whole range of motives that press a party to seek to retain or avoid individual jurisdictions e.g. differing approaches to the governing law, differing limitation periods, concerns about the quality of the judicial

system, belief in home court advantage, language differences, witness availability and compellability, prospects of enforcement and so on. It may even be that lawyers are occasionally anxious to hang onto business. Whatever the motive, the issues are debated with great vigour. As a recent extreme example, I am presently writing a judgment in a case where the parties have spent some £500,000 in costs on a dispute as to the appropriate forum for a $500,000 cargo claim.

Thus the concerns expressed in the speech of Lord Radcliffe in **Vitkocvice Horni a Hutni Tezirstvo v. Korner** [1951] AC 869 at p.884 still rings true:

> *Disputes as to jurisdiction are one of the plagues of modern litigation. All too often they involve resources and expense which seem more proportionate to the substantive trial, if not extravagant even by that test, than to an interlocutory issue. This reflects the fact that more often than not, and I \use that expression advisedly, disputes as to jurisdiction are motivated not by the desire for a trial that satisfies the interests of justice, but by some other perceived advantage in bringing to a halt, or delaying, the proceedings that have commenced in this jurisdiction.*

A more recent example of the sense of disproportionality is to be found in the judgment of Mr Justice Waller in **British Aerospace v. Dee Howard** [1993] 1Lloyd's Rep 368, in circumstances where he was faced with twelve lever arch files and the prediction that the hearing would last two to three days. He protested:

Part of the argument in the case sought to compare the likely trial date in the Commercial Court in London with the likely trial date in Texas. Indeed, one submission of Mr Carr QC was that it would point up the difficulties that the Commercial Court is in in relation to Judge power, if in a public judgment leave to serve out was refused on the grounds of the likely trial date in the Commercial Court....If litigants are entitled to take up lengthy periods of Court time arguing whether Court A or Court B should have jurisdiction to try their dispute, it is not surprising to find that there are significant delays in getting the cases actually tried.

In most cases, where a contract expressly provides that disputes between the parties are to be referred to the exclusive jurisdiction of a tribunal, the English court will stay or restrain proceedings instituted in breach of such agreement unless the claimant proves that it is just and proper to allow it to continue: **Donohue v. Armco** [2001] UKHL 64. But significant differences of approach can still arise, perhaps reflecting unconscious enthusiasm to sell the jurisdiction. Take for instance the question of what constitutes an exclusive jurisdiction clause. In English law, the absence of the word "exclusive" is not decisive. For an example, take **Sohio Supply Company v. Gatoil (USA) Inc** [1989] 1 Lloyd's Rep 588. The relevant clause read:- "This agreement should be governed by the laws of England, under the jurisdiction of the English court without recourse to arbitration." The laconic style of Lord Justice Staughton may be familiar to some of you. In commenting on the clause, he observed:-

I can think of no reason at all why they should choose to go to the trouble of saying that the English Court should have non-exclusive jurisdiction. I can think of every reason why they should choose

that some Court, in this case the English Court, should have exclusive jurisdiction. Then both sides would know where all cases are to be tried. It may be that in some other types of case such as a policy of insurance, there is a reason for providing for non-exclusive jurisdiction. I can see none here. I am not sure that I can detect what precisely the reason was for choosing England. The parties had chosen English law; it may be that the best place for English law to be applied was in English Courts; it may be that they even thought that English Courts were a good thing in their own right – I do not know.

The US federal approach on exclusivity is quite different. The most recently reported case that I have seen is **The Pacific Senator (Hartford Fire Insurance Co v. Novocourt USA Inc.)** [2001] 2 Lloyd's Rep 674 where the relevant clause read:- "*Any dispute arising under or in connection with this bill of lading shall be governed by German law and be determined by the law courts of Bremen*". It was common ground that a mandatory and exclusive forum selection clause is presumptiveley valid and could only be overcome by a clear showing that the selection was unreasonable. But the District Court judge held:

This Court, however, need not reach the issue of the unreasonableness of the German forum selection clause because the clause is permissive rather than mandatory. Second Circuit case law holds that when a forum selection clause specifies only the jurisdiction, "'the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive...As Judge Weinfeld eloquently summarized

the rules in ***City of New York v. Pullman Inc.*** *477 F. Supp 438, 442 n. 11 (SDNY 1979), "[a]n agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion...or it leaves it in the control of one party with power to force on its own terms the appropriate forum.*

Rather startlingly, the judge went on to hold that even the arbitration clause *("[the dispute] shall be submitted to arbitration")* was only permissive because the contract provided that in the event of a dispute arising one of the parties "*may give written notice*" following which there would a period of 60 days for voluntary settlement. (These conclusions clearly came as a surprise to the defendant who issued a motion for reconsideration but this was dismissed pretty summarily: see [2002] 1 Lloyd's Rep. 485.)

A good example of a situation in which the same two jurisdictions were able to operate in parallel with broad agreement on the relevant principles is provided by almost my first hearing as a newly appointed Commercial judge. It was an ex parte application for an anti-suit injunction by plaintiffs in a charterparty dispute arising out of casualties to two ships operating on the Atlantic container line trade. Within a short period the defendant operators of the line made an application to set aside my order granting the injunction. It required quick resolution since there was a matching application for a stay in parallel United States proceedings due to take place only three days later.

The agreement was a slot charter agreement whereby the participants in the pool took container space on vessels operating a transatlantic liner

trade. The charter contained a London arbitration clause. There were several sets of United States proceedings. The claimants took out a motion to stay the proceedings in the United States. The counter to that from the defendants was a motion seeking to consolidate the cargo actions and the limitation action. It was this that had prompted the claimants to obtain an anti-suit injunction in England.

Despite the existence of the arbitration clause, I came to the conclusion that it was more appropriate to discharge the injunction given the imminence of the US decision on the stay application. Not only were there some issues raised by the parties which would have been more conveniently dealt with by the US court as they raised issues of US law but also:

> *[A]llowing the matter to be dealt with by the United States courts occasions no injustice or prejudice to the plaintiff. MSC have invoked the US jurisdiction in the first place by issuing the exoneration and limitation proceedings. Further, they took out the motion to stay the third party proceedings....months before seeking parallel relief from this court. The principles to be applied by the US court are very similar to the principles which this court would apply ...[W]ith an imminent hearing in New York for which the costs have largely been incurred, the interests of justice and the principles of comity are ad idem and lead inexorably to the desirability of the matter being dealt with in New York...*

What happened thereafter I sadly know not. But at least the potential for ill-feeling was avoided.

In recent years the English courts have been ready to issue anti-suit-injunctions against those who institute proceedings in breach of an exclusive jurisdiction clause. This form of relief is regularly granted even in circumstances where a stay could be sought in the non-contractual forum. In this connection, a passage from the judgment of Millett LJ in **The Angelic Grace**[1995] 1 Lloyd's Rep 87 at p. p. 96 has attracted a degree of notoriety:-

> *In my judgment the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution....there is no reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them....I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he has promised not to invoke and which it was its own duty to decline.*

In fact, a differently constituted Court of Appeal in **Toepfer v. Cargill** [1998] 1 Lloyd's rep 379 were at pains to say that: "*we would not wish it to be thought that we have independently endorsed these sentiments*". The court thought there was much to be said as a matter of comity and procedural simplicity if a defendant sued in breach of an arbitration clause in a New York Convention country was left to seek a stay in the court in question.

The point becomes magnified in the context of a Brussels Convention case. Contrary to the expectations of Millett LJ, the German Courts have made it plain that an anti-suit injunction directed at a party to restrain him from proceeding in Germany is regarded as an infringement of German jurisdiction and an interference with German sovereignty: see **Re the Enforcement of an English Anti-Suit Injunction** [1997] ILPr 320. This in turn led to the following observation from Leggatt LJ in the parallel proceedings in London:

> *The practice of the courts in England to grant injunctions to restrain a defendant from prosecuting proceedings in another country may require reconsideration in the light of the facts of this case. The conventional view is that such an injunction only operates in personam with consequence that the English courts do not and have never regarded themselves as interfering with the exercise by the foreign court of its jurisdiction....But in case in which the defendant does not live in England and does not have assets here the injunction is unlikely to be enforceable except by the foreign court recognising and giving effect to the injunction...In the present case the German courts regarded the injunction as an infringement of the sovereignty and refused to permit them to be served in Germany....*

Another issue in this field which has yet to be worked through is the extent to which it is open to a party who has issued proceeding in breach of contract to pray in aid issues of convenience. In one sense, the parties have by definition identified the appropriate forum. Even the fact that the

parties have merely agreed in their contract that the English court shall have non-exclusive jurisdiction creates a strong prima facie case that that jurisdiction is an appropriate one: "*it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate*": per Hobhouse J. in **Berisford Plc v. New Hampshire Insurance Co** [1990] 1 Lloyd's Rep 454.

The applicant is of course seeking a discretionary remedy and it is not realistic to exclude questions of convenience (e.g. language, availability of witnesses and so on) but prima facie these will be of little weight. More difficult question arise where the enforcement of the jurisdiction clause would involve the interests of other parties not bound by it. Here the risk of duplication of proceedings with the associated cost and risk of inconsistent decisions may lead the court to the view that a stay or injunction should not be granted: see **Bouygues Offshore SA v. Caspian Shipping Co** [1998] 2 Lloyd's Rep 461.

A particular variation to this theme that I have in mind is the extent to which the questions of convenience (including the risks of inconsistent decisions) can properly arise at all in cases concerning a breach of an arbitration clause. This point was not argued in **The Angelic Grace** but was considered at first instance in **Toepfer v. Cargill** [1997] 2 Lloyd's Rep 98. It arose again in a case that I heard at the end of July **Welex AG v. Rosa Maritime.** It was a follow on to an earlier dispute as to the incorporation of an English arbitration clause in a bill of lading which referred to an unexecuted charterparty: [2002] 1 All ER (Comm) . The facts were pretty bizarre. There had been a shipment of steel from the Ukraine to Poland. The cargo was wet on discharge. Shortly thereafter

the vessel was sold. It was then arrested in Portugal. No security was posted as the new owners' club asserted it was not liable and the old owners' club refused on the grounds that there was no maritime lien as a matter of English law. The vessel has accordingly been under arrest for a year.

One issue was whether the cargo-owners should be exposed to an anti-suit injunction to restrain proceedings brought by them in Poland to enforce a maritime lien available under Polish law. The second judgment has yet to be handed down so there is a limit to which can refer to detailed conclusions. Suffice it to say that there is some considerable force in the proposition that, since the New York Convention leaves no room for discretionary flexibility, it is difficult to see why considerations of forum conveniens and risks of inconsistent decisions should have any material weight in deciding whether to enforce an arbitration clause.

Let me briefly summarize on this topic. We have moved a long way to ensure that only an appropriate jurisdiction is invoked for the resolution of international disputes. Nonetheless, the criteria are not only uneven but leave a large measure of discretion to the judge. The uncertainty thus induced, taken with the perceived prize of the party's preferred jurisdiction, stokes up the enthusiasm for expensive and prolonged jurisdictional arguments. This is so even when there are express or implied choice of law/jurisdiction clauses. The present position is not entirely satisfactory and has the by-product of inducing suspicion, if not resentment, amongst judicial colleagues, the more so if they are expected to "sell" their court.