EXHIBIT 6

DICEY, MORRIS AND COLLINS
ON
THE CONFLICT OF LAWS

FOURTEENTH EDITION

UNDER THE GENERAL EDITORSHIP OF
SIR LAWRENCE COLLINS
LL.D. (Cantab.), F.B.A.

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case a stay of execution would no doubt be ordered pending a possible appeal.[2]

Enforcement. Where the statement of case[3] in proceedings on a foreign judgment has been served on the defendant and the defendant has acknowledged service or filed a defence, the claimant may apply for summary judgment on the ground that the defendant has no real prospect of successfully defending the claim.[4] Unless the defendant satisfies the court that there is an issue or question in dispute which ought to be tried—for instance, on the ground that the judgment was obtained by fraud[5]—the court may give judgment for the claimant.[6] Where the defendant does not appear the claimant may enter judgment at once.[7] The proceedings upon such an action may thus have a largely formal character. The English court must have *in personam* jurisdiction over the judgment debtor, and the process in a claim to enforce a judgment at common law must be served on him in England, unless permission is obtained to serve him outside. But even where the judgment debtor has no connection with England process may be issued, with permission, for service outside the jurisdiction, solely on the basis that the claim is to enforce a foreign judgment.[8] **14–025**

It is immaterial that the debtor dies before judgment is pronounced by the foreign court and that the judgment is pronounced against his personal representatives.[9] **14–026**

Since *Miliangos v George Frank (Textiles) Ltd*[10] there is no reason why a claim for enforcement of a foreign judgment may not be for the amount of the judgment in the currency in which it was rendered.

A foreign judgment *in personam* cannot be enforced in England by a claim *in rem*.[11]

Clause (2) of the Rule. A foreign judgment may be relied on in English proceedings otherwise than for the purpose of its enforcement. A claimant **14–027**

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[2] *Scott v Pilkington* (1862) 2 B. & S. 11, 41; *Colt Industries Inc v Sarlie (No.2)* [1966] 1 W.L.R. 1287; *Four Embarcadero Center Venture v Mr Greenjeans*, above, n.91; *Arrowmaster Inc v Unique Farming Ltd* (1993) 17 O.R. (3d) 407; *cf. The Varna (No.2)* [1994] 2 Lloyd's Rep. 41, 46.

[3] Under the practice prior to the CPR, the statement of claim usually contained a specific assertion that the foreign court had jurisdiction: there is nothing in the CPR which requires any change in the practice.

[4] CPR, r.24.2, replacing RSC Ord.14, r.1; *Grant v Easton* (1883) 13 Q.B.D. 302 (CA); *Colt Industries Inc v Sarlie (No.2)* [1966] 1 W.L.R. 1287 (CA).

[5] *Manger v Cash* (1889) 5 T.L.R. 271; *Codd v Delap* (1905) 92 L.T. 510 (HL); *Israel Discount Bank of New York v Hadjipateras* [1984] 1 W.L.R. 137 (CA); *Jet Holdings Inc v Patel* [1990] 1 Q.B. 335, 347 (CA); *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241, 250 (CA); *Jacobs v Beaver* (1908) 17 O.L.R. 496.

[6] CPR, r.24.2.

[7] CPR Pt 12.

[8] CPR, r.6.20(9) replacing RSC Ord.11, r.1(l)(m) and Rule 27, clause (10), above, para.11R–227, reversing the effect of *Perry v Zissis* [1977] 1 Lloyd's Rep. 607 (CA). For an example, see *Midland International Trade Services Ltd v Sudairy, Financial Times*, May 2, 1990. CPR, r.6.20(9) will not apply, however, unless and until there is a judgment which has been rendered by the foreign court: *Mercedes Benz AG v Leiduck* [1996] 1 A.C. 284, 298–299 (PC).

[9] *Re Flynn (No.2)* [1969] 2 Ch. 403.

[10] [1976] A.C. 443. See Rule 242. *cf.* the position under the 1933 Act, below, para.14–175.

[11] *The City of Mecca* (1881) 6 P.D. 106 (CA); *The Sylt* [1991] 1 Lloyd's Rep. 240, 244.

who has brought proceedings abroad and lost may seek to bring a similar claim in England; or in proceedings on a different claim an issue may be raised which has been decided abroad. In such cases a foreign judgment entitled to recognition may give rise to *res judicata*, i.e. to a cause of action estoppel, which prevents a party to proceedings from asserting or denying, as against the other party, the existence of a cause of action, the nonexistence or existence of which has been determined by the foreign court, or to an issue estoppel, which will prevent a matter of fact or law necessarily decided by a foreign court from being re-litigated in England.[12]

14–028 Thus a foreign judgment which is final and conclusive on the merits in favour of the defendant is at common law[13] a good defence to a claim in England for the same matter.[14] There is no cause of action estoppel against a different remedy,[15] although there may be an issue estoppel if a relevant issue has been decided directly in the foreign action. Where two conflicting foreign judgments, each of which would satisfy the criteria for recognition, have determined issues which arise in the English proceedings, the general rule is that the one given first in time is to be recognised, to the exclusion of the latter.[16]

14–029 It was established by a majority of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*[17] that a foreign judgment could give rise to an issue estoppel, i.e. prevent a party from denying any matter of fact or law necessarily decided by the foreign court. For there to be such an issue estoppel, three requirements must be satisfied[18]: first, the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; secondly, the parties to the English litigation

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[12] In an appropriate case the court may declare, in advance, that a foreign judgment is entitled to be recognised in England: *Phillips v Avena, The Times*, November 22, 2005.

[13] See also 1933 Act, s.8 (below, para.14–183), 1982 Act, s.19, and Schs 1 and 3C, Art.26 (below, para.14–224).

[14] *Ricardo v Garcias* (1845) 12 Cl. & F. 368; *Jacobson v Frachon* (1927) 138 L.T. 386 (CA). *cf. Booth v Leycester* (1837) 1 Keen 579. It is irrelevant which proceedings were commenced first. It used to be said that the foreign judgment only gave rise to the estoppel if the English proceedings were subsequent to the foreign judgment: but see *Lee v Citibank NA* [1981] Hong Kong L.R. 470 (CA), following *Bell v Holmes* [1956] 1 W.L.R. 1359 and *Morrison Rose & Partners v Hillman* [1961] 2 Q.B. 266 (CA) and not following *The Delta* (1876) 1 P.D. 393; *Houstoun v Sligo* (1885) 29 Ch.D. 448, 454.

[15] *Callandar v Dittrich* (1842) 4 M. & G. 68. On the other hand, a mere change in form to proceedings *in rem* is immaterial: *The Griefswald* (1859) Swab. 430, 435. But the same relief may be asked based on a different case giving rise to a new equity: *Hunter v Stewart* (1861) 4 De G.F. & J. 168; contrast *Henderson v Henderson* (1843) 3 Hare 100, 115. See *Michado v The Hattie and Lottie* (1904) 9 Exch.C.R. 11.

[16] *Showlag v Mansour* [1995] 1 A.C. 431 (PC). But if the party holding the earlier judgment is himself estopped from relying on it, the general rule will be displaced.

[17] [1967] 1 A.C. 853, 917, 925, 967.

[18] *The Sennar (No.2)* [1985] 1 W.L.R. 490, 499 (HL) See also *Vervaeke v Smith* [1983] 1 A.C. 145; *Tracomin SA v Sudan Oil Seeds Co Ltd (No.1)* [1983] 1 W.L.R. 662, 673, affirmed [1983] 1 W.L.R. 1026 (CA); *The Jocelyne* [1984] 2 Lloyd's Rep. 569; *ED&F Man (Sugar) Ltd v Haryanto (No.2)* [1991] 1 Lloyd's Rep. 429; *cf. Westfal-Larsen A/S v Ikerigi Compania Naviera SA* [1983] 1 All E.R. 382; *EI du Pont de Nemours v Agnew (No.2)* [1988] 2 Lloyd's Rep. 240 (CA); *Black v Yates* [1992] Q.B. 526; *Desert Sun Loan Corp v Hill* [1996] 2 All E.R. 847 (CA).

must be the same parties (or their privies) as in the foreign litigation[19]; and, thirdly, the issues raised must be identical. A decision[20] on the issue must have been necessary for the decision of the foreign court and not merely collateral.[21] But Lord Reid emphasised that special caution is required before a foreign judgment can be held to give rise to an issue estoppel: English courts are unfamiliar with modes of procedure in many foreign countries, and it may be difficult to see whether a particular issue has been decided or that a decision was a basis of a foreign judgment and not merely collateral or obiter; and it might be unjust for a litigant to be estopped from putting forward his case in England because he failed to do so in an earlier case of a trivial character abroad.[22]

14–030 The requirement that the judgment must be final and conclusive applies when it is relied on by the defendant as a defence,[23] just as it does when it is relied upon by the claimant seeking enforcement. The judgment must be "on the merits." In *The Sennar (No.2)*[24] Lord Diplock seems to have thought this added nothing to the condition that the judgment must be final and conclusive, but Lord Brandon suggested that "a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."[25] The issue determined by the foreign court in *The Sennar (No.2)*, was that a jurisdiction agreement bound the claimant to bring his claim

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[19] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853, 910–911, 928–929, 936–937, 944–946. But it may be an abuse of the process to attempt to relitigate in England an issue decided by a foreign court against one, but not both, of the parties to the English action: *Rayner v Bank für Gemeinwirtschaft AG* [1983] 1 Lloyd's Rep. 462 (CA). In *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241 (CA) it was held that an Irish judgment was enforceable against a judgment creditor, who (unlike his co-defendants) had not applied in Ireland to set aside the judgment for fraud. Since he was aware of the proceedings, he would be regarded as "privy" to them, and was bound by the determination of the Irish court that there had been no fraud in the absence of fresh evidence. Even if he were not estopped it would be an abuse of process and contrary to justice and public policy for the issue of fraud to be relitigated in England after the issue had been decided by the foreign court. *cf. Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 W.L.R. 44 (PC). For discussion of whether judgments or settlements in US class actions may be regarded as *res judicata* against class members resident outside the United States, see Dixon (1997) 46 I.C.L.Q. 134. In *Currie v McDonald's Restaurants of Canada Ltd* (2005) 250 D.L.R. (4th) 224 (Ont CA), it was held that issue estoppel could in principle bind persons who, having been sufficiently notified of US class action proceedings, had "passively submitted" to the jurisdiction by failing to opt out. It is doubtful whether this reasoning is consistent with the English common law.

[20] But where what was decided by the foreign court cannot be determined, e.g. where judgment is entered in default of appearance, this principle will be inapplicable: *Masters v Leaver* [2000] I.L.Pr. 387 (CA); *Baker v Ian McCall International Ltd* [2000] C.L.C. 189.

[21] *Good Challenger Navegante SA v Mineralexportimport SA* [2003] EWCA Civ. 1668, [2004] 1 Lloyd's Rep 67 (CA); *Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2325 (Comm.), [2003] 2 Lloyd's Rep. 753; *Sun Life Assurance Association of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ. 1660, [2005] 1 Lloyd's Rep. 606.

[22] [1967] 1 A.C. 853 at p.918, *per* Lord Reid. But *cf. The Sennar (No.2)* [1985] 1 W.L.R. 490, 500 (HL).

[23] *Plummer v Woodburne* (1825) 4 B. & C. 625; *Frayes v Worms* (1861) 10 C.B. (N.S.) 149; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853. See also *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep. 433 (CA).

[24] [1985] 1 W.L.R. 490, 494 (HL).

[25] *ibid.* p.499.

in Sudan, and as such may have been considered as being procedural in nature. But it was the final conclusion of the foreign court on the point which it had been asked to decide, namely, whether the exclusive jurisdiction agreement applied to a claim framed in tort; and it was on this account held capable of supporting an estoppel against the claimant[26] upon the issue. In *Desert Sun Loan Corp v Hill*[27] the Court of Appeal accepted in principle that issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, non-substantive issue where there was express submission of the issue in question to the foreign court, and the specific issue of fact was raised before and decided, finally and not just provisionally, by the court. It was emphasised that before according preclusive effect to any such finding by a foreign court the need for caution should be borne in mind.[28] Consequently, if the decision of the foreign court is a non-reviewable but clear decision upon an issue submitted to it for its determination,[29] it is unnecessary for the purposes of issue estoppel to characterise the issue so decided as being substantive rather than procedural.

14–031 It has been held that at common law and under the 1933 Act a judgment given in favour of the defendant on the ground that the action is barred by a statute of limitation was not on the merits.[30] But the effect of these decisions is reversed by s.3 of the Foreign Limitation Periods Act 1984, by which a foreign judgment determining any matter by reference to limitation is deemed to be on the merits. A judgment in default or by consent may, however, be a judgment on the merits.[31]

14–032 By the Civil Liability (Contribution) Act 1978 "any person liable" in respect of any damage may recover from any other person liable in respect of the same damage. It has been held that the equivalent provision in Scots law (which is in different terms and refers to liability found in an action) applies to the liability of the party seeking contribution established in an action in Scotland, and not in a foreign country.[32] The view has been expressed that a foreign judgment gives no right to seek contribution under the 1978 Act.[33] This question was left open in the Privy Council in *Soc Nat Ind Aerospatiale v Lee Kui Jak*,[34] but it indicated that the argument that the 1978 Act did not apply to foreign judgments had some substance.[35] It is suggested that these

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[26] Who was necessarily taken to be bound by findings made by a court to the jurisdiction of which he had unquestionably submitted.

[27] [1996] 2 All E.R. 847 (CA).

[28] This represents the view of the majority, Evans and Stuart-Smith L.JJ; Roch L.J. dissented.

[29] For consideration of the separate question whether it is open to the losing party to contend that he did not submit to the jurisdiction of the foreign court, so that its ruling is not to be recognised as against him, notwithstanding that he sought a determination on the point in question, see below, para.14–065.

[30] *Harris v Quine* (1869) L.R. 4 Q.B. 653; *Black-Clawson International Ltd v Papierwerke-Aschaffenburg AG* [1975] A.C. 591.

[31] See Read, p.101; but on the need for caution in the case of default judgments see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853, 916–917, 926, 946; Spencer-Bower, Turner and Handley, *Res Judicata* (3rd ed. 1996), pp.74–75.

[32] *Comex Houlder Diving Ltd v Colne Fishing Co Ltd*, 1987 S.L.T. 443 (HL).

[33] Clerk and Lindsell, *Torts* (19th ed. 2006), para.4–113.

[34] [1987] A.C. 871.

[35] *ibid.* at p.902, *per* Lord Goff of Chieveley, who was a party to both decisions, as was Lord Keith who delivered the leading speech in the former case.

doubts are well-founded, unless a foreign judgment, in proceedings to which the person from whom contribution is sought is a party, has held him liable and is entitled to recognition.

A distinct question arises when a foreign judgment is relied on as the basis of a consequential contractual claim. Where an insurer has been adjudged liable to an insured, and claims reimbursement from his reinsurer, the judgment of the foreign court will be recognised as the foundation for the claim if the foreign court was one of competent jurisdiction in relation to the claim against the insurer; judgment was not obtained by the insured in breach of a jurisdiction agreement or other contractual obligation not to proceed in that court; the insured took all proper defences; and the judgment was not manifestly perverse. To this extent the reinsurer is bound by the findings of a court in proceedings to which he was not party,[36] provided that there is no express term to the contrary in the contract of reinsurance. **14–033**

Clause (3) of the Rule. Clause (2) of the Rule deals with the case in which issues determined by a foreign court are recognised as being *res judicata* for the purpose of proceedings properly brought in an English court in which those issues also arise. The party in whose favour the relevant finding was made relies on the foreign judgment to prevent his being at risk for a second time. The situation is different when a claimant has succeeded in a foreign court, but, dissatisfied with the measure of his recovery, sues again on the original cause of action. In this case there may have been no finding in favour of the defendant which may be recognised in his defence,[37] and clause (2) will furnish no answer to the second claim. A foreign judgment in favour of a claimant was at one time no bar to a subsequent action in England based on the original cause of action. But s.34 of the 1982 Act provides that no proceedings may be brought by a person on a cause of action[38] in respect of which a foreign judgment has been given in his favour in proceedings between the same parties, or their privies,[39] unless the judgment is not enforceable or entitled to recognition in England. This displaces in part the rule of the common law that a foreign judgment does not extinguish the original cause of action in respect of which the judgment was given: a rule which was described by Lord Wilberforce as a rule "which, if surviving at all, is an illogical survival".[40] **14–034**

Section 34 does not enact a statutory rule of merger[41] (by which the original cause of action would cease to exist), but provides that "no proceedings shall **14–035**

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[36] *Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd* [1998] 2 All E.R. 434 (CA). But if the insured's claim has been settled, this principle cannot be applied, and the reinsurer may require the insurer to demonstrate its legal liability to the insured.

[37] If there has been, and if the defendant succeeded in part and obtained a determination of certain issues in his favour, recognition of that part of the judgment under clause (2) of this Rule will provide him with the necessary defence.

[38] For the meaning of the same cause of action, see *Black v Yates* [1992] Q.B. 526; *Republic of India v India Steamship Co Ltd* [1993] A.C. 410, 419–421. It means the factual situation which confers a remedy, and not the evidence to support it, nor the nature of the remedy itself.

[39] *cf. Black v Yates*, above; *House of Spring Gardens v Waite* [1991] 1 Q.B. 241 (CA); para. 14–005, above.

[40] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 855, 966.

[41] [1993] A.C. 410, 423–424.

RULE 44[2]—A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy. 14R–141

COMMENT

There are very few reported cases in which foreign judgments *in personam*[3] have been denied enforcement or recognition for reasons of public policy at common law.[4] In *Re Macartney*,[5] a foreign judgment awarding the mother on behalf of an illegitimate child perpetual maintenance against the estate of the deceased putative father was refused enforcement on three grounds: (1) it was contrary to public policy to enforce an affiliation order not limited to minority; (2) the cause of action—a posthumous affiliation order—was unknown to English law; and (3) the judgment was not final and conclusive.[6] Under the second head the court relied heavily on an American case[7] in which a French judgment awarding maintenance to a French son-in-law against his American father-in-law and mother-in-law was refused enforcement in the United States. Both these cases were disapproved or distinguished in *Burchell v Burchell*[8] and *Phrantzes v Argenti*.[9] 14–142

In *Burchell v Burchell* an Ontario court enforced a judgment of an Ohio divorce court for a lump-sum payment by a wife for the support of her husband, although by the law of Ontario a husband could not have obtained alimony from his wife. In *Phrantzes v Argenti* (which was not a case upon a foreign judgment), the English court refused to enforce a claim by a Greek daughter against her father for the provision of a dowry on her marriage as required by Greek law, not on the ground that the cause of action was unknown to English law, but on the ground that English law had no remedy for awarding a dowry, the amount of which in Greek law was within the discretion of the court and varied in accordance with the wealth and social 14–143

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[2] *Re Macartney* [1921] 1 Ch. 552; *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA); *Israel Discount Bank of New York v Hadjipateras* [1984] 1 W.L.R. 137 (CA); *ED&F Man (Sugar) Ltd Haryanto (No.2)* [1991] 1 Lloyd's Rep. 429 (CA); *Mayo-Perrott v Mayo-Perrott* [1958] I.R. 336; *Holt v Thomas* (1987) 38 D.L.R. (4th) 117 (Alta); *Honolulu Savings and Loan Ass'n v Robinson* (1989) 64 D.L.R. (4th) 551, affirmed (1990) 76 D.L.R. (4th) 103 (Man CA); *Minkler and Kirschbaum v Sheppard* (1991) 60 B.C.L.R. (2d) 360; *Resorts International Hotel Inc v Auerbach* (1991) 89 D.L.R. (4th) 688 (Que CA); *Boardwalk Regency Corp v Maalouf* (1992) 88 D.L.R. (4th) 612 (Ont CA); *Union of India v Bumper Development Corp* [1995] 7 W.W.R. 80 (Alta); *Connor v Connor* [1974] 1 N.Z.L.R. 632; Read, pp.292–295; Restatement, s.117. In *Adams v Cape Industries Plc* [1990] Ch. 433, 496, affirmed *ibid.* 503, Scott J. suggested that the principles in Rules 44 and 45 might overlap in the sense that, if a foreign judgment were obtained in breach of natural justice, it would also be contrary to public policy to enforce it.

[3] For non-recognition of foreign divorce and nullity decrees see below, Rule 83.

[4] There is also a public policy in favour of accepting the finality of litigation: *cf.*, in the context of arbitral awards, *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1999] Q.B. 740.

[5] [1921] 1 Ch. 522.

[6] See Rule 35, above. This third ground would clearly have been sufficient by itself to dispose of the case.

[7] *De Brimont v Penniman* (1873) 10 Blatchford Circuit Court Reports 436.

[8] [1926] 2 D.L.R. 595 (Ont).

[9] [1960] 2 Q.B. 19, 31–34.

Human Rights has since affirmed the principle in *Pellegrini* without significant further comment, though subject to the qualification that where a State has acted in compliance with its legal obligations under EU law, there will be a presumption that it has not acted contrary to the European Convention.[36]

ILLUSTRATION

A & Co, sugar traders, sell sugar to X, an Indonesian citizen, for $200 million under contracts governed by English law. Disputes arise and X seeks a declaration in England that he is not bound by the contracts. His action is dismissed, and the judgment is confirmed by the Court of Appeal, which also dismisses his application to raise an issue that the contracts are illegal by reason of a prohibition on importation of sugar into Indonesia. Further English proceedings ensue which are settled by an agreement governed by English law, under which X agrees to pay A & Co $27 million. Subsequently, X commences proceedings in Indonesia against A & Co, and the Indonesian court decides that the settlement agreement is illegal because it arises out of illegal contracts, and that it is contrary to Indonesian public policy to recognise the English judgment. A & Co. then seek a declaration in England that the settlement agreement is valid and binding on X. The Indonesian judgment is not recognised because the real issue in those proceedings was the validity of the underlying agreements which had already been the subject of a decision of the English court.[37] **14–150**

RULE 45—A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice.[38] **14R–151**

COMMENT

In a celebrated passage in his judgment in *Pemberton v Hughes*[39] (a case on the recognition of a foreign divorce decree), Lord Lindley observed: "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice." This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the merits or has misapplied English law or foreign law, is not impeachable on that ground.[40] Nor is it impeachable because the court admitted evidence which is inadmissible in England[41] or did not admit evidence which is admissible in England[42] or otherwise followed a practice **14–152**

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[36] *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland*, June 30, 2005.
[37] *ED&F Man (Sugar) Ltd v Haryanto (No.2)* [1991] 1 Lloyd's Rep. 429 (CA).
[38] *Buchanan v Rucker* (1808) 9 East 192; *Sheehy v Professional Life Assurance Co* (1857) 2 C.B.(N.S.) 211; *Crawley v Isaacs* (1867) 16 L.T. 529; *Pemberton v Hughes* [1899] 1 Ch. 781, 790 (CA); *Robinson v Fenner* [1913] 3 K.B. 835; *Bergerem v Marsh* (1921) 91 L.J.K.B. 80; *Richardson v Army, Navy and General Assurance Association Ltd* (1925) 21 Ll.L.R. 345; *Jacobson v Frachon* (1927) 138 L.T. 386 (CA); *Adams v Cape Industries Plc* [1990] Ch. 433 (CA); *Beals v Saldanha* [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1; Read, pp.281–288; Restatement, s.25.
[39] [1899] 1 Ch. 781, 790 (CA).
[40] See *Jacobson v Frachon* (1927) 138 L.T. 386, 390, 393 (CA); *Adams v Cape Industries Plc* [1990] Ch. 433, 569 (CA).
[41] *De Cosse Brissac v Rathbone* (1861) 6 H. & N. 301 (the sixth plea).
[42] *Scarpetta v Lowenfeld* (1911) 27 T.L.R. 509; *Robinson v Fenner* [1913] 3 K.B. 835.

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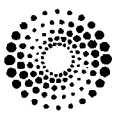
LORD COLLINS OF MAPESBURY
P.C., LL.D., LL.M., F.B.A.

WITH

SPECIALIST EDITORS

SWEET & MAXWELL



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8–057 NOTE 72. Now CPR, rr.6.48 to 6.52.

8–059 A further Special Commission of the Hague Conference was held in 2009 to review the practical operation of a number of conventions, including the Evidence Convention.

8–060 For the implicit acceptance of the approach adopted in *Aérospatiale* by those States which allow evidence to be taken by audio or video conferencing across national borders, see Davis (2007) 55 Am. J. Comp.L. 205.

8–061 The Special Commission of 2009 recommended that States which have made a general, non-particularised declaration under Art.23 revisit their declaration taking into account terms such as those contained in the United Kingdom declaration or in Art.16 of the Additional Protocol of 1984 to the Inter-American Convention on the Taking of Evidence Abroad.

8–063 On the question whether the Regulation is the exclusive means of obtaining evidence, see Nuyts, 2007 *Rev. Crit.* 53.

In Case C–175/06 *Tedesco v Tomasoni Fittings SrL* (later removed from court register) Kokott A-G delivered an opinion on July 18, 2007 to the effect that measures for the preservation and collection of evidence (such as seizure of counterfeit goods under the Italian Industrial Property Code) constituted a request for the taking of evidence coming within the scope of Art.1 of Council Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence, which the competent court of a Member State must execute at the request of a court from another Member State.

In *Masri v Consolidated Contractors International (UK) Ltd (No.4)* [2008] EWCA Civ 876, [2009] 2 W.L.R. 699 the Court of Appeal emphasised that the Evidence Regulation only applies where a request is made by a court in one Member State either to take evidence in another Member State or that a court in that State should itself take evidence. An order under CPR r.71.2 against a judgment debtor to substantive proceedings over which the English court has jurisdiction, requiring the debtor to provide evidence to the English court as to nature and location of his assets did not fall within the Evidence Regulation, no such request being made. (On appeal the House of Lords held that an order under CPR r.71.2 could not be made against persons abroad: [2009] UKHL 43, [2009] 3 W.L.R. 385 and see the entry at para.8–068). The Court of Appeal rejected an argument that the Evidence Regulation established a complete code, the sole and exclusive route by which evidence may be obtained from a non-party who is in the territory of another Member State. (This point was not reached in the House of Lords.) See Rushworth [2009] L.M.C.L.Q. 196.

8–068 In *Masri v Consolidated Contractors International Company SAL* [2009] UKHL 43, [2009] 3 W.L.R. 385 the House of Lords confirmed that the service of a writ of subpoena under s.36 of the Supreme Court Act 1981 was only

402 (S.D.N.Y. 1997). In *Re Application of Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994) the court held that arbitrators could be a "tribunal" within 28 U.S.C., s.1782, but denied the application for assistance on discretionary grounds. In *Re Application of Roz Trading Ltd*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) the court held that an arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna was a tribunal for the purposes of s.1782, regarding the matter as now to be governed by principles developed by the United States Supreme Court in *Intel Corp v Advanced Micro Devices Inc*, 542 U.S. 241 (2004) in holding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" for that purpose. See Fellas (2007) 23 Arb.Int. 379; Knöfel (2009) 5 J. Priv. Int. L. 281.

8–082 For the approach of the Canadian courts, see *OPSEU Pension Trust Fund v Clark* (2006) 270 D.L.R. (4th) 429 (Ont. CA) (letters rogatory from a United States case sought the production of documents by an independent auditor and the oral examination of officers involved in the audit; it would require a minimum of 1500 person-hours to identify the documents sought; request granted, applying the test that the evidence was relevant, not otherwise obtainable, and identified with reasonable specificity, and enforcement was consistent with Canadian public policy and not unduly burdensome). That case was distinguished in *Presbyterian Church of Sudan v Taylor* (2006) 275 D.L.R. (4th) 512 (Ont. CA), partly on public policy grounds, aspects of the litigation having been made the subject of a diplomatic protest by Canada, but also because a request seeking information about the defendant corporation's "operations in Sudan" was too wide and it had not been established that the evidence sought was relevant, necessary and not otherwise obtainable.

8–086 See the examination of s.2(4) of the Evidence (Proceedings in Other Jurisdictions) Act 1975 in *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 W.L.R. 1053.

8–088 See *Morgan, Lewis & Bockius LLP v Gauthier* (2006) 82 O.R. (3d) 189 (letter of request in part contrary to Canadian public policy opposing extra-territorial application by the United States of its embargo against Cuba).

8–090 NOTE 7. Companies Act 1985, s.447 is amended by the Companies Act 2006, s.1038(2).

NOTE 12. Companies Act 1989, s.87 is amended by SI 1992/1315, SI 1993/1826, the Pensions Act 1995, Sch.3, para.19, SI 1997/2781, the Bank of England Act 1998, Sch.5, para.66(3), the National Lottery Act 1998, Sch.1, para.4, SI 1999/1820, SI 2001/1283, SI 2001/3649, the Enterprise Act 2002, Sch.25, para.21(1),(3), SI 2002/1889, the Pensions Act 2004, Sch.4, Pt 4,

NOTE 83. See also *US Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27, [2009] 2 All E.R. 1009, generally approving the principle in *Robb Evans v European Bank Ltd* (2004) 61 N.S.W.L.R. 75.

14–021

NOTE 90: ; *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 (no estoppel against defendant whose contention was that it never agreed to arbitrate the matter and who had not submitted that issue to the final determination of a foreign court).

NOTE 92. See also *CLE Owners Inc v Wanlass* [2005] 8 W.W.R. 559 (Man. CA). For a less strict interpretation of the requirement of finality, see *Re Cavell Insurance Co* (2006) 269 D.L.R. (4th) 663 (Ont. CA).

When the foreign default judgment is set aside, it is no longer entitled to recognition, and a local judgment will be set aside on application: *Benefit Strategies Group Ltd v Prider* [2007] SASC 250.

14–025 NOTE 8. *Tasarruf Mevduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508 (permission to serve out under CPR r.6.20(9) not dependent upon showing assets within the jurisdiction). See also *NML Capital Ltd v Republic of Argentina* [2009] EWHC 110 (Comm.), [2009] Q.B. 579 (enforcement against State).

For CPR, r.6.20(9), now see CPR PD6B, para.3.1(10).

14–027 NOTE 12. The neutral citation for *Phillips v Avena, The Times*, November 22, 2005 is [2005] EWHC 3333.

14–030 But orders or requests made in bankruptcy proceedings before a foreign court may not be seen as judgments, and a court may make an order which responds to a judicial request for co-operation with the procedure before the foreign court even though a foreign judgment in similar terms and circumstances would be refused recognition: *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 A.C. 508 (on which see Briggs (2006) 77 B.Y.I.L. 575).

By contrast, when a foreign court, which has opened insolvency proceedings in the debtor's centre of main interests, has given a judgment against third parties, that judgment will not be enforced in England unless it complies with the ordinary rules for the recognition of judgments at common law, and in particular those which define the international jurisdiction of the foreign court over the individual defendant, regardless of the insolvency. The fact that the insolvency proceeding is recognised under the UNCITRAL Model Law (implemented in England by SI 2006/1030) does not alter the position so far

as judgments against third parties are concerned: *Re The Consumers Trust* [2009] EWHC 2129 (Ch.).

On the degree of preclusion attributable to the foreign judgment, see *Barrett v Universal Island Records* [2006] EWHC 1009 (Ch.), [175] at [190] (foreign judgment will not be given greater preclusive effect than it has under its own law).

It may appear from *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, at [22]–[29], that the English court may have been prepared, in principle at least, to give effect to findings made in the course of a motion to dismiss on jurisdictional grounds before the courts of Texas, though whether this may be taken as a form of recognition in the strict sense is doubtful. For the practical difficulty presented by the contention that one may "accord deference" to the reasons given by another tribunal, see *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, [20]–[21].

Final sentence. See *Republic of Kazakhstan v Istil Group Ltd* [2006] EWHC 448 (Comm), [2006] 2 Lloyd's Rep. 370 (affd. [2007] EWCA Civ 471, [2008] Bus. L.R. 878, holding that estoppel may issue from implied determination by foreign court (application for permission to appeal refused without reference to this point: [2007] EWCA Civ 471, [2008] Bus. L.R. 878; for further proceedings, see *Republic of Kazakhstan v Istil Group Inc (No.2)* [2007] EWHC 2729 (Comm.), [2008] 1 Lloyd's Rep. 382); *Liebinger v Stryker Trauma GmbH* [2006] EWHC 690, applying *The Sennar (No.2)* [1985] 1 W.L.R. 490 (HL)) to a German decision as to validity of appointment of arbitrator. In *Armacel Pty Ltd v Smurfit Stone Container Corp* [2008] FCA 592, (2008) 248 A.L.R. 573, issue estoppel was held to operate against a party who, as defendant, had made an unsuccessful jurisdictional challenge before a foreign court. The observation at [66] that the case was "indistinguishable from *The Sennar*" does not appear to be correct, at least from the perspective of English law and s.33 of Civil Jurisdiction and Judgments Act 1982.

NOTE 36. See also *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] EWHC 58 (Comm.), [2006] 1 Lloyd's Rep. 500; *Korea National Insurance Corp v Allianz Global Corporate & Specialty AG* [2007] EWCA Civ 1066, [2008] Lloyd's Rep. I.R. 413. **14–033**

See *Karafarin Bank v Mansoury-Dara* [2009] EWHC 1217 (Comm.), [2009] 2 Lloyd's Rep. 289 (Iranian judgment not entitled to recognition in England; neither Civil Jurisdiction and Judgments Act 1982, s.34, nor doctrine of abuse of process, a bar to proceedings in England). **14–034**

NOTE 41. *cf. Messer Griesheim GmbH v Goyal MG Gases Pvt Ltd* [2006] EWHC 79 (Comm.), holding that the principle of merger did not prevent an **14–035**

application for summary judgment after judgment had been entered in default of appearance.

B. *Jurisdiction Of Foreign Courts at Common Law*

(1) Jurisdiction in Personam

14–059 In *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch.), [2009] F.S.R. 103 the court refused to interpret, adapt, or extend the rule in *Adams v Cape Industries Plc* [1990] Ch. 433 (CA) to produce the consequence that a defendant whose internet website was accessible from the United States, and who sold goods to purchasers who ordered them from the United States was present in the United States for the purpose of this Rule: "trading into" a country is not proof of presence: at [222].

Once a corporation is in liquidation and ceases the carrying on business, it will not be regarded as present within the jurisdiction of the foreign court: *Re Flightlease (Ireland) Ltd* [2006] IEHC 193, [2008] 1 I.L.R.M. 53.

14–063 An English court may stay its proceedings to allow a foreign court to determine by way of preliminary issue whether it has jurisdiction under a dispute resolution agreement, on condition that it not be alleged that the defendant's participation in the procedure before the foreign court amounted a submission to its jurisdiction: *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 2146 (Ch.), [2009] Bus. L.R. 1006.

14–064 Note 42. In relation to *Starlight International Inc v Bruce* [2002] EWHC 374 (Ch.), [2002] I.L.Pr. 617, see (to similar effect, though not a case on the recognition of judgments) *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm.), [2009] 1 Lloyd's Rep. 475.

14–080 Text to note 6. For CPR, r.6.20, now see CPR, r.6.36 and PD6B, para.3.1.

14–081 Text to note 8. For CPR, r.6.20, now see CPR, r.6.36 and PD6B, para.3.1.

On jurisdictional competence, see *Long Beach Ltd v Global Witness Ltd* [2007] EWHC 1980 (QB), at [26].

14–082 Text to note 20. For CPR, r.6.20, now see CPR, r.6.36 and PD6B, para.3.1.

14–084 See also *King v Drabinsky* (2008) 92 O.R. (3d) 616 (Ont. CA) (US judgment recognised in Ontario on basis that transaction had been entered into in US capital markets, and that comity therefore required its recognition).

On the flexibility or unpredictability inherent in *Morguard Investments Ltd v De Savoye* [1990] S.C.R. 1077 (Can. Sup. Ct.), see *Disney Enterprises Inc v*

Click Enterprises Inc (2006) 267 D.L.R. (4th) 291 (Ont.) (a case on wrongful commercial activity on the internet). In *Re Flightlease (Ireland) Ltd* [2006] IEHC 193, [2008] 1 I.L.R.M. 53 it was held that it was not yet appropriate for Ireland to adopt the new approach taken by the Supreme Court of Canada.

NOTE 24. See also Pitel and Dusten (2006) 85 Can. B. Rev. 61.

(3) JUDGMENTS IN REM

On meaning of judgment *in rem*, see *Pattni v Ali* [2006] UKPC 51, [2007] 2 A.C. 85 (on which see Briggs (2006) 77 B.Y.I.L. 575; Tham [2007] L.M.C.L.Q. 129). Rule 40 deals with recognition of judgment as one *in rem*, as distinct from the separate question whether a judgment *in rem*, which may not be recognised, may still be recognised as binding the parties to the proceedings as a judgment *in personam*. **14R–099**

An order made by a foreign court which is exercising insolvency jurisdiction, which orders a repayment of money to the insolvent company to undo a fraudulent preference, may be seen as a judgment *in personam*, and its recognition governed by Rule 36 rather than Rule 40: *Re Flightlease (Ireland) Ltd* [2006] IEHC 193, [2008] 1 I.L.R.M. 53. **14–100**

The content of this paragraph was approved and applied in *NML Capital Ltd v Republic of Argentina* [2009] EWHC 110 (Comm.), [2009] Q.B. 579. **14–095**

Supreme Court Act 1981 is now renamed Senior Courts Act 1981: Constitutional Reform Act 2005, s.59 and Sch.11, in force October 1, 2009. **14–103**

C. *Conclusiveness of Foreign Judgments: Defences*

NOTE 97. On whether a foreign order refusing or granting recognition to a judgment from a third State is a final judgment on the merits, see *Cortés v Yorkton Securities Inc* (2007) 278 D.L.R. (4th) 740, at [49]; *Morgan Stanley & Co International Ltd v Pilot Lead Investments Ltd* [2006] 4 H.K.C. 93 (on which see Smart (2007) 81 A.L.R. 349). **14R–109**

It was the opinion of the House of Lords in *Clarke v Fennoscandia Ltd* [2007] UKHL 56, 2008 S.C. (H.L.) 122, at [23]–[24], that where a Scottish court declares that a foreign judgment was obtained by fraud and for that reason may not be recognised or enforced in Scotland, such a decision has no effect *in rem*, and "no conceivable effect" outside Scotland. There is no reason to suppose that English private international law is to different effect; and the decision suggests that estoppel by *res judicata* is inapplicable to such a ruling. **14–128**

NOTE 54. See also *Korea National Insurance Corp v Allianz Global Corporate & Specialty AG* [2007] EWCA Civ 1066, [2008] Lloyd's Rep. I.R. 413 (a case

on the recognition of foreign judgment as founding a claim for reimbursement by a reinsurer): to challenge a foreign judgment for fraud, it must be shown that the party putting forward a false claim knew of its falsity.

14–129 NOTE 55. See also *Yeager v Garner* [2007] 4 W.W.R. 469 (B.C.).

14–133 See *Korea National Insurance Co v Allianz Global Corporate and Specialty AG* [2008] EWCA Civ 1355, [2008] 2 C.L.C. 837 (allegations that foreign judgment was procured by fraudulent conspiracy between judgment creditor, foreign court and foreign State were properly justiciable, given that the foreign State had been notified of the allegations and had made no response; such serious allegations needed to be advanced with caution).

14–144 See also *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470, [22] (public policy objection will be very hard to sustain).

14–145 On the question of whether a party bringing proceedings outside England which are designed to undermine an English judgment may be restrained from bringing those proceedings, see *Masri v Consolidated Contractors International Co SAL (No.3)* [2008] EWCA Civ 625, [2009] Q.B. 503, where *ED & F Man (Sugar) Ltd v Haryanto (No.2)* was distinguished.

14–146 According to the New Zealand Court of Appeal, recognition may be denied on grounds of public policy where recognition would offend a reasonable New Zealander's sense of morality, but may not be denied simply because the case would have been decided differently in New Zealand: *Reeves v One World Challenge LLC* [2006] 2 N.Z.L.R. 184, [50]–[67]; applied in *Questnet Ltd v Lane* [2008] NZHC 710 (a case also rejecting a complaint of lack of notification of the hearing of an application as a plea sufficient to establish a want of natural justice).

14–148 See Fawcett (2007) 56 I.C.L.Q. 1.

14R–151 NOTE 32. Canadian case-law places more emphasis on the principle of natural justice as a result of the wider approach to rules of jurisdictional competence established by its Supreme Court. See *Oakwell Engineering Ltd v Enernorth Industries Inc* (2007) 81 O.R. (3d) 288 (CA) (on which Sullivan and Woolley (2006) 85 Can. B. Rev. 605; *United States of America v Shield Development Co* (2004) 74 O.R. (3d) 585 (appeal dismissed May 18, 2005); *Angba v Marie* (2004) 263 D.L.R. (4th) 562 (Fed. Ct.); *CLE Owners Inc v Wanlass* [2005] 8 W.W.R. 559 (Man. CA).

14–156 NOTE 65. On whether the objection needs to be taken before the foreign court (held sometimes, but not where the complaint is founded on the absence of due service), see *Cortés v Yorkton Securities Inc* (2007) 278 D.L.R. (4th) 740; *Marx v Balak* [2008] BCSC 195.

cover a variety of forms of evidence, including oral testimony and the inspection of documents or other property,[75] and is sent to a Central Authority designated for the purposes of the Convention in the country in which the evidence is to be taken.[76] The Convention does not exclude the use of other methods of obtaining evidence provided for under the national law of the State in which the evidence is sought.[77]

8–060 In *Société Nationale Industrielle Aérospatiale v US District Court for the Southern District of Iowa*[78] the United States Supreme Court held that the Hague Convention does not provide an exclusive or mandatory set of procedures, nor even a preferred set of procedures to which first resort must always be had. The court did, however, recognise the need for considerations of comity to be addressed before orders were made which would be regarded by the foreign State concerned as an infringement of its sovereignty.[79] The English court has taken a similar approach, confirming an order for discovery against a French company despite an argument that first resort should have been had either to the Hague Convention or to the bilateral Civil Procedure Convention between the United Kingdom and France.[80]

8–061 Under Art.23 of the Convention, inserted at the proposal of the United Kingdom, a reservation is permitted. A Contracting State may declare "that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." It is now recognised amongst delegates at the Hague Conference that this Article was poorly drafted. It also seems that the authors of the Convention failed to address important questions as to the relationship between a reservation under Art.23 and the primary provisions of the Convention which is concerned with "evidence" and "other judicial acts," concepts which few of the signatory States would regard as including the more extensive forms of discovery procedures. The phrase "pre-trial discovery of documents as known in Common Law countries" obscures significant differences between the procedures available in countries following the practice contained in what was RSC Order 24 and is now Pt 31 of the Civil Procedure Rules 1998 and the much more extensive procedures available in many jurisdictions in the United States which can include wide-ranging requests for non-parties to the action to make oral depositions or to produce documents[81] which may not necessarily be relevant to the issues but could possibly assist the plaintiff to formulate allegations against the defendant. The United Kingdom's reservation under Art.23 contains a statement of its intended scope, which is reflected in the

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[75] See Art.3(1)(f)(g). The appointment of a technical expert to assist the court is not within the scope of the Hague Convention: *Sté Luxguard v Sté SN Sitaco* [1996] I.L.Pr. 5 (Cr d'app., Versailles, 1993) (exploring relationship between that Convention and Brussels Convention of 1968).

[76] In the UK, as in most countries, the Central Authority and other relevant authorities are the same as those acting in respect of the Hague Convention on the Service of Process; see para.8–045, above.

[77] Art.27(c).

[78] 482 U.S. 522 (1987).

[79] See Slomanson (1988) 37 I.C.L.Q. 391; Born and Hoing (1990) 24 Int.L. 393; McClean, *International Co-operation in Civil and Criminal Matters* (2002), pp.133–143.

[80] *The Heidberg* [1993] 2 Lloyd's Rep. 324.

[81] And, indeed, other forms of information; Art.23 refers only to the discovery *of documents*.

Evidence (Proceedings in Other Jurisdictions) Act 1975.[82] A number of other Contracting States have revised their own reservations to incorporate this statement.[83]

8–062 Chapter II of the Convention is concerned with the Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners. Diplomatic agents and consular officers may take the evidence of nationals of the State they represent without seeking prior permission from the authorities of the State in which they serve; a Contracting State may however declare that prior permission is required in these cases.[84] Where diplomats or consuls wish to take the evidence of other persons, or where a commissioner is appointed to take any evidence, prior permission is required (and may be given subject to conditions) unless the Contracting State concerned has made a declaration waiving this requirement.[85] A Contracting State may declare its willingness to make available appropriate assistance to obtain the evidence by compulsion in any of these cases.[86]

8–063 *European Union Regulation.* The taking of evidence in other Member States of the European Union (other than Denmark) is facilitated by Council Regulation (EC) 1206/2001 of May 28, 2001 on co-operation between the courts of the Regulation States in the taking of evidence in civil or commercial matters ("the Taking of Evidence Regulation"),[87] which came into force on January 1, 2004. The Taking of Evidence Regulation builds on the Hague Convention of 1970, a major difference being that the Regulation provides for the direct transmission of requests from court to court, dispensing with the device of Central Authorities, though preserving a limited role for what are termed "central bodies".[88] The Taking of Evidence Regulation prevails over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Regulation States and in particular the Hague Convention.[89] The Taking of Evidence Regulation applies in civil or commercial matters where the court of a Regulation State, in accordance with the provisions of the law of that State, requests (a) the competent court of another Regulation State to take evidence; or (b) to take evidence directly in another Regulation State.[90] A request may not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.[91]

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[82] s.2(4): see below, para.8–086.

[83] See Collins (1986) 35 I.C.L.Q. 765 (reprinted in Collins, *Essays*, p.289) and the Report of the Special Commission of the Hague Conference on the operation of the Convention, *Actes et Documents* of the Fourteenth Session, 420–1.

[84] Art.15.

[85] Arts 16, 17.

[86] Art.18.

[87] [2001] O.J. L174. Because Denmark is not subject to the Regulation, this Chapter refers to the Member States to which the Regulation applies as "Regulation States." A Manual containing comprehensive information about procedures under the Regulation in each Regulation State is to be found on the website of the European Judicial Network. For the procedure for taking evidence in England, see CPR, r.34.24.

[88] Art.3.

[89] Art.21(1).

[90] Art.1(1).

[91] Art.1(2); *Dendron GmbH v Regents of the University of California* [2004] EWHC 589 (Ch), [2005] 1 W.L.R. 200.

property which is the subject-matter of the execution.[55] Thirdly, if property is seized and the defendant appears and defends the case on the merits, the appearance is not involuntary.[56] But there may be cases in which the defendant may appear to oppose the seizure on jurisdictional grounds, e.g. where he denies he has property within the jurisdiction or where he challenges the validity of the seizure.[57] In such cases the effect of s.33 of the 1982 Act is that the appearance will not be voluntary.

14–068 The defendant, by an appearance which is voluntary in the sense explained, renders himself subject to the jurisdiction of the foreign court with respect not only to the original claim but also to such further claims as the court allows to be added by the plaintiff. But this does not mean that he subjects himself also to claims by new claimants.[58] In principle, a submission will extend to claims concerning the same subject-matter, and to related claims which ought to be dealt with in the same proceedings, but (in either case) only if advanced by parties who were such at the date of the defendant's submission to the jurisdiction of the court; the decision of the foreign court to allow the new claim is not decisive.[59]

14–069 **The fourth case. Agreement to submit.** If a contract provides that all disputes between the parties shall be referred to the exclusive[60] jurisdiction of a foreign tribunal, not only will proceedings brought in England in breach of such agreement usually be stayed,[61] but also the foreign court is deemed to have jurisdiction over the parties.[62] A contractual submission to a particular court is not of itself a submission generally to the jurisdiction of all courts of that country[63]; the question is one of construction of the contract.[64]

14–070 An agreement to submit may also take the form of an agreement to accept service of process at a designated address. Thus, if a person takes shares in a foreign company, the articles of association or statutes of which provide that all disputes shall be submitted to the jurisdiction of a foreign court, and that every shareholder must "elect a domicile" at a particular place for service of process, and that in default the officers of the company may do so for him,

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[55] *Guiard v De Clermont* [1914] 3 K.B. 145; *Poissant v Poissant* [1941] 3 W.W.R. 646, 650 (Sask).

[56] *Clinton v Ford* (1982) 137 D.L.R. (3d) 281 (Ont CA); *cf. Re Low* [1894] 1 Ch. 147, 160 (CA).

[57] As he may do in the United States on constitutional grounds: see *Shaffer v Heitner*, 433 U.S. 186 (1977).

[58] See Restatement, s.26, comment e and Illustration 8, and *Re Indiana Transportation Co*, 244 U.S. 456 (1917) (submission to jurisdiction in respect of death of one passenger held not to involve submission in other claims). And see, by analogy, *Jordan Grand Prix Ltd v Baltic Insurance Group* [1999] 2 A.C. 127.

[59] *Murthy v Sivajothi* [1999] 1 W.L.R. 467 (CA), in which the text to n.58 was approved. The principle in *Murthy* was applied in *Whyte v Whyte* [2005] EWCA Civ. 858.

[60] The same will be true where the jurisdiction agreement is non-exclusive, though proceedings brought in England in breach of such an agreement be less likely to be stayed.

[61] Rule 33(2). A non-exclusive jurisdiction agreement (see above, para.12–092) will also be regarded as a submission: *First Capital Ltd v Winchester Computer Corp* (1987) 44 D.L.R. (4th) 301 (Sask CA).

[62] *Feyerick v Hubbard* (1902) 71 L.J.K.B. 509; *Jeannot v Fuerst* (1909) 25 T.L.R. 424.

[63] *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA) (a case on the 1933 Act).

[64] See Briggs (2004) 8 Sing. Yb. Int. L. 1.

unsworn testimony may be received if the foreign court so requests.[80] Thus interrogatories cannot be administered under the Act in England to a corporation as such, even though this is possible by the *lex causae* or by the domestic law of the requesting court.[81] An order requiring a corporation to produce documents must similarly be made in the English form, i.e. that the corporation should "by its proper officer" attend and produce the documents.[82] Conversely, the court cannot make an order for the taking of evidence for use in foreign proceedings except in accordance with the Act, even if the particular evidence sought could have been obtained under the rules relating to corresponding proceedings in the English courts.[83] The court may not make an order under the Act binding on the Crown or on any person in his capacity as an officer or servant of the Crown.[84]

8–086 Under the Act, the court may not require a person to state what documents relevant to the foreign proceedings are in his possession, custody or power, or to produce any documents other than particular documents specified in the court's order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power.[85] "Fishing" arises where what is sought is not evidence as such, but information which may lead to a line of enquiry which would disclose evidence; it is a search, a roving enquiry, for material in the hope of being able to raise allegations of fact.[86] For this reason, the statutory reference to "particular documents specified in the order" is to be given a strict construction. It is not sufficient to refer to a class of documents (e.g. "all bank statements for 1984"); the order must refer to individual documents or a specific group of documents (e.g. "monthly statements for 1984 relating to the current account at X & Co's Bank").[87] There must be evidence that the documents actually exist and are likely to be in the respondent's possession; mere conjecture is not enough.[88] If a request for assistance is framed too widely, it may be possible for the English court to order partial compliance with the request, striking out the impermissible material; but the English court will not undertake the task of redrafting the request.[89]

8–087 It is however possible under the Act to order the production of documents by a third party even though this is not ancillary to the oral examination of that party as a witness, provided they are sought for use at the trial and not as part

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[80] s.2(3), which applies to both oral and documentary evidence: *Re Westinghouse Uranium Contract Litigation MDL Docket No.235*, above at p.634.

[81] *Penn-Texas Corp v Murat Anstalt* [1964] 1 Q.B. 40 (CA) (decided under an earlier statute).

[82] *Penn-Taxas Corp v Murat Anstalt (No.2)* [1964] 2 Q.B. 647 (CA).

[83] *Re Westinghouse Uranium Contract Litigation MDL Docket No.235*, above, at p.610.

[84] s.9(4); *Re Pan American Airways Inc's Application* [1992] Q.B. 854 (CA).

[85] s.2(4).

[86] *Re State of Norway's Application (No.1)* [1990] 1 A.C. 723 (CA); affirmed on other grounds (HL).

[87] The examples are given by Lord Fraser in *Re Asbestos Insurance Coverage Cases* [1985] 1 W.L.R. 331 at pp.337–338 (HL). See also *Boeing Co v PPG Industries Inc* [1988] 3 All E.R. 839 (CA); *Genira Trade & Finance Inc v Refco Capital Markets Ltd* [2001] EWCA Civ. 1733.

[88] *Re Asbestos Insurance Coverage Cases* [1985] 1 W.L.R. 331, 338 (HL).

[89] *cf. Re Westinghouse Uranium Contract Litigation MDL Docket No.235*, above and *Re State of Norway's Application*, above.

not necessarily exclusive. Like any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society. However, English courts have decided that certain jurisdictional bases are inadequate, though some of them are quite commonly relied upon by foreign courts. These are as follows:

14–076 (1) *Possession by the defendant of property in the foreign country.* This is relied upon in Scotland[85] but has been rejected in England.[86] As early as the Judgments Extension Act 1868 the registration in England or Northern Ireland of a Scottish judgment based on this ground was specifically excluded.

14–077 (2) *Presence of the defendant in the foreign country at the time when the cause of action arose.* Though a dictum of Lord Blackburn favours this head,[87] the Privy Council and the Court of Appeal have since rejected it.[88]

14–078 (3) *Defendant a national of the foreign country.* There is a long chain of dicta extending from 1828 to 1948 suggesting that the courts of a foreign country might have jurisdiction over a person if he was a subject or citizen of that country.[89] But there is no actual decision which supports this proposition. *Douglas v Forrest*[90] goes nearest to a decision to this effect. But that is a very old case, and the judgment dwells also on the fact that the defendant retained property in the foreign country—an alternative basis of jurisdiction which would not now be acknowledged as adequate. It is evident that nationality is quite inappropriate as a basis of jurisdiction when the defendant is, e.g. a British citizen[91] or an American citizen,[92] or an Australian citizen since in these cases the political unit (or State) does not coincide with the law district (or country). Citizenship does not serve to identify them with any particular law district, such as England or New York or Victoria, within a composite State such as the United Kingdom, the United States or Australia. Moreover, the question whether a person is a national of a given state is a matter for the law of that State.[93] As a connecting factor, therefore, nationality is not subject to the control or definition of the *lex fori*; and as the law of the given State may deem a person to be a national, or deny nationality, on grounds which are objectionable in English eyes, nationality would constitute too unpredictable

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[85] See Anton, pp.188–196.

[86] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 163; *Rousillon v Rousillon* (1880) 14 Ch.D. 351, 371; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC); *Emanuel v Symon* [1908] 1 K.B. 302 (CA).

[87] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161.

[88] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC); *Emanuel v Symon* [1908] 1 K.B. 302 (CA); *cf. Mattar and Saba v Public Trustee* [1952] 3 D.L.R. 399 (Alta CA); *Gyonyor v Sanjenko* [1971] 5 W.W.R. 381 (Alta).

[89] *Douglas v Forrest* (1828) 4 Bing. 686; *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Rousillon v Rousillon* (1880) 14 Ch.D. 351, 371; *Emanuel v Symon* [1908] 1 K.B. 302, 309 (CA); *Gavin Gibson & Co v Gibson* [1913] 3 K.B. 379, 388; *Harris v Taylor* [1915] 2 K.B. 580, 591 (CA); *Forsyth v Forsyth* [1948] P. 125, 132 (CA). *cf.* Restatement, s.31, comment c.

[90] (1828) 4 Bing. 686.

[91] See *Gavin Gibson & Co v Gibson* [1913] 3 K.B. 379.

[92] See *Dakota Lumber Co v Rinderknecht* (1905) 6 Terr.L.R. 210, 221–224.

[93] See above, para.6–133.

a basis for jurisdiction. Nationality as a basis of jurisdiction has been doubted by three High Court judges,[94] and definitely rejected by the Irish High Court.[95] It cannot therefore safely be relied upon today.[96] It is not mentioned as a basis of jurisdiction in the 1933 Act.

14–079 (4) *Defendant domiciled (but not resident or present) in the foreign country.* There are dicta in English cases[97] which suggest (though rather faintly) the recognition of domicile in the common law sense[98] as a basis of jurisdiction, but no English decision supports this, though one Canadian decision does.[99] It is not claimed as a ground of jurisdiction by the Scottish courts.[1] It is not mentioned in the 1933 Act. Despite the Canadian decision referred to above, Dean Read concluded that "domicile alone, unaccompanied by either residence or presence, will not yet suffice."[2]

14–080 (5) *Reciprocity.* Reciprocity is used in two distinct senses in connection with the recognition and enforcement of foreign judgments. Firstly, it is used to describe the view, once espoused by the United States Supreme Court[3] but which has been largely abandoned in the United States,[4] that a judgment rendered by the court of a foreign country will not be enforced unless that country would enforce a comparable judgment of the requested court. That view of reciprocity forms part of the law of many civil law countries,[5] but has never been the law in England. Secondly, reciprocity is used to describe the view that the English court should recognise the jurisdiction of the foreign court if the situation is such that, *mutatis mutandis*, the English court might have exercised jurisdiction, e.g. under CPR, r.6.20.[6] On the present state of the authorities, the jurisdiction of the foreign court will not be recognised on such a basis.

14–081 In *Schibsby v Westenholz*[7] the plaintiff brought an action in England on a French judgment. The defendant was not in France when the writ was issued, nor did he appear or submit to the jurisdiction. The writ was served on him in England. The Court of Queen's Bench was much pressed with the argument that, under what were then ss.18 and 19 of the Common Law Procedure Act

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[94] *Blohn v Desser* [1962] 2 Q.B. 116, 123; *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 Q.B. 352, 382–383; *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133; see also *Patterson v D'Agostino* (1975) 58 D.L.R. (3d) 63 (Ont).

[95] *Rainford v Newell-Roberts* [1962] I.R. 95. *cf.* Cheshire and North, p.419.

[96] The observations in *British Nylon Spinners Ltd v Imperial Chemical Industries* [1953] Ch. 19, 25 (CA) relate, it is submitted, to nationality as a basis of legislative rather than curial jurisdiction.

[97] *Turnbull v Walker* (1892) 67 L.T. 767, 769; *Emanuel v Symon* [1908] 1 K.B. 302, 308, 314 (CA); *Jaffer v Williams* (1908) 25 T.L.R. 12, 13; *Gavin Gibson & Co v Gibson* [1913] 3 K.B. 379, 385.

[98] Domicile in the sense of the 1982 Act would for most purposes be within the First Case.

[99] *Marshall v Houghton* [1923] 2 W.W.R. 553 (Man CA). *cf.* Restatement, s.29.

[1] *Kerr v Ferguson*, 1931 S.C. 736, overruling *Glasgow Corporation v Johnston*, 1915 S.C. 555.

[2] Read, p.160. *cf.* Cheshire and North, pp.419–420.

[3] *Hilton v Guyot*, 159 U.S. 113 (1895).

[4] Restatement Third, *Foreign Relations Law*, s.481, Rep. Note 1.

[5] e.g. Germany: Code of Civil Procedure, para.328.

[6] See Rule 27, above.

[7] (1870) L.R. 6 Q.B. 155.

14E–046 ***Exception 2*—No proceedings may be entertained in any court in the United Kingdom for the recovery of any sum alleged to be payable under a judgment given in a court of a country to which section 9 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 has been applied by Order in Council.**[71]

COMMENT

14–047 Section 9(1) of the 1933 Act provides that if it appears to Her Majesty that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the courts of the United Kingdom is substantially less favourable than that accorded by the courts of the United Kingdom to judgments of the courts of that country, Her Majesty may apply that section to that country, with the consequences stated in Exception 2 above. The object of this enactment was to strengthen the hand of HM Government in negotiating conventions with foreign counries for the reciprocal enforcement of foreign judgments.[72] No Order in Council has yet been made under the section. The section refers to "any foreign country." It is thus not limited to foreign countries to which Pt I of the 1933 Act applies, but is of general application. However, the term "foreign country" is limited to countries foreign in the political sense: it does not extend to countries forming part of the Commonwealth.[73]

B. *Jurisdiction of Foreign Courts at Common Law*

(1) JURISDICTION IN PERSONAM

14R–048 **RULE 36—Subject to Rules 37 to 39, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition in the following cases**[74]**:**

First Case[75]**—If the judgment debtor was, at the time the proceedings were instituted, present in the foreign country.**

Second Case[76]**—If the judgment debtor was claimant, or counterclaimed, in the proceedings in the foreign court.**

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[71] 1933 Act, s.9, as amended by 1982 Act, Sch.10, para.2.

[72] See the Report of the Foreign Judgments (Reciprocal Enforcement) Committee, Cmd. 4213 (1932), Annex V, para.14.

[73] This is made clear in s.7.

[74] See generally *Adams v Cape Industries Plc* [1990] Ch. 433, 512–525 (CA). See also *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Rousillon v Rousillon* (1880) 14 Ch.D. 351, 371; *Emanuel v Symon* [1908] 1 K.B. 302, 309 (CA).

[75] *Carrick v Hancock* (1895) 12 T.L.R. 59; *Littauer Glove Corporation v FW Millington (1920) Ltd* (1928) 44 T.L.R. 746; *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133; *Adams v Cape Industries Plc* [1990] Ch. 433 (CA); *cf. Sfeir & Co v National Insurance Co of New Zealand* [1964] 1 Lloyd's Rep. 330 (a case on the 1920 Act); Read, pp.148–151.

[76] Cases cited in n.74 above, and *Burpee v Burpee* [1929] 3 D.L.R. 18 (BC); Read, p.160.

***Third Case*[77]—If the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.**

***Fourth Case*[78]—If the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.**

COMMENT

A fundamental requirement for the recognition or enforcement of a foreign judgment in England at common law[79] is that the foreign court should have had jurisdiction according to the English rules of the conflict of laws. "All jurisdiction is properly territorial," declared Lord Selborne,[80] "and *extra territorium jus dicenti, impune non paretur.* ... In a personal action, ... a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced." Thus, in an early leading case[81] upon the subject, the plaintiff brought an action in England on a judgment of a court in the island of Tobago. The defendant had never been in the island, nor had he submitted to its jurisdiction. There had been a substituted service, valid by the law of Tobago, effected by nailing a copy of the writ to the court-house door. In refusing to recognise the judgment, Lord Ellenborough said "Can the Island **14–049**

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[77] *De Cosse Brissac v Rathbone* (1861) 6 H. & N. 301, as explained in *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 162; *Voinet v Barrett* (1885) 55 L.J.Q.B. 39 (CA); *Guiard v de Clermont* [1914] 3 K.B. 145; *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA) (a case under the 1933 Act); *Jet Holdings Inc v Patel* [1990] 1 Q.B. 335, 341 (CA); *Re Overseas Food Importers & Brandt* (1981) 126 D.L.R. (3d) 422 (BCCA); *Canada Trustco Mortgage Co v Rene Management & Holdings Ltd* (1988) 53 D.L.R. (4th) 222 (Man CA); *575225 Saskatchewan Ltd v Boulding* [1988] 6 W.W.R. 738 (BCCA); *First National Bank of Houston v Houston E&C Inc* [1990] 5 W.W.R. 719 (BC); *Gourmet Resources International Inc v Paramount Capital Corp* [1993] I.L.Pr. 583 (Ont); and *cf. The Atlantic Emperor (No.2)* [1992] 1 Lloyd's Rep. 624, 633 (CA); Read, pp.161–171; Clarence Smith (1953) 2 I.C.L.Q. 510; on the effect of an appearance to protest the jurisdiction of the foreign court see 1982 Act, s.33, and paras 14–063, *et seq.*, below.

[78] *Feyerick v Hubbard* (1902) 71 L.J.K.B. 509; *Copin v Adamson* (1875) 1 Ex. D. 17 (CA); *Jeannot v Fuerst* (1909) 25 T.L.R. 424; *Bank of Australasia v Harding* (1850) 9 C.B. 661; *Bank of Australasia v Nias* (1851) 16 Q.B. 717; *Kelsall v Marshall* (1856) 1 C.B.(N.S.) 241; *Vallée v Dumergue* (1849) 4 Exch. 290; *Blohn v Desser* [1962] 2 Q.B. 116; *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133; *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA) (a case on the 1933 Act); *First City Capital Ltd v Winchester Computer Corp* (1987) 44 D.L.R. (4th) 301 (Sask CA); *Bank of Credit & Commerce International (Overseas) Ltd v Gokal* [1995] 2 W.W.R. 240 (BCCA); Read, pp.171–177; Restatement, ss.32, 43.

[79] And under the 1920 and 1933 Acts. The power of the English court to review the jurisdiction of the foreign court under the 1982 Act and the Judgments Regulation is more limited. See Rule 48, below.

[80] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670, 683–684 (PC).

[81] *Buchanan v Rucker* (1808) 9 East 192, 194.

of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"

14–050 In *Adams v Cape Industries Plc*,[82] the leading modern authority, it was said that "in determining the jurisdiction of the foreign court. . . . , our court is directing its mind to the competence or otherwise of the foreign court to summon the defendant before it and to decide such matters as it has decided"[83] and "we would . . . regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory."[84]

14–051 It has already been seen[85] that the identification of the relevant "country" can present a problem in the case of a federal system, whose constituent States (like those in the United States) retain some degree of legislative sovereignty. But while not deciding the issue, the Court of Appeal inclined to agree with Scott J. that the relevant country (or law district) for the purposes of the recognition and enforcement of the judgment of a federal court sitting in Texas (and applying Texan substantive law) was the United States and not Texas.

14–052 In that case the Court of Appeal indicated, first, that foreign judgments were enforced in England only if the foreign court was one of "competent jurisdiction"[86]; second, in deciding whether the foreign court was one of competent jurisdiction, the English court would apply, not the law of the foreign court, but English rules of the conflict of laws.[87] Those rules were developed in the nineteenth century, and were restated in the frequently cited judgment of Buckley L.J. in *Emanuel v Symon*[88]: "In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued[89]; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained." The actual issue in the case was whether the possession of property in the foreign country was sufficient to give jurisdiction to the foreign court,[90] and none of the heads of jurisdiction enumerated by Buckley L.J. was subjected to scrutiny in that case. As will be seen later,[91] the first case mentioned in Buckley L.J.'s statement can no longer be relied on. The second case was adopted in the 1933 Act, but was stated without reference to those cases which led to the conclusion that mere

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[82] [1990] Ch. 433, 517–518 (CA).

[83] Citing *Pemberton v Hughes* [1899] 1 Ch. 781, 790 (CA).

[84] [1990] Ch. at pp.517–519.

[85] *Williams v Jones* (1845) 13 M. & W. 628, 633; *Godard v Gray* (1870) L.R. 6 Q.B. 139, 147; *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 159.

[86] *ibid.*

[87] See below, para.14–119.

[88] [1908] 1 K.B. 302, 309 (CA), which (as he acknowledged) was taken verbatim from the judgment of Fry J. in *Rousillon v Rousillon* (1880) 14 Ch.D. 351, 371. The Supreme Court of Canada has said that Buckley L.J.'s summary "bears a remarkable resemblance to a Code": *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077, 1087.

[89] i.e. where a counterclaim is brought.

[90] See below, para.14–076.

[91] See below, para.14–078.

presence, without residence, would be sufficient to confer jurisdiction and which were approved by the Court of Appeal in *Adams v Cape Industries Plc.*[92] The other three cases are examples of the principle of submission and correspond respectively to the Second, Third and Fourth Cases of Rule 36. All four cases (including residence, rather than presence) were adopted (and slightly altered) in the 1933 Act, and in their altered and re-arranged form they are set out in Rule 47.

14–053 The provisions of the 1933 Act were deliberately framed so as to reproduce the rules of the common law as closely as possible,[93] though, as the Foreign Judgments (Reciprocal Enforcement) Committee conceded, it was found desirable to make one or two very slight departures from the common law rules in order to secure international agreements which would be likely to operate satisfactorily in practice.[94] The question therefore arises whether the provisions of the 1933 Act as to the jurisdiction of foreign courts, and as to the scope of the defences, can legitimately be invoked by a court which is asked to enforce a foreign judgment at common law, even though the 1933 Act has not been extended by Order in Council to the foreign country in question. Although the Act has been used[95] to negative arguments that there are additional bases for recognition at common law,[96] the Court of Appeal has held that it is wrong to use the Act to ascertain the common law "by arguing backwards from the provisions of the statute."[97]

14–054 **The first case. Presence.** There is divergence of authority on the question whether presence, as distinct from residence, is a sufficient basis of jurisdiction. The older cases acknowledge that the residence of a defendant in the country at the time when proceedings are commenced gives that court jurisdiction over him at common law.[98] The position is the same under the 1920 Act[99] and the 1933 Act,[1] except that the former requires "ordinary residence", which in this context probably does not differ much from residence simpliciter[2] and the latter contains special rules for corporations. But some of the older cases also suggest that presence, rather than residence, is a sufficient

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[92] [1990] Ch. 433 (CA).

[93] Report of the Foreign Judgments (Reciprocal Enforcement) Committee, Cmd. 4213 (1932), paras 2, 16, 18 and Annex V, para.7.

[94] *ibid.* para.18 and Annex V, para.7.

[95] See *Re Trepca Mines Ltd* [1960] 1 W.L.R. 1273, 1282 (CA); *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 Q.B. 352, 383.

[96] In *Owens Bank Ltd v Bracco* [1992] 2 A.C. 443, 489, it was held that, because the 1920 Act adopted the common law approach to fraud in relation to foreign judgments (below, para. 14–130), it would be wrong for the courts now to alter the common law rule.

[97] *Henry v Geoprosco International* [1976] Q.B. 726, 751. *cf. Société Co-opérative Sidmetal v Titan International Ltd* [1966] 1 Q.B. 828, 845–846.

[98] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Emanuel v Symon* [1908] 1 K.B. 302, 309 (CA). In *State Bank of India v Murjani Marketing Group Ltd*, unreported, March 27, 1991 (CA), Sir Christopher Slade inclined to the view that residence (in the sense of principal home) would be a sufficient basis of jurisdiction, even if the judgment debtor was not present in the foreign country at the date of commencement of proceedings.

[99] s.9(2)(b).

[1] s.4(2)(a)(iv).

[2] *cf.* above, para.6–120.

basis,[3] and presence as a basis of jurisdiction is strengthened by those authorities which suggested that "temporary allegiance" to the local sovereign was one of the reasons why a defendant might be under an obligation to comply with the judgments of its courts.[4] For this reasoning is no less applicable where a defendant is merely present within the foreign country concerned. It is also supported by the authorities on the jurisdiction of the English court over persons present in England: the temporary presence of an individual defendant in England gives the English court jurisdiction at common law[5] and the test for the presence of corporations in that context[6] is the same as that for corporations in the context of the jurisdiction of foreign courts, although in the latter context it is described as residence rather than presence.[7] It may be doubted, however, whether casual presence, as distinct from residence, is a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned. For the court is not likely to be the *forum conveniens*, in the sense of the appropriate court most adequately equipped to deal with the facts or the law.[8] The 1920 and 1933 Acts adopted residence rather than presence as the basis of jurisdiction over individuals, and presence (at least as regards domiciliaries of Contracting States) is regarded as an exorbitant basis of jurisdiction over individuals for the purposes of the Judgments Regulation, and the 1968 and Lugano Conventions.[9] Whilst it is true that the test for corporations in relation to foreign judgments is equivalent to that for the "presence" of corporations in the context of the jurisdiction of the English court, the test for "presence" of corporations involves some fixed place of business in the foreign country,[10] and is not comparable to what may be the fleeting presence of an individual, even in the extreme case where the place of business is established for a very short period.[11]

14–055 In *Adams v Cape Industries Plc*[12] the Court of Appeal reviewed the authorities on presence and residence in the context of the jurisdiction of foreign courts over corporations, but took the opportunity to express general views on the issue. The First Case of the Rule is now framed in terms of presence rather than residence in the light of this decision but the issue remains open in the House of Lords.

14–056 In *Carrick v Hancock*[13] the plaintiff was an Englishman domiciled in Sweden who had acted in Sweden as an agent on commission for the

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[3] *Carrick v Hancock* (1895) 12 T.L.R. 59; *Herman v Meallin* (1891) 8 W.N. (NSW) 38; *Forbes v Simmons* (1914) 20 D.L.R. 100 (Alta); *cf. General Steam Navigation Co v Guillou* (1843) 11 M. & W. 377. Contrast *Australian Assets Co Ltd v Higginson* (1897) 18 L.R. (NSW) Eq. 189, 193.

[4] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161; *cf. Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670, 683–684 (PC).

[5] *Colt Industries Inc v Sarlie* [1966] 1 W.L.R. 440 (CA); *Maharanee of Baroda v Wildenstein* [1972] 2 Q.B. 283 (CA) above, para.11–103; *cf.* Restatement, s.28.

[6] See above, paras 11–115 *et seq.*

[7] See below, para.14–059.

[8] *cf.* Dodd (1929) 23 Ill.L.Rev. 427, 437–438.

[9] See above, para.11–273.

[10] See below, para.14–059.

[11] As in *Dunlop Pneumatic Tyre Co Ltd v AG Cudwell & Co* [1902] 1 K.B. 342 (CA).

[12] [1990] Ch. 433 (CA).

[13] (1895) 12 T.L.R. 59.

defendant, an Englishman. The defendant was served with Swedish proceedings during a short visit to Sweden, and he subsequently defended the Swedish proceedings. Accordingly, the case had a significant connection with Sweden, and in any event the defendant had clearly submitted to the jurisdiction of the Swedish courts. But in an unreserved judgment Lord Russell of Killowen C.J. decided that the Swedish judgment was enforceable because of the defendant's presence in Sweden, and "the question of the time the person was actually in the territory was wholly immaterial".[14]

14–057 This decision (among others[15]) was relied on by the Court of Appeal in *Adams v Cape Industries Plc* as supporting the principle that, in the absence of submission to the jurisdiction of the foreign court, the competence of a foreign court to summon the defendant before it depended on the physical presence of the defendant in the country concerned at the time of suit: "So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law."[16]

14–058 The Court of Appeal referred to the "voluntary" presence of the defendant as being one not induced by compulsion, fraud or duress, but it is clear from the context[17] that it was not finally decided that the presence of these factors would negative jurisdiction. There is no decision in England on what the position is when the defendant is forcibly brought, or fraudulently induced to come, into the jurisdiction of the foreign court and there served with process.[18] But in the United States the view is held that in such a case jurisdiction exists but may or should be disclaimed by the court for reasons of equity if the plaintiff is privy to the force or fraud.[19] In this case also, it is clear, the defendant has the benefit of the laws of the State concerned and owes temporary allegiance thereto. The question whether at common law a foreign court has jurisdiction over an individual who is neither resident or present within the foreign jurisdiction but who carries on business regularly there

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[14] *ibid.* at p.60.

[15] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670, 683–684; *Employers' Liability Assurance Corp v Sedgwick Collins & Co Ltd* [1927] A.C. 95, 114–115.

[16] [1990] Ch. 433 at p.519. The Court of Appeal indicated that dicta (in cases on the jurisdiction of the *English* court) indicated that the relevant time was *service* of proceedings, rather than *issue*, but expressed no final view. The Court of Appeal (at p.518) also left open the question whether residence without presence would be a sufficient basis of jurisdiction, but *cf. State Bank of India v Murjani Marketing Group Ltd*, above, which suggests that it does suffice; and see para.14–054.

[17] See *ibid.* pp.518–519.

[18] See *Stein v Valkenhuysen* (1858) E.B. & E. 65 and *Watkins v North American Lands, etc., Co* (1904) 20 T.L.R. 534 (HL), above, para.11–103, which suggest that in appropriate circumstances English process might be set aside if the defendant was fraudulently lured into the jurisdiction.

[19] Restatement, s.82, comments b, d and f.

through an agent has been raised but not decided,[20] although it is a basis of jurisdiction under the 1920 Act.[21]

14–059 Where a corporation is concerned neither residence nor presence has, of course, any real meaning. But there is a long line of cases dealing with the question whether a foreign corporation does or does not carry on business in England so as to render itself amenable to the jurisdiction of the English courts at common law.[22] The principle of these cases applies also to the question whether a corporation is present in a foreign country so as to give its courts jurisdiction over it.[23] In *Adams v Cape Industries Plc*[24] the Court of Appeal held that in the case of corporations the test of jurisdiction is satisfied if the corporation is carrying on business at a definite and fixed place. The basic principle is that a trading corporation will be regarded as present within the jurisdiction of the courts of a foreign country if (a) it has established and maintained a fixed place of business and for more than a minimal time has carried on its own business there, *or* (b) its representative has for more than a minimal period of time been carrying on the corporation's business in that country at or from some fixed place of business. In the latter case it will be necessary to consider a number of factors (already mentioned in connection with the jurisdiction of the English court[25]) to determine whether the business being carried on is that of the corporation or its representative. In deciding whether a company is present in a foreign country as a result of the acts of a subsidiary present there, the court must consider whether the subsidiary was acting as agent, and if so, on what terms; it may also treat the subsidiary as the *alter ego* of the parent if special circumstances exist which indicate that there is a "mere façade concealing the true facts".[26] If the local agent has authority to enter into contracts on behalf of the corporation without seeking the prior approval of the corporation, this is a powerful indicator that the corporation is present; if the agent does not have this authority, this fact points powerfully in the opposite direction.[27]

14–060 Under the 1920 Act the principle of the cases on the jurisdiction of the English court applies also to the question whether a corporation carries on business in the jurisdiction of the original court within the meaning of the Act. Thus it has been held that a New Zealand insurance company does not carry on business in Ghana merely because it maintains agents there with limited

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[20] *Blohn v Desser* [1962] 2 Q.B. 116, 123, on which see below, para.14–072. The mere fact that the defendant contracted through an agent in the foreign country is not of itself sufficient: *cf. Seegner v Marks* (1895) 21 V.L.R. 491.

[21] 1920 Act, s.9(2)(b). On the jurisdiction of the English court in such a case see above, para.11–104.

[22] See above, paras 11–117 *et seq.*

[23] *Littauer Glove Corporation v FW Millington (1920) Ltd* (1928) 44 T.L.R. 746; *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133; *Adams v Cape Industries Plc* [1990] Ch. 433 (CA); see also *Moore v Mercator Enterprises Ltd* (1978) 90 D.L.R. (3d) 590 (N.S.).

[24] [1990] Ch. 433, 530–544. *cf. Akande v Balfour Beatty Construction Ltd* [1998] I.L.Pr. 110 (a case on the 1920 Act).

[25] See above, para.11–125.

[26] [1990] Ch. at p.539, citing *Woolfson v Strathclyde Regional Council*, 1978 S.L.T. 159, 161 (HL) (a case not involving the conflict of laws).

[27] *F&K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146; *Adams v Cape Industries Plc* [1990] Ch. 433, 531 (CA).

powers to settle claims.[28] The 1933 Act[29] requires that the corporation must have its principal place of business (and not merely carry on business) in the foreign country.

The second case. Appearance as claimant or counter-claimant. It is obvious that a person who applies to a tribunal himself is bound to submit to its judgment, should that judgment go against him, if for no other reason than that fairness to the defendant demands this. It is no less obvious that a claimant exposes himself to acceptance of jurisdiction of a foreign court as regards any set-off, counterclaim or cross-action which may be brought against him by the defendant.[30] By the same token, a defendant who resorts to a counterclaim or like cross-proceeding in a foreign court clearly submits to the jurisdiction thereof. **14–061**

The third case. Appearance. This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. Where such a litigant, though a defendant rather than a claimant, appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. The same is the case where he does indeed contest the jurisdiction[31] but nevertheless proceeds further to plead to the merits,[32] or agrees to a consent order dismissing the claims and cross-claims,[33] or where he fails to appear in proceedings at first instance but appeals on the merits.[34] If the defendant takes no part in the proceedings and allows judgment to go against him in default of appearance, and later moves to set the default judgment aside, the application to set aside may be a voluntary appearance if it is based on non-jurisdictional grounds, even if the application is unsuccessful.[35] There is no English[36] authority directly in point; in *Guiard* **14–062**

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[28] *Sfeir & Co v National Insurance Co of New Zealand* [1964] 1 Lloyd's Rep. 330.

[29] s.4(2)(a)(iv).

[30] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Burpee v Burpee* [1929] 3 D.L.R. 18 (BC); Westlake, ss.324, 325.

[31] But a defendant who wishes to enter an appearance but fails to succeed in doing so does not submit: *De Santis v Russo* [2002] 2 Qd.R 230 (Qd CA).

[32] *cf. Boissière v Brockner* (1889) 6 T.L.R. 85, criticised by Clarence Smith (1953) 2 I.C.L.Q. 510, 517–520; *McFadden v Colville Ranching Co* (1915) 8 W.W.R. 163 (Alta); *Richardson v Allen* (1916) 28 D.L.R. 134 (Alta CA).

[33] *Adams v Cape Industries plc* [1990] Ch. 433, 461, *per* Scott J., affd. on other grounds *ibid.* p.503 (CA).

[34] *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA) (a case on the 1933 Act).

[35] Cheshire and North, p.418; Read, pp.168–170.

[36] There are two Canadian cases where there was held to be no voluntary appearance in the circumstances. In *McLean v Shields* (1885) 9 O.R. 699 (CA) the application in the original court to set aside the default judgment was dismissed because it was made too late; it does not appear from the report what the grounds of the application were. In *Esdale v Bank of Ottawa* (1920) 51 D.L.R. 485 (Alb CA) there was a successful application to set aside a default judgment and for leave to defend; the defendant was granted leave to defend on condition that he made a payment into court; when he failed to make the payment judgment was again given against him, but he was nevertheless held not to have voluntarily submitted. These cases have been followed in Canada (*Re Carrick Estates Ltd and Young* (1987) 43 D.L.R. (4th) 161 (Sask CA)) but are of doubtful authority.

v De Clermont[37] the defendant applied successfully to have a default judgment set aside and to have judgment entered in his favour at first instance, but the original judgment was restored by an appeal court; he was held to have voluntarily submitted.

14–063 Where the defendant contests the jurisdiction of a foreign court, the position is regulated by s.33 of the Civil Jurisdiction and Judgments Act 1982. If his challenge to the jurisdiction of the foreign court is successful, no question of submission arises. If it is unsuccessful and he goes on to contest the case on the merits, he will have submitted to the jurisdiction of the foreign court. But if he takes no further part in the proceedings and judgment in default is entered against him, will he be regarded as having voluntarily submitted? Common sense would suggest that a defendant who has been vigorously protesting that a court has no jurisdiction should not be regarded as having voluntarily submitted.[38] Under the 1933 Act an appearance for the purpose of (inter alia) contesting the jurisdiction is not to be regarded as a voluntary appearance.[39] But in *Harris v Taylor*,[40] decided at common law, a defendant who had entered a conditional appearance in the Isle of Man court in order to set aside the proceedings on jurisdictional grounds was held to have submitted to the jurisdiction of the Manx Court, even though he took no further part in the proceedings after his application to set aside was unsuccessful. This decision was followed in *Henry v Geoprosco International*,[41] where the Court of Appeal held that there was a voluntary appearance where the defendant appeared before the foreign court to invite that court in its discretion not to exercise a jurisdiction which it had under its local law; and that there was also a voluntary appearance if the defendant merely protested against the jurisdiction of the foreign court if the protest took the form of a conditional appearance which was converted automatically by operation of law into an unconditional appearance if the decision on jurisdiction went against the defendant. The court left open the question whether an appearance the sole purpose and effect of which was to protest against the jurisdiction of the foreign court would be a voluntary appearance. The criticism to which this decision was subjected led to considerable pressure for its reversal by legislation, and this was effected by s.33 of the 1982 Act.

14–064 Section 33 provides that a judgment debtor shall not be regarded as having submitted by reason only of the fact that he appeared (conditionally or otherwise) in the foreign proceedings (a) to contest the jurisdiction of the court; (b) to ask the court to dismiss or stay the proceedings on the ground that

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[37] [1914] 3 K.B. 145.

[38] *Re Dulles' Settlement (No.2)* [1951] Ch. 842, 850 (CA), *per* Denning L.J. See also *Daarnhouwer & Co NV v Boulos* [1968] 2 Lloyd's Rep. 259.

[39] 1933 Act, s.4(2)(a)(i).

[40] [1914] 3 K.B. 145 (CA); followed in *Kennedy v Trites* (1916) 10 W.W.R. 412 (BC); not followed in *Dovenmuehle v Rocca Group Ltd* (1981) 34 N.B.R. (2d) 444, app. dismissed (1982) 43 N.B.R. (2d) 359 (Sup Ct Can); *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 Sing. L.R. 603 (HC). See also *Re McCain Foods and Agricultural Publishing Co Ltd* (1979) 103 D.L.R. (3d) 734 (Ont CA); *Mid-Ohio Imported Car Co v Tri-K Investments Ltd* (1995) 129 D.L.R. (4th) 181 (BCCA).

[41] [1976] Q.B. 726 (CA), criticised by Collins (1976) 92 L.Q.R. 268 (reprinted in Collins, *Essays*, p.313); Carter (1974–75) 47 B.Y.I.L. 379; Solomons (1976) 25 I.C.L.Q. 665.

the dispute in question should be submitted to arbitration[42] or to the determination of the courts of another country; or (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings. If the defendant in the foreign court fails on any of these issues, but nevertheless goes on to defend the case on the merits, he will be regarded as having submitted.

14–065 If a defendant makes an appearance in order to argue that the court seised has no international jurisdiction over him according to its law, the section plainly applies to protect him from the contention that he submitted by appearance. But if he appears to argue that the particular court has no local jurisdiction because the claim exceeds its internal competence, or because the court in a different judicial district alone has jurisdiction, it is less clear that an appearance to make this objection this would be protected by s.33(1)(a). Certainly it was not the problem which was presented by *Henry v Geoprosco International*, and which the section was immediately designed to remedy. It is submitted that if the whole of the relief sought by the defendant from the foreign court is a decision by the court that it has no international jurisdiction, the appearance will be protected from being regarded as a submission by s.33(1)(a)[43]; but that a contention that a different court (but in the same country) has jurisdiction is not to be seen as contesting the jurisdiction within the meaning of s.33(1)(a), for it is implicit in the contention that the courts of the country do not lack jurisdiction.

14–066 Some systems of law require or allow a defendant to plead to the merits at the same time as, and as an alternative to, an objection to the jurisdiction. In *Boissière & Co v Brockner*[44] a plea on the merits put forward in this way was regarded as a submission at common law. But it should not now be so regarded, provided at least that, having lost on the issue of jurisdiction, the defendant does not put forward his case on the merits. This conclusion is supported by two decisions on submission as a basis of jurisdiction in the original court, and by two decisions on foreign judgments. In *Elefanten Schuh GmbH v Jacqmain*[45] the European Court held, in the context of Art.18 of the 1968 Convention, that pleading to the merits as an alternative to an objection to the jurisdiction would not be a submission. The House of Lords has held, in the context of submission to the jurisdiction of the English court,[46] that a step in the proceedings only amounts to a submission when the defendant has taken some step which is only necessary or only useful if the objection to the

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[42] As in *Tracomin SA v Sudan Oil Seeds Co Ltd (No.1)* [1983] 1 W.L.R. 662, affirmed [1983] 1 W.L.R. 1026 (CA). If the applicant does not proceed to have his challenge heard and ruled on, it will be taken as waived and his appearance will be denied the protection of s.33: *Starlight International Inc v Bruce* [2002] EWHC 374 (Ch.), [2002] I.L.Pr. 617.

[43] In *Desert Sun Loan Corp v Hill* [1996] 2 All E.R. 847 (CA), the defendant appeared before the foreign court to contend that he had not authorised his attorney to accept service of the writ. The majority (Evans and Stuart-Smith L.JJ.) did not appear to consider s.33(1)(a) to be relevant to the case; by contrast, Roch L.J. interpreted such a contention as falling squarely within the section.

[44] (1889) 6 T.L.R. 85.

[45] Case 150/80 [1981] E.C.R. 1671.

[46] See above, para.11–133.

jurisdiction has been waived.[47] In *Adams v Cape Industries Plc*[48] defendants to United States proceedings objected to the jurisdiction of the court, but also participated in pre-trial discovery on the merits of the case. These steps were accompanied, expressly or impliedly, by a re-assertion of the jurisdictional objection, and under Federal law the steps taken did not amount to a submission. It was held that steps not regarded by the foreign court as a submission should not be regarded as a submission for the purposes of enforcement in England. In *Marc Rich & Co AG v Soc Italiana Impianti PA (No.2)*[49] it was held that Section 33 should not be construed narrowly: an objection to the jurisdiction of the Italian court, accompanied by a defence on the merits, did not amount to a submission, even though it was not necessary under Italian law for an alternative defence on the merits to be put forward. But after the Italian court had ruled that the parties had not agreed to arbitrate in London, and that it therefore had jurisdiction over the merits of the dispute, the defendants in the Italian proceedings lodged a defence on the merits. The consequence was that they thereby submitted to the jurisdiction of the Italian court, and were bound by the decision that the contract did not contain an arbitration clause.

14–067 Where the property of the defendant is attached in foreign proceedings and he intervenes to obtain its release, a similar question of submission arises. The 1933 Act provided, for cases within its scope, that an appearance for the purpose of protecting, or obtaining the release of, property seized or threatened with seizure in the foreign proceedings was not to be regarded as a voluntary appearance.[50] There was some doubt as to the extent to which this represented the common law rule,[51] but the 1982 Act[52] makes this principle one of general application. The common law authorities may still be helpful in considering the extent to which the defendant may go in taking steps to preserve his property. Thus it is clear that an appearance was not involuntary at common law merely because it was motivated by the fact that the defendant had property within the jurisdiction of the foreign court on which execution might be levied in the event of judgment going against him by default[53]; still less was an appearance involuntary when it was made because, although the defendant had no property within the jurisdiction of the foreign court, his business often took him there, so that the judgment might be made effective against him.[54] Secondly, an appearance is not involuntary when it is made after execution has been levied under the judgment in order to rescue the

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[47] *Williams & Glyn's Bank v Astro Dinamico* [1984] 1 W.L.R. 438 (HL), applied in *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep. 90.

[48] [1990] Ch. 433, 461 *per* Scott J., affirmed on other grounds *ibid.* p.503 (CA); *The Eastern Trader* [1996] 2 Lloyd's Rep. 585, 600; *Akai Pty Ltd v People's Insurance Co Ltd*, above; *cf. Canada Trustco Mortgage Co v Rene Management & Holdings Ltd* (1986) 32 D.L.R. (4th) 747 (Man); *Gourmet Resources International Inc v Paramount Capital Corp* [1993] I.L.Pr. 583 (Ont).

[49] [1992] 1 Lloyd's Rep. 624 (CA); *The Eastern Trader*, above, at pp.598–602.

[50] 1933 Act, s.4(2)(a)(i).

[51] *Voinet v Barrett* (1885) 55 L.J.Q.B. 39, 41 (CA); *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 162 (CA); *Guiard v De Clermont* [1914] 3 K.B. 145, 155; *Henry v Geoprosco International* [1976] Q.B. 726, 746–747 (CA).

[52] 1982 Act, s.33(1)(c).

[53] *De Cosse Brissac v Rathbone* (1861) 6 H. & N. 301 (the third plea).

[54] *Voinet v Barrett* (1855) 55 L.J.Q.B. 39 (CA).

property which is the subject-matter of the execution.[55] Thirdly, if property is seized and the defendant appears and defends the case on the merits, the appearance is not involuntary.[56] But there may be cases in which the defendant may appear to oppose the seizure on jurisdictional grounds, e.g. where he denies he has property within the jurisdiction or where he challenges the validity of the seizure.[57] In such cases the effect of s.33 of the 1982 Act is that the appearance will not be voluntary.

14–068 The defendant, by an appearance which is voluntary in the sense explained, renders himself subject to the jurisdiction of the foreign court with respect not only to the original claim but also to such further claims as the court allows to be added by the plaintiff. But this does not mean that he subjects himself also to claims by new claimants.[58] In principle, a submission will extend to claims concerning the same subject-matter, and to related claims which ought to be dealt with in the same proceedings, but (in either case) only if advanced by parties who were such at the date of the defendant's submission to the jurisdiction of the court; the decision of the foreign court to allow the new claim is not decisive.[59]

14–069 **The fourth case. Agreement to submit.** If a contract provides that all disputes between the parties shall be referred to the exclusive[60] jurisdiction of a foreign tribunal, not only will proceedings brought in England in breach of such agreement usually be stayed,[61] but also the foreign court is deemed to have jurisdiction over the parties.[62] A contractual submission to a particular court is not of itself a submission generally to the jurisdiction of all courts of that country[63]; the question is one of construction of the contract.[64]

14–070 An agreement to submit may also take the form of an agreement to accept service of process at a designated address. Thus, if a person takes shares in a foreign company, the articles of association or statutes of which provide that all disputes shall be submitted to the jurisdiction of a foreign court, and that every shareholder must "elect a domicile" at a particular place for service of process, and that in default the officers of the company may do so for him,

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[55] *Guiard v De Clermont* [1914] 3 K.B. 145; *Poissant v Poissant* [1941] 3 W.W.R. 646, 650 (Sask).

[56] *Clinton v Ford* (1982) 137 D.L.R. (3d) 281 (Ont CA); *cf. Re Low* [1894] 1 Ch. 147, 160 (CA).

[57] As he may do in the United States on constitutional grounds: see *Shaffer v Heitner*, 433 U.S. 186 (1977).

[58] See Restatement, s.26, comment e and Illustration 8, and *Re Indiana Transportation Co*, 244 U.S. 456 (1917) (submission to jurisdiction in respect of death of one passenger held not to involve submission in other claims). And see, by analogy, *Jordan Grand Prix Ltd v Baltic Insurance Group* [1999] 2 A.C. 127.

[59] *Murthy v Sivajothi* [1999] 1 W.L.R. 467 (CA), in which the text to n.58 was approved. The principle in *Murthy* was applied in *Whyte v Whyte* [2005] EWCA Civ. 858.

[60] The same will be true where the jurisdiction agreement is non-exclusive, though proceedings brought in England in breach of such an agreement be less likely to be stayed.

[61] Rule 33(2). A non-exclusive jurisdiction agreement (see above, para.12–092) will also be regarded as a submission: *First Capital Ltd v Winchester Computer Corp* (1987) 44 D.L.R. (4th) 301 (Sask CA).

[62] *Feyerick v Hubbard* (1902) 71 L.J.K.B. 509; *Jeannot v Fuerst* (1909) 25 T.L.R. 424.

[63] *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA) (a case on the 1933 Act).

[64] See Briggs (2004) 8 Sing. Yb. Int. L. 1.

then he is deemed to have agreed to submit to the jurisdiction of the foreign court, even if he never does elect a domicile.[65] And a member of a foreign company is bound by a statute enacted in the country of its incorporation providing that the particular company may sue and be sued in the name of its chairman and that execution on any judgment against the company may be issued against the property of any member in like manner as if the judgment had been obtained against him personally.[66] But English courts have stopped short of inferring an agreement to submit from a mere general provision in the foreign law (and not in the articles of association or in a statute specifically referring to the particular company) that the shareholder must "elect a domicile" for the service of process,[67] unless he does in fact elect such a domicile.[68]

14–071 It would seem that a judgment based on a "cognovit clause," which gives a claimant or his lawyer power to enter judgment against the defendant in a specified court in the event of a default in payment, would be enforceable on the basis that the defendant has agreed thereby to submit,[69] at any rate if the clause is valid by the law applicable to the contract. Such clauses are common in the United States, where they are subject to widespread criticism because of their potential abuse, and where their validity varies from state to state.[70]

14–072 It may be laid down as a general rule that an agreement to submit to the jurisdiction of a foreign court must be express: it cannot be implied.[71] If the parties agree, expressly or by implication, that their contract shall be governed by a particular foreign law, it by no means follows that they agree to submit to the jurisdiction of the courts which apply it.[72] Nor can any such agreement be implied from the fact that the cause of action arose within a foreign country or from the additional fact that the defendant was present there when the cause of action arose.[73] In *Emanuel v Symon*,[74] the Court of Appeal held that a defendant did not submit to the courts of a foreign country merely because he

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[65] *Copin v Adamson* (1874) L.R. 9 Ex. 345; (1875) 1 Ex. D. 17 (CA) (the first replication).

[66] *Bank of Australasia v Harding* (1850) 9 C.B. 661; *Bank of Australasia v Nias* (1851) 16 Q.B. 717; *Kelsall v Marshall* (1856) 1 C.B.(N.S.) 241.

[67] *Copin v Adamson* (1874) L.R. 9 Ex. 345 (the second replication). The point was reserved in the Court of Appeal: see 1 Ex D. 17, 19. See also *Risdon Iron & Locomotive Works v Furness* [1906] 1 K.B. 49, 57; *Allen v Standard Trusts Co* (1920) 57 D.L.R. 105 (Man CA); *Veco Drilling v Armstrong* [1982] 1 W.W.R. 177 (BC); *Jamieson v Robb* (1881) 7 V.L.R. 170, on which see Read, pp.176–177.

[68] *Vallée v Dumergue* (1849) 4 Exch. 290.

[69] See *Re Hughes & Sharp* (1968) 70 D.L.R. (2d) 298, reversed on other grounds (1969) 5 D.L.R. (3d) 760 (BCCA); *Batavia Times Publishing Co v Davis* (1977) 82 D.L.R. (3d) 247, app. dismissed (1979) 102 D.L.R. (3d) 192 (Ont CA); Read, p.172.

[70] See Scoles and Hay, pp.281–282; Restatement, s.32.

[71] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC); *Emanuel v Symon* [1908] 1 K.B. 302 (CA); *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133 and *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep. 361, 371–372 (CA), not following dicta in *Blohn v Desser* [1962] 2 Q.B. 116, 123 and in *Sfeir & Co v National Insurance Co of New Zealand* [1964] 1 Lloyd's Rep. 330, 339–340.

[72] *Sfeir & Co v National Insurance Co of New Zealand* [1964] 1 Lloyd's Rep. 330, 340 (a case on the 1920 Act); *Mattar and Saba v Public Trustee* [1952] 3 D.L.R. 399 (Alta CA); *Dunbee Ltd v Gilman & Co* (1968) 70 S.R.N.S.W. 219; also reported [1968] 2 Lloyd's Rep. 394.

[73] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC); *Emanuel v Symon* [1908] 1 K.B. 302 (CA); *Mattar and Saba v Public Trustee* [1952] 3 D.L.R. 399 (Alta CA); *Gyonyor v Sanjenko* [1971] 5 W.W.R. 381 (Alta).

[74] [1908] 1 K.B. 302 (CA).

became a member of a partnership firm which carried on business there. But in *Blohn v Desser*,[75] Diplock J. held that where a person resident in England became a sleeping partner in an Austrian firm she did submit to the jurisdiction of the Austrian courts. These cases can perhaps be reconciled on the basis that *Emanuel v Symon* was concerned with the liability of the partners *inter se*, while *Blohn v Desser* was concerned with the liability of a partner to an outside creditor. In other words, there was an element of holding out in *Blohn v Desser* which was absent from *Emanuel v Symon*. It is submitted that on this point *Blohn v Desser* cannot be supported. It was not followed in *Vogel v RA Kohnstamm Ltd*,[76] and in *Adams v Cape Industries Plc*[77] Scott J. said that he did not think it was right that an agreement to submit could be implied: but he accepted that an alleged consent which was not contractually enforceable could be treated as a representation by the defendant of a willingness to submit to the jurisdiction if acted upon by the plaintiff, provided that the representation was intended to be acted upon, or at least be one which the plaintiff reasonably believed was intended to be acted upon. But in that case no such representation could be inferred.[78]

14–073 If the defendant agrees to submit to the jurisdiction of a foreign court, and agrees (or is deemed to agree) to a particular method of service, it is immaterial at common law that he does not receive actual notice of the proceedings if service is effected in the agreed manner.[79] It was suggested in earlier editions of this work[80] that, even if there is no agreement as to method of service, it is immaterial that the defendant did not receive sufficient notice of the proceedings to enable him to defend them; but it is submitted that there is no rule to this effect: the ultimate question is whether there has been substantial injustice, and the court may take into account (inter alia) whether the foreign law provides an opportunity for the judgment to be set aside.[81]

14–074 The 1920 and 1933 Acts both contain provisions, separate and distinct from their provisions as to jurisdiction, which require respectively that the defendant must have been duly served[82] or must have received notice of the proceedings in sufficient time to enable him to defend.[83]

14–075 **What does not give jurisdiction.** The rules of common law (by contrast with those under the 1933 Act, which are exhaustive[84]) as to jurisdiction are

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[75] [1962] 2 Q.B. 116, 123, criticised Lewis (1961) 10 I.C.L.Q. 910; Cohn (1962) 11 I.C.L.Q. 583; Carter (1962) 38 B.Y.I.L. 493.

[76] [1973] Q.B. 133.

[77] [1990] Ch. 433, 465–466, *per* Scott J., affirmed on other grounds *ibid.* p.503 (CA).

[78] In particular, it was held that a submission in one set of proceedings could not be regarded as a submission in another set of (related) proceedings.

[79] *Vallée v Dumergue* (1849) 4 Exch. 290; *Bank of Australasia v Harding* (1850) 9 C.B. 661; *Bank of Australasia v Nias* (1851) 16 Q.B. 509; *Copin v Adamson* (1875) 2 Ex. D. 17 (CA). *cf. Jamieson v Robb* (1881) 7 V.L.R. 170.

[80] 11th ed., p.446. *cf. Feyerick v Hubbard* (1902) 71 L.J. K.B. 509; and the Canadian cases on "cognovit clauses", above, n.69.

[81] *Adams v Cape Industries Plc* [1990] Ch. 433, 563–571; *cf. Jeannot v Fuerst* (1909) 25 T.L.R. 424. See below, Rule 45.

[82] 1920 Act, s.9(2)(c).

[83] 1933 Act, s.4(1)(a)(iii).

[84] *Société Co-opérative Sidmetal v Titan International Ltd* [1966] 1 Q.B. 828; *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] N.Z.L.R. 819 (a decision on the identically worded New Zealand Act).

not necessarily exclusive. Like any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society. However, English courts have decided that certain jurisdictional bases are inadequate, though some of them are quite commonly relied upon by foreign courts. These are as follows:

14–076 (1) *Possession by the defendant of property in the foreign country.* This is relied upon in Scotland[85] but has been rejected in England.[86] As early as the Judgments Extension Act 1868 the registration in England or Northern Ireland of a Scottish judgment based on this ground was specifically excluded.

14–077 (2) *Presence of the defendant in the foreign country at the time when the cause of action arose.* Though a dictum of Lord Blackburn favours this head,[87] the Privy Council and the Court of Appeal have since rejected it.[88]

14–078 (3) *Defendant a national of the foreign country.* There is a long chain of dicta extending from 1828 to 1948 suggesting that the courts of a foreign country might have jurisdiction over a person if he was a subject or citizen of that country.[89] But there is no actual decision which supports this proposition. *Douglas v Forrest*[90] goes nearest to a decision to this effect. But that is a very old case, and the judgment dwells also on the fact that the defendant retained property in the foreign country—an alternative basis of jurisdiction which would not now be acknowledged as adequate. It is evident that nationality is quite inappropriate as a basis of jurisdiction when the defendant is, e.g. a British citizen[91] or an American citizen,[92] or an Australian citizen since in these cases the political unit (or State) does not coincide with the law district (or country). Citizenship does not serve to identify them with any particular law district, such as England or New York or Victoria, within a composite State such as the United Kingdom, the United States or Australia. Moreover, the question whether a person is a national of a given state is a matter for the law of that State.[93] As a connecting factor, therefore, nationality is not subject to the control or definition of the *lex fori*; and as the law of the given State may deem a person to be a national, or deny nationality, on grounds which are objectionable in English eyes, nationality would constitute too unpredictable

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[85] See Anton, pp.188–196.

[86] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 163; *Rousillon v Rousillon* (1880) 14 Ch.D. 351, 371; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC); *Emanuel v Symon* [1908] 1 K.B. 302 (CA).

[87] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161.

[88] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC); *Emanuel v Symon* [1908] 1 K.B. 302 (CA); *cf. Mattar and Saba v Public Trustee* [1952] 3 D.L.R. 399 (Alta CA); *Gyonyor v Sanjenko* [1971] 5 W.W.R. 381 (Alta).

[89] *Douglas v Forrest* (1828) 4 Bing. 686; *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Rousillon v Rousillon* (1880) 14 Ch.D. 351, 371; *Emanuel v Symon* [1908] 1 K.B. 302, 309 (CA); *Gavin Gibson & Co v Gibson* [1913] 3 K.B. 379, 388; *Harris v Taylor* [1915] 2 K.B. 580, 591 (CA); *Forsyth v Forsyth* [1948] P. 125, 132 (CA). *cf.* Restatement, s.31, comment c.

[90] (1828) 4 Bing. 686.

[91] See *Gavin Gibson & Co v Gibson* [1913] 3 K.B. 379.

[92] See *Dakota Lumber Co v Rinderknecht* (1905) 6 Terr.L.R. 210, 221–224.

[93] See above, para.6–133.

a basis for jurisdiction. Nationality as a basis of jurisdiction has been doubted by three High Court judges,[94] and definitely rejected by the Irish High Court.[95] It cannot therefore safely be relied upon today.[96] It is not mentioned as a basis of jurisdiction in the 1933 Act.

14–079 (4) *Defendant domiciled (but not resident or present) in the foreign country.* There are dicta in English cases[97] which suggest (though rather faintly) the recognition of domicile in the common law sense[98] as a basis of jurisdiction, but no English decision supports this, though one Canadian decision does.[99] It is not claimed as a ground of jurisdiction by the Scottish courts.[1] It is not mentioned in the 1933 Act. Despite the Canadian decision referred to above, Dean Read concluded that "domicile alone, unaccompanied by either residence or presence, will not yet suffice."[2]

14–080 (5) *Reciprocity.* Reciprocity is used in two distinct senses in connection with the recognition and enforcement of foreign judgments. Firstly, it is used to describe the view, once espoused by the United States Supreme Court[3] but which has been largely abandoned in the United States,[4] that a judgment rendered by the court of a foreign country will not be enforced unless that country would enforce a comparable judgment of the requested court. That view of reciprocity forms part of the law of many civil law countries,[5] but has never been the law in England. Secondly, reciprocity is used to describe the view that the English court should recognise the jurisdiction of the foreign court if the situation is such that, *mutatis mutandis*, the English court might have exercised jurisdiction, e.g. under CPR, r.6.20.[6] On the present state of the authorities, the jurisdiction of the foreign court will not be recognised on such a basis.

14–081 In *Schibsby v Westenholz*[7] the plaintiff brought an action in England on a French judgment. The defendant was not in France when the writ was issued, nor did he appear or submit to the jurisdiction. The writ was served on him in England. The Court of Queen's Bench was much pressed with the argument that, under what were then ss.18 and 19 of the Common Law Procedure Act

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[94] *Blohn v Desser* [1962] 2 Q.B. 116, 123; *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 Q.B. 352, 382–383; *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133; see also *Patterson v D'Agostino* (1975) 58 D.L.R. (3d) 63 (Ont).

[95] *Rainford v Newell-Roberts* [1962] I.R. 95. *cf.* Cheshire and North, p.419.

[96] The observations in *British Nylon Spinners Ltd v Imperial Chemical Industries* [1953] Ch. 19, 25 (CA) relate, it is submitted, to nationality as a basis of legislative rather than curial jurisdiction.

[97] *Turnbull v Walker* (1892) 67 L.T. 767, 769; *Emanuel v Symon* [1908] 1 K.B. 302, 308, 314 (CA); *Jaffer v Williams* (1908) 25 T.L.R. 12, 13; *Gavin Gibson & Co v Gibson* [1913] 3 K.B. 379, 385.

[98] Domicile in the sense of the 1982 Act would for most purposes be within the First Case.

[99] *Marshall v Houghton* [1923] 2 W.W.R. 553 (Man CA). *cf.* Restatement, s.29.

[1] *Kerr v Ferguson*, 1931 S.C. 736, overruling *Glasgow Corporation v Johnston*, 1915 S.C. 555.

[2] Read, p.160. *cf.* Cheshire and North, pp.419–420.

[3] *Hilton v Guyot*, 159 U.S. 113 (1895).

[4] Restatement Third, *Foreign Relations Law*, s.481, Rep. Note 1.

[5] e.g. Germany: Code of Civil Procedure, para.328.

[6] See Rule 27, above.

[7] (1870) L.R. 6 Q.B. 155.

1852 and is now CPR, r.6.20[8] the English court would have had power to order service out of the jurisdiction on converse facts, and therefore it should enforce the French judgment. In rejecting this argument Lord Blackburn observed[9] that "if the principle on which foreign judgments were enforced was that which is loosely called 'comity,' we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down" (i.e. the doctrine of obligation quoted earlier in this chapter[10]). This was followed in *Turnbull v Walker*,[11] where Wright J. refused to enforce a New Zealand judgment based on provisions for the service of writs out of the jurisdiction which were identical with the English provisions.

14–082 In spite of these decisions, it was suggested by Denning L.J.[12] that an English court would recognise that a court in the Isle of Man had jurisdiction to give a judgment based on service of the writ out of the jurisdiction if the English court would have assumed jurisdiction in converse circumstances. And in *Travers v Holley*[13] the Court of Appeal recognised a New South Wales divorce granted in the absence of domicile on the ground that "it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claimed for themselves." The width and generality of this statement led to suggestions being made extra-judicially[14] that the principle of reciprocity might be applicable to foreign judgments *in personam*. But it has since been held that this is not so and that English courts do not concede jurisdiction *in personam* to foreign courts merely because English courts would, in converse circumstances, have power to order service out of the jurisdiction.[15] "The decision in *Travers v Holley* was a decision limited to a judgment *in rem* in a matter affecting matrimonial status, and it has not been followed in any case except a matrimonial case."[16] "Comity has never been the basis on which we recognise or give effect to foreign judgments."[17] "I am unwilling to accept ... that the law of foreign divorce (still less other) jurisdiction must be a mirror image of our own law."[18] Indeed, in *Amin Rasheed Shipping Corp v*

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[8] i.e. Rule 27, above.
[9] At p.159.
[10] See above, para.14–006.
[11] (1892) 67 L.T. 767. *cf. Phillips v Batho* [1913] 3 K.B. 25, 29–30; *Wendel v Moran*, 1993 S.L.T. 44 (fact that delict occurred in the US insufficient to give jurisdiction).
[12] *Re Dulles' Settlement (No.2)* [1951] Ch. 842, 851 (CA).
[13] [1953] P. 246, 257, *per* Hodson L.J.
[14] Kennedy (1954) 32 Can.Bar Rev. 359, 373–383; (1957) 35 *ibid.* 123; Cheshire, 7th ed., pp.557–558; contrast 13th ed., pp.420–422.
[15] *Re Trepca Mines Ltd* [1960] 1 W.L.R. 1273, 1280–1282 (CA); *Société Co-opérative Sidmetal v Titan International Ltd* [1966] 1 Q.B. 828; *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] N.Z.L.R. 819, 823; *Crick v Hennessy* [1973] W.A.R. 74.
[16] *Re Trepca Mines Ltd*, above, at pp.1281–1282, *per* Hodson L.J., approved in *Henry v Geoprosco International* [1976] Q.B. 726, 745 (CA). *cf. Schemmer v Property Resources Ltd* [1975] Ch. 273, 287.
[17] *Indyka v Indyka* [1969] 1 A.C. 33, 58, *per* Lord Reid, citing *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155 at p.159.
[18] *ibid.*, at p.106, *per* Lord Wilberforce.

Kuwait Insurance Co[19] (which was not a case involving foreign judgments) Lord Diplock went so far as to say that the jurisdiction exercised under what is now CPR, r.6.20 is an exorbitant jurisdiction, in the sense that "it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition." Although Lord Diplock was wrong to describe what is now CPR, r.6.20 as an exorbitant jurisdiction,[20] he was certainly expressing the orthodox view on recognition of foreign judgments in cases where the debtor was neither within the foreign jurisdiction nor had submitted to it. Thus, none of the following facts by itself gives jurisdiction to the courts of a foreign country: that the cause of action arose out of a contract made or broken there or which was to be governed by the law thereof, or out of a tort committed there; or that the defendant is a necessary or proper party to an action properly brought against a person duly served. This means, of course, that in proceedings *in personam* English courts claim in this respect a wider jurisdiction than they are prepared to concede to foreign courts.

14–083 (6) *Real and substantial connection.* In *Indyka v Indyka*[21] the House of Lords held that foreign divorce decrees should be recognised, not only on the basis of reciprocity under the doctrine in *Travers v Holley*, but also wherever a real and substantial connection was shown between the petitioner and the country whose court granted the decree. There is no authority in England which suggests that this is the appropriate test for the recognition and enforcement of foreign judgments *in personam*. But in 1990 the Supreme Court of Canada held in *Morguard Investments Ltd v De Savoye*[22] that, as regards the enforcement of judgments between the Canadian provinces, it was no longer appropriate to apply the nineteenth century rules developed in England for the recognition and enforcement of wholly foreign judgments. It was held that courts in one province should give full faith and credit (a phrase borrowed from the United States Constitution) to judgments given by a court in another province or territory "so long as that court has properly, or appropriately, exercised jurisdiction in the action". That condition was met when the defendant was present in the foreign jurisdiction at the time of the action, or submitted to its judgment by agreement or appearance: in other cases, the test to be applied was not that of reciprocity in the sense discussed above,[23] but whether the foreign jurisdiction had a real and substantial connection with the claim.

14–084 The decision of the Supreme Court of Canada involved the enforcement of an Alberta judgment in British Columbia, and rested in part on the federal structure of the Constitution, including the strong need for the enforcement throughout the country of judgments given in one province; the fact that there

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[19] [1984] A.C. 50, 65.

[20] See above, para.11–148, n.94.

[21] [1969] 1 A.C. 33.

[22] [1990] 3 S.C.R. 1077, on which see Black and Swan (1991) 12 Advocates' Q. 489. *cf.* Briggs (1987) 36 I.C.L.Q. 240.

[23] Which was the basis on which the judgment had been recognised in the lower court: [1988] 5 W.W.R. 650 (BCCA), on which see Blom (1989) 68 Can.B.Rev. 359; Black (1989) 4 Oxford J. Leg. Stud. 547; Law Reform Commission, British Columbia, *The Enforcement of Judgments Between Canadian Provinces* (1989).

were no concerns about differential quality of justice in the various provinces; and the existence of the Supreme Court of Canada as a court of final review, which could determine when the courts of one province have appropriately exercised jurisdiction. Despite these doubts, in *Beals v Saldanha*[24] the Supreme Court extended the principle to permit the recognition of a judgment from the courts of Florida entered in default of defence. It thereby confirmed that this test will be applied to the recognition of foreign judgments generally, though this will be in addition to the traditional grounds of presence and submission, rather than as replacement of them.

14–085 (7) *Judgment in personam ancillary to divorce decree.* In *Phillips v Batho*,[25] it was held that a judgment of an Indian divorce court awarding damages to a husband against a co-respondent could be enforced in England, although the co-respondent had left India before the commencement of the proceedings for divorce and did not submit to the jurisdiction. The decision is in terms confined to a foreign country which is part of the Commonwealth. It is submitted that this decision is wrong and that a foreign judgment for damages or costs against a co-respondent cannot be enforced in England unless the foreign court had jurisdiction over him under Rule 37. The decision has been severely criticised extra-judicially,[26] it has not been followed in New Zealand,[27] and there is a later English case which undermines its reasoning.[28]

ILLUSTRATIONS[29]

THE FIRST CASE

14–086 1. 462 Individuals bring personal injury actions in the federal court in Texas against (inter alia) X & Co, an English company which is the holding company of two other defendants: Y & Co, an English company, which is engaged in the worldwide marketing of asbestos, and Z & Co, an Illinois corporation, which is engaged in the marketing of asbestos in the United States. X & Co and Y & Co object to the jurisdiction of the federal court, but the actions are settled under a consent order by a payment to the plaintiffs to which X & Co and its subsidiaries contribute. Subsequently a further 206 individuals commence similar proceedings in Texas. X & Co, Y & Co and Z & Co take no part in these proceedings. Z & Co ceases to carry on business, and the United States marketing is carried on by two new subsidiaries of X & Co, one incorporated in Illinois and the other in Liechtenstein, whose shares are held by nominees. Subsequently default judgments are entered in the Texas court. The default judgments are not recognised because, among other reasons,[30] the federal court in Texas has no jurisdiction: the consent order in the first set of actions is a submission to the jurisdiction of the court in that set of actions, but not in the second set of actions; whether or not presence in Illinois was sufficient for the purposes of the enforcement of the judgment of a Federal court sitting in Texas, X & Co and Y & Co were not present in Illinois through their Illinois subsidiaries.[31]

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[24] [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1. See also Briggs (2004) 8 Sing. Yb. Int. L. 1.

[25] [1913] 3 K.B. 25.

[26] Read, pp.262–267.

[27] *Redhead v Redhead* [1926] N.Z.L.R. 131 (costs).

[28] *Jacobs v Jacobs and Ceen* [1950] P. 146, where dicta in *Phillips v Batho* were dissented from. See below, para.18–083.

[29] See also the Illustration to Rule 42, below, para.14–126.

[30] See below, para.14R–151, on natural justice.

[31] *Adams v Cape Industries Plc* [1990] Ch. 433 (CA).

2. X, an English traveller, is staying for a few days in an hotel in Massachusetts when there is issued and served upon him a summons commencing an action against him in the Massachusetts court. The Massachusetts court has jurisdiction.[32]

3. Y is the director of X & Co, an English company. Y visits New York and while he is there A, a New York firm, takes out a summons against X & Co and serves process upon Y. X & Co has no branch in New York and does not carry on business there. The New York court has no jurisdiction.[33]

4. X & Co, an English company, employs Y, a resident of Israel, as its representative there to elicit orders from customers for X & Co.'s goods. Y has no authority from X & Co to make contracts on its behalf. Y introduces an Israeli customer, A, who contracts with X & Co for the purchase of X & Co.'s goods. A sues X & Co in Israel for damages for breach of contract. X & Co takes no part in the proceedings and has no office or place of business in Israel. The Israeli court has no jurisdiction at common law.[34]

THE SECOND CASE

14–087 5. A, an Englishman residing in England, brings an action against X in Tel Aviv for breach of a contract made and broken in England. The court gives judgment for costs against A. The Israeli court has jurisdiction.

THE THIRD CASE

14–088 6. A brings an action in a New York court against X, an Englishman. X appears and defends the action because his business transactions frequently involve his presence in New York, so that judgment might be executed against him there. His appearance is voluntary and the New York court has jurisdiction over him.[35]

7. The circumstances are the same as in Illustration 6 save that X has valuable property in the United States upon which execution might be levied. X appears and defends the action in order to protect that property. The New York court has jurisdiction.[36]

8. The circumstances are the same as in Illustration 6 save that X does not appear until after judgment has been given against him in default and execution has been levied, when he appears and secures the reopening of the proceedings in order to recover property upon which execution has been levied. The New York court has jurisdiction.[37]

9. A brings an action in a foreign court against X and obtains a judgment against X in default of appearance. X's application to the foreign court for leave to appeal out of time is dismissed, but X also appeals to the Court of Appeal for the relevant district on the basis that he was not in fact out of time to appeal. The appeal is not expressed to be on jurisdictional grounds. The foreign court has jurisdiction.[38]

10. A brings an action in a foreign country against X, an Englishman, jurisdiction being founded solely upon the arrest of property of X in the country concerned. X appears in order to recover the property arrested. *Semble*, the foreign court has no jurisdiction.[39]

11. A brings an action against X in a foreign court. X enters a conditional appearance in order to contest the jurisdiction. The conditional appearance becomes unconditional automatically when X's application to contest the jurisdiction fails, but X takes no further part in the proceedings. The foreign court has no jurisdiction.[40]

12. A brings an action against X in a foreign court. X applies to the foreign court to set aside the proceedings on the grounds that the foreign court is not the *forum conveniens*. The foreign court has no jurisdiction.[41]

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[32] *Carrick v Hancock* (1895) 12 T.L.R. 59.

[33] *Littauer Glove Corporation v FW Millington* (1920) *Ltd* (1928) 44 T.L.R. 746.

[34] *Vogel v RA Kohnstamm Ltd* [1973] Q.B. 133 (decided before the 1933 Act was extended to Israel).

[35] *cf. Voinet v Barrett* (1885) 55 L.J.Q.B. 39 (CA).

[36] *cf. De Cosse Brissac v Rathbone* (1861) 6 H. & N. 301 (the third plea).

[37] *cf. Guiard v De Clermont* [1914] 3 K.B. 145.

[38] *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] Q.B. 279 (CA) (a case on the 1933 Act).

[39] *Guiard v De Clermont*, above, at p.155. *cf. Re Low* [1894] 1 Ch. 147 (CA).

[40] 1982 Act, s.33(1)(a), reversing the effect of *Harris v Taylor* [1915] 2 K.B. 580 (CA).

[41] 1982 Act, s.33(1)(b), reversing the effect of *Henry v Geoprosco International*, above.

13. A brings an action against X in a foreign court. X merely contests the jurisdiction. The foreign court has no jurisdiction.[42]

THE FOURTH CASE

14–089 14. A is a New York firm carrying on business in New York. X is a British citizen resident in England. By a contract made in New York X agrees to assign certain patent rights to A, the contract providing inter alia that "all disputes as to the present agreement and its fulfilment shall be submitted to the New York jurisdiction." In an action by A in the appropriate New York court for breach of the contract, judgment is given for A for $1 million. The New York court has jurisdiction.[43]

15. X, who was resident in England, held shares in a French company. The statutes or articles of association of the company provided that every dispute should be subject to the jurisdiction of the French courts and that every shareholder must "elect a domicile" in France for service of process and that in default the officers of the company might do so for him. X never elected a domicile. The company went into liquidation and A brought an action in France against X for moneys not paid up on X's shares. Notice was duly served on X at his statutory domicile. X, however, had no knowledge of the proceedings. Judgment was given against X. The French court had jurisdiction.[44]

16. The circumstances are the same as in Illustration 15, except that the provisions about disputes being referred to the jurisdiction of the French courts and about "electing a domicile" were general provisions of French law applicable to all French companies. The French court had no jurisdiction.[45]

17. X, who is resident in England, is a member of an Australian company. By an Australian statute referring to this particular company the chairman of the company is capable of suing or being sued in place of the company and may act and be treated as the agent of the members. A recovers judgment against the chairman, and therefore against, *inter alios*, X, in an action in an Australian court of which X has no notice. The Australian court has jurisdiction.[46]

18. X, a British citizen, when resident and carrying on business in Western Australia, there entered into partnership with A for the working of a gold mine there situate. The partnership was dissolved and an account was taken under decree of a Western Australian court. A deficiency appearing, A sued X therefor in the same court. X had ceased to be resident in Western Australia and the writ was served upon him in England. X did not appear. The Western Australian court had no jurisdiction.[47]

(2) WHERE JURISDICTION DOES NOT EXIST

14R–090 **RULE 37—A court of a foreign country outside the United Kingdom has no jurisdiction under the First Case of Rule 36 if the bringing of the proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country and the judgment debtor did not agree to the proceedings being brought in that court nor counterclaim in the proceedings, or otherwise submit to the jurisdiction of that court.[48]**

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[42] 1982 Act, s.33(1)(a).

[43] *cf. Feyerick v Hubbard* (1902) 71 L.J.K.B. 509. See also *Jeannot v Fuerst* (1909) 25 T.L.R. 424.

[44] *Copin v Adamson* (1874) L.R. 9 Ex. 345; 1 Ex. D. 17 (CA) (the first replication).

[45] *Copin v Adamson*, above (the second replication). Contrast *Vallée v Dumergue* (1849) 4 Exch. 290, where X did "elect a domicile" though he had no notice of the proceedings. *cf.* Case C–214/89 *Powell Duffryn Plc v Petereit* [1992] E.C.R. I–1745.

[46] *Bank of Australasia v Harding* (1850) 9 C.B. 661. See also *Bank of Australasia v Nias* (1851) 16 Q.B. 717.

[47] *Emanuel v Symon* [1908] 1 K.B. 302 (CA). Contrast *Blohn v Desser* [1962] 2 Q.B. 116.

[48] 1982 Act, s.32.

the courts should therefore approach with circumspection any request for leave to serve out of the jurisdiction. The same thought was expressed by Scott L.J. in *George Monro Ltd v American Cyanamid Corp*[27]:

"Service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected . . . As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of Or. XI."

1–011 More recently, comity has been invoked to justify the caution which is required in the exercise of the power to grant injunctions to restrain proceedings in foreign courts. Both in the Commonwealth and in the United States the courts have been sensitive to the charge that to grant an anti-suit injunction may be contrary to considerations of comity. It used to be emphasised that an anti-suit injunction was directed to the party and not to the foreign court, but it is now recognised that that is not a realistic view.

1–012 In the *Laker Airways* litigation, British Airways and British Caledonian Airways obtained injunctions in the English courts enjoining the commencement by the liquidator of Laker Airways against them of anti-trust proceedings in the United States. The United States courts enjoined other airlines from taking similar steps in the English courts to frustrate the liquidator's anti-trust proceedings in the United States. In the final phase of this contest between the English and American courts,[28] the House of Lords discharged the English injunctions: in *British Airways Board v Laker Airways Ltd*,[29] Lord Scarman said that an anti-suit injunction was, however disguised and indirect, an interference with the process of justice in the foreign court. More recently, it has been held that comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the

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[27] [1944] K.B. 432, 437. For a full discussion in the context of judicial jurisdiction see *Spar Aerospace Ltd v American Mobile Satellite Corp* (2002) 220 D.L.R. (4th) 54, 63–66 (Sup Ct Can). See also, in the context of recognition and enforcement of foreign judgments, *Beals v Saldanha*, 2003 SCC 72, (2004) 234 D.L.R. (4th) 1 (Sup Ct Can).

[28] See, e.g. *Laker Airways Ltd v Pan American Airways*, 559 F. Supp. 1124, 1128, *per* Greene J. (DDC 1983) ("It can hardly be said that an order which . . . directs a party not to file further papers in this Court, as did the order of the British court . . . is anything other than a direct interference with the proceedings in this Court."); *British Airways Board v Laker Airways Ltd* [1984] Q.B. 142, at 185–186 (CA) *per* Sir John Donaldson M.R. (" . . . let it be said no less loudly and clearly that neither the English courts nor the English judges entertain any feelings of hostility towards the American antitrust laws or would ever wish to denigrate that or any other American law. Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards."); *Laker Airways Ltd v Sabena Belgian Airlines*, 731 F. 2d 909, 937 (D.C. Cir. 1984) *per* Wilkey J. ("comity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure.")

[29] [1985] A.C. 58 at 95. See also *Barclays Bank v Homan* [1993] B.C.L.C. 680, 690 (CA); *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] I.L.Pr. 73, 117 (CA).