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Materials Packet 5

INTERNATIONAL SYNDICATED LOAN AGREEMENTS 3: GOVERNING LAW AND CHOICE OF JURISDICTION

Caroline Bradley [1]

ARMCO v North Atlantic Insurance Co.. 9

Donohue v ARMCO. 17

Deutsche Bank AG v Highland Crusader Offshore Partners LP.. 28

Allianz SpA v West Tankers Inc. 32

The parties to a loan agreement governed by New York or by English law would expect a New York or English court to give effect to the choice of law and jurisdiction clauses in the agreement. But courts may find that contractual choices of governing law and jurisdiction do not apply to certain disputes which may be connected in some way with the contract.

The UK is a Member State of the European Union (EU), which has adopted a Regulation to govern the proper law applicable to contracts: the **Rome Regulation**.[2] This Regulation came into force in December 2009 and supercedes an earlier EU Convention (the Rome Convention of 1980).[3] Although the UK originally opted out of the Rome Regulation it recently decided to opt in.[4] EU Courts have applied the Rome Convention (an EU Convention) provisions even where the law that governed the contract is that of a non-party or if the parties are not resident or established in the EU.

The **Rome Convention** contained the following provisions:

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[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ No L 177/6 (Jul. 4, 2008) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF

[3] The UK's Contracts (Applicable Law) Act 1990 gave legal effect to the Rome Convention in the UK. See http://www.hmso.gov.uk/acts/acts1990/Ukpga_19900036_en_1.htm .

[4] *See* Ministry of Justice, Rome I - should the UK opt in? Response to Consultation (Jan. 2009) at http://www.justice.gov.uk/docs/rome-i-consultation-govt-response.pdf. The consultation document is available at http://www.justice.gov.uk/docs/cp0508.pdf .

Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4 Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated...

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 7 Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in

a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 10 Scope of the applicable law
1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
(a) interpretation;
(b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.
2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 15 Exclusion of renvoi
The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 Ordre public
The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 17 No retrospective effect
This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18 Uniform interpretation
In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

In January 2003 the EU Commission issued a Green Paper on whether the Rome Convention should be converted into an EU regulation and, if so, whether it should be amended.[5] A number of financial market participants and organisations commented on the Green Paper. ISDA (the International Swap Dealers Association) said:

The arguments against converting the Rome Convention into a Community instrument would include the fact that the Rome Convention has served the markets reasonably well since it first

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[5] *See* Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654(01), Jan 14, 2003. The Brussels Convention on Jurisdiction and the Enforcement of Judgments was converted into EU Regulation 44/2001, OJ No. L 12/1 (Jan. 16, 2001).

came into effect. Since it is a "known" element of the legal framework within which the European financial markets currently operate, it is arguably better to preserve it in its current form than to risk the uncertainty that might accompany a conversion to a Community instrument. This is particularly so where, as discussed elsewhere in the Green Paper, substantive amendments, which might be of uncertain effect, to various aspects of the Rome Convention would most likely be made as part of the conversion process.
The arguments for converting the Rome Convention into a Community instrument would include (1) the benefit of having a consistent European legislation framework for private international law, following the conversion of the Brussels Convention of 1968 to a Community instrument, (2) the benefit of having a regime common to all EU member states rather than the current somewhat heterogeneous Rome Convention regime resulting, among other things, from reservations made by certain member countries, and (3) the benefit of having the European Court of Justice as the final single arbiter of the meaning of the Community instrument (with, therefore, hopefully, a unifying effect on jurisprudence on the Community instrument in the national courts), as opposed to the current situation, where the First Protocol on the Interpretation by the Court of Justice of the European Communities has never come into effect.

On the issue of references to mandatory requirements in the Convention ISDA said:

...we do believe that a carefully thought-through clarification of the meaning of the terms "mandatory provisions" and "mandatory rules" would be beneficial for parties to cross-border financial contracts and their advisers. To do this properly would require detailed consultation with national legal experts. In framing this clarification, the necessity of preserving freedom of contract for cross-border financial and commercial counterparties should be borne firmly in mind, as well as the desirability of reinforcing legal certainty (and minimising the risk of legitimate expectations being defeated) by restricting as far as possible the potential interference of mandatory rules developed for other contexts (for example, the consumer) in otherwise legitimate contractual arrangements between sophisticated financial and commercial counterparties.

This invocation of the idea of legal certainty is very common in lobbying on rules that affect financial businesses. Do you think that parties to a contract should be able to provide that the contract alone regulates their relationship and that no other rules should apply (the mandatory rules question)? Why?

In December 2005 the EU Commission published a proposed Regulation to supersede the Rome Convention.[6] The proposed regulation stated that the governing law of a contract could be international principles of contract law:

Proposed Art 3(2): The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly

[6] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) COM(2005) 650 (Dec. 15, 2005) at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf (Proposed Rome I Regulation).

settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.

Although this language is quite general, the Explanatory Memorandum suggested that it is not intended to refer to *lex mercatoria*:

The form of words used would authorise the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the lex mercatoria, which is not precise enough, or private codifications not adequately recognised by the international community. Like Article 7(2) of the Vienna Convention on the international sale of goods, the text shows what action should be taken when certain aspects of the law of contract are not expressly settled by the relevant body of non-State law.[7]

How does the form of words used achieve this result? Why would the drafters seek to limit the use of international contract law principles in this way?

The version of the Regulation which was adopted does not contain this provision, and does not explicitly seem to address this issue. Article 3 of the Rome I Regulation as adopted provides:

Rome I Regulation Article 3
Freedom of choice
1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Note that this provision is very similar to Art. 3 of the Convention. The reference in the

[7] Proposed Rome I Regulation, Explanatory Memorandum at p. 5

Convention to “mandatory rules” has been replaced by a reference to “provisions of .. law... which cannot be derogated from by agreement”. And there is an additional reference to provisions of Community law which cannot be derogated from by agreement. The change in language is designed to align this measure with a separate Regulation on the law applicable to non-contractual obligations (Rome II).[8]

On the mandatory provisions question the **Proposed Rome I Regulation** stated in Art. 8:

1. Mandatory rules are rules the respect for which is regarded as crucial by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.
3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.

The explanatory memorandum stated that it is “essential in a genuine European justice area for the courts to be able to have regard to another Member State's mandatory provisions where there is a close connection with the case and where a court action has already been brought by the claimant.”

Is this approach to mandatory rules consistent with legal certainty?

The Rome I Regulation addresses the issue of mandatory provisions in Art 9:

Rome I Regulation Article 9
Overriding mandatory provisions
1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and

[8] *See* Ministry of Justice, Response to Consultation, note 4 above, at 18 (“First, no substantial change was ever intended between the rule in the Regulation and the rule in the Rome Convention. The change in the wording to Article 3.3 of Rome I was made to align the position with that of Rome II.”)

to the consequences of their application or non-application

The recitals to the Regulation state that “Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively.”

The Rome I Regulation thus envisages three types of situation where a law other than that chosen by the parties to govern their relationship might be applied by a court:

1. laws, which cannot be derogated from by agreement, of the country with which the contract would be regarded as being connected apart from the choice (because all other elements relevant to the situation are in that country);
2. provisions of Community law (where appropriate as implemented in the Member State of the forum) which cannot be derogated from by agreement where the parties have chosen a governing law other than the law of a Member State but all other elements relevant to the situation are in one or more Member States;[9] and
3. overriding mandatory provisions of the forum or place of performance.

The Rome I Regulation does, therefore, seem to raise some issues of legal (un)certainty.

Article 4, on the applicable law where there is no choice, is being amended:

Rome I Regulation Article 4
Applicable law in the absence of choice
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3... the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

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[9] Presumably this would apply to a choice of the law of a state which is not a Member State and to the choice of international principles of contract law.

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC,[10] in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.
2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Another EU regulation, the Rome II Regulation,[11] states that "To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice." Article 14 of the Rome II Regulation provides:

Article 14: Freedom of choice

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[10] This is Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ. No. L 145/1 (Apr. 30, 2004) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:145:0001:0044:EN:PDF .

[11] Regulation No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-contractual Obligations (Rome II) OJ No L 199/40 (Jul. 31, 2007) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF. Art 4 establishes the general rule: "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

1. The parties may agree to submit non-contractual obligations to the law of their choice:
(a) by an agreement entered into after the event giving rise to the damage occurred; or
(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.
The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.
2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

Just as courts may not give effect to contracting parties' choices with respect to governing law, they may not give effect to the parties' choices with respect to jurisdiction. Courts may decline to exercise jurisdiction on the basis of forum non conveniens. They may also decide to seek to restrain proceedings abroad. In both types of case courts will likely consider what is the appropriate forum for resolution of a particular dispute. The following two cases show the English House of Lords and a federal district court in New York addressing the issue of what significance to attach to a choice of jurisdiction clause in litigation arising out of the same facts. The cases illustrate that there may be a risk that courts will not give effect to contracting parties' choice of jurisdiction. Does this risk concern you? Are there ways of limiting the risk?

The New York Court decided that it had jurisdiction in the case on the basis that the forum selection clauses were procured by fraud (compare page 24 below.)

ARMCO v North Atlantic Insurance Co. [12]

Allen G. Schwartz, District Judge:
This action was filed by plaintiff Armco Inc. ("Armco") and four of its subsidiaries to recover funds allegedly obtained fraudulently from them by defendants. Plaintiffs assert causes of action for common law fraud, conversion, breach of fiduciary duty, and violation of the Federal Racketeer Influenced and Corrupt Organizations Act. Before the Court are motions by certain of the defendants to dismiss on grounds of (i) lack of personal jurisdiction, (ii) improper venue, and (iii) forum non conveniens. For the reasons set forth below, the motion is denied.

Factual Background
Plaintiff Armco, the direct or indirect parent of its co-plaintiffs, is incorporated under the laws of the State of Ohio with its principal place of business in Pittsburgh, Pennsylvania... Plaintiff Armco Financial Services Corporation ("AFSC") is a corporation existing under the laws of the

[12] 68 F. Supp. 2d 330 (SDNY 1999).

State of Delaware, with its principal place of business in Middletown, Ohio... AFSC owned the majority of Armco's finance leasing and insurance businesses during the period relevant to this case... Plaintiff Armco Financial Services International Limited ("AFSIL") is a corporation existing under the laws of the State of Delaware, with its principal place of business in Middletown, Ohio... AFSIL owned part of a group of insurance subsidiaries now called the North Atlantic Group during the period relevant to this case. .. Plaintiff Armco Pacific Limited ("APL") is a corporation existing under the laws of Singapore with its principal place of business in Singapore... APL was engaged in the business of finance and leasing during the period relevant to this case... Plaintiff Northwestern National Insurance Company ("Northwestern") is a corporation existing under the laws of the State of Wisconsin, with its principal place of business in Middletown, Ohio... Northwestern was engaged in the insurance and reinsurance business during the relevant period.

In 1990, Armco sought to dispose of a group of insurance subsidiaries which are now known as the North Atlantic Group (the "Group")... Armco became interested in selling the North Atlantic Group, in a management buy-out, to defendants David W. Atkins and Roger T. Donohue, who were then the Managing Director and Chairman, respectively, of the Group... The sale of the Group was negotiated, on behalf of Armco, by two individuals who were then Armco executives, and who are also defendants in this action: Patrick H. Rossi and Larry L. Stinson. Rossi and Stinson currently reside in Ohio.... Atkins resides in England, and Donohue, a citizen of the United Kingdom, resides in Singapore...

At the time of the negotiation of the management buy-out, the Group was in "run-off" status... This meant that no new policies were being issued by the insurance subsidiaries in the Group,.and the business of the Group consisted solely of paying out claims on pre-existing.insurance contracts as they became due... The sale of the Group therefore was expected to involve a financial transfer from the Armco companies to the Group, which would then be acquired by Atkins and Donohue for nominal consideration... After the sale, the Group would pay off the claims on its insurance policies with the funds initially contributed by Armco and its affiliates...

According to plaintiffs, Atkins, Donohue, Rossi, and Stinson (collectively, the "Individual Defendants") secretly agreed prior to the sale of the Group that Rossi and Stinson would become joint owners of the Group with Atkins and Donohue after the management buy-out... Defendant Wingfield Limited ("Wingfield"), a corporation existing under the laws of Jersey, Channel Islands, and with its principal place of business in Jersey, was the acquisition vehicle used by Donohue and Atkins to purchase the North Atlantic Group from Armco... Plaintiffs allege that Wingfield was secretly owned also by Rossi and Stinson...

The sale of the Group was completed on September 3, 1991 upon the execution of a contract of sale (the "Sale Contract") in the New York City offices of Armco's attorneys... The Sale Contract consisted principally of Wingfield's purchase of CI Services Holding Limited ("CISHL"), which held the assets of the North Atlantic Group, from plaintiff AFSIL and another Armco affiliate... CISHL, also a defendant in this action, is incorporated and has its principal place of business in Jersey... As part of the agreement between the parties, Armco affiliates contributed over $ 40 million to CISHL. ..The Sale Contract also contained a forum selection clause providing that all disputes arising out of the transaction would be resolved by the courts of England...

Plaintiffs assert that the Sale Contract was not the product of an arms-length negotiation but rather part of a wide-ranging conspiracy to defraud Armco and its affiliates out of millions of dollars... Plaintiffs assert that, because their representatives Rossi and Stinson were secret partners of the purchasers, the terms of the Sale Contract were biased in favor of the

purchasers at the expense of plaintiffs... Specifically, plaintiffs allege that the Sale Contract resulted in Armco's making an excessive contribution to the Group, permitting the defendants to enrich themselves at plaintiffs' expense.
In addition to the fraudulent inducement of the sale agreement, plaintiffs allege that defendants engaged in further fraud after the transfer of the Group to their control. According to plaintiffs, the Individual Defendants, acting in concert with the principal insurance subsidiary of the Group, now called North Atlantic Insurance Company ("NAIC"), further increased the available assets of the Group by fraudulently withdrawing funds from two trust funds that NAIC had previously established in favor of plaintiff Northwestern...Defendant NAIC is an insurance company existing under the laws of the United Kingdom with its principal place of business in England...
Plaintiffs allege that defendants completed their scheme by diverting funds from the Group to themselves... Defendants allegedly accomplished this by means of excessive "acquisition fees," "dividends," "commissions," and "consulting fees," paid either to the Individual Defendants themselves or to corporate entities they controlled... Plaintiffs allege that more than $ 16 million was fraudulently obtained by defendants from the Group between 1991 and 1997...
Other corporate entities allegedly controlled by the Individual Defendants and used in furtherance of the alleged fraud are (i) defendant International Trustee and Receivership Services, Inc. ("ITRS"), a corporation organized under the laws of the State of Ohio with its last known principal place of business in Ohio, and which was controlled by defendant Rossi in connection with the alleged fraud;.. (ii) defendant International Run-Off Services, Inc. ("International Run-Off"), a corporation existing under the laws of the State of Ohio with its last known principal place of business in Ohio, and which was controlled by defendant Stinson in connection with the alleged fraud...; and (iii) defendant NPV, a corporation existing under the laws of Nevis, with its principal place of business in Singapore..
The immense fraud was exposed, according to the complaint, because the diversion of funds from the Group eventually led to the insolvency of NAIC in 1997... Atkins had resigned from the Group in 1995, and subsequent to the initiation of the NAIC insolvency proceeding, the other Individual Defendants transferred funds to NAIC which plaintiffs allege represent monies fraudulently obtained by them from Armco and its affiliates...
Plaintiffs commenced the present action to recover the funds that they allege were taken under false pretenses by the Individual Defendants and corporate entities they controlled... The Amended Complaint states claims arising under the common law doctrines of fraud, conversion, and breach of fiduciary duty, as well as under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Because defendant NAIC is in provisional liquidation, this action was originally filed as an adversary proceeding in the bankruptcy court. Upon the motion of NAIC, however, the bankruptcy court dismissed the claims against NAIC on the grounds that they were barred by the court's previously issued injunction. Plaintiffs moved this Court to withdraw the reference of the action to the bankruptcy court, and, NAIC having been dismissed from the case, this Court granted the motion on February 3, 1999...
While the appeal from the bankruptcy court's order dismissing the claims against NAIC was pending, NAIC entered into a settlement with plaintiffs. Defendant Atkins has also settled with plaintiffs and agreed to come to New York to testify on their behalf. A consent judgment between plaintiffs and Atkins was entered by this Court on August 24, 1999...
The case is now before the Court upon the motion to dismiss on various grounds made by Rossi, Stinson, Wingfield, ITRS, International Run-off, and CISHL (the "Moving Defendants").

Discussion
Moving Defendants seek dismissal of this action on three grounds: (1) lack of personal

jurisdiction, (2) improper venue, and (3) forum non conveniens, each of which is separately addressed below....

II. Improper Venue

Moving Defendants assert that the forum selection clause in the Sale Contract (the "Forum Selection Clause" or "Clause") prohibits plaintiffs from maintaining this action in New York. Plaintiffs respond that the Forum Selection Clause does not apply to the present action. If the district court concludes that a valid forum selection clause exists, it "must enforce the forum-selection provision absent a clear showing [by the party opposing enforcement] that enforcement would be 'unjust' or that the clause is 'invalid for such reasons as fraud or overreaching.'" ... . However, on this motion, the "party seeking to avoid enforcement of [a forum selection clause is] entitled to have the facts viewed in the light most favorable to it, and no disputed fact should be resolved against that party until it has had an opportunity to be heard." ...

Plaintiffs contend that the Forum Selection Clause (i) is not applicable to the instant litigation because the claims asserted in the complaint do not fall within the Clause's scope; (ii) is unenforceable because it was induced by fraud; and (iii) is unenforceable in the context of this litigation because only one Moving Defendant and two plaintiffs were parties to the Sale Contract containing the Clause. Applying the relevant standards, and viewing the facts in the light most favorable to plaintiffs, the Court concludes that plaintiffs have made a prima facie showing that the Forum Selection Clause does not apply to this action.

A. the Scope of the Forum Selection Clause Does Not Encompass this Action, Which Involves Allegations of a Pre-contract Scheme to Defraud Plaintiffs.

The Court finds that the allegations of a wide-ranging conspiracy to defraud plaintiffs are not claims that fall under the scope of the Forum Selection Clause contained in the Sale Contract. "The applicability of a forum selection clause is governed by 'objective consideration of the language' of the clause." ... The Forum Selection Clause in the Sale Contract provides that the parties irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement... Because this action did not "arise out of or in connection with" the Sale Agreement, the Forum Selection Clause is inapplicable.

This action is not one that "arose out of" the Sale Contract. Plaintiffs are not suing for breach of the Sale Contract, alleging any lack of performance required by the Sale Contract, or disputing either party's rights or obligations under the Sale Contract. Rather, plaintiffs allege in the complaint a series of fraudulent activities that included the negotiation and execution of the subject Sale Contract. This action arose out of the alleged wide ranging fraud, including numerous acts committed before the execution of the Sale Contract.

The Court also concludes that this action did not arise "in connection" with the Sale Contract, but rather should be viewed independently of that contract. The Court reaches this conclusion, to a significant extent, because plaintiffs allege the existence of a large scale scheme to defraud that included numerous pre-contract activities by defendants, and properly assert a cause of action arising out of that fraud. The conclusion of the court in Anselmo supports this view...The Anselmo court was required to interpret a forum selection clause with language covering claims "relating to" the underlying agreement... That court found the "relating to" language to be "broad enough to encompass claims not explicitly grounded in the Agreement . . . . [and enforceable if the] claims [asserted in the complaint] grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship." .. The court

concluded, however, that "plaintiff's tort claim . . . did not 'relate to' the Agreement because the tort grew out of events which preceded the Agreement."..

Here, plaintiffs assert tort claims that also allegedly grew out of events and acts by defendants preceding the execution of the contract. Plaintiffs allege that the Individual Defendants, together with their corporate entities, were engaged in a broad scheme to defraud plaintiffs out of vast sums of money. Part of the alleged scheme involved, for example, the creation of Wingfield as a vehicle for defendants' fraudulent activities, and the misrepresentation to plaintiffs that Wingfield was owned solely by Atkins and Donohue, when it was in fact allegedly also owned by plaintiffs' representatives Rossi and Stinson... These allegations pre-date the signing and negotiation of the sale agreement, and do not arise from its terms.

The "gist" of plaintiffs' claims is not the breach of a contractual relationship, but the series of acts by defendants resulting in the fraud... In addition to the fact that plaintiffs base their fraud claims on numerous pre-contract activities by defendants, plaintiffs' cause of action for breach of fiduciary duty is also not based on the terms or relationships embodied in the Sale Contract. Plaintiffs allege that Rossi and Stinson, by acting as plaintiffs' principal representatives during the negotiation of the Sale Contract, had an affirmative duty to disclose their interest in Wingfield, and are therefore liable to plaintiffs for their breach of this duty... This cause of action does not arise out of the Sale Contract itself, but rather out of the course of Rossi's and Stinson's representation of plaintiffs' interests during the negotiation of the contract. The relationship upon which this claim is based is between Armco, Rossi and Stinson--not between the parties to the Sale Contract.

Further support for the Court's conclusion that the Forum Selection Clause is inapplicable to this case is derived from the fact that an English court involved in related Armco litigation has made expressly the same finding. The English court, in Donohue v. Armco ...Queen's Bench Division (July 16, 1999) (Hon. Mr. Justice Aikens) (hereinafter referred to as the "English Decision"), was presented with the issue as to whether it should grant a petition to enjoin the present litigation (referred to by the court as the "NY Proceedings") on the basis of the Forum Selection Clause contained in the Sale Contract. The English court refused to issue an injunction, concluding, inter alia, that the claims raised in the NY Proceedings based on a pre-existing conspiracy to defraud Armco are not claims that "arise out of" [the Sale Agreement] . . .. They "arise out of" the agreement to conspire against Armco and to defraud it... WMW Machinery, Inc. v. Werkzeugmaschinenhandel Gmbh Im Aufbau, 960 F. Supp. 734 (S.D.N.Y. 1997) illustrates the contrasts between the current action and one where the tort claims did in fact arise out of a contractual relationship. The WMW Machinery court was faced with the question as to whether the plaintiff's tort claims should be subject to a forum selection clause that was contained in a contract between the parties. The contract gave the plaintiff the exclusive rights to distribute machinery in North America, and the plaintiff had purchased large quantities of machine tools under the contract... When the defendant held up shipment of plaintiff's goods, plaintiff sued for, inter alia, the tort of wrongful conversion. The defendants contended that because the plaintiff's "wrongful conversion claim related to goods and alleged obligations which were the subject of the [Agreement] . . . that claim 'arose out of or in connection' with the Agreement and must, therefore, be resolved by an appropriate German court [as specified by the forum selection clause]." ... The WMW Machinery court agreed and enforced the clause...

The contrast between WMW Machinery and the current case is evident. In WMW Machinery, although the complaint asserted a tort claim, it did not alter the fact that the plaintiff was seeking redress for having been denied benefits guaranteed to it by the exclusive distribution agreement containing the forum selection clause. Here, by contrast, plaintiffs' claims do not

derive from entitlements or benefits granted in the Sale Contract--quite the opposite. Further, the origin of the current dispute was not a contractual relationship as it was in WMW Machinery, but rather a pre-existing comprehensive scheme by the defendants to defraud plaintiffs, of which the signing of the Sale Contract was merely one important aspect.
The Court notes that similar reasoning has been used in the context of a choice of law clause. In Telemedia Partners Worldwide Ltd. v. Hamelin Ltd ..(S.D.N.Y. Feb. 2, 1996), the court held that a limited choice of law clause did not apply to a RICO claim "based on allegations of mail and wire fraud antedating the existence of the agreement and which goes beyond issues merely of construction and enforcement of the Agreement." .. The same reasoning applies here, where the alleged fraud is much broader than the sale contract at issue, and allegedly predates it.

B. the Forum Selection Clause Does Not Defeat Venue in this District Because Plaintiffs Allege That Their Agreement to the Clause Was Induced by Fraud.
Even if the Forum Selection Clause did apply to this dispute, it would not bar the present action from proceeding because plaintiffs have properly alleged that they were fraudulently induced to agree to the Clause. A forum selection clause is not enforceable if "the inclusion of that clause in the contract was the product of fraud . . .." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 ...(1974). A forum selection clause will not be enforced unless it was the product of an "arms length negotiation" and the clause was "a 'vital part of the agreement' so as to make it believable that the parties conducted their negotiations with the clause in mind." Full-Bright Indus. Co., Ltd. v. Lerner Stores, Inc. ...(S.D.N.Y. May 14, 1991)...
Plaintiffs, by alleging facts supporting the conclusion that the Forum Selection Clause was not an arms length transaction have made a "prima facie showing . . . [that] would support the court's exercise of jurisdiction." ... Plaintiffs have set forth facts in the complaint that suggest that similar transactions of this type normally contain non-exclusive forum selection clauses... Plaintiffs also assert that an initial draft of the agreement provided for New York law to govern, and contained no forum selection clause, until Rossi directed Armco's lawyers to switch forms to one that made use of exclusive U.K. forum and choice of law clauses. Because plaintiffs allege that Rossi, who was charged with protecting plaintiffs' interests in the contract negotiations, was secretly working with the other defendants in this action to defraud plaintiffs, it is not unreasonable to infer that Rossi may have included the Forum Selection Clause in order to further the alleged fraud. Similarly, if, as defendants suggest, Wingfield's attorneys first suggested the inclusion of the Forum Selection Clause, it is not unreasonable to assume that Rossi and Stinson agreed to the Clause's inclusion in order to further their alleged fraud.
The Court therefore finds that the allegations that the Forum Selection Clause was the product of fraud provides an alternative basis for its conclusion that the Clause does not prevent this suit from proceeding in New York. the motion to dismiss premised on the Forum Selection Clause is denied.

III. Forum non Conveniens
Moving Defendants move to dismiss the claims against them based on the doctrine of forum non conveniens, contending that England is the more appropriate forum for the resolution of this dispute... A district court has broad discretion in deciding whether to dismiss an action on forum non conveniens grounds...
There is a strong presumption in favor of a U.S. plaintiff's choice of a U.S. forum. To prevail on a motion to dismiss based on forum non conveniens, a defendant must demonstrate (i) that an adequate alternative forum exists and (ii) that considering the relevant private and public

interest factors, "the balance of convenience tilts strongly in favor of trial in the alternative forum" because a trial would lead to "oppressiveness and vexation to defendant . . . out of all proportion to plaintiff's convenience." ... Although trial in England would be an adequate alternative forum, the court concludes that the relevant private and public factors indicate that litigating this case in the United States is completely appropriate. Permitting this trial to proceed in New York would be neither oppressive nor vexatious to defendants.

The public and private factors a court must consider in evaluating a forum non conveniens motion were set forth by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501.. (1947). Among the private factors to be considered are: (i) ease of access to proof, (ii) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining those witnesses, (iii) all other factors that make a trial of a case easy, expeditious, and inexpensive...

First, it will be noted that not a single Moving Defendant is a resident of England, nor is any plaintiff. The two Individual Moving Defendants, Rossi and Stinson, are residents of Ohio, two corporate Moving Defendants are Ohio corporations, and two other corporate Moving Defendants are Jersey corporations controlled by Rossi and Stinson. Two of the major English defendants, NAIC and Atkins, have settled with plaintiffs, and a third, Donohue, is not actively participating in the litigation and, in any event, resides in Singapore. Additionally, all but one of the plaintiffs are U.S. corporations, and assert that the majority of their relevant documents are located in the United States.

Defendants assert that many of their witnesses are located in England. Even if this were true," the unavailability of witnesses [is] not a sufficiently weighty concern to require forum non conveniens dismissal because any testimony [that the defendant] needs from witnesses whose attendance cannot be compelled can be obtained, for example, through the use of letters rogatory." ... Moving Defendants do not assert that letters rogatory are unavailable with respect to their witnesses currently residing in England.

Further, plaintiffs allege that the secret fraudulent scheme perpetrated by defendants was planned, to a significant extent, at meetings that took place in New York. Witnesses testifying as to these meetings would likely be found in New York. Additionally, the Sale Contract was executed in New York, and non-party witnesses with respect to the negotiation and execution of that contract will likely be found in New York.

Among the public factors to be considered by a Court in evaluating a forum non conveniens motion are (i) court congestion, (ii) interest of forums in deciding local disputes, (iii) interest in issues of foreign law being decided by foreign tribunals. See Gulf Oil, 330 U.S. at 508-509... It is beyond doubt that "the United States has an interest in ensuring that fraud does not occur within its borders . . .." Bank of Crete, S.A. v. Koskotas... (S.D.N.Y. Dec. 20, 1991). Further, the statements of the English courts themselves suggest that the U.S. interest in this action is greater than the English interest. The English court involved in related Armco litigation concluded the following:

> In my view England is not the natural "centre of gravity" for these claims, which have worldwide connections. There are a large number of strands that lead to this conclusion. First the alleged conspiracy is said to have originated in meetings in the U.S. and culminated in a secret written agreement of the group of four in New York in April 1991. Further, the alleged breaches of fiduciary duty by Mr. Donohue to the Armco companies (incorporated and operating in the USA) are said to have taken place in the USA, or at least not in England. Secondly, only one of the alleged conspirators, Mr. Atkins, resides in England . . .. Wingfield and CIHSL are Jersey companies, but with no obvious connections

> with England. Fourthly, four of the Armco companies . . . are incorporated in American states . . .. Further, none of the Armco companies carries on business in England . . .. Sixthly, the key witness on the Armco side . . . Atkins, although a resident of England, has agreed to give evidence in New York . . . Seventhly, the RICO statute claims can only be brought in the USA...

The English court went on to state that:

> the connections with England are slim . . .. It seems likely that English substantive law will be of marginal significance in the NY Proceedings .. In this case most of the key witnesses are not to be found in England...

This Court concludes that this action, involving U.S. plaintiffs, mostly U.S. or non-English defendants, and a fraudulent scheme that allegedly arose in New York, is far removed from the facts of those cases where courts granted the extraordinary remedy of forum non conveniens. See, e.g., Piper Aircraft, 454 U.S. at 255-60 (dismissing case on basis of forum non conveniens where the action involved a plane crash and (i) the victims of the crash were Scottish, (ii) the accident occurred in Scottish airspace, (iii) a large portion of relevant evidence was in Scotland, and (iv) the ability to implead other defendants supported holding trial in Scotland). The motion to dismiss based on the doctrine of forum non conveniens must therefore be denied.

Compare **Thunder Marine v Brunswick** 2006 US Dist Lexis 45949 (MD Fl. 2006): "Here, the claims of unfair competition, violation of fair trade, and breach of fiduciary duty, rather than being dependant upon the contractual relationship existent for the sale of marine products between Thunder Marine and Brunswick's subsidiaries, are purportedly based on an entirely new venture--a partnership between Thunder Marine and Brunswick for the purchase and development of waterfront real estate. Furthermore, although Brunswick may very well have a program that encourages dealers of its subsidiaries to share with Brunswick proposals for the acquisition of waterfront property, no facts support the premise that a dealer-manufacturer relationship is required in order to enter into a joint venture with Brunswick for the acquisition of real estate. No facts show that Brunswick would not partner with any entity regarding a waterfront real estate purchase if it saw fit to do so. So, the mere fact that the dispute would not have occurred but for the contractual relationship between Brunswick's subsidiaries and Thunder Marine is not enough to frame the causes of action as dependant upon the contractual relationship. See Armco, Inc...(finding that the scope of the forum selection clause did not encompass the claims where the "gist" of the claims was not dependant upon the terms or relationship embodied in the contract)."

Cf. also *Forrest* v. *Verizon Communications Inc*., 805 A.2d 1007 (DC 2002)
"like the trial court, we conclude that even if the clause is ambiguous, it is still applicable to all of appellant's claims. We follow the number of courts that have held that non-contract claims that involve the same operative facts as a parallel breach of contract claim fall within the scope of a forum selection clause. See Terra...119 F.3d at 695; Lambert ...983 F.2d at 1121-22; Lawler v. Schumacher Filters Am., 832 F. Supp. 1044, 1052 (E.D. Va. 1993)... Courts should not "reward attempts to evade enforcement of forum selection agreements through 'artful pleading of [non-contract] claims' in the context of a contract dispute.""

Did the Armco decision reward artful pleading?

In **Donohue v ARMCO**[13] the UK's House of Lords was faced with the question of whether to grant an anti-suit injunction to restrain the pursuit of proceedings in New York. The contracts which gave rise to the litigation were contracts for the sale and purchase of shares in an insurance group. The contracts contained exclusive jurisdiction clauses as Lord Bingham of Cornhill described in his judgment in the case :

[7] ... each of the three agreements contained an express stipulation that the contract was governed by English law, made provision for service on a nominated agent of the vendor's solicitors in England and, most importantly, provided for the exclusive jurisdiction of the English court. In the sale and purchase agreement it was provided that 'the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement'....

Donohue brought proceedings in the English courts relying on the exclusive jurisdiction clauses and seeking an anti-suit injunction in relation to the New York proceedings. The House of Lords held that the anti-suit injunction should not be granted. The following excerpt is from the judgment of Lord Bingham of Cornhill (a majority of the Law Lords concurred):

[13] On the first summons, the judge held that an injunction restraining proceedings in New York should not be granted to Mr Donohue. In reaching that conclusion he made two important findings. The first was expressed in paras 42 and 43 of his judgment ([2000] 1 All ER (Comm) 425 at 439):

> '42. I have decided that the claims raised in the NY proceedings based on a pre-existing conspiracy to defraud Armco are not claims that "arise out of" either the SPA [sale and purchase agreement] or the transfer agreements. They "arise out of" the agreement to conspire against Armco to defraud it. I have also concluded that the claims concerning the collection agreement did not arise out of or in connection with the SPA or the transfer agreements. I doubt the trust fund claims come within the EJCs [exclusive jurisdiction clauses] too, but I was told that the trust fund claims may not be relevant now that the NNIC/NAIC disputes have been settled subject to ratification by the Court. Thus at least the issues raised in counts 1 to 8 and 9 to 12 [of the amended complaint in the New York proceedings] are not within the EJCs.
> 43. This means that much of the disputes raised in the NY proceedings are outside the scope of the EJCs.'

The second important finding was that Armco Inc had never succeeded to the rights and obligations of AFSEL under the transfer agreement and the sale and purchase agreement to which AFSEL had been party and so had never become bound by the exclusive jurisdiction clause in those agreements... The judge accordingly approached Mr Donohue's application by considering whether the New York proceedings against him were vexatious and oppressive and concluded that they were not ... All three members of the Court of Appeal disagreed with these two findings...The Court of Appeal held that these errors vitiated the judge's exercise of

[13] [2001] UKHL 64, [2002] 1 All ER 749 (HL)

discretion and so entitled the Court of Appeal to exercise its discretion afresh...
[14] The Court of Appeal's conclusions on these two points have not been in issue before the House. Armco Inc accepts that as the successor to AFSEL it is bound by the exclusive jurisdiction clauses in the transfer agreement to which AFSEL was party and in the sale and purchase agreement to the extent that AFSEL would itself have been bound had it not been dissolved. Armco Inc also asserts that as the ultimate victim of the alleged conspiracy it has claims independent of those derived from AFSEL, an assertion challenged by Mr Donohue and the PCCs. On the scope of the clauses, the Armco companies accept that the clauses cover claims based on the conspiracy which preceded the making of the agreements as well as the misrepresentations and concealment which procured them to be made. The scope of the clauses was not the subject of argument before the House and I do not think it appropriate to give detailed consideration to this aspect of the case. The exclusive jurisdiction clause in the sale and purchase agreement, quoted above, was in wide terms. The practice of the English courts is to give such clauses, as between the parties to them, a generous interpretation.
[15] The Court of Appeal granted an injunction against the first three Armco defendants ... restraining them from commencing or continuing proceedings against any of the claimants ... in any court other than those of England and Wales regarding any dispute arising out of the management buy-out... The injunction was expressed to apply in particular to the Armco companies' New York proceedings already referred to, and to the numbered counts which were held to cover the 1991 management buy-out. Thus the injunction did not apply to [companies] the joinder of which ...had been disallowed, and was limited to the causes of action held to fall within the exclusive jurisdiction clauses. But the benefit of the exclusive jurisdiction clauses was extended to ... four PCCs who were not party to them ... The object of the injunction was plainly to give effect to the exclusive jurisdiction clauses and to ensure trial in England of the issues arising out of or connected with the management buy-out between all the parties involved.
[16] The grant of an anti-suit injunction, as of any other injunction, involves an exercise of discretion by the court. To exercise its discretion reliably and rationally, the court must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it. This is particularly true of an anti-suit injunction because, as explained below, the likely effect of an injunction on proceedings in the foreign and the domestic forum and on parties not bound by the injunction may be matters very material to the decision whether an injunction should be granted or not. Thus although the two main issues before the House cannot be regarded entirely independently of each other, it is preferable to consider the issue of joinder of the PCCs before considering the grant of an anti-suit injunction more generally.

Joinder of the PCCs
[17] CISHL was party to each of the transfer agreements. Wingfield was party to the sale and purchase agreement. All three agreements contained an English exclusive jurisdiction clause. Both companies have been sued by Armco in New York. Both have claims ... entitling them to seek leave to serve proceedings out of the jurisdiction... the court has power to add these companies as claimants if it considers it desirable to do so. Thus if the court should consider it desirable to do so there is no jurisdictional objection to the grant of leave to add CISHL and Wingfield as claimants in Mr Donohue's action and to give leave (if it were needed) to CISHL and Wingfield to serve AFSIL and Armco Inc ... out of the jurisdiction. The basis of their claim is in principle the same as that of Mr Donohue, but since they seek to be added to existing proceedings they must persuade the court that it is desirable to add them. The decision whether it is desirable to add them will be heavily influenced by the decision whether to join the other PCCs and whether Mr Donohue upholds his claim to the grant of an anti-suit injunction.

[18] The other four PCCs (Messrs Rossi and Stinson and their respective companies) are in a different position. None was a party to either transfer agreement or to the sale and purchase agreement and so none has the benefit of the English exclusive jurisdiction clause. It is common ground that none has any cause of action which would entitle the court to give leave to serve proceedings out of the jurisdiction... and thus none could bring independent proceedings against any Armco company in England unless that company submitted to the jurisdiction. But these PCCs rely on the broad power of the court under RSC Ord 15, r 6 and CPR Pt 19, which is said to be unconstrained by the rules on service out of the jurisdiction, and it is said to be desirable to add them because they have a substantial cause of action entitling them to seek an anti-suit injunction. The Armco companies reply that a foreign party, even if already properly sued within the jurisdiction, may not be subjected to a claim for which leave to serve out could not be granted and further that, in the absence of any contractual right to rely on an exclusive jurisdiction clause, these PCCs have on the material before the House no cause of action entitling them to seek an anti-suit injunction. The first issue between the parties is whether these PCCs can show any cause of action which would entitle them to claim an injunction.
[19] The jurisdiction of the English court to grant injunctions, both generally and in relation to the conduct of foreign proceedings, has been the subject of consideration by the House of Lords and the Privy Council in a series of decisions in recent years which include ..The Siskina...[1979] AC 210; Castanho v Brown & Root (UK) Ltd ...[1981] AC 557; British Airways Board v Laker Airways Ltd ...[1985] AC 58...SNI Airospatiale v Lee Kui Jak ..[1987] AC 871... Those decisions reveal some development of principle ... But certain principles governing the grant of an injunction to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction, in cases such as the present, as between the Armco companies and these PCCs, are now beyond dispute. They were identified by Lord Goff of Chieveley giving the opinion of the Judicial Committee of the Privy Council in the SNI Airospatiale case ...[1987] AC 871 at 892: (1) the jurisdiction is to be exercised when the ends of justice require it; (2) where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed; (3) an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy; and (4) since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

In the SNI Airospatiale case the issue was whether proceedings in Texas should be restrained in favour of Brunei, and Lord Goff summarised the guiding principles:

> 'In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff is he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate

> terms, just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate can likewise often be solved by granting a stay on terms.'...

[20] If these principles are applied to the present case it is in my opinion plain that an anti-suit injunction could not properly be granted in favour of these PCCs. The judge... concluded that England was not the natural forum for these proceedings, that the connections with England were slim and that the New York proceedings were not vexatious and oppressive ... Stuart-Smith LJ observed that if this were an alternative forum case he would not necessarily disagree with the judge ... Brooke LJ considered that the convenient forum for the resolution of all disputes between Messrs Rossi and Stinson and their former employers was clearly situated on the other side of the Atlantic ... Judge Schwartz concluded that: 'Permitting this trial to proceed in New York would be neither oppressive nor vexatious to defendants' and further said:

> 'This Court concludes that this action, involving US plaintiffs, mostly US or non-English defendants, and a fraudulent scheme that allegedly arose in New York, is far removed from the facts of those cases where courts granted the extraordinary remedy of forum non conveniens.'

The Armco companies are incorporated in Ohio, Delaware, Wisconsin and (in the case of APL) Singapore. Messrs Rossi and Stinson and their companies have no English links. The dispute between them and the Armco companies concerns the alleged breach of the fiduciary duty they owed to their employers. It is plain that England is not the natural forum for resolution of this dispute and that the New York proceedings by the Armco companies against these PCCs are neither vexatious nor oppressive.

[21] There is another more technical objection to the joinder of these PCCs. In stating the third of his basic principles in the SNI Aerospatiale case, Lord Goff made reference to 'a party who is amenable to the jurisdiction of the court'. This echoed the language of Lord Diplock in his important statement of principle in The Siskina ... which has been understood to mean that the court may only grant an injunction where it has personal jurisdiction over the defendant in the sense that he could be served personally or under RSC Ord 11 (other than sub-r (i))... These PCCs could not, as already noted, have obtained leave to serve out of the jurisdiction on any of the Armco companies in independent proceedings. Service on APL and NNIC has been set aside. Does the amenability of Armco Inc, AFSC and AFSIL to the jurisdiction of the English court by virtue of their contractual relationship with Mr Donohue enable these PCCs to take advantage of that relationship to effect service on the solicitors nominated by those companies pursuant to the transfer and sale and purchase agreements, and thus to prosecute a claim which could not otherwise have been prosecuted in this forum? In my opinion it does not. Since Holland v Leslie [1894] 2 QB 450 the view has prevailed that the court should refuse to allow an amendment of proceedings which would introduce a new cause of action against a foreign defendant in respect of which the court would have refused leave for service out of the jurisdiction ... This view seems to me to accord with principle. The jurisdiction of the English court is territorial. A party resident abroad may be subjected to the jurisdiction of the court to the extent (and only to the extent) that statute or rules made under statute permit... It would be wrong in principle to allow these PCCs to use Mr Donohue's action as a Trojan horse in which to enter the proceedings when they could have shown no possible ground for doing so in their own right.

[22] The majority of the Court of Appeal were in my opinion wrong to allow the joinder of these

four PCCs, and I would accordingly set aside that order and refuse joinder.

The grant of an injunction to Mr Donohue

[23] My Lords, I turn to the question whether an anti-suit injunction should be granted to Mr Donohue, recognising that as between him and the first three Armco appellants... there is a contractual obligation to submit any dispute which may arise out of or in connection with the sale and purchase agreement to the exclusive jurisdiction of the English court. It is plain that while some of the claims made by the Armco companies in the New York proceedings fall outside the scope of this clause, some claims central to the Armco companies' complaint fall within it. In this situation, exercise of the broad discretion conferred on the court by s 37 of the Supreme Court Act 1981 to grant an injunction in all cases in which it appears to the court to be just and convenient to do so is controlled by principles to be derived from a substantial line of authority here and abroad.

[24] If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1969] 2 All ER 641 at 645-646... Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see the SNI Airospatiale case.. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)

[25] Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause... A similar approach has been followed by courts in the United States, Canada, Australia and New Zealand..:

[26] The Fehmarn [1958] 1 All ER 333 ..shows that this is not an invariable result. This was one of the earlier cases in the modern series. The Russian exclusive jurisdiction clause was a condition in a bill of lading, no doubt part of a standard form, and certainly not the subject of negotiation between the parties to the eventual dispute. That was between English owners of the bill and German owners of the vessel. The dispute was held to have a much closer connection with England than with Russia, and it was thought that the German owners did not object to the dispute being decided in England if they could avoid giving security. On those

grounds, the judge having declined to stay the proceedings in England, the Court of Appeal upheld his decision.
[27] The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. These decisions are instructive. In Evans Marshall & Co Ltd v Bertola SA [1973] 1 All ER 992, [1973] 1 WLR 349 there was a tripartite dispute but only two of the parties were bound by a clause conferring exclusive jurisdiction on the court in Barcelona. Kerr J at first instance was impressed by the undesirability of there being two actions, one in London and the other in Barcelona ... The Court of Appeal took a similar view .. Sachs LJ thought separate trials particularly inappropriate where a conspiracy claim was in issue... In Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria [1981] 2 Lloyd's Rep 119 the primary dispute was between cargo interests and the owner of the vessel, both parties being bound by a clause in the bill of lading conferring exclusive jurisdiction on the courts of Egypt. But the cargo interests had also issued proceedings against the Mersey Docks and Harbour Co, which was not bound by the clause. The Court of Appeal upheld the judge's decision refusing a stay. In the course of his leading judgment in the Court of Appeal Brandon LJ said (at 128):

> I agree entirely with the learned Judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries...

Citi-March Ltd v Neptune Orient Lines Ltd [1996] 2 All ER 545, [1996] 1 WLR 1367 also involved third party interests and raised the possibility of inconsistent decisions. Colman J regarded separate trials in England and Singapore as not only inconvenient but also a potential source of injustice and made an order intended to achieve a composite trial in London despite a Singaporean exclusive jurisdiction clause...The MC Pearl [1997] 1 Lloyd's Rep 566 again involved third parties and raised the possibility of inconsistent findings. Despite a clause conferring exclusive jurisdiction on the courts of Seoul, Rix J refused to stay proceedings in England. He regarded the case as on all fours with the Citi-March case .. and observed..:

> It seems to me that so far the plaintiffs have shown strong cause why the jurisdiction clause should not be enforced. This is indeed a paradigm case for the concentration of all the relevant parties' disputes in a single jurisdiction. If in such a case a host of different jurisdiction clauses were to be observed, the casualty at the root of the action would become virtually untriable. The action would fragment and reduplicate, at vast cost.'

A similar approach is discernible in Bouygues Offshore SA v Caspian Shipping Co... in which the disputes involved four parties only two of whom were bound by an English exclusive jurisdiction clause. Although the effect of the clause was described by Evans LJ as 'near-conclusive' .. an injunction to restrain proceedings in South Africa was refused...Evans LJ

said:

> 'In my judgment, two questions arise, one a matter of principle. First, should the Court, when deciding whether or not to enforce the exclusive jurisdiction clause by means of an injunction which prevents Bouygues from continuing with its proceedings against Ultisol in South Africa, take into account the effects of such an injunction on persons who are not parties or entitled to enforce the contract containing the jurisdiction clause, Portnet and Caspian here, but who are both necessary and proper parties to the litigation wherever it is held? In my judgment, the clear answer to this question is "yes". Mr. Justice Clarke did so in his judgment and the contrary has not been argued before us. The relevance of the potential effects on third parties has been recognised in other authorities . . .'

Sir John Knox also held that proceedings should be allowed to continue in South Africa because, among other reasons.. 'this is the only way in which to minimize, if not avoid altogether, the risk of inconsistent decisions in different jurisdictions'.
[28] Not all cases can be so neatly categorised. In Credit Suisse First Boston (Europe) v MLC (Bermuda) Ltd [1999] 1 All ER (Comm) 237 Rix J dealt with a case in which there were four potential parties and three different agreements (or classes of agreement) but only two of the parties were bound by an English exclusive jurisdiction clause under one of the agreements. There were proceedings by C against A (the two parties to the clause) in England and proceedings by A against C, B and D in New York alleging statutory breaches relating to the agreement containing the clause and also under an agreement not containing an exclusive jurisdiction clause, and including other claims such as a claim for conversion. The judge gave leave, on their application, for B and D to be joined to C's action against A in England (at 248). A's application to stay the proceedings by C in England was not pursued, but if it had been it would have failed (at 257). On an application by C, B and D for an injunction to restrain A suing them in New York, the judge granted an injunction but only to restrain the prosecution of claims covered by the exclusive jurisdiction clause... The judge was confronted in this case with a difficult procedural and jurisdictional tangle which permitted no wholly satisfactory solution. It was, however, important to his decision that he did not judge it possible to make an order which would ensure trial of all proceedings arising out of all the agreements in one forum. He said..

> (5) An important fact in this case, as it seems to me, is that, whether I enforce [the exclusive jurisdiction clause] or not, I cannot ensure that all litigation between [A] and [B, C and D] is carried forward in one jurisdiction unless I would be prepared to extend my injunction to all the claims against [B, C and D] in New York. That is because [the exclusive jurisdiction clause] does not bind [B and D]. That remains the case even if I assume that all the claims against [C] come within [the exclusive jurisdiction clause], but I have already stated that in my judgment that is not the case. It follows that unless I am prepared not only to enforce [the exclusive jurisdiction clause] but also to injunct [A's] claims against [B and D] and [A's] claims against [C] outside [the exclusive jurisdiction clause], [A's] complaint in New York will continue in any event. On the other hand [counsel] has not pursued [A's] application for a stay of [C's] action, but if he had, it would fail for the reasons for which [counsel] cited British Aerospace plc v Dee Howard Co [1993] 1 Lloyd's Rep 368. Thus the continuation of the proceedings in England is inevitable too.

(6) I would not, however, injunct the claims against [B and D] because, however undesirable it is in principle to have parallel litigation in two jurisdictions, it seems to me the duplication of litigation does not in itself make it in the interests of justice to injunct the New York proceedings in so far as claims against [B] and [D] are concerned.

[29] In seeking to apply this body of authority to the present case the first point to be made is that Mr Donohue has as against the first three Armco appellants a strong prima facie right not to be the subject elsewhere than in England of claims by those companies falling within the scope of the clause. Some of the claims made against him by those companies in New York do fall within the clause. This is an important and substantial, and not a formal or technical, right. At an earlier stage of this English litigation Armco sought to impeach the exclusive jurisdiction clauses on the ground that they had been induced by the fraud of the four conspirators. The judge not only rejected the contention that Armco executives had been misled but also found that Armco's English and US lawyers had known all about the clauses and their consequences and that Armco had had its own good reasons for inserting English law and jurisdiction clauses in the contracts ... There was no appeal against these conclusions. Thus Armco, having agreed to these clauses to serve their own ends, are now seeking to be released from their bargain. To permit them to do so exposes Mr Donohue to an obvious risk of injustice. This risk does not derive from the venue alone: Mr Donohue might, as a United Kingdom citizen, prefer to be sued in London rather than New York if he has to be sued anywhere, but to him, as a resident of Singapore, New York is not in itself an obviously more inconvenient forum than London. A more substantial objection may be founded on the perceived procedural disadvantages to him of being sued in New York: as the evidence suggests, the cost would be greater, trial would be by jury and costs would be very largely irrecoverable even if he were to succeed. But there are always points of this kind to be made when comparing one forum with another, and the standing, authority and expertise of the forum in which the New York proceedings are being pursued cannot be questioned. Much more significant, from Mr Donohue's viewpoint, are the RICO claims made against him. They could not be pursued against him in England. They could, if established in New York, lead to the award of swingeing damages against him. On agreement of the exclusive jurisdiction clause he could reasonably have felt confident that no RICO claim arising out of or in connection with the agreements could be pursued against him and it would represent an obvious injustice if he were now to be exposed to those claims.
[30] There is, as always, another side to the coin. All five Armco appellants have a clear prima facie right to pursue against Messrs Rossi, and Stinson and their respective companies any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. There is, as I have already concluded, no ground upon which this court could properly seek to restrain those proceedings. It would not be appropriate for the English courts to form any judgment, however tentative, on the merits of the Armco companies' claims, beyond noting that lack of merit was not one of the grounds on which the PCCs invited Judge Schwartz to dismiss the proceedings in New York. It must be assumed that the claims made by the Armco companies against their former employees Messrs Rossi and Stinson, including the RICO claims, are serious and substantial claims. There is nothing whatever to suggest that these claims will not proceed in New York whether or not an injunction is granted to Mr Donohue.
[31] It must further be noted that APL and NNIC have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL also any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. I have

already recorded that service of the English proceedings on APL and NNIC has been set aside. There is no ground upon which the English court could properly restrain their proceedings in New York. It appears.. that the claims of APL and NNIC relate to the collection agreement and the trust fund withdrawals rather than the allegedly fraudulent management buy-out, but these claims also cannot be treated as lacking merit. They are proceeding in New York, and everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.
[32] Similarly, the first three Armco appellants have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL any claim not covered by the exclusive jurisdiction clauses in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. To the extent that the claims of these Armco companies do not arise out of or in connection with the transfer agreements and the sale and purchase agreement, they fall outside the exclusive jurisdiction clauses, and there is no ground upon which the English court could properly restrain these proceedings. Everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.
[33] Thus Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the fact of this case, the Armco companies can show strong reasons why the court should displace Mr Donohue's clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?
[34] I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.
[35] Stuart-Smith LJ ... regarded the subject matter of the collection agreement complaints as 'quite different' from that involving the first three Armco appellants in relation to the transfer agreements and the sale and purchase agreement. He discounted the significance of the trust fund withdrawal claims on the ground that they had almost certainly been settled ... although it is noteworthy that the settlement agreement made with NAIC expressly preserved the right of NNIC to pursue claims against Messrs Rossi, Stinson, Donohue and Atkins, ITRS, IROS, Wingfield, NPV and CISHL in the New York proceedings. It is true that the collection agreement and the trust fund withdrawals give rise to different grounds of claim. But the principal actors

are the same, and Armco contends, rightly or wrongly, that these were further manifestations of the plot made by the four conspirators to enrich themselves at the expense of Armco. I cannot for my part accept that the ends of justice would be well served if Armco's allegations concerning the transfer and sale and purchase agreements were determined in England and its allegations concerning the collection agreement and trust fund withdrawals were determined in separate proceedings in New York. The judgment made of the motives and honesty of the four alleged conspirators in the one context would plainly have an important bearing on the judgment made in the other.
[36] In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue. In New York proceedings Mr Donohue will be entitled to claim that the sale and purchase agreement is governed by English law. And Lord Grabiner, representing Armco, has accepted that Armco's breach of contract in suing elsewhere than in the contractual forum could found a claim by Mr Donohue for any damage he has suffered as a result. The qualification is that he should be protected against liability under the RICO claims made against him because of the obvious injustice to him which such liability would in the circumstances involve. But before considering whether such a protection can and should be afforded to Mr Donohue it is necessary to address an important preliminary question.
[37] The discretion whether or not to grant an injunction was in the first instance that of the judge. His exercise of discretion was entitled to be respected unless, on grounds of his error or misdirection, the Court of Appeal was entitled to exercise its discretion afresh. The Court of Appeal held, rightly, that such grounds existed, and did exercise its discretion afresh. But the exercise of discretion is not at large in this House: the Court of Appeal's exercise of discretion must in its turn be respected unless on grounds of error or misdirection the House is entitled to exercise its own discretion. Having regard to the long and closely-reasoned leading judgment of Stuart-Smith LJ, I would not lightly disregard the majority's conclusion.
[38] I am, however, persuaded that the discretionary judgment made by the Court of Appeal is fundamentally vitiated by an incorrect view of the future shape of this litigation. In his judgment, Stuart-Smith LJ considered the grant of an injunction to Mr Donohue before considering whether Messrs Rossi and Stinson and their respective companies should be joined as claimants, and this enabled Mr Donohue to contend in argument that the Court of Appeal's decision on grant of an injunction should stand despite its conclusion, incorrect as I have held it to be, on joinder. But this reading of Stuart-Smith LJ's judgment cannot in my opinion be sustained. I think it is plain, in particular from para 42 of his judgment ... that Stuart-Smith LJ contemplated that all disputes between the Armco companies and Messrs Donohue, Rossi and Stinson relating to the transfer and sale and purchase agreements would be resolved in the English forum. This enabled him to say:

> The issues in the claim of AFSC, AFSIL and the derivative claim of Armco Inc in relation to the MBO [management buy-out] are whether there was the secret agreement alleged, whether Mr Rossi and Mr Stinson were beneficially interested in Wingfield at the time, whether S30m was an excessive sum and whether S10m worth of AFSEL's assets were secretly and fraudulently transferred. If these allegations are made out, Mr Donohue, Mr Rossi, Mr Stinson and Wingfield will be liable . . .

He was not there recognising the possibility that different conclusions might be reached in the

cases of Mr Rossi and Mr Stinson on the one hand and Mr Donohue and Wingfield on the other, a very unlikely event in the case of a single composite trial but an entirely possible outcome if parallel trials relating to the management buy-out took place in both England and New York. This incorrect view was in my opinion compounded by his treatment of the collection and trust fund withdrawal claims as different and separate from the management buy-out claims. For reasons already given I cannot accept this view. Had Stuart-Smith LJ reached the view which I have reached on the joinder of Messrs Rossi and Stinson and their companies, I feel sure that he would have been gravely concerned at the prospect of the same issue being determined in different tribunals, with the obvious and highly undesirable risk of inconsistent findings and decisions. For these reasons I am of the opinion that members of the House are entitled and bound to exercise their discretion afresh.
[39] The interests of justice are in my judgment best served if an anti-suit injunction is denied to Mr Donohue but an undertaking proffered on behalf of the Armco companies (defined to include the five Armco appellants) is accepted in the following terms:

> The Armco companies . . . confirm that they undertake not to enforce against Mr Donohue, Wingfield or CISHL any multiple or punitive damages awarded in the New York proceedings whether awarded pursuant to the RICO statute or common law.
> For the avoidance of doubt, the above undertaking (i) shall not restrict the Armco companies from seeking to enforce any award made in the New York proceedings for damages which are not multiple or punitive; (ii) shall relate only to enforcement; and (iii) as against any defendant in the New York proceedings other than Mr Donohue, Wingfield or CISHL, shall have no effect whatsoever in respect of the Armco companies pursuing or enforcing any claim or award in the New York proceedings whether for multiple or punitive damages or otherwise.

If there were any doubt about the efficacy of this proffered undertaking in relation not only to Mr Donohue but also Wingfield and CISHL, I would order the joinder of those companies. But I am satisfied that this is an unnecessary step which would serve no useful purpose. I would accordingly refuse the application of these parties to be joined as claimants in the present action. In the result, I would allow the appeal, on the undertaking just recited, and set aside the orders of the Court of Appeal joining the PCCs as claimants and granting an injunction to Mr Donohue.

In 2005 a **Hague Convention on Choice of Court Agreements** was concluded, although it is not yet in force.[14] The Convention contains the following provisions:

Article 5 Jurisdiction of the chosen court
1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

[14] *See* http://www.hcch.net/index_en.php?act=conventions.text&cid=98 .

3. The preceding paragraphs shall not affect rules -
a) on jurisdiction related to subject matter or to the value of the claim;
b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen
A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -
a) the agreement is null and void under the law of the State of the chosen court;
b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
e) the chosen court has decided not to hear the case.

This approach does not necessarily resolve the Armco issue.

In a decision in 2004[15] the English Court of Appeal insisted that a non-exclusive jurisdiction clause meant exactly that. The case arose out of a swap transaction using the ISDA standard form agreement with an English choice of law clause and a non-exclusive choice of jurisdiction in England. The Court of Appeal said that this did not preclude litigation in New York. The Court of Appeal adopted a similar approach in **Deutsche Bank AG v Highland Crusader Offshore Partners LP** in 2009.[16] Lord Justice Toulson (delivering the judgment of the Court) stated:

105 The starting point for considering the effect of a non-exclusive jurisdiction clause must be the wording of the clause. In terms of contract law, I cannot see how a party could ordinarily be said to be in breach of a contract containing a non-exclusive jurisdiction clause merely by pursuing proceedings in an alternative jurisdiction. It is conceivable that a jurisdiction clause which is not fully exclusive may nevertheless be drafted in such a way as to have the effect of barring parallel proceedings in certain circumstances, but that is a matter of individual contractual interpretation. Looking at the matter in general terms, I agree with Raphael's suggestion in The Anti-Suit Injunction at para 9.12 that
"where a non-exclusive jurisdiction clause does not clearly indicate whether prior or subsequent parallel proceedings in a non-selected forum are permitted or prohibited, the best interpretation will usually be that, by contracting for non-exclusive jurisdiction, the parties have anticipated and accepted the possibility of some parallel proceedings, and as a result, only foreign proceedings which are vexatious and oppressive for some reason independent of the

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[15] *Royal Bank of Canada* v *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 07, [2004] All ER (D) 216

[16] [2009] EWCA Civ 725 at http://www.bailii.org/ew/cases/EWCA/Civ/2009/725.html .

mere presence of the non-exclusive clause will be restrained by injunction."
106 Consistently with that approach, when it comes to the question whether the interests of justice require that an anti-suit injunction should be granted, I do not consider that it would be right to start with a general presumption that parallel proceedings in a non-selected forum are to be regarded as vexatious or oppressive and that there is a burden on the party responsible for prosecuting them to make out a strong case to justify them on grounds of matters unforeseeable at the time of the contract or other exceptional circumstances. My reasons are based on principle, practice and authority.
107 In principle, there are a number of reasons why I do not think that it would be right to adopt such a presumption. First, it is equivalent or at least comes close to treating a non-exclusive clause as an exclusive jurisdiction clause once proceedings are commenced under it, whereas there is an important difference. An exclusive jurisdiction clause creates a contractual right not to be sued elsewhere, although the court has a discretion whether to enforce it (and may refuse as in Donohue v Armco). In the case of a non-exclusive clause, either party is prima facie entitled to bring proceedings in a court of competent jurisdiction. Duplication of litigation through parallel proceedings is undesirable, but it is an inherent risk where the parties use a non-exclusive jurisdiction clause.
108 Secondly, I see no cogent reason why it should automatically be assumed that nomination of a non-exclusive forum should give priority or dominance to that forum over any other. It ignores all variables. The non-exclusive jurisdiction clause may in one case represent the result of specific negotiations; in another it may result from the use of a standard form of contract. In one case there may be another forum which is obviously appropriate applying the normal factors; in another case there may not be.
109 Thirdly, there is the important factor of comity to consider. If the English court and the foreign court take different views about the weight to be attached to a non-exclusive jurisdiction clause, I do not see that as a sufficient reason for departing from the principle that each court should ordinarily be left to determine the suitability of the litigation before it and should be chary of attempting to interfere with the other court's decision. ..
110 The argument for saying that where proceedings are brought in England pursuant to a non-exclusive English jurisdiction clause it will be vexatious and oppressive for either party to pursue parallel proceedings in a foreign court, unless there is an exceptional reason for doing so, is premised on the reasoning that such parallel proceedings cannot have been within the parties' contemplation, that the exposure to the costs and risks of inconsistent judgments resulting from parallel proceedings is oppressive, and that justice therefore requires that the foreign proceedings should be barred (since there can be no objection to the English proceedings in the light of the agreed submission to English jurisdiction). For reasons already set out, I am not persuaded by the premises which underlie the argument. As to the first, if on the proper interpretation of the clause its effect was to bar parallel proceedings, then the party suing in England would have a contractual right to enforce the bar, subject to the court's residual discretion in matters of procedure. But if that is not the effect of the clause, then the clause does leave open the foreseeable possibility of parallel proceedings. As to the second, it does not follow that because parallel proceedings are undesirable they are necessarily oppressive. If they are improperly brought they are oppressive, but here the argument becomes circular.
111 As a matter of practice non-exclusive jurisdiction clauses are commonplace but, as noted, there appear to have been only three known previous cases where the English court has granted an anti-suit injunction to restrain the foreign proceedings. They are Cannon Screen, Amoco v TGTL and Sabah. Those cases were in different ways exceptional. The anti-suit

injunction in Cannon Screen was not based on any broad proposition that the Californian proceedings were presumptively vexatious and oppressive in the light of the English non-exclusive jurisdiction clause. It was based on a combination of factors which lead the judge to describe the action brought against Cannon UK in California as a crude form of oppression. Amoco v TGTL concerned the institution of what seem to have been effectively ancillary proceedings in a foreign court for the purpose of obtaining documents for use in an English action.

112 Sabah has given rise to a good deal of debate as to its interpretation. I agree with Andrew Smith J in Evialis and Raphael that the decision is best understood to have been based on the finding that the GOP acted in breach of its contract with Sabah by bringing proceedings in Islamabad in which it claimed an injunction to prevent Sabah from enforcing its rights against the GOP in England pursuant to the English non-exclusive jurisdiction clause. (This view is supported by Waller LJ's statement in para 44 that the injunction "is being granted by the Court to which both parties have agreed to give effect to the bargain they made".) If I am wrong, and the injunction was granted not in support of a legal right but under the court's power to protect Sabah from vexatious and oppressive litigation, for reasons already discussed the conduct of the GOP was certainly vexatious and oppressive on the particular facts of the case. On either approach, the case needs to be seen in the context of its own particular facts. It would be wrong in my view to extrapolate from it a rule of law that the prosecution of foreign litigation in parallel with litigation in England pursuant to a non-exclusive jurisdiction clause is per se vexatious and oppressive unless exceptional circumstances can be shown to justify it. Such a rule would be inconsistent with the weight of other appellate authorities from Du Pont (No 2) to RBC v Rabobank. It follows that in so far as later first instance judgments have treated Sabah as establishing such a rule, they are in my view wrong (although I am not suggesting that the decisions made in those cases, concerning applications to stay English proceedings or to set aside service of English proceedings out of the jurisdiction, were wrong).

113 I would therefore hold that Burton J misdirected himself in principle when he said that

"…absent some unforeseeable change since the contract, none of which is suggested here, in my judgment, when it comes to deciding whether it is vexatious or oppressive to continue two sets of proceedings in parallel, it is vexatious and oppressive, in the absence of any such exceptional unforeseeable circumstances, for a party to pursue proceedings in non-contractual forum."

114 Accordingly it is necessary for this court to make its own decision whether an anti-suit injunction ought to have been granted. There are a number of relevant factors.

115 The starting point is the wording of the contract. The GMRA used by the parties was a standard form of international finance agreement. The last sentence of paragraph 17 ("Nothing in this paragraph shall limit the right of any party to take proceedings in the courts of any other country of competent jurisdiction") is inconsistent with reliance on that clause of itself to suggest that the prosecution of parallel proceedings in another jurisdiction would be oppressive or vexatious. The clause does not prevent DB from relying on other factors to show that the parallel proceeding were vexatious or oppressive, but, to the extent that a party might otherwise pursue parallel litigation without it being vexatious or oppressive, its right to do so is not limited by the paragraph, because the paragraph itself says so in plain terms.

116 Looking at the usual list of factors, some would favour England as the forum and some would favour Texas as the forum.

117 I have referred to the main ones advanced by the parties on the application to dismiss or stay the Texas action for forum non conveniens, and they were fully argued before Judge Molberg.

118 I would attach little significance to the fact that the Texas action was begun before the English action, both for the reason given by Bingham LJ in Du Pont when considering an application to stay an English action in favour of an Illinois action commenced a month later (where he expressed the view that the outcome should not be affected by what was little more than an accident of timing), and also because the natural consequence of treating it as an important factor would be to encourage parties to rush to fire the first shot.
119 Far more important is what has happened in the foreign proceedings. Whatever decision this court might have made about the rival merits of London and Texas as a forum for determining the dispute, there can be no foundation for any suggestion that Judge Molberg's decision to accept the suit of the Highland companies (who had strong connections with Dallas and whose complaints related to financial agreements negotiated and executed by them in Dallas) violated the principles of customary international law. In my judgment his decision whether to accept jurisdiction should be respected. Although the cases such as Re Maxwell and Airbus recognise that there may be exceptional circumstances where the interests of justice, as perceived by the English court, require the grant of an injunction to restrain foreign proceedings which the foreign court considers it proper to entertain, this is not such an exceptional case.
120 When all is said and done, this is a dispute between international financial institutions under a standard form contract governed by English law and with an English non-exclusive jurisdiction clause, but where there is relatively little else to connect the dispute with England. The English Commercial Court has an important role as a tribunal often chosen by foreign parties for the resolution of their disputes; but if such parties do not choose to make its jurisdiction exclusive, the court should not attempt to block any alternative jurisdiction which properly regards itself as an appropriate forum, save possibly in exceptional circumstances which do not presently exist.

Within the EU choice of forum clauses may turn out to be ineffective. The EU's Regulation on Jurisdiction and Enforcement of Judgments (cited above at note 5) sets out the rules for which courts have jurisdiction in relation to different categories of dispute. However, the Court of Justice has held that courts in one Member State may not rule that the courts in another Member State do not have jurisdiction over a dispute because of the need for mutual trust between courts in the EU. So, in **Turner v Grovit**,[17] the Court of Justice said:

24. At the outset, it must be borne in mind that the Convention[18] is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments...
25. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them..

[17] *See* http://www.bailii.org/eu/cases/EUECJ/2004/C15902.html .

[18] The case involved the Convention which preceded the Regulation.

26. Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State..
27. However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.
28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which... underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.
29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention... However, that result would follow from the grant of an injunction of the kind at issue which.. has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.
30. The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.
31. Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

In **Allianz SpA v West Tankers Inc**,[19] the Court of Justice held that the same result should apply in relation to an arbitration clause.

[19] http://www.bailii.org/eu/cases/EUECJ/2009/C18507.html .

19 By its question, the House of Lords asks, essentially, whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof.
20 An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.
21 Both West Tankers and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No 44/2001 because Article 1(2)(d) thereof excludes arbitration from its scope of application.
22 In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings ... More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect...
23 Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.
24 However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.
25 It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.
26 In that regard, the Court finds... that, if, because of the subject-matter of the dispute..., that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.
27 It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.
28 Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from

ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.
29 It follows, first... that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it ... It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State ... That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction ...
30 Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based ...
31 Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.
32 Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.
33 This finding is supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
34 In the light of the foregoing considerations, the answer to the question referred is that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

The ECJ thus rejects the idea that national courts can use injunctions to impede the effect of the “Italian Torpedo”. This rejection has been criticized:

...it does seem to me to be a pity that the ECJ has set itself against the anti-suit injunction with quite such determination. Why not adopt the sensible compromise suggested by Advocate General Leger ... (and not expressly commented upon by the ECJ), namely that the solution is to allow the court second seised to continue to exercise jurisdiction provided that it could establish the existence and application of the agreed choice of jurisdiction clause in a rigorous manner and beyond any possible doubt—any risk of contradictory decisions being thereby

largely avoided?
I hope that one of these days the ECJ might be willing to consider some of these considerations. After all there is now a good deal of academic comment to the effect that its present approach can be said to legitimise the use of a procedural device whose purpose is to frustrate the proper determination of disputes. This is the device which has become known as 'the Italian Torpedo': see Delaygua, Choice of Court Clauses: Two Recent Developments [2004] ICCLR 15 (9) 288 at 295. It is an approach which can be compared with the French courts' approval of their own use of anti-suit injunctions... The French introduction of the anti-suit injunction might be thought to support the conclusion that this type of injunction is not anti-pathetic to civilian jurisdictions. It might also help to persuade the ECJ to give serious consideration to its approval as part of the armoury of all member states' courts as a necessary procedural device in order to ensure that the Brussels-Lugano regime is not abused.[20]

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[20] The Rt Hon Sir Anthony Clarke, Master of the Rolls, The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales Institute of Advanced Legal Studies, Russell Square, London, 23 February 2006 at http://www.judiciary.gov.uk/publications_media/speeches/2006/sp230206.htm.