THE IMPACT OF ARTICLE 6(1) OF THE ECHR ON PRIVATE INTERNATIONAL LAW

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Abstract An increasing trend in private international law cases decided by courts in the United Kingdom has been to refer to the European Convention on Human Rights and, in particular, to Article 6. This article will examine the impact of this provision on private international law. The article will go on to examine why the impact has been so limited and will put forward a new approach that takes human rights more seriously, using human rights law to identify problems and the flexibility inherent in private international law concepts to solve them.

I. INTRODUCTION

Human rights concerns have been raised and discussed in private international law cases in the United Kingdom long before the passing of the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR) into the law of the United Kingdom.[1] Nonetheless, since 1998 instances of this phenomenon have increased dramatically. The discussion has most commonly centred on the effect of Article 6 of the ECHR, which provides the right to a fair trial.[2] This article will examine the limited impact of this Article on the rules of private international law and their application in

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[1] *J v C* [1970] AC 668, HL; *Oppenheimer v Cattermole* [1976] AC 249, 278 (per Lord Cross), 283 (per Lord Salmon), HL; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 428 (per Lord Templeman); *The Playa Larga* [1983] 2 Lloyd's Rep 171, 190, CA; *Settebello Ltd v Banco Toto and Acores* [1985] 1 WLR 1050, 1056, CA. See generally A Bell, 'Human Rights and Transnational Litigation-Interesting Points of Intersection' in S Bottomley and D Kinley (eds), *Commercial Law and Human Rights* (Ashgate, Aldershot, 2002) 115. They continue to be raised in other common law jurisdictions which are not a party to that Convention: for Australia see *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575, HC of Australia; for Canada see *Recherches internationales Quebec v Cambior* Inc 1998 CarswellQue 4511, [72], Cour Superieure du Quebec.

[2] See in relation to Art 8 (right to respect for private and family life) *J v C* [1970] AC 668, HL; *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] UKHL 40, [2005] 3 WLR 14; *Re I (Minors)* 23 April 1999 unreported, CA; Art 10 (right to freedom of expression) *Skrine & Co v Euromoney Publications Plc* [2002] EMLR 15; *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No 2)* [2003] EWCA Civ 1154, [2004] ETMR 29; Art 12 (right to marry) *Wilkinson v Kitzinger* (*Same-sex Marriage*) The Times 21 Aug 2006; Art 14 (prohibition of discrimination) *Re J*, Art 1 of the First Protocol (protection of property) on which see *Shanshal v Al-Kishtaini* [2001] EWCA Civ 264, [50]–[62], [2001] 2 All ER (Comm) 601;

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particular cases. It will then consider why the impact of Article 6 has been so limited. Finally, it will suggest a new approach under which the impact of Article 6 will no longer be underplayed. Before this, a little needs to be said about Article 6, concentrating on those aspects of its scope and operation that have a potential impact on private international law.

II. ARTICLE 6(1) OF THE ECHR

As is well known, Article 6 of the ECHR is entitled 'Right To A Fair Trial' and paragraph (1) provides that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The right of access to the courts is not expressly guaranteed by Article 6(1). However, decisions of the European Court of Human Rights (ECtHR) have made it clear that denial of access to national courts may amount to a breach of Article 6.[3] The right of access to a court is not absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate.[4]

A. Direct effect and access to the UK courts

The primary focus of the ECHR is territorial; Contracting States are bound to respect the Convention rights of those within its borders.[5] A claim based on the Convention arises most commonly in the situation where a State is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person[6] within its territory. These are what Lord Bingham has referred to as domestic cases.[7] In other words, the contracting State is directly responsible, because of its own act or omission, for the breach

Orams v Apostolides [2006] EWHC 2226 (QB); Carruthers, *The Transfer of Property in the Conflict of* Laws (OUP, Oxford, 2005) paras 8.71–8.76. See also *Emin v Yeldag* [2002] 1 FLR 956.

[3] *Airey v Ireland*, Judgment of 9 Oct 1979, Series A, No 32; (1979) 2 EHRR 305; *Golder v UK*, Judgment of 21 Feb 1975, Series A, No 18; (1975) 1 EHRR 524; *Osman v United Kingdom*, Judgment of 28 Oct 1998; (2000) 29 EHRR 245. For the right of access in relation to the transnational enforcement of environmental law, see The International Law Association Toronto Conference (2006) Draft Rules on Transnational Enforcement of Environmental Law, rule 1. For the provision of the means of execution of a judgment and Art 6 see: *Immobiliare Saffi v Italy*, Judgment of 28 July 1999; *Orams v Apostolides* [2006] EWHC 2226 (QB).

[4] *Ashingdane v United Kingdom*, Judgment of 28 May 1985, Series A, No 93, para 57; (1985) 7 EHRR 528; *Steel and Morris v United Kingdom*, Judgment of 15 Feb 2005, para 62.

[5] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [7], [2004] 3 WLR 23.

[6] See Art 34 of the ECHR. This extends to legal persons. See, eg, in relation to a company applicant, *Dombo Beheer BV v the Netherlands*, Judgment of 22 Sept 1993, Series A No 274-A; (1994) 18 EHRR 213.

[7] The Ullah Case (n 5) [7]. See also *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [15], [2004] 1 WLR 2241.

of Convention rights.[8] In a domestic case, the state must always act in a way which is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved.[9]

In private international law, the issue that will arise is whether the courts in the United Kingdom are in breach of Article 6 when they refuse to try a case. This denial may be on the ground that there is no basis of jurisdiction, that there is a limitation on jurisdiction, that a stay of the English proceedings should be granted, or that recognition of a foreign judgment creates a cause of action or issue estoppel.

B. Indirect effect and transfer abroad

The ECHR can also have indirect effect. This is where it is not that the State complained of has violated or will violate the applicant's Convention rights within its own territory but rather that the conduct of the State in removing a person from its territory (whether by compulsion or extradition) to another territory will lead to a violation of the applicant's Convention rights in that other territory.[10] These are what Lord Bingham has referred to as foreign cases.[11] They represent an exception to the general rule that a State is only responsible for what goes on within its own territory or control.[12] The ECtHR regards such cases as exceptional.[13]

Judge Matscher in his concurring opinion in the ECtHR in *Drozd and Janousek v France and Spain*[14] has given two examples of where the Convention has indirect effect. The first is where a State may violate Articles 3[15] and or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a Member State of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention. This was established by the ECtHR in *Soering v United Kingdom*[16] and has been followed in a large number of ECtHR decisions[17]

[8] *R (Razgar) v Special Adjudicator* [2004] UKHL 27, [41] (per Baroness Hale), [2004] 3 WLR 58. See also *Government of the United States of America v Montgomery (No 2)* (n 7) [15].

[9] *R (Razgar) v Special Adjudicator* (n 8) [42].

[10] *R (Ullah) v Special Adjudicator* (n 5) [9]; *R (Razgar) v Special Adjudicator* (n 8) [41].

[11] *R (Ullah) v Special Adjudicator* (n 5) [9].

[12] ibid [42]. Quaere whether this accurately reflects the position in *Soering v United Kingdom,* Judgment of 7 July 1989, Series A No 161; [1989] 11 EHHR 439.

[13] *R (Razgar) v Special Adjudicator* (n 8) [42].

[14] Judgment of 26 June 1992, Series A No 240; (1992) 14 EHRR 745, 749.

[15] Prohibition of torture.

[16] Judgment of 7 July 1989, Series A No 161; [1989] 11 EHHR 439.

[17] See *Einhorn v France*, Decision of 16 Oct 2001; Reports of Judgments and Decisions 2001-XI, p 275; *Tomic v United Kingdom*, Decision of 14 Oct 2003; *Bankovic v Belgium*, Decision of 12 Dec 2001; (2001) 11 BHRC 435. See also *MAR v United Kingdom* (1996) 23 EHRR CD 120; *Dehwari v Netherlands*, Decision of 12 Mar 1998; (2000) 29 EHRR CD 120. For an English analysis of the case-law see *R (Ullah) v Special Adjudicator* (n 5).

since *Soering* and *Drozd* and by the House of Lords.[18] As far as Article 6 is concerned, the breach must be a flagrant one.[19] Judge Matscher said that other hypothetical cases of an indirect effect of certain provisions of the Convention were also quite conceivable. *Drozd* has been recognized by the English courts as being an important case, notable for the concurring opinion of Judge Matscher.[20] The House of Lords has said that our obligations may be engaged where there is a real risk of particularly flagrant breaches of Articles other than Article 3 in the foreign country.[21] In particular, it has been accepted that, as a matter of principle, our obligations could be engaged by Article 8[22] in a civil case involving the return of a child to a foreign country.[23] However, there is great difficulty in relying on this concept of indirect effect and the exceptional nature of such cases has been recognized. In no indirect case has the former Commission or the ECtHR found a violation of Article 6. Moreover, it can be argued that, the recent introduction of a separate requirement for the provision of a domestic remedy in the State where the alleged direct breach of Article 6 occurred, [24] shifts the focus onto that State and thereby reduces the need to have a doctrine of indirect effect.

In private international law, transfer abroad occurs whenever an English court stays its own proceedings in favour of an alternative forum abroad.[25] This is a very different situation from the example given by Judge Matscher in *Drozd*, which involved transferring a person abroad rather than transferring an action.[26] Nonetheless, it is arguable that, as far as Article 6 is concerned, the problem is essentially the same. As yet though, it is unclear whether the ECtHR or an English court would apply the indirect effect doctrine in such a case.[27]

C. Indirect effect and enforcement of foreign judgments

The second example given by Judge Matscher is concerned with enforcement of foreign judgments. A Contracting State may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a Contracting State or a non-Contracting State, which has been obtained in

[18] *R (Ullah) v Special Adjudicator* (n 5); followed in *R (Razgar) v Special Adjudicator* (n 8). See also *Re J (a child)* (*return to foreign jurisdiction: convention rights*) [2005] UKHL 40, [2006] 1 AC 80.

[19] The *Soering* case (n 12) para 113; Judge Matscher in *Drozd*. Art 3 does not require this.

[20] *R (Ullah) v Special Adjudicator* (n 5); followed in *R (Razgar) v Special Adjudicator* (n 8).

[21] *Re J (a child)* (n 2) [42]; following the *Ullah* case.

[22] Right to respect for private and family life.

[23] *Re J (a child)* (n 2). On the facts there was no such risk.

[24] *Kudla v Poland*, Judgment of 26 Oct 2000.

[25] The International Law Association call this referral; see the 2000 Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters.

[26] *Re J (a child)* (n 2), involved transferring a child abroad.

[27] In Canada, denial of access leading to transfer abroad to a State where there was a reasonable apprehension of bias would be a failure to provide a fair hearing as guaranteed under s 2 of the Bill of Rights, *Aristocrat v National Bank of the Republic of Kazakhstan* 2001 Carswell Ont 2534, 21 CPC (5th) 147, Ontario Superior Court of Justice.

conditions which constitute a breach of Article 6, whether it is a civil or criminal judgment.[28] Judge Matscher went on to say that this must clearly be a flagrant breach of Article 6. Article 6 has in its indirect applicability only a reduced effect, less than it would have if directly applicable.

Is there a wider principle which does not require a 'flagrant' breach abroad, merely a breach of Article 6 requirements? The decision of the ECtHR in *Pellegrini v Italy*[29] is directly relevant to enforcement. The applicant's marriage was annulled by a decision of the Vatican courts which was declared enforceable by the Italian courts. The Vatican has not ratified the ECHR. An application was lodged against Italy alleging that the proceedings before the Italian courts for a declaration that the judgment of the Vatican courts was enforceable had been unfair. The ECtHR held that their task was not to examine whether the proceedings before the Vatican courts complied with Article 6 of the Convention,[30] but to examine whether the Italian courts, before authorizing enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant (ie Vatican)[31] proceedings fulfilled the guarantees of Article 6.[32] It was said that a 'review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention'. It is unclear whether *Pellegrini* applies where the judgment was granted in a ECHR State[33] (which would include all the EC Member States), it is at least arguable that it does so.

D . Obligations imposed by the Human Rights Act

Article 6 and the other Articles in the Convention[34] are incorporated into the law of the United Kingdom by the Human Rights Act 1998. The incorporated rights are referred to under the Act as 'the Convention rights'. A court or tribunal determining a question which has arisen in connection with a Convention right must 'take into account' any judgment[35] of the ECtHR so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in

[28] There is no breach of the Canadian Charter of Rights and Freedoms in such a case, see *Beals v Saldanha* 2003 SCC 72, [78], SC of Canada.

[29] Judgment of 20 July 2001; (2001) 35 EHRR 44.

[30] Making the point that the Vatican has not ratified the ECHR.

[31] See P Kinsch, 'The Impact of Human Rights on the Application of Foreigh Law and on the Recognition of Foreign Judgments' in T Einhorn and K Siehr (eds), *International Co-operation Through Private International Law- Essays in Memory of Peter Nygh* (TMC Asser Press, The Hague, 2004 197, 218–22; Hartley, in a case note (2004) 120 LQR 211. See also *Government of the United States of America v Montgomery (No 2)* (n 7); discussed below. The Court of Appeal in *Jomah v Attar* [2004] EWCA Civ 417, [49], reversed by the House of Lords in *Re J (a child)* (n 2), interpreted the 'relevant' proceedings as being those before the Italian courts for enforcement. But the ECtHR concluded that 'the Italian courts breached their duty of satisfying themselves . . . that the applicant had had a fair trial in the proceedings under canon law'. The House of Lords did not discuss this point.

[32] Pellegrini (n 29) [40].

[33] P Kinsch (n 31) 227–8.

[34] With the exception of Art 13.

[35] Or decision, declaration or advisory opinion of that Court.

which that question has arisen.[36] Taking into account does not mean that the court has to follow the judgment of the ECHR, it is merely of persuasive authority. However, whilst such case-law is not strictly binding, the courts should in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court.[37] The 1998 Act also provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[38] Moreover, it is unlawful for a public authority, which includes a court, to act in a way which is incompatible with a Convention right.[39] When examining the impact of Article 6 in private international law cases, it will be necessary to see whether courts in the United Kingdom have: taken into account decisions of the ECtHR; construed legislation in a way that is compatible with Article 6 rights; and acted in a way which is compatible with Article 6 rights.

III. THE LIMITED IMPACT OF ARTICLE 6(1)

A. No impact on bases of jurisdiction

1. Denying access to the English courts

If the English court holds that there is no basis of jurisdiction, the consequence is to deny the claimant access to the English courts. Does this constitute a breach of the right to a fair hearing under Article 6? What little authority there is on this question has answered it in the negative. Thorpe LJ in the Court of Appeal in *Mark v Mark*[40] accepted that the State had the right to impose conditions and limitations on the right of access to the English courts. [41] This was said in a case where the statutory basis of jurisdiction was not challenged on human rights grounds. What was in issue was whether a limitation in relation to the connecting factor used under the statutory basis of jurisdiction infringed Article 6. Neither will the argument succeed that denying access to the English courts is a denial of access to the court of choice. This is clear from comments of Aikens J in *OT Africa Line Ltd v Hijazy (The Kribi)*.[42] Aikens J said in response to the argument that an anti-suit injunction would have the effect of denying the defendants the right of access to a Court in an ECHR State that

[36] Section 2(1).

[37] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [26], [2003] 2 AC 295; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [18].

[38] Section 3(1).

[39] Section 6(1). This is subject to s 6(2), which sets out circumstances where para (1) does not apply.

[40] [2004] EWCA Civ 168, [2005] Fam 267, CA.

[41] ibid [40].

[42] [2001] 1 Lloyd's Rep 76.

'Article 6 of the ECHR does not provide that a person is to have an unfettered choice of tribunal in which to pursue or defend his civil rights. . . . Article 6 of the ECHR does not deal at all with where the right to a "fair and public hearing before an independent and impartial tribunal established by law" is to be exercised by a litigant. The crucial point is that civil rights must be determined somewhere by a hearing and before a tribunal in accordance with the provisions of Article 6.'[43] When it comes to what Article 6 does require, civil proceedings must be determined somewhere before a tribunal in accordance with Article 6. According to Aikens J, if a court determines that the parties themselves have agreed to determine their rights exclusively in the court of a particular country (and one that is a contracting party to the ECHR) then the Article 6 right is on the face of it upheld. Looking in more detail at what Article 6 requires it can be seen that there are two aspects to this. First, there must be trial *somewhere*. Taken literally, this would suggest that an English court would be in breach of Article 6 if England was the only forum available but refused to try the case. Second, the trial must be before a tribunal in accordance with Article 6, ie there is a fair and public hearing before an independent and impartial tribunal established by law. The fact that the trial must be before a tribunal in accordance with Article 6 acknowledges that if trial is in England this must be in accordance with Article 6. *The Kribi* involved jurisdiction under the Brussels Convention but what was said about human rights, choice of forum and the basis of jurisdiction must apply equally to bases of jurisdiction under the English traditional national rules.

2. Granting access in the forum and thereby denying access abroad

So far we have been considering whether denial of access to the English courts constitutes an infringement of Article 6. But the same question can arise in relation to the converse situation. In other words, will the granting of access to the English courts constitute an infringement of Article 6 in that it leads to a denial of access to a court abroad? Under the Brussels I Regulation, the granting of access to the courts in one State leads to a denial of access in another State because of mechanical rules on *lis pendens* and related actions.[44] If you follow what was said by Aikens J in *The Kribi*, the argument, that granting access in England leads to a denial of access abroad, is doomed to fail because Article 6 does not provide that a person is to have an unfettered choice of tribunal. Indeed, Aikens J was influenced to come to this conclusion by the realization that if he accepted that a person did have an unfettered choice, taken to its logical conclusion, this would mean that the above argument could be raised in relation to the basis of jurisdiction.

[43] ibid [42].

[44] The question whether an exception should be made to the *lis pendens* rule in what is now Art 27 of the Brussels I Regulation in cases where there is substantial delay in the court first seised is considered below.

3. No fair trial in England

This allegation was raised in the private international law context in *AG of Zambia v Meer Care and Desai (a firm)*,[45] where a stay of English proceedings was sought on two grounds. First, that the defendants would not receive a fair trial in England (arguing that bail conditions set in Zambia prevented the defendants from taking part effectively in the English proceedings) and, second, on *forum non conveniens* grounds. These were regarded as substantially overlapping grounds and the case was regarded as one where the defendants were arguing that it would be fairer to them to have trial in Zambia. The stay was refused using *forum non conveniens* criteria. The judge decided the case looking at the whole picture, ie the position of the claimant and of other defendants if a stay were to be granted, rather than focusing on whether the defendants would receive a fair trial in England. No decisions of the ECtHR on Article 6 were cited.

B. No impact on the exercise of the discretionary element

1. Forum conveniens

Cases where an English court is asked to exercise its discretionary power to permit service out of the jurisdiction can raise questions in relation to the direct effect of Article 6. This is illustrated by *Dow Jones & Co Inc v Yousef Abdul Latif Jameel,*[46] which concerned the publication in an online journal of an allegedly defamatory story. The journal was placed on a World Wide Web site, access to which was available to subscribers. Only five subscribers accessed the article and three of these were from the claimants' camp. There was therefore only minimal publication in England. The Court of Appeal struck out the claim as being an abuse of process. It was argued by the claimants that to do so would infringe Article 6 of the ECHR. This argument was rejected by the Court of Appeal in the following terms: 'We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial'.[47] Jurisdiction was no longer an issue by this stage but it was clear that if earlier there had been an application to set aside permission to serve the proceedings out of the jurisdiction this would have been granted on the basis that the five publications that had taken place in England did not, individually or collectively, amount to a real and substantial tort.[48] The case is authority for the obvious point that just because access is denied to the English courts does not necessarily mean a breach of Article 6. It must depend on the circumstances of the case. The Court would be decid-

[45] [2005] EWHC 2102 (Ch), appeals dismissed [2006] EWCA Civ 390—by then it was not in dispute that the English courts had jurisdiction.

[46] [2005] EWCA Civ 75, [2005] QB 946. [47] ibid [71]. [48] ibid [70].

ing the case applying the private international law criterion of *forum conveniens*,[49] which in defamation cases considers the question whether a real and substantial tort has been committed within the jurisdiction,[50] assuming that this meets human rights requirements.

2. Stays of action

In *forum non conveniens* cases, Article 6 concerns are raised in three different ways: because of a denial of access; because of a delay in trial; and, in some cases, because of a breach of the right to a fair trial abroad.

(a) A denial of access

The first, and most basic, way in which Article 6 concerns are raised is because of the denial of access to the English courts, which is the inevitable consequence of staying the English proceedings and, in effect, transferring the action abroad. Does this involve a breach of Article 6 by the English courts? This is asking essentially the same question as was asked earlier when we considered whether denying access to the English courts because there was no basis of jurisdiction was an infringement of Article 6. What was said in *The Kribi* is equally pertinent here. What Article 6 requires is that there is a trial somewhere and that this is before a tribunal in accordance with the requirements of Article 6. It does not matter that this trial is abroad.

(b) A delay in trial

The second way in which Article 6 concerns are raised relates to the inevitable delay involved when an English court considers whether a stay should be granted on the ground of *forum non conveniens* and the even greater delay in trial of the merits if a stay is granted. Does this delay involve a breach of the right under Article 6 to a fair hearing within a reasonable time? This is a concern that has been raised by Advocate General Leger in *Owusu v Jackson*,[51] who said the grant of a stay on *forum non conveniens* grounds, because of the delay involved, could be regarded as being incompatible with the requirements of Article 6. However, this concern does not appear to have been discussed in the English courts.

(c) A breach abroad

The third way in which Article 6 concerns are raised relates to a possible breach of the right to a fair trial by a foreign court. For example, the alternative forum abroad may be one where there are substantial delays before the case is tried or one where there is a question mark over the independence and impartiality of the judiciary. How should concern over this be reflected in the

[49] See *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 470.
[50] *Kroch v Rossell* [1937] 1 All ER 725, CA; referred to in *Dow Jones v Jameel* (n 46) [50].
[51] Case C-281/02 [2005] QB 801, para 270.

operation of the doctrine of *forum non conveniens*? If the English court does stay the action and transfers it to such a country, should it then be regarded as denying the claimant the right to a fair trial? We are now concerned with the indirect effect of Article 6. It is implicit from what Aikens J said in *The Kribi* that the English courts must not transfer a case to a tribunal abroad in which there is no fair and public hearing before an independent and impartial tribunal established by law. The question whether a transfer abroad would breach Article 6 rights was raised directly in *Lubbe v Cape Plc*.[52] The plaintiffs submitted that to stay the English proceedings in favour of proceedings in South Africa would violate their rights guaranteed under Article 6 of the ECHR since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant. This submission was considered by Lord Bingham towards the end of his judgment. This was after he had applied the private international law principles on stays of action set out in the leading case, *Spiliada Maritime Corporation v Cansulex Ltd*.[53] Under these principles a stay will not be granted where it is established by cogent evidence that the claimant will not obtain justice in the foreign forum. Lord Bingham had earlier concluded that a stay would lead to injustice to the claimants. This was because he could not conceive that the court would grant a stay in any case where adequate funding and legal representation of the claimant were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum, although available in England. He then dismissed the human rights argument in one sentence: 'I do not think article 6 supports any conclusion which is not already reached on application of *Spiliada* principles.'[54]

The result is not one that gives rise to human rights concerns. The House of Lords did not, in effect, transfer the case to the courts of South Africa and so concerns about a possible breach of Article 6 requirements if trial had been held there were groundless. However, the technique used in the case does give rise to a concern that in the future there could be a transfer to a country where trial would involve a breach of these requirements. The *Spiliada* principles were examined first and only then was the human rights point considered. Having concluded, after applying *Spiliada* principles, that no stay should be granted it was thought not necessary to consider the human rights point. This was the opposite technique to that adopted in *The Kribi*, where the human rights points were considered first, before considering private international principles. This was regarded as being the logical order for dealing with these points. Putting the private international law point first gives the impression that these rules deal with the human rights concern so there is no such concern. The statement from Lord Bingham, that he did not think that Article 6 supported any conclusion which was not already reached on application of *Spiliada* principles, reinforces this impression. *On the facts of the case* Article

[52] [2000] 1 WLR 1545. [53] [1987] AC 460. [54] ibid 1561.

6 did not support any conclusion which is not already reached on application of *Spiliada* principles. But what if the facts were different? It is interesting to speculate on what would have happened if the application of the *Spiliada* principles had led to the conclusion that there had been no injustice abroad, ie no injustice in the private international law sense. Would the Court have then concluded that Article 6 does not support any conclusion which is not already reached on application of *Spiliada* principles? The technique adopted by the House of Lords leads to a very real danger that this is what may happen. The case is decided one way or the other applying private international law principles and human rights principles are regarded as being irrelevant.[55] It is right to call this a danger because application of human rights principles may in fact reveal that there would be a breach of Article 6 if trial were held abroad. In other words, the idea of injustice in private international may not be coterminous with that of a fair trial under Article 6. It may be a narrower idea.[56] If an English court were to transfer an action to a foreign State in which, in the circumstances of the case, there is a real risk of a flagrant breach of Article 6 standards, it is arguable that the English court would itself be in breach of Article 6 under the indirect effect doctrine. If so, it would also be in breach of section 6 of the Human Rights Act 1998 because it has acted in a way which is incompatible with a Convention right. Finally, it is at least arguable that, if a court were to follow the *Lubbe* approach on the same facts now, it would be in breach of the obligation under section 2 of the Human Rights Act 1998[57] to take into account any decisions of the ECtHR relevant to the proceedings since it would be ignoring a decision of the ECtHR deciding that the unavailability of legal representation before the courts of a State can constitute a breach of Article 6 by that State.[58]

3. Restraining foreign proceedings

(a) Does the grant of an injunction constitute a breach of Article 6(1)?

Where an injunction is granted by the English courts restraining the commencement or continuance of proceedings abroad, there is a denial of access to the court abroad. Is this a breach of the claimant's right to a fair and public hearing? Or does this only refer to denial of access to the *English* courts? This question arose in *The Kribi*,[59] in which the claimants sought, inter alia, an anti-suit injunction restraining the defendants from continuing

[55] See, eg, *AG of Zambia v Meer Care and Desai (A firm)* [2005] EWHC 2102 (Ch), appeals dismissed [2006] EWCA Civ 390, discussed above.

[56] See the discussion below.

[57] The Act was not yet in force when *Lubbe* was decided.

[58] *Airey v Ireland*, Judgment of 9 Oct 1979, Series A, No 32; (1979) 2 EHRR 305. But has a question arisen in connection with a Convention right? Counsel may have raised such a question but arguably the court, by deciding not to stay the English proceedings, has, in effect, said that this question no longer arises.

[59] [2001] 1 Lloyd's Rep 76.

proceedings commenced against them in Belgium. The defendants responded by raising two points under the Human Rights Act. The first was that section 3 of that act required the court to interpret section 37 of the Supreme Court Act 1981 (giving the court power to grant injunctions) in a way that is compatible with the ECHR, in particular the rights in Article 6. An anti-suit injunction would have the effect of denying the defendants (all of whom were domiciled in States that are a party to the ECHR) the right of access to a Court in an ECHR State, ie Belgium. The power granted to the English Court should therefore be construed so as to exclude the power to grant an anti-injunction where it would have this effect. Alternatively, it would be unlawful under section 6 of the Act for the court to grant an anti-suit injunction that would have the intention or effect of depriving the defendants of access to the Belgian courts because that would be incompatible with those parties' rights under Article 6 of the ECHR. Therefore the court could not grant an anti-suit injunction. Both arguments hinged on the question whether the denial of access to the Belgian courts was incompatible with Article 6 of the ECHR. Aikens J held that it was not.[60] This was because Article 6 does not provide that a person is to have an unfettered choice of tribunal in which to pursue or defend his civil rights. It followed that there was also no need to construe section 37 of the Supreme Court Act 1981 in a way that restricted the power of the court to grant anti-suit injunctions.

The ground on which the injunction was granted was that the bringing of proceedings abroad had been a breach of an exclusive jurisdiction agreement.[61] The use of this ground was upheld by Aikens J, who, it will be recalled, said that, if a court determines that the parties themselves have agreed to determine their rights exclusively in the court of a particular country (and one that is a Contracting party to the ECHR), the Article 6 right is on the face of it upheld.[62] However, there is one possible situation where the grant of an anti-suit injunction is now in doubt. This is where it is a single forum case, ie the injunction relates to proceedings in the only State in which the claimant could bring a successful action.[63] There is a well-known instance of an anti-suit injunction being granted in this situation. The requirement stressed by Aikens J that there must be a trial *somewhere* suggests that the grant of an injunction in such circumstances would be incompatible with Article 6 of the ECHR.

[60] But a foreign court may object to the injunction as denying access to their courts, as provided for by Art 6, and refuse to enforce the order on public policy grounds, see *Evialis SA v SIAT* [2003] EWHC 863, [2003] 2 Lloyd's Rep 377, [52]–[58].The affront to another court would then be a reason for not exercising the discretion to grant an injunction.

[61] Where the ground for grant of an injunction is the breach of an arbitration agreement, the argument that the right to a public hearing under Art 6 requires the court to adopt a 'reluctant' approach to the incorporation of the agreement into a bill of lading has been rejected: *Welex AG v Rosa Maritime Ltd* (*The Epsilon Rosa*) [2002] 2 Lloyd's Rep 81, [30]–[31]; appeals dismissed without discussion of this point, [2003] 2 Lloyd's Rep 509, CA.

[62] *The Kribi* (n 42) [42].

[63] *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, CA.

Although in *The Kribi* the human rights argument failed, this was a case where human rights concerns were treated seriously by counsel and the judge. The argument was rejected after examining what Article 6 requires. Reference was also made to the requirements of the Human Rights Act. Moreover, the order in which points raised by the defendants were dealt with by the judge is significant. The defendants had also raised a number of arguments to the effect that granting an anti-suit injunction in the circumstances of the case would be inconsistent with the Brussels Convention. However, Aikens J thought that logically the human rights points came first.[64]

(b) Does the refusal to grant an injunction constitute a breach of Article 6(1)?

If there has been a breach of the right to a fair trial abroad and the English court refuses to grant an injunction, is it then itself in breach of Article 6? The decision of the Court of Appeal in *Al-Bassam v Al-Bassam*[65] indicates that it would not be. Lewison J, at first instance, when exercising his discretion to grant an anti-suit injunction in relation to proceedings in Saudi Arabia, had been influenced (ie this was a factor to be taken into account rather than determinative of the issue) by the perception that the claimant would not receive a fair trial in that country. The Court of Appeal held that he had exercised his discretion in a way that was substantially flawed. The Court agreed that Lewison J was correct to be concerned that a judgment given abroad in proceedings which, in the eyes of English law, had failed to meet the requirements of a fair trial should not be recognized in England. However, the Court regarded this as being a matter that arose after the foreign judgment was given, when the English court applied its own rules on recognition of foreign judgments, rather than at the earlier stage of restraining the foreign proceedings before a judgment was given. Chadwick LJ, giving the unanimous judgment of the Court, said that 'It is not for the English court to restrain a party in proceedings before it from suing in another jurisdiction on the grounds of its own perception as to the fairness or unfairness of proceedings in that other jurisdiction—*a fortiori*, where the country in which the party seeks to sue is not itself bound by the European Convention'.[66] In explanation of why it was not for the English court to so act, it was said that this would go 'well beyond anything necessary to protect its own process'. This shows a reluctance to alter private international rules to take account of human rights concerns.

C. No exception to lis pendens *under the Brussels I Regulation*

The concern here is with a possible breach of the right to a fair trial in another Member State. Where the court of a Member State second seised is required to stay its proceedings or decline jurisdiction under Articles 27 or 28 of the

[64] [2001] 1 Lloyd's Rep 76, [41]. [65] [2004] EWCA Civ 857. [66] ibid [46].

Brussels I Regulation (ex Articles 21 and 22 of the Brussels Convention) in favour of the court first seised, this may result in trial before a court which denies the defendant a fair trial. Should the court second seised stay or decline jurisdiction in such a case? This question arose in *Erich Gasser GMBH v Misat SRL*.[67] The Higher regional Court in Innsbruck referred a number of questions to the European Court of Justice (ECJ), one of which was, in essence, whether an exception may be allowed to Article 21 of the Brussels Convention where, generally, proceedings before the courts of the Contracting State of the court first seised take an unreasonably long time.

This question was submitted because the court first seised was in Italy. The seller argued that, in Roman law countries such as Italy, Greece, and France, legal proceedings generally last an unreasonably long time and this was said to be contrary to Article 6 of the ECHR. The seller argued that proceedings were excessively protracted where their duration exceeded three years. And that where no decision on jurisdiction had been given within six months following the commencement of proceedings before the court first seised, or no final decision on jurisdiction had been given within one year following the commencement of those proceedings, it is appropriate to decline to apply Article 21 of the Brussels Convention. The courts of the Contracting State second seised should then be able to rule on jurisdiction and, after slightly longer periods, on the substance of the case. This argument did not refer to this particular action before the Tribunale civile e penale di Roma and the delay involved, but instead to where proceedings before the courts of the Contracting State first seised 'generally' last an unreasonably long time. There was no evidence as to what delays constituted a breach of Article 6 and no decisions of the ECtHR were referred to; in particular there was no mention of the scores of decisions of that Court condemning the delays in trial in the civil courts of the various regions of Italy.[68] Neither was any reference made to the hundreds of reports of the European Commission of Human Rights resulting in resolutions by the Committee of Ministers finding Italy in breach of Article 6 for the same reason.[69]

The ECJ held that Article 21 cannot be derogated from where, in general, the duration of proceedings before the courts of the Brussels Convention Contracting State first seised is excessively long. Such a derogation would be manifestly contrary both to the letter and spirit and to the aim of the Convention. The way the Article 6 point was argued meant that the ECJ was being asked to say that there should always be an exception where the court

[67] Case C-116/02 [2005] QB 1, [2003] ECR-I 4693.

[68] *Riccardi Pizzati v Italy* (App 62361/00), Judgment of 10 Nov 2004; *Bottazzi v Italy* (App 34884/97), Judgment of 28 July 1999; *Salesi v Italy*, Judgment of 26 Feb 1993, Series A No 257-E; (1998) 26 EHRR 187, para 24; *Katte Klitsche de la Grange v Italy*, Judgment of 27 Oct 1994, Series A no 293-B; (1994) 19 EHRR 368, para 61. The *Bottazzi* case, ibid, pointed out that since *Capuano v Italy* (Series A no 119) it had delivered 65 such judgments.

[69] The *Bottazzi* case (n 68) points out that there are more than 1,400 such reports.

first seised was in certain Member States, ie Italy, France, or Greece.[70] One can understand the ECJ baulking at this. Would the decision of the ECJ have been any different if the Article 6 argument had been more focused? This could be done by focusing on Italy and presenting the specific evidence that exists of the condemnation by the ECtHR of delays in that country. It could be further focused by looking at specific evidence of delays before the Tribunale civile e penale di Roma and at the delay in this particular case. The ECJ heard the case some three and a half years after proceedings commenced in Italy and the Italian court seemingly had not established that it had jurisdiction, let alone decided the case on its merits. The strongest argument for an exception to Article 21 would arise if the ECtHR had actually condemned the delay before the Tribunale civile e penale di Roma in this particular case. But even without this, it could be argued that, in the particular circumstances of the case, there was a real risk of a breach of Article 6 if trial were to be held in Italy. It could also be argued that, by virtue of the indirect effect doctrine, the court second seised would itself be in breach of Article 6 by declining jurisdiction in favour of the court first seised in the circumstances in *Gasser*.

The human rights argument would have been much stronger if it had been more focused,[71] and this would have been against a background of an ECJ that takes human rights seriously. The ECJ has consistently held that fundamental rights form an integral part of the general principles of Community law, the observance of which it ensures.[72] In protecting these rights, the ECJ draws inspiration from the guidelines supplied by international treaties for the protection of human rights. Amongst these, the ECHR has been recognized as having special significance[73] and the ECJ has referred extensively to its provisions and to the Strasbourg jurisprudence.[74] In particular, the ECJ has expressly recognized the general principle of Community law that everyone is entitled to a fair process, which is inspired by these fundamental rights.[75] This case-law on fundamental rights is embodied in a number of treaty provisions,[76] including the Treaty on European Union.[77] For its part, the ECtHR has

[70] AG Leger, para 88.

[71] This might have convinced the Commission to argue for an exception. One of the arguments put forward by it against the exception was that it was for the ECtHR to determine whether in the particular circumstances the delay was such that the interests of a party were seriously affected.

[72] Case C-260/89 *ERT v DEP* [1991] ECR I-2925, para 41.

[73] ibid.

[74] See the numerous cases cited by the ECtHR in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Judgment of 30 June 2005, para 73.

[75] Case C-185/95 *Baustahllgewebe v Commission* [1998] ECR I-8417, paras 20 and 21; Joined Cases C-174/98 and C-189/98 *Netherlands and Van der Wal v Commission* [2000] ECR I-1, para 17; Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, para 39; Case C-32/95 *Commission v Lisrestal* [1996] ECR I-5373, para 21.

[76] See the *Bosphorus* case (n 74) paras 77–84.

[77] Art 6(2) provides that 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 Nov 1950 and as they result from the constitutional traditions common to the Member States.'

recognized that the protection of fundamental rights by EC law can be considered to be 'equivalent' to that of the ECHR system.[78] These Community law developments were referred to and influenced the ECJ in *Krombach v Bamberski*,[79] when setting limits on the public policy defence to recognition of foreign judgments under the Brussels Convention. The concept of public policy has the flexibility to take on board easily human rights concerns. The difficulty in *Gasser* was that the *lis pendens* rule has no inherent flexibility and the only way of taking on board human rights concerns is by creating an exception to the *lis pendens* rule, which would have involved judicial redrafting of the Brussels Convention. The ECJ in Gasser was clearly not prepared to do this and stressed the need to uphold the objectives of the Brussels Convention.[80] It follows that, even if the human rights argument had been put in a more attractive and focused way, the result would probably have been the same, with the clash between, on the one hand, upholding human rights values and, on the other hand, the objectives of the Brussels Convention being decided in favour of the latter.[81]

D. A mixed reaction to blanket limitations on jurisdiction

Limitations on jurisdiction operate so as to deny the claimant access to the English courts. Does this constitute a breach of the right to a fair hearing under Article 6?

This question has arisen before the English courts in two different contexts: State immunity, which operates as a direct limitation on jurisdiction, and the acquisition of an habitual residence in England for the purpose of divorce jurisdiction, which operates as an indirect limitation on jurisdiction. In the former context, a blanket limitation on jurisdiction has been accepted. In the latter, a rule which operated as a blanket limitation on jurisdiction has been recast in the light of Article 6 concerns.

1. A direct limitation

Sovereign immunity is a public international law doctrine but one that is of considerable interest to the private international lawyer because of its opera-

[78] The *Bosphorus* case (n 74) para 165.

[79] Case C-7/98 [2001] QB 709, paras 26 and 42; [2000] ECR I-1935; discussed below. These Community law developments also influenced the ECJ in Case C-341/04 *Eurofood IFSC Ltd* [2006] IL Pr 23, discussed below, which applied *Krombach* in the context of international insolvency proceedings under Council Regulation No 1346/2000.

[80] The *Gasser* case (n 177) [70]. See also [68]. See further in the discussion below.

[81] Hartley, 'Choice-of-court agreement, *lis pendens*, human rights and the realities of international business: reflection on the *Gasser* case' in *Le droit international prive: esprit et methodes (Melanges en l'honneur de Paul Lagarde)* (Dalloz, Paris, 2005) 383, argues it should be the other way round because of Art 307 of the Treaty on European Union.

tion as a direct limitation on jurisdiction. The relationship between sovereign immunity and human rights was considered by the ECtHR in *Al-Adsani v United Kingdom*,[82] which involved civil proceedings brought against a foreign State following alleged torture in that State. The ECtHR accepted that, in a case of sovereign immunity, the right of access to a court under Article 6 was engaged.[83] However, the majority (by nine to eight) held that there had been no violation of Article 6, reasoning as follows: to be compatible with Article 6, the limitation had to pursue a legitimate aim and be proportionate.[84] The ECtHR considered that 'the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.[85] Moreover, the restriction was proportionate to the aim pursued since State immunity reflects 'a generally accepted rule of international law'.[86]

Subsequently, the English courts in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*[87] have been faced with a more complex case where, following alleged torture abroad, civil claims for damages were brought against both a foreign State, the Kingdom of Saudi Arabia, and individual defendants who were officials of that State. The Court of Appeal[88] followed the ECtHR in *Al-Adsani*,[89] as well as general principles of interpretation of the

[82] Judgment of 21 Nov 2001; (2001) 34 EHRR 273. See also to the same effect on State immunity and human rights: *McElhinney v Ireland*, Judgment of 21 Nov 2001; [2002] 34 EHRR 13-civil claim in tort brought in Ireland against the British Government following acts by its agent (a soldier) within the sphere of sovereign activity; *Fogarty v United Kingdom*, Judgment of 21 Nov 2001; [2002] 34 EHRR 12—civil claim for discrimination brought in England against the US government by an applicant for re-employment at the US embassy. See also App No 50021/00, *Kalogeropoulou v Greece and Germany*, 12 Dec 2002.

[83] *Al-Adsani v United Kingdom* (n 82) para 52; the *McElhinney* case (n 82) para 26; the *Fogarty* case (n 82) para 28.

[84] *Al-Adsani v United Kingdom* (n 82) para 53; following *Waite and Kennedy v Germany*, Judgment of 18 Feb 1999; (1999) 30 EHRR 261—immunity granted to an international organization (the European Space Agency). See also *NCF and AG v Italy* (1995) 111 ILR 153, European Commission on Human Rights.

[85] *Al-Adsani v United Kingdom* (n 82) para 54. See also the *McElhinney* case (n 82) para 35; the *Fogarty* case (n 82) para 34.

[86] *Al-Adsani v United Kingdom* (n 82) paras 56–7. See also the *McElhinney* case (n 82) paras 36–7; the *Fogarty* case (n 82) paras 35–6; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1578–9 (per Lord Hope), 1581 (per Lord Clyde), HL.

[87] [2006] UKHL 26. This was a conjoined appeal with *Mitchell v Al-Dali*. The first action was brought by Jones against the Kingdom of Saudi Arabia and an individual who was a servant or agent of the Kingdom. The second action was brought by Mitchell and two others against four individual defendants. See also *Grovit v De Nederlandsche Bank* [2005] EWHC 2944 (QB), [2006] 1 Lloyd's Rep 636; *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [49], [2006] 2 WLR 70, CA.

[88] [2004] EWCA Civ 1394, [2005] QB 699. Distinguished in *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116 at [49], [2006] 2 WLR 70, CA.

[89] It also followed the Court of Appeal in *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536, CA.

ECHR laid down by the ECtHR in other cases,[90] and held that the Kingdom was entitled to immunity. However, Mance LJ, with whom Neuberger LJ and Lord Phillips MR concurred, rejected a blanket limitation in relation to the claims against individual defendants on the ground that torture was a crime under international law,[91] could not be treated as the exercise of a State function, and a civil action against individual torturers did not indirectly implead the State. He adopted a flexible 'proportionate' approach, which required an English court to consider all relevant factors, including any evidence before it as to the availability or otherwise of any effective remedy for the torture in the State responsible for it.[92] Mance LJ's judgment was a radical one, very much concerned with human rights concerns, which he regarded as a separate ground for refusing immunity from the international law ground used to reject a blanket limitation on jurisdiction.[93] The House of Lords agreed with the Court of Appeal that the Kingdom was entitled to immunity.[94] In so deciding it was very much influenced by the decision of the ECtHR in *Al-Adsani*.[95] But it regarded the position of individual defendants as being the same as that of the Kingdom[96] with the result that immunity also applied in relation to the claims against the individual defendants.

The Law Lords started with the finding that, on a straightforward application of the State Immunity Act 1978, immunity would apply in relation both to the Kingdom and to the individual defendants.[97] The claimants argued that to apply the 1978 Act would be incompatible with the right of access to the English courts provided by Article 6. Their Lordships expressed doubts[98] as to the correctness of the unanimous decision of the ECtHR in *Al-Adsani* that Article 6 was engaged in a case of State immunity but was prepared to assume that it was.[99] The grant of immunity plainly would deny access to the English courts.[100] The claimants sought to show that the restriction imposed by the law of State immunity was disproportionate by arguing that the prescription of

[90] (n 88) [87]–[89] referring to: *Soering v United Kingdom*, Judgment of 7 July 1989, Series A No 161; (1989) 11 EHRR 439; *Ireland v United Kingdom*, Judgment of 18 Jan 1978, Series A No 25; (1978) 2 EHRR 25; *Artico v Italy*, Judgment of 13 May 1980, Series A No 37; (1980) 3 EHRR 1; *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Judgment of 7 Dec 1976, Series No 23; (1979–80) 1 EHRR 711. The Court of Appeal also referred at [91] to what s 3 of the 1998 Act requires.

[91] (n 88) [44]–[46] referring to the UN Torture Convention 1984.

[92] (n 88) [92].

[93] ibid. In this he was going further than the majority of the ECtHR was prepared to go in *Al-Adsani*.

[94] [2006] UKHL 26, [29] (per Lord Bingham), [36] (per Lord Hoffmann). Lords Rodger [103], Walker [104] and Carswell [105] concurred with these two judgments.

[95] ibid [18] (per Lord Bingham), [40] (per Lord Hoffmann).

[96] ibid [10]–[13] (per Lord Bingham), [66] (per Lord Hoffmann).

[97] ibid [13] (per Lord Bingham). See also Lord Hoffmann [66].

[98] Approving the obiter dicta of Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588. Compare Mance LJ in the Court of Appeal in the *Jones* case (n 37) [82].

[99] [2006] UKHL 26, [14] (per Lord Bingham), [64] (per Lord Hoffmann).

[100] ibid [14] (per Lord Bingham).

torture by international law, having the authority of a peremptory norm (superior in effect to other rules of international law),[101] precludes the grant of immunity to States or individuals sued for committing acts of torture since such acts cannot be governmental acts or exercises of State authority entitled to protection of State immunity *ratione materiae*.[102] The House of Lords was unable to accept that torture cannot be a governmental or official act.[103] Their Lordships focused on the fact that the lack of access was not disproportionate (and hence contrary to Article 6) because international law[104] has not yet reached the point where State immunity in civil proceedings is accepted as not applying in cases involving torture.[105]

2. An indirect limitation

The way in which an indirect limitation can arise is illustrated by *Mark v Mark*.[106] The English court's jurisdiction to entertain an application for a divorce was dependent on the petitioner wife, a Nigerian national, being either habitually resident for one year ending on the date when proceedings were begun or domiciled in England and Wales.[107] Hughes J, at first instance, had held that she could not be regarded as being habitually resident or domiciled in England since her presence in the UK was unlawful.[108] This led to an appeal on the ground that the judge's conclusion deprived the wife of the right to present her petition contrary to Article 6 of the ECHR. Thorpe LJ in the Court of Appeal[109] held that the wife's Article 6 rights were engaged. By way of explanation, he referred to 'decisions of the Strasbourg courts' (without saying what they were),[110] deciding that denial of a right of access to national courts may amount to a breach of Article 6(1). He accepted that the State had the right to impose conditions and limitations on the right of access to the English courts. But what was at issue here was not the statutory basis of jurisdiction itself but a rule of public policy as set out by Lord Scarman in *R v Barnet*

[101] It was common ground that this was so, see [13] (per Lord Bingham).
[102] ibid [17] (per Lord Bingham).
[103] [2006] UKHL 26, [19], [27] (per Lord Bingham), [85] (per Lord Hoffmann).
[104] Their Lordships looked at, inter alia, the UN Torture Convention 1984, the UN State Immunity Convention 2004, the decision of the ECtHR in the *Al-Adsani* case and *Democratic Republic of the Congo v Belgium* (Case concerning arrest warrant of 11 April 2000) [2002] ICJ Rep 3.
[105] (n 103) [40]–[64] (per Lord Hoffmann), [24]–[28] (per Lord Bingham). See also the much easier case of *Grovit v De Nederlandsche Bank* [2005]EWHC 2944 (QB), [2006] 1 Lloyd's Rep 636—immunity granted to employees of the Dutch Central Bank not disproportionate where an effective remedy in the Netherlands and gravity of allegations against defendants much less than in *Jones*.
[106] [2004] EWCA Civ 168, [2005] Fam 267, CA; affd [2005] UKHL 42, [2006] 1 AC 98.
[107] See the Domicile and Matrimonial Proceedings Act 1973, s 5(2).
[108] She was guilty of a criminal offence under the Immigration Act 1971.
[109] [2004] EWCA Civ 168, [40], [2005] Fam 267, CA.
[110] Counsel had referred to leading cases on access including *Airey* (n 3), and *Golder* (n 3).

London Borough Council, ex p Nilish Shah,[111] providing that only a person lawfully in the UK could be regarded as being habitually resident there. The essential question for Thorpe LJ was whether this public policy rule should now be recast in the light of the Human Rights Act 1998.[112] Such a rule would deny the wife access to the divorce court with which she had the closest connection. Moreover, this would be after the rejection of an application for a stay in earlier proceedings, in the course of which considerations of fairness and convenience were fully canvassed. After considering the circumstances of the case, including the fact that the husband invited the wife to petition in London, the husband admitted the court's jurisdiction and there had been extensive proceedings in England in relation to the matrimonial home, Thorpe LJ concluded that a rule of public policy that terminated proceedings so far advanced would be incompatible with the wife's rights under Article 6(1).[113] Waller LJ was inclined not to regard Lord Scarman's rule as a blanket one.[114] Moreover, in a case like the instant one, where England was the only realistic forum, such a rule would risk infringing Article 6.[115]

The House of Lords[116] affirmed this decision but on a different ground. Baroness Hale[117] did not consider that there was any need to found the decision on the Human Rights Act.[118] There never was a blanket limitation in the first place so there was no need to recast the limitation in the light of Article 6. In her view, Lord Scarman regarded the question he was dealing with as one of statutory construction, not of public policy. His comments were made in the context of entitlement to benefits. Baroness Hale could see no reason for implying the word 'lawfully' into a statute dealing with divorce jurisdiction. It followed that residence for the purposes of habitual residence in the context of matrimonial jurisdiction need not be lawful residence.[119]

E. Direct effect and recognition of a foreign judgment

We are concerned here with the estoppel effect of a foreign judgment. This prevents re-litigation of the original cause of action in England and of issues determined during that action. The principles upon which cause of action and issue estoppel are based are well known.[120] It has however been acknowl-

[111] [1983] 2 AC 309.
[112] (n 109) [38].
[113] It was also held that there was no rule of public policy preventing a person who was unlawfully resident in the country acquiring a domicile of choice.
[114] See also Latham LJ [88]. The absence of an exclusionary rule meant that he did not have to deal with the Art 6 point.
[115] He referred to the *Golder* case (n 3) and *Airey* case (n 3).
[116] [2005] UKHL 42, [2006] 1 AC 98.
[117] With whom Lords Nicholls, Hoffmann, Hope, and Phillips concurred.
[118] (n 116) [31].
[119] A domicile of choice in England could also be acquired even though a person was not lawfully in the country.
[120] See PM North and JJ Fawcett, *Cheshire and North's Private International Law* (13th edn, Butterworths, London, 1999) 434 et seq.

edged in the Court of Appeal that the application of these principles involves a denial of the right of access to the courts conferred by common law and this is a right protected by the ECHR.[121] Thus the estoppel principles 'should only be applied where the circumstances are such that their application is necessary to prevent misuse of the court's procedure amounting to an abuse of process'.[122] This was said in the context of a purely domestic case, but applies equally where there is a foreign judgment.[123] In practical terms, this may not represent any real change since it has long been accepted that estoppels must be applied so as to work justice and not injustice.[124]

F. Indirect effect and enforcement of foreign judgments

The concern here is with a possible breach of the right to a fair trial in the foreign judgment granting State. We are therefore concerned with the indirect effect of Article 6. If there is such a breach abroad would the English courts, by recognizing and enforcing the foreign judgment, be in breach of Article 6? This question arises in cases of recognition and enforcement under both traditional English rules and the Brussels regime.

1. Recognition and enforcement under traditional English rules

The Court of Appeal in *Al-Bassam v Al-Bassam*[125] said that Lewison J, at first instance, was correct to voice his concern that the judgment of a foreign court given in proceedings which, in the eyes of English law, had failed to meet the requirements of a fair trial, would not be recognized in England.[126] This was because an English court when applying its rules on recognition of foreign judgments 'will have regard to its own obligation to act in a manner which is not inconsistent with the Convention right to a fair trial'.[127] Although the decision of the ECtHR in *Pellegrini v Italy* was cited to the Court, it did not accept that the ECHR had indirect effect. The reason why a foreign judgment, granted in circumstances where a fair trial had been denied abroad, would not be recognized, was not because human rights law says it should not be, but because the English rules on recognition say it should not be. However, the human rights position was not irrelevant. When operating the private international law rules on recognition of foreign judgments, account would be taken of the human rights position. This is an example of the approach, discussed later, whereby human rights law is used to cast light upon private international law concepts.

[121] *Specialist International Group v Deakin* [2001] EWCA Civ 777 (unreported, 23 May 2001).
[122] ibid [10] (per Aldous LJ).
[123] *Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535 (Comm), [2003] 2 Lloyd's Rep 753.
[124] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853, 947 (per Lord Upjohn).
[125] [2004] EWCA Civ 857.
[126] ibid [45].
[127] ibid.

The House of Lords in the earlier case of *Government of the United States of America v Montgomery (No 2)*[128] went further and accepted that Article 6 can have indirect effect in cases of enforcement of foreign judgments. The case concerned the registration in England under section 97 of the Criminal Justice Act 1988 of a confiscation order made in the United States in circumstances where the fugitive disentitlement doctrine, under which a court does not have to hear or decide the appeal of a fugitive, was applied. Registration requires the High Court to be 'of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice'.[129] Burnton J, at first instance, had decided that it would not be contrary to the interests of justice to do so, even though the order would have been made in breach of the requirements of Article 6 of the ECHR if that Article had applied to the making of that order (which it did not because it was made in the US). On appeal to the Court of Appeal, it was argued that: (i) if the ECHR had applied in the United States, the confiscation order would have been made in contravention of Article 6 and of Article 1 of Protocol 1 in the ECHR; (ii) this being the case, if the courts registered the order, they would be contravening section 6 of the Human Rights Act 1998. The Court of Appeal did not accept that there had been a breach by the United States' courts of the standards required by Article 6. But even if there had been such a breach, it could not be said that the decision to register gave rise to any breach of Article 6 of the Convention by the English court. Lord Carswell in the House of Lords followed the dictum of Judge Matscher in the *Drozd* case and accepted that enforcement of a foreign judgment might in principle give rise to responsibility on the part of a Convention State.[130] However, under this principle there must be a flagrant breach of Article 6 and on the facts of the instant case there was no such breach. The fugitive disentitlement doctrine applied in the US, although it failed to secure all of the protection required by Article 6, was said to be a rational approach which had commended itself to the federal jurisdiction in the US. As such, it could not be described as a flagrant breach.

The House of Lords discussed whether the decision of the ECtHR in *Pellegrini v Italy*,[131] gave rise to a wider principle under which it was not necessary to show that there had been a flagrant breach abroad. This important case was not cited to the Court of Appeal but on appeal was cited to the House of Lords. *Pellegrini* looks to be directly analogous to the situation in the *Montgomery* case. Indeed, commentators[132] have criticized the Court of Appeal's decision for appearing to get the human rights law wrong by ignoring *Pellegrini*. However, the House of Lords has confounded the critics by distinguishing *Pellegrini* and affirming the decision of the Court of Appeal.

[128] [2004] UKHL 37, [2004] 3 WLR 2241.
[129] Section 97(1)(c) Criminal Justice Act 1988.
[130] (n 128) [27]; criticized by Briggs, in a case note (2004) 75 BYBIL 537.
[131] Judgment of 20 July 2001; (2001) 35 EHRR 44.
[132] See the case notes by Hartley (2004) 120 LQR 211; Briggs (2003) 74 BYBIL 553.

Pellegrini was distinguished on the basis that it turned on the relationship between the Italian civil courts and the Vatican court. This was a special legal relationship between States which was governed by the 'Concordat'. The Italian courts were specifically obliged to ensure that the procedure (in the Vatican court) was sufficient to satisfy the terms of Article 6 of the Convention.[133] This confines the *Pellegrini* case to its facts, ie the enforcement of Vatican court judgments in Italy. According to this view, it is therefore not an authority in the private international law situation where the courts in one State are being asked to recognize and enforce the judgment granted in another State. This is an example of the English courts getting human rights law wrong and will be considered further below.

2. Recognition and enforcement of foreign judgments under the EC regime

In *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)*,[134] the parties agreed that the Court of Session could not lawfully enforce a decree that had been granted by a foreign court, in civil proceedings in which, when the proceedings were looked at as a whole, the Article 6(1) Convention rights of the party, against whom that decree had been pronounced, had been infringed, without itself acting in violation of the requirements of Article 6(1) and the provisions of section 6(1) of the Human Rights Act 1998. This accepts that the ECHR has indirect effect and that the effect to be given to the Convention is a wide one. There is no requirement of a flagrant breach of Article 6(1) rights abroad, merely that there has been a breach. In this, it goes further than the House of Lords were prepared to go in the *Montgomery* case. Although *Pellegrini* was not cited to the Court of Session, it adopted the wide view of the indirect effect of the ECHR in enforcement cases, as is suggested by that decision. However, on the facts it was held that there had been no breach of the respondent's Article 6 rights in France. But it is clear that, if there had been such a breach (which in turn would have meant that the Court of Session would have been in breach if it had recognized the judgment), this would have been dealt with by refusing to recognize the foreign judgment using the public policy defence under the Brussels Convention, rather than by giving human rights law primacy and refusing recognition on the basis that the indirect effect doctrine says that the judgment cannot be recognized. This private international law public policy based approach has been used consistently to deal with breaches of Article 6 abroad in cases of recognition and enforcement under the Brussels Convention. It is an example of using Article 6 to cast light on a private international law concept, in this case that of public policy. It is to this approach that we will now turn.

[133] The Concordat requires that the Italian courts verify that in the proceedings before the ecclesiastical courts the right to sue and defend in court has been assured to the parties in a way not dissimilar from what is required by the fundamental principles of the Italian legal system. Art 6 of the Convention has been enacted into the Italian legal order.

[134] 2002 SLT 1365, Outer House of the Court of Session.

G. Taking the ECHR into account to shine light on private international law concepts

Private international law has a number of flexible concepts that could be used to respond to human rights concerns. The first of these is public policy, where it has been so used. The second is the demands of justice, where it has not been so used.

1. Public policy

Human rights law has been used to cast light on the meaning of public policy in the context of choice of law. It is well recognized that an important instance of where the English courts will disregard a provision in a foreign law is where this constitutes a gross infringement of human rights.[135] Article 6 is not raised in this context,[136] although other Articles in the ECHR may be.[137] More importantly in relation to Article 6, human rights law has been used to cast light on the meaning of public policy in the context of recognition and enforcement of foreign judgments under the EC rules.

(a) Recognition and enforcement of foreign judgments under the EC rules: the link with human rights

In 1999 the French Cour de cassation refused to enforce an English judgment for costs in a defamation action on the ground that this would be contrary to public policy under Article 27(1) of the Brussels Convention because the costs were set at a disproportionately high level.[138] It was said that the high costs of litigation had presented an obstacle to access to justice in England contrary to Article 6(1).

This links public policy and a breach of Article 6 rights. More generally on this link, it was said that the right of access to the courts established by Article 6(1) of the ECHR 'related' to public policy within the meaning of Article 27(1) of the Brussels Convention. This raises questions as to the precise nature of the link between public policy and a breach of Article 6. Will a breach of the latter always lead to the conclusion that the public policy defence applies and how is a breach of Article 6 to be established?

[135] See *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [18] (per Lord Nicholls), [114] (per Lord Steyn), [125] (per Lord Hoffmann) [137] and [149] (per Lord Hope), [171] (per Lord Scott), [2002] AC 883. See also *Oppenheimer v Cattermole* [1976] AC 249, 278 (per Lord Cross), 283 (per Lord Salmon), HL.

[136] Art 6 is not concerned with the substantive content of national law, see *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163.

[137] eg a case of racially discriminatory confiscation of an individual's property would raise Art 1 of the First Protocol (protection of property).

[138] *Pordea v Times Newspapers Ltd* [2000] I L Pr 763. Cf *Re Enforcement of a Guarantee (Case IX ZB 2/98)* [2001] IL Pr 29, Bundesgerichtshof—for the purposes of the public policy defence the only question that arises is whether enforcement of the judgment constitutes an infringement of the defendant's fundamental rights.

Guidance on the answer to these questions can be found in the leading case on enforcement of foreign judgments, public policy and human rights, *Krombach v Bamberski*.[139] The ECJ, when setting limits on the concept of public policy under Article 27(1) of the Brussels Convention, said that it 'draws inspiration' from the guidelines provided by the ECHR.[140] Recourse to public policy was only possible where there is infringement of a fundamental principle of the recognizing Brussels Convention Contracting State. The Court went on to decide that, in the light of the case-law of the ECtHR, a national court of a Brussels Convention Contracting State is entitled to hold that a refusal in the judgment granting State to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right and that recourse can be had to the public policy provision.

In determining whether there has been a breach of a fundamental right, the ECJ was guided by the case-law of the ECtHR. *Krombach* concerned a judgment for compensation, which was granted by a French court (which also heard criminal proceedings) in circumstances where the defence counsel instructed by the defendant was not heard. The defendant had been ordered to appear before the court but had not done so. Accordingly, he was in contempt of court and no defence counsel could appear on his behalf. The ECJ followed decisions of the ECtHR in cases relating to criminal charges that held that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing.[141]

There was no suggestion from the ECJ that the ECHR had indirect effect. This was so even though the violation of the right of defence was regarded as being particularly serious in that the defendant had given notice of his intention to defend himself and the French court refused his request in accordance with the French rules of procedure.[142] This could be regarded as a flagrant breach of ECHR rights. However, it is not surprising that there was no such suggestion from the ECJ. The reference from the Bundesgerichtshof was in terms of the interpretation of the public policy defence to recognition under the Brussels Convention. The ECJ was not asked whether the ECHR had indirect effect and, if so, how this would square with the provisions of the Brussels Convention. No doubt if it had been asked this latter question, it would have answered it by emphasizing the need to uphold the objectives of the Brussels Convention, as it did in the *Gasser* case.

[139] Case C-7/98 [2001] QB 709, [2000] ECR I-1935; followed in Case C-341/04 *Eurofood IFSC Ltd* [2006] IL Pr 33, discussed below.

[140] ibid para 25.

[141] *Poitrimol v France*, Judgment of 23 Nov 1993, Series A No 277-A; (1994) 18 EHRR 130; *Pelladoah v Netherlands,* Judgment 22 Sept 1994, *Series A No 297-B;* (1994) 19 EHRR 81; *Van Geyseghem v Belgium*, Judgment of 21 Jan 1999. See also *Motorola Credit Corp v Uzan* [2003] EWCA Civ 752, [54]–[58], [2004] 1 WLR 113, CA.

[142] AG Saggio, *Krombach v Bamberski* (n 139) [28].

(b) Inconsistent national decisions

Krombach has been followed by a number of national courts, but with no consistency on the question of the emphasis to be put on the human rights aspect. It was applied in Scotland in *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)*,[143] in which the parties agreed that the infringement of a party's Article 6(1) rights would constitute 'a manifest breach of a rule of law regarded as essential in the legal order of the [United kingdom]' within the meaning of that phrase (used in the *Krombach* case). It was alleged that the Tribunal de Commerce de Bordeaux lacked objective impartiality because of its composition (ie lay judges who were elected).[144] In determining whether the respondent had suffered an infringement of its Convention rights under Article 6(1) in France, Lord Mackay of Drumadoon in the Outer House took into account Strasbourg cases to which he was referred,[145] pointing out that he had a statutory duty to do so because of section 2(1) of the Human Rights Act 1998. Turning to the facts of the case, the issue arose whether proceedings before the Tribunal de Commerce de Bordeaux, which it was alleged failed to comply with Article 6(1) requirements, should be considered in isolation or whether account should be taken of the whole proceedings in France, including proceedings before the appellate courts (which were not suggested to be not fully compliant with Article 6(1)). There was nothing in the Strasbourg jurisprudence to suggest the former. Indeed, there were observations supporting the latter. Taking account of the whole proceedings, Lord Mackay reached the conclusion that the respondent had failed to establish that its Article 6(1) rights had been breached in France. Despite this result, this is a case that takes human rights seriously in terms of the link between human rights and public policy (breach of Article 6(1) leading seemingly automatically to use of the public policy defence) and in terms of technique (ie taking into account decisions of the ECtHR). The French Cour de cassation has adopted a similar approach to that in Scotland, also accepting that a breach of Article 6 falls within the public policy defence.[146] However, it does not appear to have looked at the jurisprudence of the ECtHR when determining whether there had been such a breach abroad.

In contrast, the English Court of Appeal in *Maronier v Larmer*[147] can in a

[143] 2002 SLT 1365, Outer House of the Court of Session.

[144] Lord Mackay looked at evidence from documents showing official concern from the Government and National Assembly in France that commercial courts needed reform

[145] *Aksoy v Turkey* Judgment of 18 Dec 1996; (1997) 23 EHRR 553; *Adolf v Austria*, Series A No 49; (1982) 4 EHRR 313; *Bulut v Austria* (17358/90) (1996) 24 EHRR 84; *De Cubber v Belgium*, Judgment of 26 Oct 1984, Series A No 86; (1984) 7 EHRR 236; *Edwards United Kingdom*, Judgment of 16 Dec 1992, Series A No 247-B; (1993) 15 EHRR 417. See also *Orams v Apostolides* [2006] EWHC 2226 (QB) for a good technique but no rights under Art 6 vested in the defendants.

[146] *Stolzenberg v Daimler Chrysler Canada Inc* [2005] IL Pr 24. See also *Klempka v ISA Daisytek SAS* [2004] IL Pr 6, Cour d'Appel, Versailles.

[147] [2002] EWCA Civ 774, [2003] QB 620.

number of respects be regarded as having taken human rights less seriously. First and foremost, it has sought to reduce the human rights impact of *Krombach*. The alleged human rights breach abroad arose out of an action in the Netherlands for medical negligence which was stayed and then after 12 years reactivated. The defendant was unaware that the proceedings had been reactivated until even the time for an appeal had passed. The Court of Appeal held that the respondent had not received a fair trial in the Netherlands as required by Article 6 and therefore it was against public policy to enforce the applicant's judgment. Whilst this result may appear to indicate that the Court was taking human rights seriously, the reality is that the emphasis in the case was more on the operation of the Brussels Convention than on human rights concerns. The Court pointed out that one of the fundamental objectives of the Convention was to 'facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure'.[148] This, it was said, would be frustrated if courts of an enforcing State could be required to carry out a detailed review of whether the procedures that resulted in the judgment had complied with Article 6. Accordingly, it reduced the impact of the human rights dimension by introducing a 'strong presumption that the procedures of other signatories of the human rights convention are compliant with Article 6'. There is no mention of such a presumption in *Krombach*. The introduction of this presumption puts the Brussels Convention first and the ECHR a poor second. The second way in which the Court of Appeal can be regarded as not taking human rights as seriously as the Scots court is that it considered Brussels Convention cases on public policy and natural justice but did not refer to any decisions of the ECtHR.[149] Thirdly, there was no suggestion in *Maronier* that the ECHR had indirect effect.[150]

The Irish Supreme Court in *In the matter of Eurofoods IFSC Ltd*[151] can be accused of taking human rights even less seriously. It held that it would be manifestly contrary to public policy to recognize a decision of an Italian court where a provisional liquidator was not given the protection of fundamental aspects of fair procedures by being refused any copy of the petition or any other papers which the appellant intended to place before that court for the purpose of the opening of insolvency proceedings. Although the Court purported to apply *Krombach*, it did not follow the approach in that case. There was no enquiry into whether there had been a breach of a fundamental right, ie it did not use the language of rights, and guidance was not sought from

[148] ibid [24], quoting Case C-414/92 *Solo Kleinmotoren GmbH v Boch* [1994] ECR I-2237, 2256, para 20.

[149] *Konig v Federal Republic of Germany*, Judgment of 28 June 1978, Series A No 27; (1978) 2 EHRR 170 and *Vermeulen v Belgium*, Judgment of 20 Feb 1996; (1996) 32 EHRR 313 were cited in argument. See also, eg, *Citibank NA v Rafidian Bank* [2003] EWHC 1950, [44], [2003] IL Pr 49—no evidence as to content of Art 6 as opposed to its applicability.

[150] This does not appear to have been argued by counsel.

[151] [2005] IL Pr 3, a case under the Council Regulation on Insolvency Proceedings No 1346/2000.

the case law of the ECtHR.[152] The court was not even making the limited use of human rights law that was made of it in *Krombach*. On a reference to the ECJ,[153] that Court followed the approach in *Krombach* and held that a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.[154] This uses the language of rights and, as in *Krombach*, reference was made to the case-law of the ECJ expressly recognizing the general principle of Community law that everyone is entitled to a fair legal process.[155]

(c) The impact on the natural justice defence

When considering the impact of Article 6 on the recognition and enforcement of foreign judgments it is important not just to look at the results in particular cases but also at the impact on the development of rules of private international law. Prior to *Krombach*, Article 6(1) of the ECHR was used by a German court[156] to provide guidance on the question whether there was due service in the judgment granting State as required by Article 27(2) of the Brussels Convention (now Article 34(2) of the Brussels I Regulation). The case concerned service by remise au parquet (lodging documents with the Public Prosecution Service in France) in the French judgment granting State. This is designed to save a French plaintiff the trouble of service abroad. It increases the likelihood that the defendant will receive documents in a language with which he is unfamiliar. In deciding that this did not constitute due and timely service, as required by Article 27(2), the Oberlandesgericht, Karlsruhe, pointed out that Article 6(1) of the ECHR requires not only effective legal protection for the plaintiff but also understandable information for the defendant by means of clear, formalized requirements. Following *Krombach*, such a case could be dealt with now by using the public policy defence. The use of Article 6(1) requirements as guidance on whether there has been a breach of a fundamental right leading to the use of the public policy defence is likely to lead to an increase in the use of that defence and a corresponding decrease in the use of the natural justice defence under what is now Article 34(2) of the Brussels I Regulation. As an example of this phenomenon, the *Maronier* case was argued in the alternative as involving the natural justice defence and the Court of Appeal acknowledged that the facts of the case had some similarities to a leading case on that defence.[157] Nonetheless, *Maronier*

[152] The ECHR was only mentioned in so far as *Krombach*, which mentions this, was quoted.
[153] Case C-341/04 *Eurofood IFSC Ltd* [2006] IL Pr 23. [154] ibid para 67.
[155] ibid para 65, citing: Case C-185/95 *Baustahllgewebe v Commission* [1998] ECR I-8417, paras 20 and 21; Joined Cases C-174/98 and C-189/98 *Netherlands and Van der Wal v Commission* [2000] ECR I-1, para 17.
[156] *Re the Enforcement of a French Interlocutory Order* (Case 9 W 69/97) [2001] IL Pr 17.
[157] Case C-49/84 *Debaecker v Bouwman* [1985] ECR 1779, ECJ.

was decided on public policy grounds. *Krombach* can be used to deal with cases that fall outside the natural justice defence under Article 34(2). This was always a limited defence in that it only applied where a judgment had been given in default of appearance. Cases where there has been a breach of the right to a fair trial abroad because of service of the document instituting the proceedings can now be dealt with under the public policy defence, even though the defendant has appeared. Of course, the public policy defence goes wider than Article 34(2), which only deals with one aspect of the right to a fair trial,[158] ie service in sufficient time and in such a way as to enable the defendant to arrange for his defence. The public policy defence can deal with other aspects of this right which do not arise from deficient service.[159]

(d) Recognition and enforcement under the traditional rules

The approach applied in Brussels regime cases is doubtless equally applicable in cases of enforcement of foreign judgments under the traditional English common law rules. This is apparent from the *Al-Bassam* case where it will be recalled that the Court of Appeal said that the human rights dimension would come into play when the English court is applying the common law rules on enforcement of foreign judgments. This would have to be through the use of the public policy defence. Indeed, it is noticeable that one of the cases referred to by the Court of Appeal was the *Maronier* case.

In cases of enforcement of foreign judgments under the traditional rules, not only has the concept of public policy had light cast on it by Article 6 but so also has the concept of the interests of justice for the purposes of recognizing a foreign confiscation order under the Criminal Justice Act 1988. In *Government of the United States of America v Montgomery (No 2)*,[160] the Court of Appeal accepted that the jurisprudence under Article 6 may shed light on what is to be regarded as in the interests of justice in this particular context.[161] However, it went on to say that, in the majority of cases, it would not be necessary to refer in detail to the ECHR jurisprudence.

2. The demands of justice and transfer of procedings abroad

To get a balanced view of the impact of Article 6 it is important to look at areas where one might have expected the courts to use Article 6 to shine light on a private international law concept but have not done so. The basic criterion in cases of *forum non conveniens* is the interests of the parties and the ends of justice.[162] In determining whether justice demands that a stay should not be granted, the court has to consider all the circumstances of the

[158] The *Maronier* case (n 147) [27].

[159] See, eg, the *Stolzenberg* case (n 146). Public policy can also come into play in a case where there is no breach of Art 6, such as one of fraud.

[160] [2003] EWCA Civ 392, [2003] 1 WLR 1916; discussed above.

[161] ibid [29].

[162] [1987] AC 460, 476 (per Lord Goff).

case.[163] These have included evidence of delay in trial in the alternative forum abroad and a lack of legal representation abroad. When deciding whether trial abroad in such circumstances would amount to an injustice the courts have not used Article 6 of the ECHR and the jurisprudence on this as their yardstick.[164] Yet the ECtHR has had to determine when delay in a country involves a breach of Article 6.[165] Likewise it has had to determine when lack of legal representation[166] will constitute a breach of that Article.

IV. WHY ARTICLE 6 HAS HAD SUCH LITTLE IMPACT

A. Human rights concerns dealt with under existing principles of private international law

A recurring theme in the English case-law rejecting an argument based on Article 6 concerns is that such concerns are dealt with under existing principles of private international law. Thus in *Lubbe v Cape Plc*,[167] Lord Bingham dismissed the human rights argument in one sentence: 'I do not think article 6 supports any conclusion which is not already reached on application of *Spiliada* principles.'[168] Likewise in *Government of the United States of America v Montgomery (No 2)*,[169] the Court of Appeal took the view that human rights concerns were properly catered for by existing criteria for recognition, which involved examining the interests of justice. On the facts the Court did not accept that there had been any breach of the requirements of Article 6 abroad. However, it was said that if there had been a denial of a fair trial abroad then the foreign order would doubtless not be enforced.[170] It was stressed that this would have been because it would not have been in the interests of justice to do so. The refusal to enforce would have been based on the

[163] See generally on conflicts justice in this context, A Bell, 'Human Rights and Transnational Litigation—Interesting Points of Intersection' in S Bottomley and D Kinley (eds), *Commercial Law and Human Rights* (Ashgate, Aldershot, 2002) 115.

[164] However, Bingham MR in the Court of Appeal (Evans and Ward LJJ concurring) in *Connelly v RTZ Corporation plc* [1997] IL Pr 643, [30]–[31], CA, confirmed [1998] AC 854, HL, said that the interests of justice approach was consistent with the obligations under Art 6 of the ECHR, without citing decisions of the ECtHR on the absence of legal aid.

[165] *Riccardi Pizzati v Italy*, Judgment of 10 Nov 2004; *Bottazzi v Italy*, Judgment of 28 July 1999; *Salesi v Italy,* Judgment of 26 Feb 1993, Series A No 257-E; (1998) 26 EHRR 187, para 24; *Katte Klitsche de la Grange v Italy*, Judgment of 27 Oct 1994, Series A no 293-B; (1994) 19 EHRR 368, para 61.

[166] *Airey v Ireland*, Judgment of 9 Oct 1979, Series A, No 32; (1979) 2 EHRR 305; *McVicar v United Kingdom*, Judgment of 7 May 2002*; Steel and Morris v United Kingdom*, Judgment of 15 Feb 2005.

[167] [2000] 1 WLR 1545.

[168] ibid 1561. See also his comments in the Court of Appeal in *Connelly v RTZ Corporation plc* (n 164).

[169] [2003] EWCA Civ 392, [2003] 1 WLR 1916; affd [2004] UKHL 37, [2004] 3 WLR 2241.

[170] ibid [28].

wording of section 97(1)(c) of the Criminal Justice Act 1988,[171] rather than on Article 6 and section 6 of the Human Rights Act 1998. Similarly in *Dow Jones & Co Inc v Yousef Abdul Latif Jameel*, [172] the Court of Appeal rejected the Article 6 argument in favour of deciding the case using the private international law criterion, assuming that this would meet the human rights requirement. More generally, the approach whereby human rights law is used to cast light on the meaning of private international law concepts is effectively using existing rules to deal with human rights concerns.

This theme is not confined to the English courts. There is an element of it in *Krombach v Bamberski*.[173] The ECJ said that they had consistently held that fundamental rights formed an integral part of the general principles whose observance the Court ensures[174] and that it drew inspiration from guidelines supplied by international treaties for the protection of human rights on which Member States have collaborated, with the ECHR being of particular significance. It went on to mention that the ECJ has expressly recognized the general principle of Community law that everyone is entitled to a fair process, which is inspired by those fundamental rights.[175]

B. Human rights concerns are overridden by other concerns

Concerns about an individual's human rights can clash with and be overridden by other concerns. The ECJ has been concerned to uphold the objectives of the Brussels system at the expense of human rights considerations, giving more weight to State interests than to an individual's interests.[176] The dictates of international law may also override human rights considerations.

1. Upholding the objectives of the Brussels system

The ECJ in the much criticized *Erich Gasser* case[177] was concerned to uphold the objectives of the Brussels Convention. It will be recalled that the Court said, in response to the argument that Article 21 should be set aside where the court first seised belongs to a Member State in whose courts there are, in

[171] ibid.

[172] [2005] EWCA Civ 75, [2005] QB 946; discussed above.

[173] Case C-7/98 [2001] QB 709; [2000] ECR I-1935. See also Case C-341/04 *Eurofood IFSC Ltd* [2006] IL Pr 23.

[174] (n 173) para 25.

[175] ibid paras 26 and 42. See also Case C-341/04 *Eurofood IFSC Ltd* [2006] IL PR 23 [65].

[176] See Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, 813–21 and in 'Choice-of-court agreements, *lis pendens*, human rights and the realities of international business: reflections on the *Gasser* case', in *Le droit international prive: esprit et methodes (Melanges en l'honneur de Paul Lagarde)* (Dalloz, Paris, 2005) 383.

[177] Case C-116/02 [2005] QB 1, [2003] ECR I-4693; criticized by Hartley (n 176); Mance (2004) 120 LQR 357; Fentiman [2004] CLJ 312. It has also been seen, above, that the human rights argument was put in an unattractively unfocused way.

general, excessive delays in dealing with cases, that this 'would be manifestly contrary both to the letter and spirit and to the aim of the Convention'.[178] The mutual trust and the desire for legal certainty that lay at the heart of the Convention would be breached by such an exception.[179] In *Krombach*, the way in which recourse was had to the public policy solution under the Brussels Convention, rather than to the human rights indirect effect solution, has implicit in it a value judgment that the EC rules and their objectives override the human rights rules and their objectives. The higher precedence of the EC rules came out even stronger in the judgment of the Court of Appeal in *Maronier v Larmer*,[180] where the introduction of the strong presumption that the procedures of other signatories of the ECHR were compliant with Article 6 was prompted by concerns that the facilitation of the free movement of judgments under the Brussels Convention should not be frustrated by the court in the enforcing State having to carry out a detailed review of whether the procedures in the judgment granting State complied with Article 6.[181]

2. The dictates of international law

In the area of State immunity, there may be a clash between the dictates of international law and human rights requirements, a clash between the interests of the State and those of the individual. This has been acknowledged by the ECtHR in *Al-Adsani v United Kingdom*, which was followed by the House of Lords in *Jones v Saudi Arabia*.[182] A majority of the ECtHR,[183] when considering whether the sovereign immunity restriction on access was compatible with Article 6, said that 'The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.[184] On the issue of whether the restriction was proportionate to the aim pursued, the ECtHR went on to say that 'measures . . . which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the access to a court as embodied in Article 6(1) . . . some restrictions on access must be regarded as inherent, an example being those limitations generally accepted by the community as part of the doctrine of State immunity'.[185]

[178] The *Gasser* case (n 177) [70]. See also [68].
[179] ibid [71]–[72].
[180] [2002] EWCA Civ 774, [2003] QB 620.
[181] ibid [24]–[25].
[182] Lord Bingham saw the case as involving a clash between two international law principles, [2006] UKHL 26, [1]. cf Mance LJ [2004] EWCA Civ 1394, [92], [2005] QB 699.
[183] The minority stressed the overriding effect of the jus cogens rule prohibiting torture.
[184] *Al-Adsani v United Kingdom*, Judgment of 21 Nov 2001; (2001) 34 EHRR 273, [54].
[185] ibid [56].

C. Not wanting to get involved with the complexities of human rights law

The *Montgomery* case[186] is an example of this. The Court of Appeal accepted that the jurisprudence under Article 6 may be relevant (in an indirect way) in shedding light on what is to be regarded as being in the interests of justice under the recognition criteria. However, in the majority of cases it was unnecessary to refer in detail to this jurisprudence. 'The desirability of not becoming too closely engaged with the jurisprudence relating to Article 6 is emphasised by the fact that the jurisprudence can be technical.'[187] By way of illustration it was said that the requirements of Article 6 differ depending on whether the proceedings involve 'the determination of a criminal charge' and that whether a criminal charge is involved is itself a technical issue.

A court may not want to get involved with the complexities of human rights law because it does not regard itself as being the best body to do this. This comes out in the arguments put by the Commission in the *Gasser* case against introducing an exception to Article 21 of the Brussels Convention based on delay in the court first seised. It was argued that the question whether delay was such that the interests of a party may be seriously affected can be determined only on the basis of an appraisal taking account of all the circumstances of the case. According to the Commission, that cannot be determined in the context of the Brussels Convention. 'It is for the ECtHR to examine the issue and the national courts cannot substitute themselves for it by recourse to Art 21 of the Convention.'[188] In *Lubbe*, Lord Bingham may not have wanted to get involved with the complexities of Article 6 of the ECHR. This would have been understandable, given that the Convention was all very new to the English courts. Indeed, the case was decided at a time when the Human Rights Act was not yet in force. Now that the English courts are familiar with Article 6 there is no need for any such hesitancy.

D. A failure to realize the importance of human rights in private international law

The discussion of human rights in the British case-law has been in response to argument raised by counsel. However, counsel sometimes fail to realize the importance of human rights, do not raise the point and fail to draw the attention of the court to the relevant decisions of the ECtHR. The court will not raise the human rights point of its own motion. It is for the party raising the issue of non-compatibility with Article 6(1) to demonstrate that this provision has been breached.[189] But even where counsel raises the human rights point,

[186] *Government of the United States of America v Montgomery (No 2)* (n 7).
[187] ibid [29].
[188] (n 177) [69]. However, the ECtHR considers that the primary responsibility for guaranteeing Convention rights falls on national authorities.
[189] *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)* 2002 SLT 1365, 1372.

the court may not respond to this adequately. This represents a failure sometimes by judges to realize the importance of human rights in private international law cases. A good illustration is the judgment of the House of Lords in *Mark v Mark*.[190] It will be recalled that Baroness Hale held that there never was a blanket limitation preventing a person not lawfully in the UK from being regarded as being habitually resident there so there was no need to recast the limitation in the light of Article 6. This contrasts with the approach of Mance LJ in the Court of Appeal in *Jones v Saudi Arabia*. There it was decided that quite apart from the human rights point a State cannot possess any absolute right to claim immunity in respect of civil claims against its officials for systematic torture.[191] Nonetheless, the human rights position was still considered and the appeal was decided in the light of the ECHR.[192] Mance LJ said that he was concerned to reach a conclusion that reflects the importance attaching in today's world and in current international thinking and jurisprudence to the recognition and effective enforcement of individual human rights.[193] Baroness Hale was evidently not so concerned and can be accused of not taking human rights seriously, at least in this area of private international law. If the issue of human rights arises in a mainstream area such as immigration and asylum then the importance of human rights is obvious, not always so in private international law. Indeed, Baroness Hale, in the previous year, had given learned judgments on human rights in an expulsion case[194] and in a child abduction case.[195] Likewise, one can contrast the full discussion of human rights by Lord Bingham in an expulsion case[196] with the failure by the same judge to discuss human rights in the earlier *Lubbe* case. But in both cases it is arguable that the problem was essentially the same, the transfer, in the former of a person and in the latter of proceedings, to a country where there would be a breach of Article 6 standards.

If one goes on to ask why there has been a failure to realize the importance of human rights law in private international law cases, one obvious explanation is the complete absence of decisions of the ECtHR applying human rights principles in this context. The operation of the indirect effect doctrine in private international law cases is particularly uncertain. The argument for saying this doctrine should have an impact rests on drawing analogies: that the transfer of an action abroad in cases of *forum non conveniens* is analogous to transferring a person abroad; and in the case of enforcement of a foreign judgment, that *Pellegrini* is akin to a private international law cases of enforcement of a foreign judgment.

[190] [2005] UKHL 42, [2006] 1 AC 98.
[191] (n 88) [96].
[192] Compare the approach of the House of Lords in that case, discussed above, where human rights were not treated as a separate ground for deciding the case from the international law ground (ie whether torture could or could not be treated as the exercise of a state function).
[193] (n 88) [96].
[194] *R (Razgar) v Special Adjudicator* (n 8).
[195] *Re J (a child)* (n 2).
[196] *R (Ullah) v Special Adjudicator* (n 5).

E. Getting it wrong

The best example of the courts[197] getting human rights law wrong is *Government of the United States of America v Montgomery (No 2)*. The Court of Appeal seemed to be oblivious to the indirect effect doctrine, even though it considered (and distinguished) *Soering v United Kingdom*,[198] the case in which that doctrine had originated. It was also oblivious to the jurisprudence applying this doctrine to cases of enforcement of foreign judgments. The leading cases on enforcement, *Drozd*[199] and *Pellegrini*,[200] were not cited by counsel or referred to by the Court of Appeal. These errors were not repeated in the House of Lords, where the full discussion of the indirect effect doctrine was doubtless helped by the fact that that Court had recently had to consider this doctrine in the mainstream human rights context of expulsion of immigrants.

But their Lordships, by confining *Pellegrini* to its facts, appear to have got the law wrong. *Pellegrini* was distinguished on the basis that it turned on the relationship between the Italian civil courts and the Vatican court, as regulated by the Concordat. But there is nothing in the section of the judgment of the ECtHR setting out 'The Law' to suggest that the decision turned on this relationship. This relationship was not examined and the Concordat was not even mentioned in this section.[201] The only clear statement of law that was made was one whereby the ECtHR described its task as not being to examine whether the proceedings before the Vatican courts complied with Article 6 of the Convention, but to examine whether the Italian courts, before authorizing enforcement of the decision annulling the marriage, duly satisfied themselves that the Vatican proceedings fulfilled the guarantees of Article 6.[202] This is clearly not intended to be confined to the facts of the case since the ECtHR went on to say that 'such a check is required, in fact, where the judgment for which confirmation and execution is sought emanates from the courts of a country which does not apply the Convention'. This part of the sentence was rather cavalierly dismissed by Lord Carswell as 'too frail a peg' on which to hang the wider interpretation of *Pellegrini* on which the appellant's counsel sought to rely. Others have not taken this narrow view of *Pellegrini*.[203]

[197] Counsel sometimes get human rights law wrong in the sense of raising implausible human rights arguments, such as where a State seeks to rely on the ECHR, which have been rightly rejected by the courts, see, eg, *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [49], [2006] 2 WLR 70, CA.

[198] Judgment of 7 July 1989, Series A No 161; [1989] 11 EHHR 439.

[199] Judgment of 26 June 1992, Series A No 240; (1992) 14 EHRR 745.

[200] Judgment of 20 July 2001; (2001) 35 EHRR 44.

[201] In the section setting out 'The facts' there is a statement of 'Relevant Domestic Law' which sets out in brief the terms of the Concordat.

[202] (n 200) [40].

[203] Lord Carswell admitted that judge J-P Costa of the ECtHR, writing extra-judicially had taken a different and wider view of the effect of *Pellegrini*. See also for a wide view, Lord Mackay in *Marie Brizzard* (n 189); P Kinsch (n 31) 218–22; Briggs, in a case note (2004) 75 BYBIL 537; Hartley, in a case note (2004) 120 LQR 211 and the Dogauchi and Hartley Report accompanying

Moreover, the subsequent decision of the ECtHR in *K v Italy*,[204] which concerned a breach of the applicant's Article 6 rights by Italy because of its failure to enforce a Polish order for maintenance payments within a reasonable time, appears to regard *Pellegrini* as dealing with the same two State situation.

Another example of getting it wrong can be found in *Al-Bassam v Al-Bassam*.[205] Lord Justice Chadwick, giving the unanimous judgment of the Court, said that 'It is not for the English court to restrain a party in proceedings before it from suing in another jurisdiction on the grounds of its own perception as to the fairness or unfairness of proceedings in that other jurisdiction—*a fortiori*, where the country in which the party seeks to sue is not itself bound by the European Convention'.[206] This suggests that the fact that Saudi Arabia is a non-Convention country in itself rules out arguments based on a breach of human rights in that country. The human rights jurisprudence says exactly the opposite.[207]

V. A NEW APPROACH

The English courts should adopt an approach which takes human rights more seriously. What is needed is a hybrid human rights/private international law approach. This would have two stages. The first stage is concerned with identifying a human rights problem. This means ascertaining whether, in the circumstances of a particular case, there is a real risk of a breach, or has been a breach, of Article 6 standards in England or abroad.[207a] Human rights jurisprudence should be used to identify such a breach. So at this stage human rights law would have primacy. This would not only ensure that any breach is identified but would also guarantee compliance with the obligation of English courts to 'take account of' decisions of the ECtHR.[208] The English courts should ensure that they are not acting in a way which involves a breach of Article 6 under the direct effect doctrine. Where there has been a breach abroad, or there is a real risk that there will be such a breach, the English courts should not act in a way which involves a possible breach of Article 6 by them under the indirect effect doctrine.

the Hague Convention of 30 June 2005 on choice of court agreements, Preliminary Draft Convention on Exclusive Choice of Court Agreements Draft Report, Prel Doc No 26 of Dec 2004, [145]. The Court of Appeal in *Jomah v Attar* [2004] EWCA Civ 417, [49], reversed by the House of Lords in *Re J (a child)* (n 2), did not regard *Pellegrini* as being confined to its facts. The House of Lords did not discuss *Pellegrini*.

[204] Judgment of 20 July 2004, para 21.

[205] [2004] EWCA Civ 857.

[206] ibid [46].

[207] Judge Matscher in his concurring opinion in *Drozd* (n 199); *Pellegrini* (n 200) [40]; *Soering* (n 12) [88]–[91].

[207a] The court appears to be asking this question when permission is sought for enforcement of a worldwide freezing order abroad, *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399, [43], [2006] 1 All ER (Comm) 709.

[208] It would be going further than merely taking account of, it would be following these decisions.

The second stage is concerned with solving the human rights problem that has been identified. There are two alternative ways in which this could be achieved.[209] The first is to give the ECHR primacy and use the fact that, to act in a particular way would involve a possible breach of the ECHR by an English court, as the ground for not so acting (the human rights solution). This was the approach adopted by Lord Carswell in *Government of the United States of America v Montgomery (No 2)*.[210] The second possible approach is to use the rules of private international law to achieve the same end (the private international law solution). In the areas of highest risk of encountering a breach of Article 6 standards, namely transferring actions abroad to a State where there is a real risk of a breach of Article 6 standards and enforcing a foreign judgment where there has been such a breach, there is no need to introduce new rules of private international law. It is possible to use the flexibility inherent in existing private international law concepts to deal with human rights concerns. Thus the public policy exception can be used, and has been used, as a ground for not enforcing a foreign judgment in a case where there has been a breach of Article 6 standards in the judgment granting State. And the concept of what justice demands can be used to prevent transfer of an action abroad to a country where there is a real risk of a breach of Article 6 standards. The decision as to which solution a State should adopt should not be a matter of concern to the ECtHR.[211] It is submitted that, at this second stage, the private international law solution is the one to be preferred. This is for a very obvious practical reason. The difficulty with giving human rights law primacy and acting according to its dictates is the uncertainty as to what it demands. Under the human rights solution, what an English court is saying is that it will not enforce a foreign judgment or transfer abroad where to do so would mean an *English* court would be in breach. This raises the whole question of the application of the indirect effect doctrine to private international law cases. Giving private international law primacy avoids having to decide whether an English court would be in breach under the indirect effect doctrine. Instead, the only question is whether there has been a breach by the foreign court (in an enforcement case) or a real risk that there will be such a breach (in a transfer case). If the answer is yes, then the private international law concept can come into play to prevent enforcement or transfer. The operation of this two stage approach will now be examined in more detail.

A. Transfer of proceedings abroad

We have seen that, at the moment, there is a danger that proceedings will be transferred abroad by virtue of the doctrine of *forum non conveniens* to a country in which Article 6 standards are not complied with. Under the proposed hybrid human rights/private international law approach, the first stage is to

[209] See P Kinsch (n 31) 202. [210] (n 7). [211] P Kinsch (n 31) 202.

ascertain whether, in the circumstances of a particular case, there is a real risk of a breach of the right to a fair trial abroad. The Strasbourg jurisprudence would be used to identify the risk of such a breach. The Strasbourg jurisprudence would also be used to see if there is a real risk of a flagrant breach. If there is, there is then at least the possibility that, under the indirect effect doctrine, this could lead to a breach of Article 6 by the English courts. This is the case, regardless of whether the country abroad is a Convention country or not. Moving on to the second stage, the human rights problem can be solved by the English courts ensuring that they do not stay English proceedings in a case where there is a real risk[212] of the denial of the right to a fair trial in the alternative forum abroad. This would not require any alteration in *Spiliada* principles. A stay would be refused under the second stage of those principles on the basis that justice demands trial in England. But any case where there is a real risk of a breach of Article 6 principles would necessarily mean that there is injustice abroad. This is more emphatic than merely using human rights jurisprudence to 'cast light' on the meaning of the private international law concept of the demands of justice. It is completely unambiguous what the effect of human rights law is. In contrast, casting light has the idea of guidance but leaves open the question whether this guidance must be followed. This suggested solution should apply whenever in a particular case there is a real risk of a breach of Article 6 *standards* abroad. This is not the same as a real risk of a breach of *Article 6* abroad. The foreign country may not be a Contracting State to the ECHR but that should not matter. The use of Article 6 standards provides an objective yardstick justifying the English court's refusal to refer the proceedings abroad.[213]

Under this suggested solution the real risk of a breach of Article 6 in a particular case would be subsumed within the private international law concept of injustice abroad. The latter does, however, go wider than the former since it covers instances other than those involving procedural unfairness. For example, it has been held that it is not conducive to justice to require a claimant, who had an arguable claim under what English law would regard as the applicable law, to litigate abroad in a country which would summarily reject the claimant's action because under its law, which it would apply, there was a total defence to an action for breach of contract.[214] Article 6 protects the individual's access to the courts for the determination of his civil rights; it does not affect the democratic power of the State to determine the scope of those

[212] See the *Soering* case (n 12) para 91; *R (Ullah) v Special Adjudicator* (n 5), *R (Razgar) v Special Adjudicator* (n 8); *Re J (a child)* (n 2).

[213] It follows that even if the ECtHR were to decide that the indirect effect doctrine did not apply in the context of private international law, the private international law solution should still continue to operate.

[214] See *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, 509.

rights.[215] Article 6 is not concerned with the substantive content of national law[216] and would therefore not cover this example.

B. A different result?

In cases of alleged procedural unfairness, is this new hybrid human rights/private international law approach going to produce a different result, bringing cases within the concept of injustice abroad that are not covered at the moment or excluding cases that are covered? In many cases it will not do so. If, for example, the allegation is one of lack of judicial independence, the real difficulty is finding factual evidence to back up this allegation,[217] rather than finding criteria to say what constitutes a lack of judicial independence. Even where there is clear evidence of what is taking place abroad, the suggested approach is in most cases unlikely to produce a different result.

(a) No exclusion of cases that are covered at the moment by the concept of injustice abroad

Cases of procedural unfairness constituting injustice abroad (in the private international law sense) will doubtless involve the real risk of a breach of human rights abroad. This means that there will be no exclusion of cases that are covered at the moment under the concept of injustice abroad. This can be seen by looking at the situation where there is no legal aid abroad. The leading private international law cases are *Connelly v RTZ Corpn plc*[218] and *Lubbe v Cape PLC*.[219] In the former case, it was said that, as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum abroad, whereas such financial assistance will be available to him in England.[220] However, this was an exceptional case since it was clear that the nature and complexity of the instant case was such that it could not be tried at all without the benefit of financial assistance.[221]

[215] *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163, [77] (per Lord Millett). A distinction has to be drawn between procedural and substantive limitations on access to court, see *Roche v The United Kingdom*, Judgment 19 Oct 2005; *Z and Others v The United Kingdom*, Judgment of 10 May 2001; (2002) 34 EHRR 97. The distinction between substance and procedure is well known to private international lawyers and its use in that context was referred to in the *Matthews* case.

[216] *Matthews v Ministry of Defence* (n 215) [79] (per Lord Millett).

[217] See, eg, *Skrine & Co v Euromoney Publications Plc* [2002] EMLR 15. See also *Recherches internationales Quebec v Cambior* Inc 1998 Carswell Que 4511, [72], Cour Superieure du Quebec.

[218] [1998] AC 854, HL.

[219] [2000] 1 WLR 1545, HL.

[220] [1998] AC 854, 873, HL. See also the *Lubbe* case (n 219) 1554.

[221] The *Connelly* case (n 218) 873–4. It might have been different if it had been possible to put on a rudimentary presentation abroad and the plaintiff sought to put on a Rolls-Royce presentation in England, ibid 874.

Accordingly, substantial justice would not be done in the particular circumstances of the case if the plaintiff had to proceed in the appropriate forum where no financial assistance was available.[222] Likewise, the circumstances in *Lubbe v Cape PLC*[223] were special and unusual. If the English proceedings were stayed in favour of the more appropriate forum in South Africa the probability was that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if their claims were to be justly decided.[224] This would amount to a denial of justice.

Under the proposed approach, it would have to be asked whether, in the circumstances in *Connelly* and *Lubbe*, there is a real risk of a breach of Article 6 standards in, respectively, Namibia and South Africa. It would appear that there is. This can be seen by examining the leading ECtHR case on the lack of legal representation in civil proceedings, *Airey v Ireland*.[225] A wife complained that because of the prohibitive cost of proceedings she could not obtain a judicial separation and that her right of access to a court was effectively barred. No legal aid was available at that time in Ireland for the purposes of seeking a judicial separation or for any civil matter. The wife was unable to find a solicitor willing to act on her behalf in judicial separation proceedings, apparently because she would have been unable to meet the costs involved. The wife could appear before the High Court without a lawyer but the ECtHR thought it improbable that a person in her position could effectively present her own case, given the complexity of the domestic judicial procedure. The ECtHR said that Article 6(1) 'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case'.[226] On the facts, it was held that the wife did not enjoy an effective right of access to the High Court in Ireland for the purpose of petitioning for a decree of judicial separation. Accordingly, there had been a breach of Article 6(1).

Similarly, cases of inordinate delay abroad would be decided no differently under the proposed approach from under the existing approach. In cases of *forum non conveniens* and *forum conveniens*, inordinate delay before an action comes to trial abroad has been held to be a denial of justice.[227] An example is

[222] Lord Hoffmann dissented on this point.
[223] [2000] 1 WLR 1545, HL.
[224] ibid 1559.
[225] Judgment of 9 Oct 1979, Series A, No 32; (1979) 2 EHRR 305.
[226] ibid [26].
[227] *The Vishva Ajay* [1989] 2 Lloyd's Rep 558, 560 (delay in India). The delays in India are now less so as not to amount to a substantial injustice, see *RHSP v EIH* [1999] 2 Lloyd's Rep 249, 253–4 and the following *forum conveniens* cases: *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, [175]–[177]; *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [177], [2002] 3 All ER 17.

where there was evidence that more than 10 years delay was usual in Indonesia.[228] Article 6 provides that everyone is entitled to a hearing within a reasonable time. The same period of delay of 10 years has been held to constitute a breach of Article 6.[229]

(b) Bringing new cases within the concept of injustice abroad

Many cases of procedural unfairness where, under the current law, an allegation of injustice (in the private international law sense) abroad has been rejected by the English courts will also be ones where there is no real risk of a breach of Article 6 either. This would be the case where, for example, the period of delay abroad is very short. However, in a difficult borderline case of delay abroad, where the allegation of injustice abroad has been rejected by the English courts, there may, nonetheless, be a real risk of a breach of Article 6 abroad. The suggested approach would then produce a different answer, bringing such a case for the first time within the concept of injustice abroad. There was no injustice abroad in a case where there was a four or even up to six years delay from commencement of proceedings to disposal of an appeal in the Czech Republic.[230] Neither was evidence of four to five years delay in India,[231] and even possibly up to 10 years, enough to show that substantial justice cannot be done in India.[232]

In these last examples, is there a real risk of a breach of Article 6 standards according to the jurisprudence of the ECtHR? In *Salesi v Italy*,[233] the ECtHR held that the right to a hearing within a reasonable time had not been met where, from commencement of proceedings to their ending with the filing of the Court of Cassation's judgment, took a little over six years. The reasonableness of the length of proceedings is determined by criteria laid down by the case-law of the ECtHR and in the light of the circumstances of the case.[234] It was relevant that the case was not a complex one and that the claimant's conduct did not substantially contribute to the length of the proceedings.[235]

[228] *Marconi v PT Pan Indonesia Bank Ltd TBK* [2004] EWHC 129 (Comm), [38], [2004] 1 Lloyd's Rep 594; affd [2005] EWCA Civ 422, [77], [2005] 2 All ER (Comm) 325 (a *forum conveniens* case).

[229] *Konig v Federal Republic of Germany*, Judgment of 28 June 1978, Series A No 27 (1978) 2 EHRR 170—after 10 years the court had still not given a decision on the merits.

[230] *Ceskoslovenska Obchodni Banka AS v Nomura International Plc* [2003] IL Pr 20. See also *Credit Agricole Indosuez v Unicof Ltd* [2004] 1 Lloyd's Rep 196, 205 (unspecific delay in Kenya).

[231] *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [177], [2002] 3 All ER 17—an expedited hearing was a possibility because of the age of some of the parties. This was a *forum conveniens* case.

[232] *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, [175]–[177] (a *forum conveniens* case).

[233] Judgment of 26 Feb 1993, Series A, No 257-E; (1998) 26 EHRR 187.

[234] ibid [22].

[235] ibid [24]. cf *Katte Klitsche de la Grange v Italy*, Judgment of 27 Oct 1994, Series A, No 293-B; (1994) 19 EHRR 368, para 61—eight years not excessive delay in a case involving complex law and facts and important repercussions on Italian law.

The Court was critical of the fact that on appeal the case remained dormant for over two years and the fact that it took eight months and six months respectively to make known the reasons supporting the District Court's and the Court of Cassation's judgments by filing these at the relevant registries.[236] The Government of Italy had argued that a factor in their favour was the excessive work load of the appellate courts.[237] The ECtHR rejected this argument, saying that States were under a duty to organize their judicial systems so the courts can meet the requirements of Article 6. In the light of this decision, there is a good argument that a delay in India of four to five years in trial, let alone dealing with any subsequent appeals, would involve a real risk of a breach of Article 6 standards.[238]

One factor that was considered when looking at delay under the private international law criteria was that India was tackling the delay problem and the problem was not as bad as it used to be.[239] In the context of private international law, this could be regarded as being relevant for reasons of comity. But such concern with the reaction of foreign States and England's relations with these States would not be relevant for deciding if there is a real risk of a breach using human rights criteria, where the concern is with an individual's rights. Other factors that have been taken into account in assessing whether delay amounts to injustice abroad are comparing the delay in the Czech Republic with that in other modern European States and asking whether the delay in the Czech Republic was dramatically greater than that in England.[240] These are understandable criteria in the context of *forum non conveniens* where what is being considered is whether trial should be in England or abroad. Again these factors do not appear to be relevant for deciding if there is a real risk of a breach using human rights criteria. If these private international law factors, which operate to say that the delay is not inordinate, are removed from the equation this may well produce a different result Arguably there would be a real risk of a breach of Article 6 standards abroad and, under the suggested approach, this should be treated as a case of injustice abroad and a stay of English proceedings would then be refused.

[236] The *Salesi* case (n 68) [24]. See also the examination of abnormal periods during the whole length of the proceedings in the *Katte Klitsche* case (n 235).

[237] The *Salesi* case (n 68) [23].

[238] In *Recherches internationales Quebec v Cambior* Inc 1998 Carswell Que 4511, [72], Cour Superieure du Quebec it was accepted obiter that this period of delay would involve a violation of the victims' human rights and a denial of justice.

[239] *RHSP v EIH* [1999] 2 Lloyd's Rep 249, 253–4 and the following *forum conveniens* cases: *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, [175]–[177]; *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [177], [2002] 3 All ER 17.

[240] *Ceskoslovenska Obchodni Banka AS v Nomura International Plc* [2003] IL Pr 20, [16]—the judge, Jonathan Sumption QC, accepted that delay may be so great as to constitute a breach of Art 6(1) but did not address the question of whether in this case this was so.

C. Enforcement of foreign judgments

1. Under the EC regime

The present approach is to deal with human rights concerns in enforcement cases by using the doctrine of public policy, employing Article 6 to cast light on the meaning of this concept. This should normally mean that the English courts do not act in breach of Article 6. However, it is possible that this may still happen, as the example, set out below, involving bias abroad, shows. The effect of *Pellegrini* is that the English courts must never enforce a foreign judgment granted in a non-ECHR State, and arguably even in an ECHR State, in circumstances where there has been a breach of Article 6 standards.[241] If the breach is a flagrant one the English court must never enforce the foreign judgment, regardless of whether the judgment is granted in an ECHR Contracting State or not.[242] To achieve this, the present law needs tightening up in two respects: first in relation to identifying the breach abroad; second, in relation to the response of the recognizing court to such a breach. The proposed hybrid human rights/private international law approach will do this.

The first stage of this approach is for the court to ascertain whether, in the circumstances of a particular case, there has been a breach of the right to a fair trial abroad. Taking this as the starting point increases the likelihood that any breach abroad will be identified. Under the present law, the starting point is the defence of public policy, rather than the breach as such. As has been seen, cases of a failure to provide a fair trial abroad have been decided on public policy grounds without even asking if there has been a breach of Article 6 standards in that country.[243] Also if the case is argued as one of, for example, a lack of natural justice, the question of public policy and hence of a breach of Article 6 may not be raised. Moreover, under the present English law, as set out in *Maronier v Larmer,* applying a presumption of compliance with Article 6 requirements abroad is not the best way of finding out if there has actually been compliance. The English courts have not always used the jurisprudence of the ECtHR to determine whether there has been a breach.[244] Using this jurisprudence will obviously help in the identification process.

Moving on to the second stage of solving the problem once a breach abroad has been identified, it is important to make absolutely sure that the English courts do not recognize the foreign judgment. When it comes to the means of achieving this, the human rights solution not only involves the usual problem of ascertaining what human rights law demands but also, in the present context, involves a clash between the EC rules and their values and the human rights rules and their values. The ECJ may well favour the former over the

[241] See more generally the Dogauchi and Hartley Report (n 203) [145].
[242] See Judge Matscher in the *Drozd* case (n 199).
[243] *In the matter of Eurofoods IFSC Ltd* [2005] IL Pr 3, Irish Supreme Court; discussed above.
[244] See, eg, *Citibank NA v Rafidian Bank* [2003] EWHC 1950, [44]—no evidence as to content of Art 6 as opposed to its applicability, [2003] IL Pr 49.

latter. The better solution is to use the existing public policy defence to achieve the desired result, providing that there is some tightening up of when this defence would operate. Using this defence, the courts automatically should hold that enforcement would be against public policy where there has been a breach of Article 6 standards in the judgment granting State. Human rights standards would therefore be subsumed within public policy but the latter would go wider than this since it covers matters other than fair process, for example instances of fraud. This tightens up the existing law by ensuring that the foreign judgment will definitely not be enforced. Under the present law using Article 6 to 'cast light' on the concept of public policy has the idea of guidance but leaves open the question whether this guidance must always be followed. The use of Article 6 standards provides an objective yardstick justifying the recognizing court's refusal to recognize and enforce a foreign judgment.

2. Under traditional English rules

The English traditional rules on enforcement of foreign judgments present much more of a blank canvas on which the English courts can work to ensure that a foreign judgment will not be enforced where there has been a breach of Article 6 standards abroad. When it comes to ensuring that a breach abroad is identified there is a danger under the current law that the English courts will apply the same approach as in *Maronier v Larmer* and presume that there has been compliance with Article 6 standards abroad.[245] Applying the proposed hybrid human rights/private international law approach will avoid this happening. Under the first stage of that approach, the court must ascertain whether, in the circumstances of a particular case, there has been a breach of the right to a fair trial abroad. Moving on to the second stage of solving the human rights problem once a breach abroad has been identified, there is more freedom of action under the traditional rules than in EC cases. It has been seen that the House of Lords in *Government of the United States of America v Montgomery (No 2)* has accepted that an English court will be in breach of Article 6 if it enforces a foreign judgment granted in circumstances where there has been a flagrant breach of Article 6 standards. It would be possible therefore in this context to use the human rights solution to refuse enforcement of the foreign judgment but it would require a finding that there had been a 'flagrant' breach. Avoiding this requirement would need the English courts to recognize that the effect of *Pellegrini* is that an English court will be in breach of Article 6 if it enforces a foreign judgment where there has been a breach of Article 6 standards, even if this is not flagrant. But this would be contrary to the view of the House of Lords in the *Montgomery* case and this would need

[245] This case was quoted with approval by the Court of Appeal in *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857.

to be overturned. The private international law solution does not require this, or a finding that there has been a 'flagrant' breach abroad. In cases of enforcement at common law, the English courts could introduce a new defence that a foreign judgment will not be recognized or enforced in cases where there has been a breach of Article 6 standards abroad. But this is not necessary. It is possible to use the existing public policy defence to achieve the same result, providing there is some tightening up of when this defence would operate. Using this defence the courts should automatically hold that enforcement would be against public policy where there has been a breach of Article 6 standards abroad.[246] Adopting this approach has the virtue of consistency with the approach adopted in EC cases, something that appeals to the English courts.[247] When it comes to statutory enforcement based on bilateral conventions, using the existing public policy defence contained therein will avoid a clash between the bilateral conventions and the ECHR.[248]

3. A different result?

It is instructive to look at the situation where there is an allegation of bias in the judgment granting State. Under the traditional rules on enforcement this is regarded as raising the defence of a lack of natural justice. This is what happened in *Jacobson v Frachon*,[249] where it was held that a French judgment was not against natural justice, even though an expert appointed by the French court to examine the quality of goods was a relative of the defendant, made no proper examination and refused to hear the evidence of the plaintiffs and their witnesses. Although this expert was found to have a biased and prejudiced mind, the plaintiffs had not been prevented from presenting their case to the court. The plaintiffs were at liberty to produce witnesses to the court and to attack the report and did so without success. Under the suggested approach it would have to be asked, at the first stage, whether there was a breach of Article 6 standards in the judgment granting State. Article 6(1) establishes the right to a hearing before an independent and impartial tribunal. There are two aspects to the requirement of impartiality: 'First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from any objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect . . .'[250] If a judge in a tribunal (and this can

[246] This is the solution suggested under the Hague Convention of 30 June 2005 on choice of court agreements, see the Dogauchi and Hartley Report (n 203) [145].

[247] See *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857.

[248] A public policy defence (Art 9(e)) was introduced into the Hague Convention of 30 June 2005 on choice of court agreements so that Contracting States are not obliged to do something that they are not able to do, see the Dogauchi and Hartley Report (n 203) [145].

[249] (1928) 138 LT 386—a case decided before the introduction of the Brussels regime. See also *Society of Lloyd's v Saunders* (2001) 210 DLR (4th) 519, Ont CA.

[250] *Findlay v United Kingdom*, Judgment of 25 Feb 1997; (1997) 24 EHRR 221, [73]. See also *McGonnell v the United Kingdom*, Judgment of 8 Feb 2000; ECHR 2000-II; *Pabla Ky v Finland*, Judgment of 22 June 2004.

include an expert lay member who is not a professional judge)[251] is subjectively biased there will be a breach of Article 6(1). It is unclear whether this can be extended to a case of an expert who is not a judge (ie is not actually involved in the decision-making process). This still leaves the possibility that the tribunal may be regarded as not being impartial from an objective viewpoint in that it appoints an expert who is biased. It is arguable that the reasonable bystander—a fully informed layman who has no axe to grind—would on objective grounds fear the court lacked impartiality. What is clear is that the ECtHR has not been guided by the criterion of whether the applicant has been able to present its side of the case. In conclusion, it is possible that, in the circumstances in *Jacobson*, there would be a breach of Article 6 standards. If so, moving on to the second stage, it should automatically follow that the public policy defence would apply.

VI. CONCLUSIONS

The impact of Article 6 of the ECHR on the rules of private international law and their application has been slight. There has been no impact on the bases of jurisdiction or the exercise of the discretionary element under the English traditional rules, and no exception to the *lis pendens* rule under the Brussels Convention (now Regulation) has been made. Article 6 has, in one instance, not led to the removal of a blanket limitation on jurisdiction. But in another instance it has so led. Such a limitation can operate so as to deny the claimant access to the English courts, constituting the breach by the English courts of the right to a fair hearing. However, the nature of private international law, being concerned with disputes with a foreign element, necessarily means that the English courts are commonly going to be faced with a breach of Article 6 requirements abroad. Indeed, in private international law cases, Article 6 concerns have been raised before the English courts more commonly in relation to an action abroad than in relation to an English action. And it is in the context of breaches abroad that Article 6 has had its greatest impact. In cases of recognition and enforcement of foreign judgments, Article 6 has been taken into account to shine light on the concept of public policy, which operates as a defence to recognition and enforcement.

The reasons for the lack of impact of Article 6 on private international law are many and varied: human rights concerns are regarded as being dealt with under existing principles of private international law; human rights concerns are overridden by other concerns, in particular the desire to uphold the objectives of the Brussels system; there has been a wish not to get involved with the

[251] *Pabla Ky v Finland* (n 250). There is no objection per se to expert Members participating in the decision-making process: *Ettl v Austria*, Judgment of 23 Apr 1987, Series A No 117, (1988) 10 EHRR 255; *Debled v Belgium*, Judgment of 22 Sept 1994, Series A No 292-B.

complexities of human rights law; there has also been a failure to realize the importance of human rights in private international law; and the courts simply have got human rights law wrong. Whilst the English courts and the ECJ have at times been misguided, this is all too understandable. It is by no means always clear what human rights law requires, particularly in relation to the response in one country to a breach of Article 6 standards in another country.

A new approach is needed which takes human rights more seriously. A hybrid human rights/private international law approach should be adopted. The first stage of this requires the court to ascertain whether, in the circumstances of a particular case, there has been, or there is a real risk that there will be, a breach of Article 6 standards in England or abroad. Human rights jurisprudence should be used to ascertain whether there is such a breach. The second stage involves solving the human rights problem that has been identified. The English courts should act in a way that ensures that they are not in breach of Article 6 standards. In the areas of greatest risk of encountering a breach of Article 6 standards, this can be achieved by using existing private international law concepts of public policy and the demands of justice. This would have the greatest impact on stays of action, with some borderline cases, that currently fall outside the concept of injustice abroad, now likely to come within this concept on the basis that trial abroad would involve a real risk of a breach of Article 6 standards, leading to the refusal of a stay of English proceedings. By so doing, the English courts will have reached a conclusion that, in the words of Mance LJ (as he then was), reflects the importance attaching in today's world and in current international thinking and jurisprudence to the recognition and effective enforcement of individual human rights.[252] This will also be in accordance with the ECtHR's view that Convention rights must be guaranteed in a way that is 'practical and effective'.[253]

[252] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2004] EWCA Civ 1394, [96], [2005] QB 699; overuled in part [2006] UKHL 26.
[253] *Artico v Italy* (n 90) para 33.