

Recovering Damages for the Tort/Delict of Inducing Breach of a Choice of Court Agreement against a Claimant’s Legal Advisers: The English Court of Appeal Adjudicates on Whether England is the Place Where the Economic Loss Occurred under Article 5(3) of the Brussels I Regulation?

Mukarrum Ahmed*

Abstract: This paper examines the recent significant ruling of the Court of Appeal on jurisdiction to adjudicate upon a claim for damages for the tort/delict of inducing breach of an English exclusive choice of court agreement against a claimant’s legal advisers. The determination of the issue of jurisdiction hinges on whether England is the place where the economic loss occurred pursuant to Article 5(3) of the Brussels I Regulation. It will be argued that the CJEU authorities on allocation of jurisdiction in tort/delict claims lend support to the conclusion that Germany was the place where the ‘harmful event’ occurred and the damage was also suffered in Germany. Therefore, it is submitted that the decision of the Court of Appeal was correct according to established EU private international law rules of allocation of jurisdiction. A more pragmatic approach to the jurisdictional issue premised on the private law rights and obligations of the parties to the choice of court agreement may end up compromising these principles by according dubious jurisdictional precedence to the place where the indirect consequences of the economic loss occur. Moreover, if it were held that the English courts possess jurisdiction over the matter then the legality and legitimacy of the damages remedy in light of the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust would be implicated which may have necessitated a reassessment of Longmore LJ’s controversial decision in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010.

Keywords: Brussels I Regulation – Private International Law – European Union Law – Choice of Court Agreements – Tort/Delict – Pure Economic Loss – Inducing Breach of Contract – Rome II Regulation

* LLB (Hons) (University of London), LLM (City University London), Barrister (Lincoln’s Inn) and Doctoral Researcher in Law at the Centre for Private International Law, School of Law, University of Aberdeen. This is a modified version of an article which will be published in volume 6 of the *Aberdeen Student Law Review*. The author would like to thank Professor Paul Beaumont, Dr. Jonathan Fitchen and the anonymous peer reviewers for their comments on a draft version of this paper.

In *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH v AMT Futures Ltd*,¹ the Court of Appeal adjudicated upon whether England is the place where the economic loss occurred under Article 5(3) of the Brussels I Regulation² in an action for recovering damages for the tort of inducing breach of an English exclusive choice of court agreement against a claimant's legal advisers.³ There is established judicial authority in English law for a claim for contractual damages for breach of an English exclusive choice of court agreement against the counter party.⁴ However, it has been argued that in some instances, it may make commercial sense to extend the scope of the recovery beyond the parties privy to the jurisdiction agreement.⁵ Potential third parties may include the directors and senior management of the company, the legal advisers of the company, another company within the group of companies or even a competitor company. However, in order to sue a third party, the English courts must have jurisdiction over the matter and a specific cause of action must lie against the third party under the applicable law of the particular legal relationship.

Where an exclusive choice of court agreement is binding between A and B and a third party, C, who is in practical control of B, has directed B to breach the agreement, the English courts have accepted that anti-suit injunctions or claims for damages, could be founded on the tort of inducing breach of contract.⁶ In *Kallang Shipping SA v Axa Assurances Senegal (The Kallang) (No.2)*, where Axa Senegal had induced their insureds to breach an arbitration clause by orchestrating proceedings before the courts of Senegal, Jonathan Hirst QC, sitting as a deputy High Court judge, awarded damages against

¹ [2015] EWCA Civ 143 (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed).

² Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1 ('Brussels I Regulation'). In accordance with Art 81 of the Brussels I Regulation (Recast), the Recast Regulation applies as of 10 January 2015 to legal proceedings instituted (and to judgments rendered) on or after that date. See Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

³ See, generally, M Lehmann, 'Where Does Economic Loss Occur?' (2011) 7 *Journal of Private International Law* 527; A Dickinson, *The Rome II Regulation* (OUP 2008) Chapter 4, 327-330; E Lein, 'Chapter 4 - Article 7(2)' in A Dickinson and E Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 155-172.

⁴ See *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ); *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [36] (Lord Bingham of Cornhill) and [48] (Lord Hobhouse of Woodborough); *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) (Julian Flaux QC J); *National Westminster Bank plc v Rabobank Nederland (No 3)* [2007] EWHC 3163 (Comm), [2008] 1 All ER (Comm) 266 (Sir Anthony Colman J); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ): A significant recent Court of Appeal decision endorsing the damages remedy in the context of the Brussels I Regulation.

⁵ Briggs accepts that the claim for compensation may be characterized as 'tortious or non-contractual' and that such a cause of action may fit more easily into the 'public law' rubric of the Brussels I Regulation, but does not explore the issue any further: A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 326-327, 337; cf Raphael describes the possibility of an award of damages outside the contractual case as 'unexplored territory', but in contrast to Briggs argues that, where there is no clear and concrete personal contractual obligation to enforce, it is harder to avoid the conclusion that the award of damages inherently involves an assessment of the jurisdiction of another Member State court, and is thus prohibited: T Raphael, *The Anti-Suit Injunction* (OUP 2008) 296, 331, 341.

⁶ See Raphael (n 5) 335-336.

Axa Senegal for procuring a breach of contract.⁷ However, as Jonathan Hirst QC stressed, both parties agreed that this issue was to be determined in accordance with English law and no case on Senegalese law was pleaded.⁸ In *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO (The Duden)*, Jonathan Hirst QC adopted the same analysis and adjudicated that a cargo insurer's conduct, knowledge and intent, in using a ship arrest as a means of trying to force the ship-owner to accept Senegalese jurisdiction, was such as to make the insurer liable for the accessory tort of procuring the cargo receivers' breach of the London arbitration clause in the contract of carriage.⁹

In the context of the Brussels I Regulation, the English High Court held that, in principle, a claim in damages may lie against a claimant's lawyers (a German law firm) for the tort of inducing breach of contract where it can be established that the claimant was advised by them to bring pre-emptive proceedings in breach of a choice of court agreement.¹⁰ In such cases, the immediate potential impediment is not the existence of the cause of action or legal basis,¹¹ but satisfying an English court that it has jurisdiction under Article 5(3) of the Brussels I Regulation.¹² The High Court has held that, such jurisdiction exists, pursuant to Article 5(3) of the Brussels I Regulation, because to induce breach of an English choice of court agreement is to deprive the claimant of the benefit of a clause conferring exclusive jurisdiction on the English courts, which constitutes harm suffered in England.¹³

The German law firm responsible for inducing the breach of the choice of court agreement appealed the High Court decision on the issue of whether or not the English courts have jurisdiction to entertain the action under the Brussels I Regulation. Overturning the first instance decision, the

⁷ *Kallang Shipping SA v Axa Assurances Senegal (The Kallang) (No.2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, [90]-[94] (Jonathan Hirst QC J); See David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell 2010) 493-494; T Raphael, *The Anti-Suit Injunction: Updating Supplement* (OUP 2010) 69.

⁸ *Kallang Shipping SA v Axa Assurances Senegal (The Kallang) (No.2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, [90].

⁹ *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO (The Duden)* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145, [65]-[70] (Jonathan Hirst QC J)

¹⁰ *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH* [2014] EWHC 1085 (Comm) (Poplewell J).

¹¹ Liability for the tort of inducing breach of contract was established in English law by the famous case of *Lumley v Gye* (1853) 2 E & B 216 and the actionable wrong was recognized as part of Scots law in *British Motor Trade Association v Gray* 1951 SC 586, 1951 SLT 247 (Lord Russell). *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 is the current leading authority on the tort of inducing breach of contract in English law and was followed by Lord Hodge in *Global Resources Group v MacKay* 2008 SLT 104, 106-107: Lord Hodge identified five characteristics which appear to the essential elements of the delict: (1) Breach of contract (2) Knowledge on the part of the inducing party that this will occur (3) Breach which is either a means to an end for the inducing party or an end in itself (4) Inducement in the form of persuasion, encouragement or assistance (5) Absence of lawful justification. See J MacLeod, 'Offside Goals and Induced Breaches of Contract' (2009) 13 *Edinburgh Law Review* 278; J Thomson, *Delictual Liability* (Bloomsbury Professional 2014) 44-47.

¹² The provision equivalent to Article 5(3) of the Brussels I Regulation in the Recast Regulation is Article 7(2).

¹³ *AMT Futures Ltd v Marzillier* [2014] EWHC 1085 (Comm) (Poplewell J).

Court of Appeal held that the English court had no jurisdiction over the claim. Both the event giving rise to the damage and the damage itself occurred in Germany, not in England. That was the place of the 'harmful event' for the purposes of Article 5(3) of the Brussels I Regulation. The Court of Appeal relied on the leading CJEU authorities.¹⁴ and reached the conclusion that the German law firm procured the former clients to start proceedings in Germany in consequence of which AMT Futures Ltd suffered loss predominantly in Germany.¹⁵ The court rejected an argument that the harm suffered was the loss of the benefit promised to the claimant – that they would only be sued in England. The harm was the commencement of proceedings in Germany and the damage suffered was the cost and expense caused by the litigation, which was suffered in Germany.

The localization of economic loss in Germany is in line with the principle that the victim's domicile should be avoided when determining the location of the economic loss unless the direct and immediate loss occurred there.¹⁶ This principle of localizing economic loss was followed by the CJEU in its recent decision in *Harald Kolassa v Barclays Bank plc* where it ruled that the courts in the Member State of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of jurisdiction of those courts'.¹⁷ In *Kronhofer*,¹⁸ the ECJ stated that in determining the place of loss, the fact the ultimate adverse effects of the damaging behaviour were felt in Austria, where the claimant lived and where his assets were concentrated, could not be taken into account.¹⁹ The court gave two reasons for this. First, to hold otherwise would run counter to the objectives of the Brussels Convention, which aims at enabling the claimant to easily identify the court in which he may sue and the defendant to reasonably foresee in which court he may be sued.²⁰ Secondly, to take into account the location of the claimant's assets would give jurisdiction to the courts of the claimant's home, a solution that is generally not favoured by the Brussels Convention.²¹

¹⁴ Case 21/76 *Bier v Mines de Potasse d'Alsace* [1976] ECR 1735; Case C-220/88 *Dumez France and Tracoba v Hessische Landesbank (Helba)* [1990] ECR I-49; *Marinari v Lloyd's Bank plc* [1996] QB 217; *Reunion Europeene SA v Spliethoff Bevrachtungskantoor BV* [2000] QB 690; Case C-168/02 *Kronhofer* [2004] ECR I-6009.

¹⁵ *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143 (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed).

¹⁶ Lehmann (n 3) 537-540.

¹⁷ *Harald Kolassa v Barclays Bank plc* [2015] EUECJ C-375/13, [2015] WLR(D) 32, EU:C:2015:37, ECLI:EU:C:2015:37; *Universal Music International Holding BV v Michael Tétéreault Schilling and Others* (Case C-12/15) is a pending preliminary reference before the CJEU from the Hoge Raad der Nederlanden (Netherlands) on Article 5(3) of the Brussels I Regulation including the questions of how a court should establish whether an economic loss is an 'initial loss' or a 'consequential loss' and in which country does the economic loss occur.

¹⁸ Case C-168/02 *Kronhofer* [2004] ECR I-6009.

¹⁹ *Ibid* [21].

²⁰ *Ibid* [20].

²¹ *Ibid*.

That said, Christopher Clark LJ stated that the first instance judge's analysis is a powerful²² and attractive one as there is much to be said for the determination of what is in essence an ancillary claim in tort for inducement of breach of contract to be made in the court which the contract breaker agreed should have exclusive jurisdiction in respect of that contract, rather than in the courts of the country where the inducement and breach occurred.²³ However, the former consideration is not a determining factor in the allocation of jurisdiction under the Brussels I Regulation. It is submitted that the arguments favouring the pragmatic and remedy driven quest of localizing the economic loss in England militate against a reasoned and systemic response to the issue of multilateral jurisdictional allocation within the Brussels I Regulation regime.

Counsel for the German law firm also obtained permission to advance an additional ground of appeal, which was not argued before the judge at first instance.²⁴ Hugh Mercer QC, argued that the High Court could not exercise jurisdiction over the German law firm in relation to the subject matter of the action because any such claim necessarily and unavoidably offended against EU law principles. Insofar, as an injunction was claimed it would, involve the court in being asked to grant an order restraining a party from commencing proceedings before a properly constituted court of a Member State.²⁵ Insofar, as damages were sought it involved the court being asked to determine issues which breached the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust, and constituted a collateral attack on the assumption of jurisdiction by the German courts and of judgments or court settlements obtained by investors in Germany, when under the Regulation any such attack was permitted only in the court where the substantive proceedings had been commenced.

However, Christopher Clarke LJ observed *obiter* that the additional ground of appeal was not well founded.²⁶ In doing so he emphasized the divide between issues of jurisdiction which were a matter for the German courts and the private law rights and obligations of the parties in relation to the contractual choice of court agreement and ancillary claims in tort for inducing breach of the choice of court agreement. In support of his contention, Christopher Clarke LJ also endorsed and reiterated the recent landmark ruling of Longmore LJ in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)*,²⁷ that EU law was no obstacle to enforcing a cause of action

²² [2015] EWCA Civ 143 [49] (Christopher Clarke LJ).

²³ *Ibid* [57].

²⁴ *Ibid* [59].

²⁵ See Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; Case C 185/07 *West Tankers Inc v Allianz SpA (The Front Comor)* [2009] 1 AC 1138.

²⁶ [2015] EWCA Civ 143 [61] (Christopher Clarke LJ).

²⁷ [2014] EWCA Civ 1010 [15]-[22] (Longmore LJ).

for the award of damages for breach of an exclusive jurisdiction clause.²⁸ However, it should be noted that Longmore LJ's ruling on the compatibility of the damages remedy with EU law is itself not free from controversy. Moreover, it is highly unlikely that the CJEU would on a preliminary reference from the English courts adjudicate that a unilateral private law remedy arising from the contractual right not to be sued in a non-elected forum is compatible with the principle of mutual trust which animates the double convention modelled jurisdiction and judgments order of the Brussels I Regulation.²⁹ It is submitted that the relative effect of jurisdiction agreements as subsisting, independent and enforceable contractual obligations will necessarily distort the effectiveness of the international allocative or distributive function of such agreements within the multilateral Brussels I Regulation.³⁰ In this regard, the private law enforcement of jurisdiction agreements has been

²⁸ [2015] EWCA Civ 143 [62] (Christopher Clarke LJ).

²⁹ See M Illmer, 'Chapter 2 – Article 1' in A Dickinson and E Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 79; G Cuniberti and M Requejo, 'La sanction des clauses d'élection de for par l'octroi de dommages et intérêts', *ERA Forum* 2010-1 (SSRN, February 18, 2010) <<http://ssrn.com/abstract=1689417>> or <<http://dx.doi.org/10.2139/ssrn.1689417>> accessed 15 December 2014; Briggs (n 5) Chapter 8, 330-338; TC Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP 2013) Chapter 10, 220; R Fentiman, *International Commercial Litigation* (OUP 2010) 90; J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] *Lloyd's Maritime and Commercial Law Quarterly* 537, 547; CJS Knight, 'The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*' [2008] *Journal of Private International Law* 501, 509; E Peel, 'Introduction' in Pascal de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing 2007) 1, 15-17; R Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe' in *ibid* 43-45; A Nuyts, 'The Enforcement of Jurisdiction Agreements Further to *Gasser* and the Community Principle of Abuse of Right' in *ibid* 57; P Briza, 'Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the way out of the *Gasser-Owusu* Disillusion?' [2009] *Journal of Private International Law* 537, 548-554; cf Raphael (n 5) 294; F Blobel and P Späth, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30 *European Law Review* 528, 545-546, highlight the counterproductive effects of secondary remedies on the principle of mutual trust in the European Union; P Gottwald, 'art 23 EuGVVO' in T Rauscher, J Wenzel and P Wax (eds.), *Münchener Kommentar zur Zivilprozessordnung* (3rd Edition, Beck 2008) [79]; P Mankowski, 'Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?' (2009) *IPRax*, 23-35, argues that all claims that directly or indirectly sanction a claim not to sue in a *forum derogatum* militate against the ratio underpinning the inhibition of anti-suit injunctions in *Turner v Grovit* since a right not to sue abroad is not recognized under the Brussels I regime; For another analysis of the relevance of *Turner v Grovit* for the damages remedy, see, T Pfeiffer, 'Die Absicherung von Gerichtsstandsvereinbarungen durch Vereinbarung eines materiell-rechtlichen Kostenerstattungsanspruchs' in W Hau and H Schmidt (eds.), *Facetten des Verfahrensrecht Liber amicorum Walter F. Lindacher* (Heymanns 2007) 77, 81ff; A Dutta and C Heinze, 'Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht' *Zeitschrift für Europäisches Privatrecht* (ZEuP) (2005) 428, 458-461, suggest that damages in relation of the foreign court's substantive liability award are impermissible, but that damages in respect of litigation costs are more defensible, although still doubtful.

³⁰ Briggs (n 5) 526, refers to the national private law enforcement function of a jurisdiction agreement as 'the principle of relative effect'; See *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, on the separation of an enforceable *in personam* obligation from the *erga omnes* right to property abroad over which the English courts have no jurisdiction.; For the public international conception of private international law as a set of universal higher level secondary rules for the allocation of regulatory authority, see, Alex Mills, 'Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law' in H Muir Watt and DP Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Law and Global Governance Series, OUP 2014) 245.

pejoratively referred to as ‘the privatization of court access’ within a commercial dispute resolution focused English common law of conflict of laws.³¹

Marzillier v AMT Futures Ltd is the first case in the English courts concerning Article 5(3) of the Brussels I Regulation in relation to the tort of inducing breach of a contract. The Court of Appeal’s localization of the economic loss in Germany may end up inhibiting future claims for damages for inducing breach of an English choice of court agreement in the English courts. The decision may also be significant for the English courts when approaching the localization of economic loss under Article 7(2) of the Brussels I Regulation (Recast) more generally. It is submitted that the approach of the Court of Appeal in localizing economic loss is firmly rooted in European Union private international law principles and the CJEU’s leading authorities which favour neither the place where the country in which the event giving rise to the damage occurred nor the country or countries in which the indirect consequences of that event occur. This mature and systemic approach to the localization of loss seeks to ensure that the rights of the claimant and the defendant are evenly balanced without unduly prejudicing either. The immediate pragmatic value of localizing the economic loss in England would have sacrificed the certainty and predictability of the European Union private international law regime and accorded dubious jurisdictional precedence to the place where the indirect consequences of the economic loss occur.

The Court of Appeal decision may also have significant implications for the applicable law of the cause of action under the Rome II Regulation.³² Article 4(1) of the Rome II Regulation uses the same criterion of the ‘place where the damage occurred’ that is the second prong of the tort jurisdiction under Art 5(3) of the Brussels I Regulation³³ (now Art 7(2) Brussels I Regulation (Recast)) in order to determine the applicable law of the tort. As the parallel interpretation and coherence of the European instruments on private international law is an objective in its own right,³⁴ the applicable law for the tort of inducing breach of contract may also localize in Germany.³⁵ However, it may be

³¹ See H Muir Watt, ‘Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance’ (2010) 3 *European Review of Contract Law* 1, 29-32.

³² Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 (‘Rome II Regulation’).

³³ In Case 21/76 *Bier v Mines de Potasse d’Alsace* [1976] ECR 1735, the European Court of Justice has interpreted the predecessor provision of Article 5(3) of the Brussels I Regulation as giving the claimant the option to sue at the place of the event giving rise to the damage or the place where the damage occurred.

³⁴ See Recital 7 of the Rome II Regulation; See E Lein, ‘The New Rome I/Rome II/ Brussels I Synergies’ (2008) 10 *Yearbook of Private International Law* 177.

³⁵ Cf R Plender and M Wilderspin, *The European Private International Law of Obligations* (4th Edition, Sweet & Maxwell 2015) 551; R Plender and M Wilderspin, *The European Private International Law of Obligations* (3rd Edition, Sweet & Maxwell 2009) 532; I Bach, ‘Article 4’ in Peter Huber (ed.), *Rome II Regulation* (Sellier, Munich 2011) 86: In line with the decision regarding Article 5(3) of the Brussels I Regulation in [2014] EWHC 1085

argued that English law is the law governing the tort by virtue of the choice of law agreement being construed as extending its cover to cases of tortious liability under Article 14 of the Rome II Regulation.³⁶ Secondly, it may also be argued that the applicable law under Article 4(1) can be displaced in favour of the manifestly closer relationship based on a contract that is closely connected with the tort in question.³⁷ Arguably, the English dispute resolution agreement is closely connected with the tort of inducing breach of contract. However, as indicated by the use of the word ‘manifestly’, a high threshold of connection must be passed for Article 4(3) to apply.³⁸ As a result, the escape clause can only be resorted to in exceptional circumstances.

The UK Supreme Court has recently granted permission to appeal to AMT Futures Ltd (the ‘Appellant’).³⁹ From the foregoing, it is likely that the UK Supreme Court will prefer the principled stance of the CJEU case law in relation to the jurisdictional allocation of tort claims as opposed to a more pragmatic approach which would accord questionable jurisdictional precedence to the place where the indirect consequences of the economic loss occur. Moreover, if it is held that the English court does possess jurisdiction over the claim then a re-examination of the principal issue underlying Longmore LJ’s decision in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* may become necessary – whether the damages remedy is indeed compatible with the

(Comm) (Popplewell J), both Plender & Wilderspin and Bach argue against such a conclusion by favouring the law governing the contract.

³⁶ Reference was made to issues concerning the scope of Article 14 of the Rome II Regulation in the Court of Appeal decision in *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143, [12] (Christopher Clarke LJ); See Th M de Boer, ‘Party Autonomy and its Limitations in the Rome II Regulation’ (2007) 9 *Yearbook of Private International Law* 19, 27.

³⁷ Article 4(3) of the Rome II Regulation; For a discussion of the accessory connecting factor in Article 4(3) of the Rome II Regulation, see, M Czepelak, ‘Concurrent Causes of Action in the Rome I and II Regulations’ (2011) 7 *Journal of Private International Law* 393, 405-409; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 35) 68, and L Collins and others (eds.), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell 2006) 1568, argue that the better view is that a contractual obligation regulated by the Rome I Regulation does not preclude a concurrent cause of action in tort governed by the Rome II Regulation; cf A Briggs, ‘Choice of Choice of Law?’ [2003] *Lloyd’s Maritime and Commercial Law Quarterly* 12; For the English substantive private law position allowing claims for concurrent liability, see *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL) (Lord Goff of Chieveley); cf Lord Justice Jackson, ‘Concurrent Liability: Where Have Things Gone Wrong?’ (Lecture to the Technology and Construction Bar Association and the Society of Construction Law, 30th October 2014) examines the boundary between contract and tort in Roman, French, German and English common law and concludes that contracts should not, and generally do not, generate duties of care in tort which mirror the contractual obligations.

³⁸ Recitals 14 and 18 of the Rome II Regulation; See, generally, CSA Okoli and GO Arishe, ‘The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation’ (2012) 8 *Journal of Private International Law* 513, 536.

³⁹ *AMT Futures Ltd v Marzillier and others* Case No: UKSC 2015/0091 (SupremeCourt.uk, 28 July 2015) <<https://www.supremecourt.uk/docs/permission-to-appeal-2015-0607.pdf>> accessed 10 September 2015.

principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust. The possibility of a preliminary reference to the CJEU under Article 267 TFEU cannot also be foreclosed.⁴⁰

It should be observed that institutionalizing an action of damages for the tort of inducing breach of an English exclusive choice of court agreement will endorse the view that it was wrong for the other party to have sued in another EU Member State where the rules of the Brussels I Regulation allow for such a jurisdictional possibility. Moreover, law firms are regulated and owe duties both to their Member State's legal system and to their clients. Any attempt by the English courts to police the conduct of law firms in EU Member States and hold them liable in tort for giving their clients advice on jurisdictional matters is bound to provoke resentment.

⁴⁰ The English courts, in the litigation that followed the CJEU's *West Tankers* ruling, appear to be very reluctant to refer matters to the CJEU for a preliminary ruling. It seems that the negative perception of the CJEU's triumvirate of decisions in *West Tankers*, *Turner*, and *Gasser* may have a part to play in this reluctance to refer matters for a preliminary reference. Moreover, the English courts may wish to continue to rely on alternatives to anti-suit injunctions regardless of their potential incompatibility with the CJEU's interpretation of the Brussels I Regulation. See M Illmer, 'English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement' (Conflictolaws.net, 31 July 2014) <<http://conflictolaws.net/2014/english-court-of-appeal-confirms-damages-award-for-breach-of-a-jurisdiction-agreement/>> accessed 31 July 2014; A Dickinson, 'Once Bitten – Mutual Distrust in European Private International Law' (2015) 131 *Law Quarterly Review* 186, 190-191.