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United Kingdom

W.C. Beckett

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My subject is the United Kingdom response to what it sees as excessive claims to jurisdiction, and, in particular, the United Kingdom's legislative response—the Protection of Trading Interests Act 1980—what you would call a blocking statute. I am not only referring to what is loosely called "extraterritoriality" where one country seeks to apply its laws to activities outside its territory, but also to the application of one country's laws to activities which by their nature, or because of the transnational character of the legal entities involved, directly affect the interests of two or more countries. It will suffice perhaps to say that such jurisdiction is assumed by United States courts and authorities in circumstances in which other states, notably the United Kingdom (but by no means alone amongst other states), object on principles of international law, comity, and even by the assertion of treaty rights. This adds the spice as well as the frustration to transnational litigation: private disputes produce confrontation between nations. Sovereignty is at stake—but not only sovereignty to be protected for its own sake but because infringements of sovereignty arising out of the application of economic laws can fundamentally affect the trading interests of other states.

It is tempting to think that there would not be such confrontation between states if the subject matter of private litigation was treated the same by the laws of our respective states. In principle, the dispute about sovereignty would remain but the assumption of jurisdiction, rightly or wrongly, would not produce results that would be thought to affect adversely the interests of other states. The fact that the laws of our respective states are not the same or that our policies, though broadly alike, are not the same in detail of application is what produces the situations to be debated, if not exploited, in private transnational litigation.

*Solicitor, Department of Trade and Industry, London, England.

I. U.K. Laws

A word or two about United Kingdom laws. We have economic laws—what we call restrictive trade practices legislation, monopolies and mergers legislation and more recently our Competition Act of 1980. These are not, however, free standing statutes to be invoked by public authorities and private litigants alike. In the case of restrictive trade practice agreements these are required to be registered with the Director General of Fair Trading and he, given a few discretionary exemptions, is under a duty to refer them to a court—a special restrictive trade practices court which is a division of the High Court—where there is a presumption that they are against the public interest unless the parties can satisfy the court to the contrary on certain specified grounds. Condemnation by the court leads to orders prohibiting the parties from giving effect to the agreements and from making future agreements to the like effect. Private litigation might ensue from the operation of unregistered or void agreements if damage suffered as a result of their operation can be established.

Monopoly and merger control is in the hands of government which may refer qualifying monopoly situations or mergers for investigation by the Monopolies and Mergers Commission. If that body finds that they are against the public interest then government has a discretionary power to make orders remedying or preventing the adverse findings of the Commission. Likewise under the Competition Act anti-competitive practices might be referred by the Director General for investigation and report by the Commission with resulting order-making powers. Apart from these statutory provisions there is of course the common law whereby acts done in execution of agreements entered into by two or more are actionable in tort but only if done for the purpose of injuring the plaintiff, not merely for the purpose of protecting their own interests.[1]

II. U.S. Law Compared

To state English law briefly thus demonstrates how unlike it is to the laws of the United States. To an English lawyer looking at the Sherman Act one is struck by its brevity and its apparent clarity. What we cannot quite comprehend is how the United States courts have managed to turn it into such an instrument of torture. We are not used to trusting to our courts such extensive powers. That your courts make, as well as declare, the law has two consequences which significantly affect our attitudes to U.S. assumptions of jurisdiction. First, it is difficult to state at any given time what the law is.

1. There is a long line of English authorities on this point, but the most interesting recent statement is to be found in Lonrho Ltd v. Shell Petroleum Co. Ltd. (No.2) [1982] A.C. 173.

There appears to us to be no real certainty. Secondly, it adds to the difficulty of negotiating with U.S. authorities whose attitude is, and no doubt under your constitution probably has to be, that certain matters must be left to be determined by the courts.

I shall not dwell upon the differences in the application of our common policies. The pipeline controversy is over and as Mr. Davis Robinson said when addressing the International Division of the District of Columbia bar in June last year, "It was an exceptional case and therefore does not provide a good basis on which to analyze the broad range of legal and diplomatic issues arising in the area of conflicts of jurisdiction."[2] For us however, it remains a notorious example of what we most strongly object to and our hope too is that it should be regarded as an exceptional case not to be repeated.

The area of dispute concerning substantive jurisdiction is not the only one relevant to the response of other nations. Extensive claims to exercise personal jurisdiction over foreigners largely derives from and is sought to be justified by relation to the substantive jurisdiction claimed. It is to this area of personal jurisdiction that the foreign governmental responses may be most effectively directed. And in doing so the distinction is drawn between the traditional assistance and co-operation given to the U.S. courts and the courts of other nations in ordinary commercial litigation and in litigation arising from the enforcement of public economic laws like the Sherman Act.

There are two other matters which do affect the attitudes of other nations, particularly the United Kingdom. The first is that the exercise by the United States of jurisdiction in antitrust matters is penal, because no distinction is seen between proceedings brought by the state to seek a criminal penalty and those brought by private individuals to enforce a monetary penalty. The second point relates to some aspects of the U.S. judicial system where it seems that "the plaintiff holds all the cards" as Lord Denning put it in the *Smith v. Kline* case[3] when in his picturesque language he referred to the contingent fees system, to trial by jury and to your liberal pre-trial discovery procedures. At this point I would remind you that, as in the case of the English language, the similarity between the legal traditions and procedures in the United States and the United Kingdom conceal many fundamental differences, not the least of which is that in the United States the process of litigation seems to be regarded as a public good whereas in the United Kingdom we have traditionally seen it as one to be controlled and where disputes should if possible be settled amicably rather than in the courts.

2. Remarks of Davis R. Robinson, Legal Adviser, Department of State, before the International Division of the District of Columbia Bar, June 7, 1983.

3. Smith, Kline & French v. Block [1982] 2 All E.R. 72.

III. Blocking Statutes/Protective Legislation

Blocking statutes as you would call them—in the United Kingdom we prefer to say protective legislation—do not, of course, solve the underlying dispute. They might be said to make matters worse in the sense that confrontation becomes public and complete. But in the United Kingdom we see our legislation as a legitimate and pragmatic response to a situation which has been developing over many years and which has recently become more acute. I note the very recent judgment of the Court of Appeals for the District of Columbia[4] where the majority judgment in impeccable judicial language referred to the actions of the United Kingdom government under its statute as "arrogant,"[5] "scarcely meeting the standard of Kant"[6] and as "intent upon frustrating the antitrust policies of the elective branches of the American government."[7] For the United Kingdom, however, our blocking legislation emphasizes the point that insofar as the application or enforcement of foreign laws requires the active assistance or passive acquiescence of the United Kingdom, regard must be had to the trading interests of the United Kingdom. Hence the Protection of Trading Interests Act of 1980, which superseded the earlier and more limited Shipping Contracts and Commercial Documents Act of 1964. Sections 1 and 2 of the 1980 Act deal with the response to the assumption of excessive substantive jurisdiction and personal jurisdiction claims. These sections have been used recently in connection with two notable disputes: the pipeline and *Laker* cases.

A. Protection of Trading Interests Act, 1980

Section 1 of the Protection of Trading Interests Act of 1980 only applies to such measures made by direct order by the Secretary of State. To make such an order—which, incidentally, is a piece of subordinate legislation subject to annulment by resolution of either House of Parliament—it has to appear to the Secretary of State that the measures in question: (a) have been or are proposed to be taken by or under the laws of any overseas country for regulating or controlling international trade; and (b) that insofar as they apply or would apply to things done or to be done outside the territorial jurisdiction of the overseas country by persons carrying on business in the United Kingdom, are damaging to the trading interests of the United Kingdom.

4. Laker Airways Ltd. v. Sabena, Belgian World Airlines and KLM, Royal Dutch Airlines, 731 F.2d 909 (1984).
5. *Id.* at 940-Ed.
6. 731 F.2d 909, 941-ED.
7. 731 F.2d 909, 940-ED.

B. Pipeline Case

In the pipeline case an order was made directing the section to apply to parts of the export administration regulations made under the United States Export Administration Act insofar as they concerned re-exports or exports from the United Kingdom.[8] No immediate consequences flowed from the making of the order, but having made such an order the Secretary of State was then empowered to do two further things. First, he could make a further order requiring persons carrying on business in the United Kingdom to notify him of any requirement or prohibition imposed or threatened to be imposed pursuant to the export administration measures. Secondly, the Secretary of State could give directions to persons carrying on business in the United Kingdom prohibiting compliance with any requirements or prohibitions. In the pipeline case no order was made requiring notifications but after an interval of several weeks, diplomatic efforts to end the disputes having by then not succeeded, directions were given to a total of six United Kingdom companies prohibiting compliance with any requirement or prohibition of the U.S. export regulations, insofar as those regulations purported to affect the exportation from the United Kingdom of goods intended for use in connection with the Trans-Siberian pipeline project.

The effect of the directions was as a matter of English law to free the United Kingdom companies from the shackles of the U.S. prohibition of re-exports to the Soviet Union. What the United Kingdom government was doing was to prohibit compliance with that prohibition. The directions did not produce a mandatory requirement on the United Kingdom companies to export or re-export to the USSR. They were left to make a free choice but insofar as any failure to complete performance of their contracts to export from the United Kingdom had been subject to action in the English courts the U.S. prohibition could not have been set up as a defense.

C. *Laker* Case

That section has been used again very recently in the *Laker* case,[9] where the act has been applied to both the Sherman and the Clayton Act provisions. Following from that, particular directions have been given to persons in the United Kingdom under Section 2 from complying with any requirements of the U.S. authorities, both courts, the Grand Jury and the Department of Justice, from producing commercial information and also from producing documents in the United Kingdom.

8. *See generally* Boyd & Whisman, *The U.S. Law of Export Controls,* 19 Int'l Law. 483 (1984) - ED.

9. *See supra* note 4 - ED.

Finally, I would like to emphasize a general point which I think is important to understand. These sections of the 1980 Act have no automatic application. They are discretionary powers which will by no means be used in every case in which they could be used. Whether or not they are used in any particular case, will depend upon such factors as whether in the view of the United Kingdom, the subject matter of investigation is within the legitimate jurisdiction of the foreign country, whether the United Kingdom's significant interests are involved and whether a genuine need for documents is demonstrated, and whether the scope of compulsory discovery is consistent with practice in the United Kingdom—the latter point, of course, relates to the United Kingdom attitude to fishing discoveries. From that, it will be perceived that the United Kingdom legislation is not what Mr. Davis Robinson has called a "knee-jerk response." It is in no way doctrinaire.