## How Not to be Sued in the US Courts

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In general, where people get involved in civil litigation, they prefer that this should take place in their home jurisdiction rather than abroad. It is usually more expensive and inconvenient to sue or be sued in a foreign jurisdiction. Foreign litigation will require foreign as well as home lawyers to be instructed. The approach of the judge or jury may be conditioned by national, cultural and sometimes racial, sexual and religious prejudices. Where there is a foreign language involved, as well as a foreign court, there will often be major communication problems.

### US Civil Litigation

The court system in the United States of America presents special problems for foreign litigants in general and insurers in particular. These were discussed in the last issue of this journal ("Fair Play in Claims Handling: the US and UK Experience" – BILA Journal issue 112 page 20). In brief terms the following aspects of the US system are relevant:

- civil cases against insurers are often tried before juries at the plaintiff's request, as either party has the right to demand such a trial;
- damages awards are often higher than they are in Europe;
- penal damages are sometimes awarded;
- speculative claims may be taken on by plaintiffs' lawyers, who most often work on contingency (being paid by sharing in the proceeds of recovery, if any);
- "costs" are not awarded against the unsuccessful party on the same basis as in, for instance, the UK;
- documentary and oral pre-action discovery is often onerous and expensive;
- substantial damages may be awarded against insurers who are considered to have defended or adjusted a claim unreasonably.

When European insurers cover US risks these factors are taken into account in the underwriting process. Sometimes, however, proceedings may be brought in the US courts unexpectedly, either against the insurer or against a party for whom the insurer has provided liability cover.

**Forum Non Conveniens**

This seems to happen particularly often when a European insurer provides insurance cover to a group of companies, one or more of which may be based in or operating in the USA.

The judgment of Mr. Justice Langley in *Royal & Sun Alliance Insurance plc v Retail Brand Alliance* ([2005] Lloyd's Rep IR 110) is an example. RSA insured Marks & Spencer and its associated companies under a master policy. One of those companies was a US corporation based in New York. Its successor in interest was Retail Brand Alliance. Retail Brand also had cover under a local policy with a US insurer. The cover under the master policy only applied to the extent that the local policy did not.

When a claim arose as a result of a fire in New York, RSA sued in England, seeking a declaration that it was not liable on the master policy. Retail Brand sued on the master and local policy in New York. It also applied for a stay of the English proceedings on the grounds that New York was the more convenient forum for resolving the dispute.

Mr Justice Langley agreed with Retail Brand and granted its application. Although English law expressly governed the policy, he considered that points of law were unlikely to arise at the trial and that it was important that the disputes under both policies should be dealt with together. In arriving at this conclusion he was applying what is referred to as the doctrine of *"forum non conveniens"*.

**Jurisdiction and Arbitration Clauses**

This conclusion would not have been open to the judge if the cover had contained a clause conferring exclusive jurisdiction on the English courts. In that event, in addition to retaining jurisdiction, he might have granted an injunction against Retail Brand restraining it from pursuing its claims in the US courts.

The US courts would not have been bound to decline jurisdiction if there had been a UK exclusive jurisdiction clause. Usually, however, US courts give effect to foreign jurisdiction clauses, unless they consider them to have been "procured by fraud". So, for instance, the Society of Lloyd's was ultimately successful in resisting jurisdiction in most of the claims brought against it in the US Federal Courts in the 1990s by US underwriting names. The allegation that the jurisdiction clauses in the names' contracts with Lloyd's had been procured by fraud was rejected by a number of US Federal Courts of Appeal (see for instance *Richards v. Lloyd's of London*, 135 F.3d 1289, 1291 [9th Cir.], cert. denied (1998)).

If the cover in the RSA case had contained a London arbitration clause, the US and UK courts would also normally have respected it, since both the UK and the USA are parties to the New York Convention on the Recognition of Arbitration Awards.

Even a New York arbitration clause might have been better than nothing, since it would have avoided trial by jury (US juries are popularly supposed, perhaps not always fairly, to have a "deep pocket" mentality). Although the US Supreme Court (*Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52 (1995)) has held that arbitrators in principle have the power to award penal damages, this can be excluded by contract.

**Where the Insured or Third Party is Based in the UK**

Sometimes an insurer providing cover to a corporate group may be threatened with proceedings in the US courts by a UK (rather than a US) member of the corporate group to which it has provided cover. Such a claim might rely on the "long arm" jurisdiction of a US State or Federal court. An example of this is *American Motorists Insurance Co v Cellstar Corporation and another* ([2003] All ER (D) 26), (discussed in detail at BILA Journal 110 page 25 *"The Member State of the Risk: Legal and Regulatory Significance"*).

Alternatively, a claim may be notified by US lawyers acting on behalf a UK third party against an insured, where there is a clear intention to sue in the US courts.

In either of those events the insurer may, on its own behalf or in pursuance of subrogation rights, issue pre-emptive proceedings in the English court. The proceedings might seek a declaration that it, or its insured, is not liable and an injunction restraining the US court proceedings.

Until March 2005 the English courts considered that the doctrine of *forum non conveniens* applied in such a case, giving them the power to decline to entertain the English action where the US court was considered to be the more appropriate forum.

**The Brussels Convention and Regulation**

The European Court of Justice, however, has now in *Owusu v N B Jackson* (Case C-281/02, 1 March 2005), come to an opposite conclusion.

The European Court judgment arises from the Brussels Convention. This Convention used to set out the rules for determining which courts within the European Union had jurisdiction over which disputes. The Convention also provided for the enforcement in one contracting state of judgments obtained in

another contracting state. The Convention was incorporated into English law by the Civil Jurisdiction and Judgments Act 1982. It has since been replaced by a slightly different set of rules contained in the EU Brussels Regulation (which is directly effective in the law of EU member states). For present purposes however, the Convention and the Regulation are in similar terms.

A further Convention, the Lugano Convention, applies the Brussels rules (in a slightly modified form) to those member states of the European Free Trade Association who have not acceded to membership of the European Union.

Article 2 of the Brussels Convention provides:

> *"Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state".*

The effect of this, according to the European Court in Owusu, was that when proceedings were brought in England against a defendant domiciled in England, the English court was bound to accept jurisdiction, subject to the other provisions of the Convention. *Forum non conveniens* could not, therefore, be invoked. Jurisdiction might have been declined under, for instance, Article 21 if an earlier action had been started between the parties in the courts of another contracting state. This principle would not, however, have applied if the earlier action had been brought in a non-contracting state.

The court was also asked to rule whether the doctrine of *forum non conveniens* was ruled out in all circumstances where jurisdiction was assumed under Article 2. Would the same rule apply, for instance, to a dispute concerning a contract containing a clause conferring jurisdiction on the courts of a non-contracting state? The court declined to express a view on this point.

**Domicile**

Under UK law, (Section 41 of the Civil Jurisdiction and Judgments Act 1982), an individual is domiciled in the United Kingdom if:

- he is resident in the United Kingdom; and
- the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.

Under Article 60 of the Brussels Regulation a company is treated as domiciled at the place where it has its statutory seat (usually its registered office), central administration, or principal place of business.

**Effect of Owusu Decision**

At first impression the Owusu judgment makes things easier for an insurer who brings proceedings against a party with a UK domicile, with a view to forestalling US court proceedings. Although, however, the English court may be bound to accept jurisdiction it would not be bound to grant an anti-suit injunction restraining the US proceedings. It might, perhaps, be persuaded to do so where it was satisfied that, quite apart from the application of Article 2, proceedings in the USA would be inappropriate. The European Court, in *Turner v Grovit*, Case C-159/02, has ruled that anti-suit injunctions may not be granted by the courts of one contracting state to restrain court proceedings in another contracting state. This does not, however, seem to affect injunctions in respect of proceedings in non-contracting states.

A US court would, perhaps, take little notice of a decision by an English court to assume jurisdiction on the basis of a mandatory rule in a convention to which the USA is not a party, and which provides for no reciprocity towards the courts of non-contracting states. Its approach to UK anti-suit injunctions might also be influenced by the fact that the *Owusu* ruling might sometimes require an English court to decline to give effect to a US anti-suit injunction.

So the outcome of a dispute involving proceedings in multiple jurisdictions (and including at least one non-European court) might depend on a number of factors such as:

- which set of proceedings was concluded earlier;
- whether the defendant to the English proceedings had the resources to fight on two fronts;
- whether the insurer could afford to ignore the US proceedings; and
- where the assets of the parties were located.

Is Article 2 to be applied even where there is a clause conferring jurisdiction on the courts of a non-contracting state? Surely not, otherwise why should the courts of non-contracting states give effect to clauses conferring jurisdiction on European courts? Yet on the basis of the reasoning in the judgment and in the opinion of the Court's Advocate-General, Philipe Léger, it is difficult to see how that view can be justified.

**In the Longer Term**

In the longer term negotiations are taking place, through the Hague Conference on Private International Law, with a view to a worldwide convention on civil

jurisdiction and the mutual enforcement of judgments. This initiative is, however, making very slow progress and is unlikely to bear fruit for many years. Even if a convention is ultimately agreed, the USA may decline to ratify.

The latest draft of the world wide convention:

- contains a clause equivalent to Article 2 of the Brussels Convention;
- gives effect to exclusive jurisdiction clauses; and
- provides (in Article 22 of the draft) for a limited application of the doctrine of *forum non conveniens*.

If and when such a convention were to come into force significant amendments would be necessary to the Brussels Regulation to avoid conflicts between the two instruments.

In the meantime it remains to be seen how the Owusu judgment affects insurers wanting to avoid being sued in the USA.

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*The author is grateful to Richard Longaker, US litigation and defence attorney, for his help in the preparation of this article.*