

### Regulating jurisdiction: English courts discretion to stay proceedings curtailed

It is unlikely that a party from the United States served with proceedings issued in the English High Court would have European law in the forefront of its mind when considering whether it will be subject to the jurisdiction of the English court. However, a recent decision of the European Court of Justice ("ECJ") *Owusu v Jackson and Others* Case C-128/01 has deprived the English court from exercising its discretion in regulating jurisdiction in international disputes. A US defendant who is party to English proceedings also involving an English defendant will not be able to rely on traditional *forum non conveniens* principles in order to have those proceedings stayed in favour of the US even if it is the natural or appropriate forum.

#### Forum non-conveniens and the Brussels Regulation

The ability of the English court to exercise its discretion by staying proceedings in favour of a more appropriate forum has, for a number of years, been an important tool used by the court to regulate international disputes.

According to the doctrine of *forum non conveniens*, the English court may decline jurisdiction on the ground that there is a court in another jurisdiction which is clearly more suitable for the trial of the action, in the interests of all the parties and the justice of the case. The doctrine is a common law concept and it has to a greater or lesser extent, been applied in several common law jurisdictions. In the US the doctrine exists in a slightly different form.

England's membership of the European Union means that the common law no longer exclusively decides issues of jurisdiction. In appropriate cases, the English court is required to apply the rules set out in the Brussels Regulation No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters ("Brussels Regulation").<sup>1</sup> A principal objective of the Brussels Regulation is to secure the reciprocal enforcement of judgments in member states.<sup>2</sup> This is achieved by ensuring that member states adopt common rules (through the Brussels Regulation) as to when their national courts will exercise jurisdiction to hear a dispute.

The starting point under the Brussels Regulation is that a defendant is sued in the place of his domicile. Article 2(1) provides:

*"Subject to the provisions of this Regulation, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State..."*

It is only by way of derogation from that general principle that the Brussels Regulation provides for cases in which the defendant may or must (depending on the case) be sued in the courts of another member state.<sup>3</sup> For example, if the proceedings have their principal object rights of ownership of property in a member state: exclusive jurisdiction is vested in the state where the land is situated.<sup>4</sup>

The Brussels Regulation (and the ECJ's interpretation of it) has impacted significantly on the common law rules in relation to jurisdiction by favouring certainty over the flexibility which was built into the common law rules.<sup>5</sup> The *Owusu*<sup>6</sup> decision has continued that trend by curtailing the ability of the English court to invoke the doctrine of *forum non conveniens*. Although the decision is in the context of the Brussels Regulation it has the potential to impact on foreign companies and individuals from non-member states (such as the US).

The remainder of this article sets out the ECJ's decision in *Owusu* before commenting on the impact that it may have on defendants from the US who are involved in English proceedings.

#### Facts

Mr. Owusu, the claimant, a British national domiciled in the United Kingdom, suffered serious injuries in Mammee Bay, Jamaica, when he struck his head when swimming against a submerged sandbank. Mr. Jackson, the first defendant, also domiciled in the United Kingdom, had let the holiday villa to Mr. Owusu. Mr. Owusu sued Mr. Jackson in the English courts for breach of an implied term that the private beach where the accident occurred would be reasonably safe or free from hidden dangers.

Mr. Owusu also sued several Jamaican companies in the same action, including:

- the third defendant, Mammee Bay, which provided the claimant with free access to the beach. He brought his action against them in tort as owners and occupiers of the beach; and



- the fourth defendant, The Enchanted Garden Resorts & Spa Ltd, which operated a holiday complex close to Mammee Bay, and whose guests were also licensed to use the beach; and
- the sixth defendant, Town & Country Resorts Ltd which operated a large hotel adjoining the beach, and which had a licence to use the beach, subject to the condition that it was responsible for its management, upkeep and control.

The fourth and sixth defendants were associated Jamaican companies and Mr. Owusu's claim against them was also in tort.

During the course of the proceedings, it came to the attention of Mr. Owusu's advisors that another English holiday maker, Ms. Rickham, had had a similar accident two years earlier. The claim against the Jamaican defendants included allegations that: (a) they failed to warn swimmers of the hazard; and (b) they failed to heed the previous injury to Ms. Rickham.

In Ms. Rickham's case there was no English domiciled defendant (ie no equivalent to Mr. Jackson) and she therefore pursued an action for damages in the courts of Jamaica.

### The English court's reference to the ECJ

Mr. Owusu commenced his claim in the English High Court in October 2000. Mr. Jackson and the Jamaican defendants contested the jurisdiction of the English court on the grounds that: (a) all the defendants (save for Mr. Jackson) were domiciled in Jamaica; (b) the claims in contract and tort were to be governed by Jamaican law; (c) the witnesses (save for Mr. Owusu) were all in Jamaica; (d) investigation of the beach conditions was required which was obviously to take place in Jamaica.

The judge at first instance agreed with the defendants that the more appropriate forum for the resolution of the litigation was Jamaica.<sup>7</sup> However, he held that he did not have the power to stay proceedings in relation to Mr. Jackson (the English defendant) because Article 2 of the Brussels Regulation was mandatory which meant that it was open to Mr. Owusu to sue Mr. Jackson in his place of domicile. It followed that because the judge could not stay the action against Mr. Jackson, if he stayed the action against the Jamaican defendants courts in two jurisdictions would end up trying the same factual issues upon the same or similar evidence, with the possibility that they might reach different conclusions. He therefore refused to stay the proceedings in relation to the Jamaican defendants in favour of the Jamaican courts.

The judge referred to the decision of the ECJ in *UGIC v Group Josi Reinsurance Co SA* (Case No C-412/98) which held that whether the jurisdictional rules in the Brussels Regulation applied depended upon whether the defendant had its domicile in a contracting state, and that the rules applied to a dispute between a defendant domiciled in a contracting state and a claimant domiciled in a non-contracting state. He

concluded that on the basis of the ECJ ruling in *Group Josi*, the decision of the English Court of Appeal in *Re Harrods (Buenos Aires) Ltd* [1992] AC 72 was bad law. The Court of Appeal in *Re Harrods* held that if a non-member state is the natural forum, the Brussels Regulation<sup>8</sup> did not touch the jurisdictional issues which arose between member and non-member states.

The defendants appealed. The Court of Appeal in *Owusu* recognised that there was no decided ECJ case on whether the English court could stay proceedings in favour of a non-member state where the defendant was domiciled in a member state. The court therefore referred the matter to the ECJ for a ruling. However, in the course of their reasons for referring the matter to the ECJ, the Court of Appeal counselled the ECJ about the difficulties that would be created if the *forum non conveniens* doctrine was curtailed. Lord Justice Brooke extended a desire for the ECJ to take into account:

*"... some of the practical difficulties which the courts of a member state which applies forum conveniens principles may encounter in their normally harmonious relationships with the courts of non-member states in cases where no other member state is involved if [Mr. Owusu's] strict interpretation of Article 2 (1) of the Brussels [Regulation] is correct. In particular, it may possibly lead to a situation on which the courts of a member state and the courts of a non member state may try the same lis [ie action] on the same or similar evidence and reach conflicting conclusions."*

### The ECJ's judgment

The ECJ held that Article 2 was not subject to a condition that there should be a legal relationship involving a number of member states, although for the Brussels Regulation to apply, the existence of an international element was required (as it did in this case).

The ECJ then went on to hold that the *forum non conveniens* doctrine was incompatible with the Brussels Regulation for the following reasons:

- Article 2 is mandatory in nature and can only be derogated from in ways expressly provided for by the Brussels Regulation.
- No exception on the basis of *forum non conveniens* was provided for in the Brussels Regulation, even though the doctrine was discussed when Denmark, Ireland and the United Kingdom acceded.
- Legal certainty would not be fully guaranteed and the predictability of the rules of jurisdiction would be undermined.
- A defendant is generally better placed to conduct his defence before the courts of his domicile and would be unable reasonably to foresee before which other court he might be sued.
- Forum non conveniens is recognised in only a limited number of member states, so would affect the uniform application of the rules of jurisdiction in member states.

The defendants emphasised the negative consequences which would result in practice from the exclusion of the doctrine of *forum non conveniens*. These consequences included:

- The expense of English proceedings.
- The difficulties in recovering costs if Mr. Owusu's action was dismissed.
- The logistical difficulties resulting from geographical distance.
- The need to assess the merits of the case according to Jamaican standards.
- The enforceability in Jamaica of a default judgment and the impossibility of enforcing cross claims against the other defendants.

The court considered that "genuine as these difficulties may be" they were not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Regulation.

The result of the ECJ's ruling was that Mr. Owusu was entitled to bring the proceedings in England, even though England had no connection with the accident and Jamaica was the more suitable forum for the trial.

The court declined to answer a second question referred to it, namely whether the application of *forum non conveniens* is ruled out in all circumstances. This leaves open the possibility of the doctrine of *forum non conveniens* still having application in certain circumstances. In particular, where the parties have expressly chosen the jurisdiction of a non-member state, where other proceedings are or have been pending in the other state, or the subject matter of the dispute is such that a member state would, in those circumstances, have taken exclusive jurisdiction.

### Comment

The *Owusu* decision will have a significant impact on the determination of jurisdiction questions where the claimant sues both English domiciled defendants and foreign domiciled defendants from a non-member state (such as the US) in the same proceedings. It appears to lead to the result that where a number of defendants are sued, but only one of them is domiciled in England, the English court will not stay proceedings even if the natural forum is in a non-member state, or even if the principal defendant (as in *Owusu* itself) is domiciled in a non-member state.

The decision is unpopular with common lawyers who are accustomed to seeing the courts applying the flexible doctrine of *forum non conveniens*, which allowed for proper considerations of the interests of claimants and defendants and provided the English court with a means by which to prevent forum shopping. The *Owusu* decision may result in claimants who wish to sue in England canvassing the factual matrix of their dispute to look for an English defendant who could be a proper party to the proceedings. If one can be found, the foreign defendant may find himself "dragged" into proceedings in England, even where neither he, nor the

subject matter of the proceedings, have any material connection to England.

### footnotes

1. *The English court may be required to take account of the Brussels Convention and Lugano Convention instead of the Brussels Regulation in appropriate cases.*
2. *See for example paragraph 6 of the preamble to Brussels Regulation.*
3. *see Reunion Europeene [1998] ECR I-6511.*
4. *See Article 22(1) and Hacker v Euro-Relais Case C-280/90; Ashurst v Pollard [2001] Ch 595.*
5. *In Turner v Grovit Case C-159/02, the ECJ ruled that anti-suit injunctions were incompatible with the Brussels Convention. It is therefore not possible to obtain an injunction to restrain proceedings before one member state commencing or continuing proceedings before a court of another member state even where it can be shown that a party is acting in bad faith in order to impede proceedings already pending. In Gasser v Misak C-116/02 the ECJ ruled that a court second seised must stay in favour of the court first seised pending determining its jurisdiction, even if the parties have granted the court second seised exclusive jurisdiction.*
6. *The Owusu decision concerned the Brussels Convention, the predecessor to the Brussels Regulation. There is no difference between Article 2 of the Convention and the Regulation. The remainder of this article makes reference only to the Brussels Regulation.*
7. *See summary of Judge Bentley QC's decision at paragraphs 19-21 of the Court of Appeal judgment [2002] EWCA 877.*
8. *It was in fact a case on the predecessor to the Brussels Regulation – the Brussels Convention*

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# Herbert Smith

## Amsterdam

Stibbe  
Stibbetoren  
Strawinskylaan 2001  
PO Box 75640  
1070 AP Amsterdam  
T +31 20 546 06 06  
F +31 20 546 01 23

## Bangkok

Herbert Smith (Thailand) Ltd  
1403 Abdulrahim Place  
990 Rama IV Road  
Bangkok 10500  
T +66 2657 3888  
F +66 2636 0657

## Beijing

Herbert Smith LLP  
Units 1410-1415  
China World Tower  
1 Jianguomenwai Ave  
Beijing 100004  
T +86 10 6505 6512  
F +86 10 6505 6516

## Berlin

Gleiss Lutz  
Friedrichstrasse 71  
D-10117 Berlin  
T +49 30 2094-6400  
F +49 30 2094-6444

## Brussels

Herbert Smith LLP  
15 Rue Guimard  
1040 Brussels  
T +32 2 511 7450  
F +32 2 511 7772

Gleiss Lutz  
Rue Guimard 7  
B-1040 Brussels  
T +32 2 551-1020  
F +32 2 5121568

Stibbe  
Rue Henri Wafelaertsstraat 47-51  
1060 Brussels  
T +32 2 533 52 11  
F +32 2 533 52 12

## Budapest

Gleiss Lutz  
Cooperation partner:  
Bán, S. Szabó & Partners  
József nádor tér 5-6  
HU-1051 Budapest  
T +36 1 266-3522  
F +36 1 266-3523

## Frankfurt

Gleiss Lutz  
Mendelssohnstrasse 87  
D-60325 Frankfurt/Main  
T +49 69 95514-0  
F +49 69 95514-198

## Hong Kong

Herbert Smith  
23rd Floor Gloucester Tower  
11 Pedder Street  
Hong Kong  
T +852 2845 6639  
F +852 2845 9099

## Jakarta

Associated firm  
Hiswara Bunjamin and Tandjung  
23rd Floor, Gedung BRI II  
Jl. Jend. Sudirman Kav. 44-46  
Jakarta, 10210  
T +62 21 574 4010  
F +62 21 574 4670

## London

Herbert Smith LLP  
Exchange House  
Primrose Street  
London EC2A 2HS  
T +44 20 7374 8000  
F +44 20 7374 0888

Stibbe  
Exchange House  
Primrose Street  
London EC2A 2ST  
T +44 20 7466 6300  
F +44 20 7466 6311

## Moscow

Herbert Smith CIS LLP  
4th Floor  
Korobeinikov Pereulok 24  
Moscow 119034  
T +7 095 363 6500  
F +7 095 363 6501

## Munich

Gleiss Lutz  
Prinzregentenstrasse 50  
D-80538 Munich  
T +49 89 21667-0  
F +49 89 21667-111

## New York

Stibbe  
350 Park Avenue, 28th Floor  
New York, NY 10022  
T +1 212 972 4000  
F +1 212 972 4929

## Paris

Herbert Smith LLP  
20 Rue Quentin Bauchart  
75008 Paris  
T +33 1 53 57 70 70  
F +33 1 53 57 70 80

## Prague

Gleiss Lutz  
Jugoslávská 29  
CZ-12000 Prague 2  
T +420 2 24007 500  
F +420 2 24007 555

## Shanghai

Herbert Smith LLP  
38th Floor, Bund Center  
222 Yan An Road East  
Shanghai 200002  
T +86 21 6335 1144  
F +86 21 6335 1145

## Singapore

Herbert Smith LLP  
#09-02 Caltex House  
30 Raffles Place  
Singapore 048622  
T +65 6868 8000  
F +65 6868 8001

## Stuttgart

Gleiss Lutz  
Maybachstrasse 6  
D-70469 Stuttgart  
T +49 711 8997-0  
F +49 711 855096

## Tokyo

Herbert Smith  
Toranomon 2-Chome Tower  
2-3-17 Toranomon  
Minato-ku  
Tokyo 105-0001  
T +81 3 3508 4508  
F +81 3 3508 4509

## Warsaw

Gleiss Lutz  
ul. Sienna 39  
PL-00121 Warsaw  
T +48 22 52655-00  
F +48 22 52655-55

[www.herbertsmith.com](http://www.herbertsmith.com)  
[www.gleisslutz.com](http://www.gleisslutz.com)  
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