

Transatlantic litigation briefing

July 2006

English court can stay proceedings in favour of a US court where there is a jurisdiction clause: *Konkola Copper Mines Plc v Coromin Ltd*

In the last edition of the Transatlantic litigation briefing we reported on the case of *Owusu v Jackson* C-128/01 (“*Owusu*”) in the European Court of Justice (“ECJ”). The effect of *Owusu* is that the English court is unable to exercise any discretion to stay proceedings against an English domiciled defendant in favour of, for example, a US court, even if it is the more appropriate forum. This is because the ECJ gives primacy to the domicile rule which is contained in Article 2 of the Brussels Regulation 44/2001 (“*2001 Regulation*”)¹ over the uncertainty and alleged unpredictability of the English doctrine of *forum non-conveniens*.

Following *Owusu* questions have been raised as to the extent to which *Owusu* will apply to limit the English court's discretion in other cases, including where the dispute involves an exclusive jurisdiction clause in favour of a non-Member State, such as a US state.

In *Konkola Copper Mines Plc v Coromin Ltd* [2005] EWCA 898 (“*Konkola*”), Colman J considered a claim by a Bermuda based claimant insurer who had entered into a re-insurance agreement which contained a jurisdiction clause in favour of the Zambian court (ie, a court in a non-member state) with an English domiciled defendant re-insurer. Two questions which Colman J had to decide were:

- whether the English court had a discretion to stay proceedings in favour of the Zambian court; and
- if so, whether in the circumstances of this case it should exercise that discretion.

As to the first issue, the claimant insurer argued that the English court did not have the power to stay proceedings because (a) the application of *Owusu* gives primacy to the domicile rule and (b) Article 23 of the 2001 Regulation (prorogation of jurisdiction), which superimposes party autonomy on the domicile rule, has no application to the courts of non-member states.

In the course of his reasoning, Colman J noted at paragraph 24:

“[The claimant’s] challenge to this application on the grounds of want of jurisdiction raises a point of far reaching importance in relation to the work of the Commercial Court. If that submission is correct the effect will be to remove from this court a frequently-used power to protect the enforcement of jurisdiction agreements in commercial contracts either by staying proceedings in this court in favour of proceedings in [non-Member state courts] or by granting anti-suit injunctions to restrain proceedings in [non-Member State courts] where there is a binding exclusive jurisdiction clause”.

After an extensive review of the authorities, Colman J determined that *Owusu* did not apply to prevent him from staying proceedings to give effect to the exclusive jurisdiction clause. He determined that Article 23 applied by “reflexive effect”:

“...[Article 23] could therefore be said...[to] reflect an underlying policy to give effect at least to jurisdiction agreements relating to courts within Member States in preference to the domicile rule. The question therefore arises why Article 2 should not also yield to an analogous rule in relation to jurisdiction clauses which do **not** relate to the courts of member states.”

As to the second issue, Colman J considered that due to the complex procedural and factual matrix of the case, interests of justice lay in not granting a stay. This exercise of discretion (but not Colman J's interpretation of *Owusu*) was reviewed by the Court of Appeal which dismissed the re-insurer's appeal: see [2006] 1 Lloyd's Rep 410.

Where a contract therefore contains a jurisdiction clause in favour of a US state and there are proceedings in England against an English domiciled defendant, the English court retains the discretion to stay the English proceedings in favour of that court.

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The content of this briefing does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

footnotes

1. Article 2 provides: “Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality be sued in the courts of that Member State.”

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