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CROSS-BORDER LITIGATION

By Andrew Legg and Daniel Hart.

Jurisdictional certainty: *Owusu v Jackson* - four years on and more cracks appearing

In globalised times, particularly during an economic crisis, jurisdictional issues are increasingly common and important in the commercial world. The forum in which a dispute is heard can significantly change the outcome, for example by affecting procedural and evidential rules, the governing law and available remedies. It can also influence worldwide enforceability and affect the cost and timescale of proceedings. The practical difficulties encountered, by reason of the location of parties, witnesses and other evidence and the use of foreign languages, will also vary with the forum. Consequently, parties increasingly lock horns over which court should hear their dispute.

In England, two complex jurisdictional regimes exist – the common law and European legislation. They do not sit well together and the ruling of the European Court of Justice in *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)*[1] (ironically made in the interests of certainty) has served only to exacerbate the problems, leading to further litigation.

The two jurisdictional regimes

Under the common law, the question of whether the English courts will hear a dispute is discretionary and depends largely upon whether they, or the courts of another country, are the most appropriate forum (or "*forum conveniens*"). In order to make that decision, they will consider and weigh up various factors[2].

European legislation applicable in EU and EFTA Member States ("**European States**")[3] introduced a more formulaic regime which sometimes applies instead of the common law. It created a hierarchy of factors which might link disputes to a particular European State, each of which, if applicable, would "trump" factors beneath it and grant a court "exclusive jurisdiction". Thus, a dispute concerning the validity of a company which had its seat in a European State is always heard in the court where the company's seat is located[4]. Similarly, a contractual exclusive jurisdiction clause in favour of one European State will "trump" other factors[5]. If none of these "trump" factors exist, default rules apply in actions against defendants domiciled in Europe. Such European defendants must generally be sued in the state of their domicile[6] but may

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sometimes instead be sued in an alternative European State[7]. Where proceedings might be commenced in a number of European States, the court validly "first seised" (i.e. that in which proceedings were first legitimately commenced) would ultimately hear the dispute[8].

As a result of the European regime, no dispute can be heard in the courts of more than one European State[9], and there is no risk of the courts of different European States giving irreconcilable judgments. This is important since court judgments of European States are readily enforceable in other European States[10]. One disadvantage of such rigid jurisdictional rules is that jurisdiction is sometimes determined by a "race to the court" and, on occasion, disputes are heard in the courts of a European State with which they have little connection. The impact of this has, however, been reduced by the introduction of universal EU rules for determining which country's law governs the dispute[11], rendering the choice of forum less likely to influence the outcome.

The *Owusu* principle and outstanding uncertainties

The English courts originally took the view that they only had to apply the rigid European regime when determining jurisdiction as between the courts of European States. Thus, the English courts considered that, even if they had jurisdiction under the European regime, they nevertheless retained a common law discretion to stay proceedings or decline jurisdiction in favour of the courts of a non-European State if it was the more appropriate forum[12]. However in *Owusu*, in which the defendant was sued in the courts of its European State of domicile, the ECJ ruled that in those circumstances they had no such discretion and were obliged to hear the dispute.

The *Owusu* ruling sought to confirm the existence of predictable and unified jurisdictional rules throughout the European States. However, various uncertainties arose from this ruling, including the following:

1. What if the dispute had a connection with a non-European State of a nature which, had the connection been with a European State, would have allocated it "exclusive jurisdiction" under the European regime? For example, what if the dispute concerned the validity of a company which had its seat in the US?

   The European hierarchical rules which might otherwise "trump" the domicile ground only concern companies whose seats are located in European States, so do not apply. Would the location of the company's seat thus in effect be overridden by domicile?

2. What if the dispute concerned a contract containing an exclusive forum selection clause in favour of the courts of a non-European State?

   The European hierarchical rules which might otherwise "trump" the domicile ground only concern jurisdiction clauses in favour of European States, so do not apply. Would the parties' express choice of court thus in effect be overridden by domicile?

3. What if there were ongoing identical or related proceedings in a non-European State?

   The "court first seised" rules only apply vis-à-vis existing proceedings in the court of another European State, so do not apply. Would the *Owusu* principle prevent the courts of European States from staying their proceedings or declining jurisdiction in favour of such non-European proceedings? They may have been ongoing for years – indeed one party might have commenced the European proceedings because the non-European proceedings took an unfavourable turn. Further, if both sets of proceedings continued, the respective judgments may well conflict.

4. Does the *Owusu* principle apply if the defendant was sued in England not on the ground of domicile, but on a different European regime ground?

Some of these theoretical circumstances were highlighted and considered during the course of the ECJ proceedings in *Owusu*. However, none of them in fact existed in the *Owusu* dispute and the ECJ limited its ruling to the facts as they were in that case. Consequently, the scope and extent of the *Owusu* principle remained unclear.

Resolving the uncertainties

Scenario 1 above has not yet arisen in a reported English case, nor been referred to the ECJ. However, an English judge has expressed his view on scenario 2[13]. He considered that it would be within the spirit of the European regime for the English Court to decline jurisdiction, notwithstanding the defendant's English domicile, if there was a court selection clause in favour of a non-European State. Such an approach accords with the fact that the ECJ had, before *Owusu*, approved the idea that the courts of a European State may give effect to such a clause[14]. It also accords with the European Community's recent signature of the Hague Convention on Choice of Court Agreements, which envisages the upholding of choice of court agreements and the recognition and enforcement of the judgments of courts selected[15]. It is therefore extremely likely that the ECJ would ensure that the *Owusu* principle does not inhibit or override the operation of non-European court selection clauses. Thus, it remains the case that such choice of court clauses, like those conferring jurisdiction on European States, will generally be enforced. That said, disputes can still arise, for example as to the scope, meaning and effect of jurisdiction clauses including where differing jurisdiction clauses are contained within suites of documentation[16].

The likely position in scenario 3 above is less clear. A similar scenario was recently referred by the Irish Supreme Court to the ECJ[17], whose ruling is eagerly awaited.

In view of the above, English Courts are very likely, despite *Owusu*, to retain an ability to stay proceedings or decline jurisdiction in at least scenarios 1 and 2; they may also do so in some circumstances in scenario 3. The retention of such a discretion in these cases would be sensible, but it is difficult to see how the specific terms of the European legislation alone justify such a conclusion as a matter of drafting. There simply are no express provisions in this respect, and they would have to be implied by analogy with equivalent express provisions conferring exclusive jurisdiction on the courts of European States. Further, it would be difficult to determine which circumstances would constitute exceptions to the *Owusu* principle and which would not. Consequently, if an ability to order a stay or decline jurisdiction is to remain despite *Owusu*, it would make sense to amend the relevant European legislation to provide for such ability and indicate when it might arise.

The applicability or otherwise of the *Owusu* principle when the European basis for jurisdiction is other than domicile (scenario 4) should also be clarified. In the meantime, an English Judge has ruled that the principle will also apply in such circumstances[18].

Inherent difficulties with the Owusu principle

Whatever the scope of the *Owusu* principle, it causes theoretical problems:

(a) There will be circumstances in which the court of a European State cannot decline to hear a dispute even though it is substantially more connected with another country - for example where the other contracting parties are US entities, the contract is governed by US law, the relevant obligation was performed in the US, and all the witnesses and other evidence are in the US.

(b) The absence of a general discretion to stay proceedings or decline jurisdiction in favour of the courts of non-European States will increase the risk of parallel European and non-European proceedings. This is because non-European States will have their own different jurisdictional rules, and are not subject to the principle that only the "court first seised" can take jurisdiction. In turn, this increases the risk of irreconcilable judgments and raises tricky worldwide enforcement issues, thereby undermining recent progress in this respect.

If such problems were to be remedied, it would be difficult to try to define and carve out every circumstance which would constitute an exception to the principle, since much would depend on precise factual combinations. Instead, any remedy would perhaps best be achieved by means of a general discretionary ability to stay proceedings or decline jurisdiction in favour of the courts of a non-European State, if only when jurisdiction is not allocated to a European State by precise "trump" factors. Nevertheless, *Owusu* appears to have put that possibility to bed, and instead favoured a formulaic regime - a regime which is arguably only appropriate for determining jurisdiction as between states which are subject to identical jurisdictional rules.

Minimising the uncertainties

An international element inherently adds an additional level of complexity to disputes since cross-border issues will inevitably be encountered. Parties seeking to maximise certainty to the extent possible are best advised to include clear and consistent forum selection and choice of law clauses in their contractual documentation.

Endnotes

1 Case C-281/02; [2005] E.C.R. I-1383

2 *Spiliada Maritime Corpn v Cansulex Ltd*, The Spiliada [1987] AC 460 - the factors taken into account commonly include which country's law would be applied, where the relevant events took place, the location of the parties, the witnesses and the real and documentary evidence, whether there are similar or related ongoing proceedings abroad; and whether a number of defendants are to be sued together and where they are located.

3 the Brussels Convention (now superseded by Regulation (EC) No 44/2001) and the Lugano Convention

4 Article 22(1) of Regulation (EC) No 44/2001 and Article 16(1) of the Lugano Convention

5 Article 23 of Regulation (EC) No 44/2001 and Article 17 of the Lugano Convention

6 Article 2 of Regulation (EC) No 44/2001 and Article 2 of the Lugano Convention

7 Articles 5-6 of Regulation (EC) No 44/2001 and Articles 5-6 of the Lugano Convention

8 Articles 27 and 29 of Regulation (EC) No 44/2001 and Articles 21 and 23 of the Lugano Convention

9 the regime also provides for the consolidation in the courts of one European State of related proceedings - Article 28 of Regulation (EC) No 44/2001 and Article 22 of the Lugano Convention

10 Articles 32-56 of Regulation (EC) No 44/2001 and Articles 25-49 of the Lugano Convention

11 specifically, the Rome Convention (shortly to be replaced by Regulation (EC) No 593/2008 on the law applicable to contractual obligations, commonly known as "Rome I"); and Regulation 864/2007 on the law applicable to non-contrac tual disputes, commonly known as "Rome II"

12 see the judgment of the Court of Appeal in *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72

13 *Konkola Copper Mines Plc v Coromin* [2005] EWHC (Comm.) 898, affirmed [2006] EWCA Civ. 5

14 Case C-387/98 Coreck Maritime GmbH v Handelsveem BV [2000] E.C.R. I-9337

15 The Convention is dated 30 June 2005. Mexico acceded on 26 September 2007 and the US signed on 19 January 2009. The European Community (save for Denmark) signed on 1 April 2009. The US and the European Community have not yet ratified it and it is not yet in force

16 UBS AG v HSH Nordbank AG [2008] EWHC 1529 (Comm)

17 *Goshawk Dedicated Ltd & ors v Life Receivables Ireland Ltd* [2009] *IESC 7 (30 January 2009)*

18 See the uncertainty expressed in this respect by Gloster DBE J in *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), and the subsequent decision in Gómez v Gómez-Monche Vives [2008] EWHC 259 (reversed on other aspects)

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