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JUDGMENT AWAITED ON 'NON-EXCLUSIVE' JURISDICTION CLAUSES

By Ingrid Hobbs and Daniel Hart

Although English courts cannot restrain the commencement or continuance of proceedings in another EU or EFTA state (*Allianz v West Tankers* [2009]), they remain able to do so as regards proceedings in other foreign courts (*Shashou v Sharma* [2009]) when in the interests of justice - for example, where a jurisdiction agreement has been breached. However, what if the agreement stated that the English courts had "non-exclusive jurisdiction"? Could a party obtain an anti-suit injunction in that circumstance?

This issue arose in *Deutsche Bank v Highland Crusader* earlier this year. Highland commenced proceedings in Texas disregarding the clause affording the English courts non-exclusive jurisdiction over disputes between the parties to the agreement. Deutsche subsequently issued proceedings in England and sought an anti-suit injunction in respect of the proceedings in Texas. The first instance judge granted the injunction as he considered that the non-exclusive jurisdiction clause created a presumption, in the absence of exceptional circumstances not foreseeable at the time of the agreement, that any attempt to commence proceedings outside the English courts would be "vexatious or oppressive". Although the decision was later overturned unanimously by the Court of Appeal (who ruled that no such presumption was created), it caused many to re-consider the effect of "non-exclusivity" and how it compares to "exclusivity". The Supreme Court will hear a further appeal in December this year which we hope will provide clarity on this issue.

The difficulty with the first instance decision is that "non-exclusivity" envisages the possibility of proceedings in other courts - indeed the jurisdiction clause in *Deutsche* expressly did not limit any right to commence proceedings elsewhere. Unlike "exclusivity", which restricts parties' options, the purpose of "non-exclusivity" is to create an additional right to sue in an alternative forum. Consequently, how can a non-exclusive jurisdiction clause give rise to a presumption that commencing proceedings in another forum is "vexatious or oppressive"?

We anticipate that the Supreme Court in *Deutsche* will uphold the Court of Appeal's ruling, but in doing so it may consider the following:

- In light of recent cases, including *Owusu v Jackson* [2005] and *Catalyst Investment Group v Max Lwinsohn* [2009], and depending on the awaited ruling of the ECJ in *Goshawk v Life Receivables*, European rules may sometimes prevent an English court from staying proceedings in favour of those ongoing outside Europe. In that event, non-exclusive jurisdiction clauses may result in an increase in parallel proceedings and inconsistent judgments. Perhaps, this was the problem the first

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instance judge sought to cure by granting the anti-suit injunction.

- Would the Supreme Court's ruling be different if the English proceedings had been issued first? Thus, would it then have been "vexatious or oppressive" for Highland to commence proceedings subsequently in another jurisdiction? Where the party first initiating proceedings has exercised the forum choice made available to it by the non-exclusive jurisdiction clause, it might be argued that the other party should only be able to commence similar proceedings elsewhere too in exceptional circumstances. If that approach were adopted, it would suggest that the non-exclusive jurisdiction clause was not designed to deal with the issue of parallel proceedings but, rather, to afford the parties some flexibility as to where disputes between them might be determined.

We await with interest the decisions of the Supreme Court in the *Deutsche* case and the ECJ in the *Goshawk* case to find out just how a non-exclusive jurisdiction clause really operates.

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