

INSURANCE/REINSURANCE

JURISDICTION AND APPLICABLE LAW

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RPC 17 MAY 2012

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1. This seminar provides a review of some of the most recent developments in jurisdiction and applicable law affecting insurance and reinsurance.
2. The focus is on jurisdiction, which continues to be a source of frequent litigation and developing law. European harmonisation of laws, in the form of the Brussels Regulation (the terms of which are currently under review), has curtailed (but not emasculated) the ability of English courts to enforce the freedom to arbitrate (witness the *West Tankers* saga). New threats to English jurisdiction loom in the latest twist in the interpretation of the Regulation. The Regulation's goals of achieving clarity and predictability of jurisdiction remain unsatisfied, leaving litigators plenty of scope to test the boundaries.

JURISDICTION

3. First, a brief reminder of jurisdictional regimes applying in the courts of England and Wales, depending on where the defendant is domiciled:
 - (1) EU members: Council Regulation 44/2001 (the "Brussels Regulation" – soon to be known as the Brussels I Regulation);
 - (2) EFTA countries (Norway, Switzerland, Iceland and Liechtenstein): Lugano Convention 2010;

- (3) Constituent parts of the UK: modified Brussels Regulation, Schedule 4 of the Civil Jurisdiction and Judgments Act 1982;
 - (4) All other countries: determined according to the ability to serve defendants in England or Wales or by the “gateways” for service out of the jurisdiction provided by Part 6(IV) of the Civil Procedure Rules, coupled with common law doctrines (including *forum conveniens*).
4. Regimes (1) to (3) (“the European Regimes”) are very similar, subject to checking the fine print. Regime 4 is the common law regime, the boundaries of which are under attack from “reflexive” interpretations of the European Regimes.

Jurisdictional Challenge

5. Any challenge to jurisdiction must be made immediately, before any step other than mere acknowledgement of service is taken.¹ Even conferral of authority on solicitors to accept service, without reserving the right to challenge jurisdiction, can be a submission to the jurisdiction. Moreover, delay in making the application to challenge jurisdiction beyond 14 days after acknowledging service is a deemed submission under CPR Part 11 Rule 11(5). Best practice is to comply with that time limit. If an extension of time must be sought (e.g. for want of instructions) it should be on the express basis that it is only for the purpose of challenging jurisdiction and should include an express order delaying the effect of Rule 11(5) until expiry of the extended period.
6. Seeking disclosure and directions (including a stay of proceedings and - probably - security for costs) for the purpose of the jurisdictional challenge under Part 11 do not amount to submissions to the jurisdiction. However, a party that consents to directions going beyond the jurisdictional issues risks being found to have submitted to the jurisdiction.

¹ If the courts of another member state are already seised of the same cause of action the English Court must decline jurisdiction/stay its proceedings. This is mandatory, so an initial failure to challenge jurisdiction in such a case is not necessarily fatal.

7. A reservation will only be effective if any step taken is not inconsistent with it and the jurisdictional objection is raised at the first practical opportunity. Engagement in the merits should be avoided unless no other option is open. However, provided a jurisdictional challenge is being pursued actively, a defence of the merits which is required as a result of the procedure/case management imposed by the Court, will not be a submission to the jurisdiction, provided no other choice was open to the challenging party: ***AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant [2011]*** EWCA Civ 647.²
8. This common sense position is similar to the rules governing a challenges to arbitrators' jurisdiction.³

Pending actions in other member states

9. Under the European regimes, if another member state is already seised of the same cause of action (between, inter alia, the same parties), the English courts must decline jurisdiction even if it is plain that the other member state has no jurisdiction – see Article 27 of the Brussels Regulation. It is for the court first seised to determine whether it has jurisdiction before any other proceedings are permitted. An English court is seised on the date the claim form is issued (or the date of amendment, if a new cause of action is determinative). If there is no identity of cause of action⁴ but the proceedings are related there is a discretion to impose a stay – see Article 28.⁵

²Para 166-188; applying *Harada Limited (t/a Chequepoint) v. Turner (No 2)* [2003] EWCA 1695 (unrep).

³ A party which argues the merits, having challenged the arbitrators' jurisdiction and lost, does not lose its chance to challenge the arbitrators' jurisdiction as long as it complies with the requirements of section 67 and/or section 73 of the Arbitration Act 1996.

⁴ In the sense that the two sets of proceedings do not share a cause of action with the same legal basis and the same object – e.g. a claim under a policy for indemnity and a claim for a declaration of no liability to indemnify under the same policy.

⁵ Though the tendency is to decline jurisdiction in the absence of compelling reasons to the contrary.

10. The same principle applies to arbitration proceedings: the English courts have no jurisdiction to restrain parties from litigating in a member state in breach of an English arbitration clause *Allianz Spa v West Tankers Inc* (“*The Front Comor*”) [2007] UKHL 4 & [2009] 1 AC 1138 (ECJ). As a result, “round one” of the *West Tankers* litigation went in favour of the Italian proceedings, which were effectively entrusted with enforcing the agreement to arbitrate. The European Commission’s current proposals for amendment of the Brussels Regulation would see a new provision introduced which would require the courts of member states to stay their proceedings in favour of the courts of the member state where the seat of arbitration is located, effectively reversing this decision.

11. Respite for those relying on English arbitration clauses appears to have been provided by rounds two and three of the *West Tankers* saga, which establish (to date) that:
 - (a) the arbitration panel can make a negative declaratory award (e.g. for a declaration that there is no obligation to indemnify). This can then be enforced by applying for judgment to be entered in the terms of the award, in reliance on the arbitration agreement and s.66 of the Arbitration Act 1996: *West Tankers Inc v Allianz Spa* [2012] EWCA Civ 27. This decision allows insurers and reinsurers to pursue, for example, negative declaratory relief in an English arbitration and obtain a judgment to the same effect. This can then be used to defend any attempt to enforce a subsequent judgment in the other member state on grounds of *res judicata*. This would effectively trump the foreign litigation with the English jurisdiction. It potentially gives rise to irreconcilable judgments, defeating the policy underlying the Regulation, so may be attacked in due course.

(b) The icing on the cake is that the party relying on the arbitration clause can seek an award for breach of the obligation to arbitrate, to recoup its costs flowing from the offending litigation: ***West Tankers Inc v Allianz Spa*** [2012] EWHC 854. Presumably such costs should be indemnified, to provide full compensation, subject to mitigation principles.

Pending actions in non-member states

12. The authorities are in a state of flux as to whether the English courts retain a discretion to stay proceedings on grounds that proceedings are pending in a non-member state when England is the first member state to be seised of a dispute through issue of proceedings against a defendant domiciled in England (thus engaging Article 2 of the Brussels Regulation).
13. The argument against there being such a discretion relies on the decision in ***Owusu v Jackson*** [2005] 1 QB 801. The narrow point decided in ***Owusu*** was that where a member state had jurisdiction based on a defendant's domicile by virtue of Article 2 of the Brussels Convention⁶ it had no discretion to decline jurisdiction on grounds of *forum non-conveniens* (i.e. that the other forum was clearly more appropriate for trial), even in the case of where the alternative forum in question was a non-member state. The judgment stated that:

“Article 2 of the Brussels Convention is mandatory in nature and... According to its terms, there can be no derogation from the principle it lays down except in cases expressly provided for by the Convention.”

14. ***Owusu*** favours English insurers and reinsurers seeking to “anchor” proceedings in this jurisdiction – provided a valid defendant with an English domicile can be identified, this assures English jurisdiction (all other things being equal), without fear of a battle on the issue of *forum non-conveniens*.

⁶ There is no relevant difference between Article 2 of the Brussels Convention (i.e. the regime preceding Council Regulation 44/2001) and Article 2 of the Regulation.

15. In ***Catalyst Investment Group v Lewinsohn* [2010]** Ch 218 Barling J found that the reasoning in ***Owusu*** also applied to a case in which proceedings were already pending in a non-member state – the court simply had no jurisdiction to decline the jurisdiction conferred on it by Article 2. Again, this favoured English jurisdiction in any case in which with an English domiciled defendant could be found, without the fear of the court wavering in the face of evidence as to the merits of allowing precedence to the foreign jurisdiction. Barling J’s approach favours insurers and reinsurers seeking to “repatriate” disputes in which opponents had commenced proceedings in foreign jurisdiction, having lost a forum race.
16. This potentially benign environment has been under threat for some time. Barling J’s decision was not followed by a Deputy Judge in the family division in 2010. Other judges have been at pains to avoid deciding the issue in at least four subsequent decisions.⁷ However, Blair J’s observations in ***RSA v Rolls Royce* [2010]** EWHC 1869 (“*It is clear that the full ramifications of Owusu have yet to be worked out....*”) was a clear enticement for litigators to seek to overturn Barling J’s decision.
17. April 2012 saw the latest onslaught. In ***Ferrexpo AG v Gilson Investments Ltd* [2012]** EWHC 721, Andrew Smith J declined to follow ***Catalyst Investment***, albeit obiter, finding that there is a discretion to stay proceedings in favour of a non-member state. He found that the right to commence proceedings against an English domiciled defendant provided by Article 2 of the Brussels Regulation was not mandatory in all circumstances (based on a restrictive interpretation of what was said by the ECJ in *Owusu*), including the case of litigation pending in non-member states.

⁷*RSA v Rolls Royce* [2010] EWHC 1869, *Choudhry v Bhatler* [2009] EWCA Civ 1176; *Lucas Film v Ainsworth* [2009] EWCA 1328 (reversed on a different point) and *Deutsche Bank AG v Sebastian Holding Inc* [2009] EWHC 3069.

18. English academic opinion is not unanimous but is broadly in favour of the existence of a discretion. There is some notable judicial support. After **Catalyst Investment** was decided Jacob LJ (with whom Rix LJ agreed without comment) observed in the Court of Appeal that the absence of any discretion would be “*an oddity.*” This is because it implies that the doctrine of *lis pendens* - reflected in its strictest form by the provisions of the Regulation which favour the court first seised - would be ousted entirely in the case of proceedings commenced first in a non-member state.
19. Some academic opinion goes further, advocating what is described as the fully “reflexive” approach – i.e. an approach which applies the strict rules of the Brussels Regulation to litigation in non-member states.⁸ The extent to which different articles of the regulation may be fully reflexive is a matter for hot debate. The EU Commission’s proposals for amendment of the Brussels Regulation provides for the “full reflexive” approach to apply in the case of pending identical proceedings in non-member states.
20. There is also debate about whether, if a semi-reflexive approach is adopted, any discretion should rely on unified principles of EC law or should be left to national law. The Brussels Regulation is silent on the point, which tends to support a reversion to national law. Andrew Smith J considered that this silence allowed a reversion to a discretion based on national law.⁹ The decision of the ECJ in **Coreck Maritime v Handelsveem (Case C-387/98)** also provides support for that view.
21. If **Ferrexpo** prevails on this issue it will reduce the scope for outmanoeuvring proceedings in non-member state jurisdictions by suing a defendant with an English domicile. The risk of extensive evidence being required to defend jurisdiction will be increased, as will the propensity for parties to commence pre-emptive foreign proceedings. Delay in responding to such proceedings by issuing English proceedings promptly (e.g. for negative declaratory relief) becomes more fatal than ever.

⁸ See discussion and references in paragraph 126 of the judgment of Andrew Smith J. Dicey, Morris & Collins and Professor Briggs are among those who support the adoption of a reflexive approach for many Articles.

⁹ Paragraphs 127, 154 (in the context of Article 22) and 164-5 of the judgment of Andrew Smith J.

22. Assuming that there is a discretion to stay proceedings on grounds of *lis pendens*, further issues arising include how to determine which proceedings come first in time in the case of non-member states, the relationship between *lis pendens* and *forum non conveniens* and the principles upon which such a discretion is to be exercised. Andrew Smith J identified the following (non-exhaustive) factors as relevant to the discretion:¹⁰
- (a) The extent and relatedness and the risk of irreconcilable decisions;
 - (b) The stage reached in each set of proceedings;
 - (c) The proximity of the courts to the subject matter of the case.
23. **Ferrexpo** also provides an illustration of how extraordinarily difficult it is to establish that there is a substantial risk of injustice occurring due to corruption within a non-member state's court system. Cogent evidence of corruption - extending to the appellate courts - and of a willingness of the other party to take advantage of such corruption will be required. In this regard the decision in ***Cherney v Deripaska [2009]*** EWCA Civ 849 may be the exception that proves the rule (a case which involved evidence of death threats, a likelihood of prosecution on fabricated criminal charges and a strong risk of political interference with the judicial process in Russia).

¹⁰ Paragraph 188. In relation to Article 22 (exclusive jurisdiction for rights *in rem*) Andrew Smith J declined to express any views on the considerations which come into play in exercising the discretion (having found that Ferrexpo had not established any real risk of not receiving justice in Ukraine, it was unnecessary for him to do so) - paragraph 155 of the judgment.

Exclusive Jurisdiction & Arbitration Clauses

24. **Ferrexpo** adds support to the first instance decisions which have not applied **Owusu** to proceedings brought in the English courts in breach of exclusive jurisdiction clauses which confer jurisdiction on non-member states.¹¹ The existence of a discretion to grant stays in such cases, governed by principles of national law, is supported by an earlier ECJ decision: **Coreck Maritime v Handelsveem (Case C-387/98)**. In this respect a “semi-reflexive” approach (at least) is applied to exclusive jurisdiction clauses (i.e. semi-reflexive of Article 23 of the Brussels Regulation).
25. Where a reinsurance-led local policy had an exclusive jurisdiction clause stating that Brazilian law was the applicable law and jurisdiction, but London was named as the seat of arbitration in an arbitration clause, the Court of Appeal continued an anti-suit injunction in favour of English proceedings, restraining proceedings commenced by the insured in Brazil: **Sulamerica Cia Nacional De Seguros Sa & Ors v Enesa Engenharia & O’s** [2012] EWCA Civ 638 (16 May 2012) – a case of an arbitration clause trumping an exclusive jurisdiction clause.

Abusive Proceedings

26. The prevailing first instance decisions establish that member states retain a discretion to restrain abusive proceedings – Baring J (in **Catalyst Investment**) and Andrew Smith J (in **Ferrexpo**) agreed on this point.¹² The power to stay proceedings in such circumstances is provided by CPR 3.1(2)(f) or the inherent jurisdiction of the court.

¹¹ e.g. *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 898 (Comm)

¹² Paragraph 138 of the judgment of Andrew Smith J.

Forum Conveniens

27. For claims involving defendants in non-member states served out of the jurisdiction in reliance on the provisions of Part 6(IV) of the CPR, the conventional forum conveniens test still applies – a stay of English proceedings will be ordered if another forum is clearly more appropriate. For a recent example of the successful launch of proceedings for negative declaratory relief see ***Faraday Reinsurance Co Ltd v (1) Howden North America Inc and (2) Howden Buffalo Inc*** [2011] EWHC 2837.
28. It has been said that the *forum conveniens* doctrine has no role to play if there is jurisdiction under the Brussels Regulation, relying on ***Owusu***.¹³ However, claims commenced against an English domiciled defendant, in reliance on jurisdiction conferred by Article 2 of the Brussels Regulation, are now subject to a similar balancing exercise if they involving pending actions in non-member states – see the discussion of ***Ferrexpo*** above.

APPLICABLE LAW

29. Where a policy included an exclusive jurisdiction clause stating that Brazilian law was the applicable law and jurisdiction of the policy, but London was named as the seat of arbitration in an arbitration clause, the applicable law of the arbitration agreement was English law, as the law with the closest and most real connection to the arbitral proceedings: ***Sulamerica Cia Nacional De Seguros Sa & Ors v Enesa Engenharia & O's*** [2012] EWCA Civ 638.

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¹³ The comparable, but narrower, discretion to stay related proceedings under Article 28 being a creature of the Brussels Regulation. In particular, juridical advantages and alleged impropriety of proceedings in member states cannot be relied upon as a basis for exercising the Article 28 discretion. The tendency is to decline jurisdiction in the absence of compelling reasons to the contrary.