JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 27th January 2006.

Introduction

1. On 8th August 2005 I gave a short oral judgment in this matter dismissing the application by the defendant, Biosafety USA Inc ("Biosafety") to set aside and/or stay the proceedings brought by the claimant, Antec International Limited ("Antec") on 23rd December 2004, which were served on Biosafety in Florida on 29th December 2004. The stated grounds in Biosafety's application notice were:
   i) that the court had no jurisdiction; and/or
   ii) that the appropriate forum for the trial of Antec's action is Florida.

2. At the hearing before me in July 2005, it was correctly accepted by Mr Ben Hubble, counsel for Biosafety, that the court had jurisdiction to try the matter here. That was because Antec is a company incorporated and domiciled in the United Kingdom, Antec's claims (as contained in its Particulars of Claim) are for breach of contract (and ancillary relief), and these claims fall within the scope of the non-exclusive English court jurisdiction clause to which the parties submitted in their distribution agreement dated 1st November 2002. This provides, at Clause 10.6 as follows: *"10.6 This agreement shall be governed by and construed in all respects in accordance with the Laws of England and each party hereunder submits to the non-exclusive jurisdiction of the English Courts".*

3. Mr Hubble conceded that it therefore followed that the non-exclusive English jurisdiction clause fell within the scope of Article 23 of the Judgments Regulation (EC) 44/2001 ("the Regulation") and that, accordingly, permission to serve out of the jurisdiction was not required because the proceedings fell within CPR 6.19(1A)(6)(iii) in that Biosafety (notwithstanding its Florida domicile) is a party to an agreement conferring jurisdiction to which Article 23 applies. There was no dispute that Article 23 applied to non-exclusive, as well as exclusive, jurisdiction clauses. It was thus common ground at the hearing before me that Biosafety's application to set aside jurisdiction should be dismissed without the court even considering the question whether this was a proper case in which to give permission to serve out, and that the court should proceed directly to consider Biosafety's application for a stay on grounds of *forum non conveniens*.

4. However, Mr Ricky Diwan, counsel for Antec, in the course of a clear and helpful argument, submitted as a threshold point that there was no room for the application of the *forum non conveniens* doctrine in the light of the judgment of the European Court of Justice ("ECJ") in ***Owusu –v- Jackson*** (1 March 2005, Case No C-281/02). Accordingly, he submitted that, since section 49 of the Civil Jurisdiction and Judgments Act 1982 (as amended by Schedule 2 to the Civil Jurisdiction and Judgments Order 2001 – SI 2001/3928) permits the court to apply the doctrine of *forum non conveniens* **only** provided that it is not inconsistent with the Regulation, there was no basis upon which the court was entitled to consider Biosafety's alternative application for a stay, and that I should therefore dismiss it without even considering it on its merits.

5. After the hearing before me, and after my receiving from counsel various post-judgment submissions on the law in relation to the ***Owusu*** issue, it became apparent that, contrary to what I had been told at the hearing, it had become necessary for me to give an urgent determination, during the vacation, on Biosafety's application. That was because, on 14th July 2005, apparently shortly after the conclusion of the hearing before me (and contrary to indications given by Mr Hubble at the hearing as to the imminence of proceedings, as he was not aware that these were about to be issued), Biosafety commenced proceedings in Florida against both Antec and Antec's ultimate parent company, E I DuPont de Nemours & Company ("DuPont"), a company incorporated in Delaware. In those circumstances, on 4th August 2005, Antec's solicitors, Eversheds, requested that I give my judgment as a matter of urgency, in the vacation, so that my determination could be put before the Florida court in the context of Antec's and DuPont's challenge to the jurisdiction of that court. Accordingly, on 8th August 2005 I gave a short oral judgment refusing Biosafety's application for a stay on the grounds of *forum non conveniens*. I specifically told the parties that, in view of the time which I had available, I was not at that stage going to give any ruling or make any decision on the ***Owusu*** point, but was merely going to address the merits of the *forum non conveniens* argument, on the assumption that Antec's

arguments in relation to the *Owusu* point were not well founded, and that the court was accordingly entitled to entertain Biosafety's application for a stay on *forum non conveniens* grounds on its merits.

6. In the event, I decided that Biosafety had not established that England was not the natural or appropriate forum for Antec's claims, or that Florida (or, indeed, other jurisdictions in the United States of America) were clearly or distinctly the more appropriate forum; see ***The Spiliada*** [1987] AC 460 at pages 476-477. In particular, I held that Biosafety could not point to any strong or overwhelming reasons for not keeping the parties to their contractual choice of the English court as a forum for the resolution of their disputes, and that the factors of convenience for their witnesses and possible experts and the location of their documentary evidence and the subsequent issue of proceedings in Florida could not amount to strong or overwhelming circumstances such as would justify staying the English proceedings.

Relevant legal principles

7. In coming to my conclusion, I applied the following legal principles that can be derived from the authorities:

   i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; see e.g. per Hobhouse J in ***S & W Berisford Plc v New Hampshire Insurance Co.*** [1990] 1 Lloyd's Rep. 454, at 463; per Waller J in ***British Aerospace Plc v Dee Howard Co*** [1993] 1 Lloyd's Rep. 368; per Moore-Bick J in ***Mercury Communications Ltd v Communication Telesystems International*** [1999] 2 AER 33 at page 41.

   ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; see e.g. ***British Aerospace Plc supra ; Mercury Communications*** *supra at* page 41; per Aikens J in ***Marubeni Hong Kong & South China Ltd v Mongolian Government*** [2002] 2 AER (Comm) 873 at 891(b) – (f); per Lawrence Collins J in ***Bas Capital Funding Corporation and others v Medfinco Ltd and Others*** [2004] 1 Lloyd's Rep. 652, at paragraphs 192-195; per Gross J **in *Import Export Metro Ltd v Compania Sud Americana de Vapores SA*** [2003] 1 Lloyd's Rep. 405.

   iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard *Spiliada* balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; see cases cited *supra.* In particular, the fact that the defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction; see cases cited *supra* and ***The El Amria*** [1981] 2 Lloyd's Rep. 119; ***Breams Trustees Ltd v Upstream Downstream Simulation Services*** [2004] EWHC 211 (Ch) per Patten J at paragraphs 27 and 28.

Application of legal principles to the facts

8. I concluded that Biosafety could not point to any overwhelming or even strong reasons to justify the Court not requiring it to observe the contractual choice of the English court as the forum for the resolution of its disputes with Antec, notwithstanding the additional element that DuPont, a Delaware corporation is now a defendant to the Florida proceedings. In so deciding, I had regard in particular to the following factual matters.

9. Antec is, and always has been an English incorporated company, which is in the business, *inter alia*, of manufacturing chemical products (including disinfectants) for distribution and sale world-wide, including two disinfectant products in issue in these proceedings, known as Virkon and Perasafe. Those products are, and always have been, manufactured at Antec's two manufacturing facilities in Sudbury, England, where it has some 65 employees. Antec is a substantial company; in 2003 it had an annual turnover in excess of £11 million, and in 2004 its turnover exceeded £15 million.

10. At the time the parties contracted for English jurisdiction, Biosafety was a Florida-based company and Antec was an English-based company and the contract provided for Biosafety to perform distribution services in the USA in accordance with the contract. In other words, in the event of a dispute, the convenience (or perceived lack of convenience) for Biosafety witnesses was foreseeable; by agreeing to the clause Biosafety would have known that, if proceedings came about it would have to fly people to England and contest proceedings there; equally foreseeable was the fact that the English courts would be scrutinising performance in the USA of the distribution agreement.

11. The only factor that had changed was that, since 8th October 2003 (and therefore after the distribution agreement had been entered into) Antec had become wholly owned by DuPont UK (an English registered company), which is in turn owned by DuPont, a Delaware incorporated company. In consequence, some coordination of Antec's activities now takes place from DuPont's offices in Delaware. However:
    i) Antec remains the party to the distribution agreement, including the jurisdiction clause in question, and no contrary assertion can properly be made. At the time of its acquisition, Antec announced that business would be as usual.
    ii) Antec, from its two manufacturing facilities in Sudbury, continues to produce and deliver the products in question and Biosafety's orders for products are processed from Antec's base in England.
    iii) Biosafety continues to have regular contact with Antec's personnel in England.

12. In my judgment, nothing has changed in relation to the jurisdictional position at all. I agree with Antec's contention that it is difficult to see how Biosafety can assert that the change in ownership or the slight operational changes amount to either an unforeseeable event which leads to injustice or otherwise amounts to a powerful factor. The foreseeable and alleged inconvenience to Biosafety remains. Biosafety's submissions in this regard came close to asserting that in the present situation they would now prefer to negotiate a different jurisdiction clause. The fact that there have been discussions regarding the possible amendment of the distribution agreement, including the non-exclusive English jurisdiction clause does not assist Biosafety. The fact is that there has been no amendment.

13. Furthermore, any alleged inconvenience to Biosafety is offset by the fact that Antec's evidence will include evidence from witnesses based in England and documents that are kept in England, and may also include evidence from witnesses based in Europe. DuPont is based in Delaware, not Florida, and if matters were to be litigated in the USA there would be no single forum convenient to both parties.

14. Biosafety has indicated that, as part of any defence to Antec's claim, they may seek to implicate DuPont, and may seek to bring counterclaims against DuPont and Antec in the United States, thereby creating a risk of parallel proceedings. At the time of the original hearing before me, that had not happened, notwithstanding the passage of time. Moreover, I found it unattractive for Biosafety to seek to rely on its own potential creation of parallel proceedings against separate but related parties as a factor in favour of staying the current proceedings: see *British Aerospace* (above) at page 376; and *Breams Trustees* (above) at paragraph 27.

15. Moreover, during the course of the hearing before me, Antec's solicitors, having received instructions from DuPont, undertook that DuPont would accept service in England of any counterclaim proceedings brought by Biosafety. There can be no prejudice, therefore, to Biosafety in relation to any possible counterclaim in connection with the effective position of DuPont.

16. Accordingly, in my judgment, there were no, and certainly no strong or overwhelming, reasons for not requiring Biosafety to comply with its contractual choice of non-exclusive English jurisdiction.

The *Owusu* point

17. At the hearing on 8th August 2005, when I gave brief reasons as to why I was refusing Biosafety's application for a stay on the merits of the *forum non conveniens* application, I indicated that I would give my decision in relation to the *Owusu* point when I gave my full reasoned judgment, as this might have a bearing on the costs position. At that hearing I made an order that the defendant's application, dated 8th February 2005 be dismissed, with the full reasons for such decision to follow in a reasoned judgment; and that permission to appeal be refused.

18. However, upon mature reflection, although I heard argument on the point, I consider that it is not appropriate that I should decide the logically anterior question whether there is any scope at all for the operation of the doctrine of *forum non conveniens* in the context of a case where Article 23 of the Regulation is engaged; in other words, whether the effect of the decision in ***Owusu*** is to oust the power of the English Court to stay proceedings on such grounds. Given my decision on the merits of Biosafety's application to stay the proceedings on the grounds of *forum non conveniens*, I do not consider that it is necessary or appropriate that I should express my view on what is an extremely difficult question of European law, and where it is highly likely that, for the issue to be conclusively resolved, it would be necessary for there to be a reference to the European Court of Justice.

19. I should perhaps explain my reasons for reaching this conclusion in greater detail.

20. ***Owusu –v- Jackson*** (above) was a case where the claimant, Mr Owusu, a British national domiciled in the United Kingdom, had suffered a serious accident during a holiday in Jamaica. He had dived into the sea from a beach and struck his head on a concealed sandbank, suffering injuries which rendered him tertraplegic. He brought an action in the UK against a Mr Jackson, who was also a UK domiciliary, alleging breach of a contract under which Mr Jackson had rented a holiday home to Mr Owusu. The latter claimed that an express term of the contract (that there would be access to a private beach) carried with it an implied term that the beach would be reasonably safe or free from hidden dangers. Mr Owusu, in the same proceedings, brought claims against several Jamaican companies which variously owned, occupied or managed the beach and its facilities. Mr Jackson and various defendants applied to the English courts for a stay on the grounds that it should not exercise its jurisdiction against them because the case had closer links with Jamaica, and the Jamaican courts were a forum where the case might more suitably be tried in the interests of justice to all the parties. The English Court of Appeal stayed the proceedings and sought a preliminary ruling from the ECJ, broadly as to whether, in circumstances where a claimant contends that jurisdiction is founded on Article 2 of the Brussels Convention (which provides that "subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state"), there was any room for the operation of the English court's discretionary power to decline to hear proceedings on *forum non conveniens* grounds, in favour of the courts of a non-contracting state.

21. The ECJ held that, in the circumstances arising in the ***Owusu*** case, there was no scope for the application of the *forum non conveniens* doctrine. In particular, it held:
    i) that the Brussels Convention extends to circumstances where the legal relationship involves only one contracting state and one or more non-contracting states and not just where there is a real and sufficient link with the working of the internal market (paragraphs 28, 34 of the judgment);
    ii) that Article 2 of the Regulation (which provides that a party domiciled in a member state "shall" be sued in the courts of that member state) was of mandatory application (paragraph 37) and that respect for the principle of certainty and predictability underlying the Regulation would not be guaranteed if a member state court could apply *forum non conveniens* principles; that would undermine the uniform application of the rules as to jurisdiction (paragraph 38-43);
    iii) that, accordingly, the Regulation precludes a court of a contracting state from declining the jurisdiction conferred on it by Article 2 on the ground that a court of a non-contracting state would be a more appropriate forum (paragraph 46).

22. It is worth setting out paragraphs 40-43 of the ECJ's judgment in full to demonstrate the importance which the ECJ attached to the principle of certainty in holding that the rule enshrined in Article 2 was mandatory:

> *"40. The Court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued (**GIE Groupe Concorde and Others,** paragraph 24, and **Besix,** paragraph 26).*
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> *41. Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.*
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> *42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits.*
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> *43. Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules."*

23. In the light of this decision, the English Court of Appeal's decision in ***In re Harrods (Buenos Aires) Limited*** [1992] Ch 72, which proceeded on the assumption that the Convention was only dealing with the regulation of jurisdiction between contracting states, can no longer be considered to be good law. However, the ECJ did not go on to consider the circumstances which arise in the present case, namely the effect of Article 23 of the Regulation, in the context of a non-exclusive jurisdiction clause providing for non-exclusive jurisdiction within a member state. The court held that it was not appropriate to consider the wider questions raised by the English Court of Appeal, namely as to the particular circumstances in which the doctrine of *forum non conveniens* was ruled out under the Brussels Convention.

24. It is clearly a moot point as to whether the ECJ's decision in ***Owusu*** predicates that a jurisdiction clause falling within Article 23 has mandatory effect, so that, once a court of a Member State is seised as a result of the invocation of such a clause, the Regulation requires the relevant court to take jurisdiction, so as to exclude any application of the *forum non conveniens* doctrine, even where the potential alternate jurisdiction involved is not a Member State. It could be argued that different considerations apply in relation to Article 23, which is not expressed in the mandatory terms of Article 2; and that Article 23 does not impose any requirement upon the court which is identified in the non-exclusive jurisdiction clause, to exercise such jurisdiction. It could further be argued that Article 23 preserves the concept of party autonomy in choice of court and, accordingly, the application of the *forum non conveniens* rule, where appropriate. The recognition afforded by the Brussels Convention to the freedom of contract is emphasised in decided English cases such as ***Kurz v Stella Musical Veranstaltungs GmbH*** [1992] Ch 196 (Hoffmann J) and ***Insured Financial Structures v Elektrocieplownia Tychy*** *SA* [2003] 1260. In the latter case the Court of Appeal, affirming the decision of the lower court, held, in effect, that Article 17 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments did not preclude the English Court from having jurisdiction,

notwithstanding that the courts of Poland (another member state) had been specified in the contract as the court which the parties agreed had non-exclusive jurisdiction.

25. The issue as to residual operation of the *forum non conveniens* rule is one which has received some limited attention in text books and academic articles: see, for example, *Jurisdiction and Arbitration Agreements and their Enforcement*, (2005) David Joseph QC at 267; *Forum Non Conveniens and European Ideals* , Edwin Peel, [2005] LMCLQ 363; *The Death of Harrods: Forum Non Conveniens and the European Court*, Adrian Briggs [2005] LQR 121; *Forum Non Conveniens and Ideal Europeans* Adrian Briggs [2005] LMCLQ 378.

26. As I have said, tempting as it is to decide this interesting issue of law, I do not consider that it is necessary or proportionate for me to do so, in the light of my very clear ruling that, even on the assumption that the doctrine applies, these proceedings should remain in the English Court. I am comforted in this approach by the course taken by the House of Lords in ***Lubbe v Cape plc*** [2000] 1 WLR 1545 at 1561-2, where the opportunity to make a reference to the ECJ was declined, on the grounds that, since their Lordships had decided that no stay would be awarded in any event, it was unnecessary to refer the question as to whether the English Court continued to enjoy the power so to order on grounds of *forum non conveniens*.

27. Nor do I think that, in reality, the absence of any decision on this point will have any effect on the question of costs. Although I have yet to hear the parties' submissions on that subject, my provisional view is that the Claimant is entitled to its costs of the application in any event, notwithstanding my decision not to determine the ***Owusu*** point. However I will hear further argument on the issue of costs, should Biosafety wish to persuade me to the contrary.

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