The Court of Appeal in *Wasa* v. *Lexington* ([2008] EWCA Civ 150, [2008] Lloyd's Rep IR 510) decided that reinsurance is liability insurance. Sedley L.J. (at [49]) made a strong case for that view. He said that the notion of "double cover" on the same risk (the view in *Charter Re*) was a fiction due to the illegality of reinsurance as such until 1864 and that the "practice and vocabulary of reinsurance law have for a long time now reflected the reality that what is reinsured is the insurer's own liability". Distinguished commentators agree because the "trigger for recovery under the insurance is that the reinsured's liability has been established and quantified, not that a peril has occurred" to the insured subject-matter; and "the amount of the reinsured's indemnity is not based on the degree of damage [to that subject-matter but] on the amount of the reinsured's exposure" (Gurses and Merkin [2008] L.M.C.L.Q. 366–388, 374).

Unfortunately, however, the House of Lords allowed the appeal: reinsurance, it said, is not a form of liability insurance but a further insurance on the subject matter of the original primary insurance: "double cover". It is as if the insurer of my house reinsured the risk: my house would then be covered against fire by two insurers, insurer and reinsurer. In the event of a fire my claim would only be against the insurer with whom I had contracted. That insurer would later recover part of what it paid me from the reinsurer.

The consequence for Wasa was that, as reinsurers, they were not automatically liable to meet liabilities incurred by Lexington under Lexington's separate and primary insurance contract, notably the obligation to pay the amount agreed in Lexington's settlement with Alcoa. This contractual settlement was distinct from and without impact on Wasa's reinsurance policy. The consequences for London insurers at large, which do environmental and pollution business of that kind, may be far reaching; but so large are the sums of money involved it is unlikely that litigation on others aspects of reinsurance will cease.

MALCOLM CLARKE

ANTI-SUIT INJUNCTIONS AND NON-EXCLUSIVE JURISDICTION CLAUSES

WHERE the English court has personal jurisdiction over a defendant it is well-established that an anti-suit injunction may be granted preventing that defendant from taking steps to litigate a dispute in a foreign jurisdiction if the English court also has an interest in, or connection with, the matter: *SNIA* v. *Lee Kui Jak* [1987] A.C. 871. Such an injunction is granted on one of two bases: either the court has an

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interest in the matter because the claimant can point to a legal right which has been infringed (for example, proceedings being brought in breach of an exclusive jurisdiction clause in favour of the English courts), or the claimant is relying upon the equitable right not to be the subject of vexatious and oppressive conduct. What has been traditionally less clear, and the subject of little case law, is how disputes arising under or out of a contract containing a non-exclusive jurisdiction clause fit into this model.

In *Highland Crusader Offshore Partners* v. *Deutsche Bank AG* [2009] EWCA Civ 725 the Court of Appeal was concerned with a jurisdiction dispute after Deutsche Bank ("DB") served default notices on Highland Crusader ("HCOP") in relation to agreements which contained the non-exclusive jurisdiction clause. The relevant agreements contained a non-exclusive jurisdiction agreement in favour of the English courts. Following the service of default notices by DB, HCOP filed proceedings against DB in the courts of Dallas, Texas. DB sought an anti-suit injunction from the English courts to halt the Texas action, and at first instance before Burton J. an injunction was granted. The Court of Appeal upheld the appeal and dismissed the injunction.

As a matter of logic it is important that the courts treat disputes subject to non-exclusive jurisdiction clauses as being different from disputes subject to exclusive jurisdiction clauses. Otherwise the non-exclusivity expressly provided for by the parties is undermined by the court and the two types of clause become indistinguishable. There seems to be no room for treating the grant of an anti-suit injunction as supporting a legal right in a non-exclusive jurisdiction clause case, but the conduct of the individual parties may still be vexatious and oppressive: see Fawcett [2001] L.M.C.L.Q. 234, 255–257. In a clear and methodical lead judgment, Toulson L.J. (with whom the other members of the Court agreed) unequivocally rejected Burton J.'s approach, which had risked eliding the two types of clause. The court must assess in the circumstances of each case whether the conduct of the litigation has become vexatious and oppressive, but, importantly, while the existence of parallel proceedings was "undesirable" it was "an inherent risk where the parties use a non-exclusive jurisdiction clause" (at [107]).

The Court of Appeal stressed that, to a much greater extent than is likely to be the case with exclusive jurisdiction clauses, the availability of an anti-suit injunction will turn on the wording of the non-exclusive clause. Where, as in *Highland Crusader*, the clause contains a very widely worded non-exclusive provision (nothing "shall limit the right of any party to take proceedings in the courts of any other country"), it will be hard to find that the parties considered parallel proceedings to be vexatious and oppressive. Toulson L.J. was influenced by a refusal to grant an injunction based on the wording of precisely the same

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clause in *Credit Suisse First Boston (Europe) Ltd.* v. *MLC (Bermuda) Ltd.* [1999] 1 Lloyd's Rep. 767. Unless parties to commercial contracts carefully agree the wording of such clauses, anti-suit injunctions will prove hard to obtain in future.

The elephant in the room was the decision of the Court of Appeal in *Sabah Shipyard (Pakistan) Ltd.* v. *Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep. 571. Attempts have been made to limit and explain away *Sabah* before (see especially *Royal Bank of Canada* v. *Cooperatieve Centrale Raiffeisen-Boerenleenbank* [2004] EWCA Civ 7, [2004] 1 Lloyd's Rep. 471) but Toulson L.J. could not have been clearer in describing *Sabah* as needing to be seen "in the context of its own particular facts" (at [112]). His Lordship refused to accept the proposition that *Sabah* was authority that a non-exclusive jurisdiction clause means that the pursuit of parallel proceedings without an exceptional reason will be vexatious and oppressive. The Government of Pakistan had been in breach of the contract in *Sabah* and an injunction was justified as of legal right, but in any event the conduct of the Government in that case had been so outrageous as to be vexatious and oppressive. He considered that using the courts of a non-nominated state to reopen an agreed arbitration award was deeply unattractive conduct. *Sabah* was authority for nothing more than that.

Cases like *Sabah* do not, however, come along with great regularity. *Highland Crusader* represents a much more standard type of clause and conduct, and in those cases the Court of Appeal has properly made considerations of comity a priority. Hartley (1987) A.J.Comp.L. 487 explained over 20 years ago the very real impact on comity that an anti-suit injunction can have, and it has sometimes seemed like those arguments were falling on forum-centric deaf ears. The prioritisation of comity again by the Court of Appeal is grounds alone to celebrate the judgment. In *Highland Crusader* plenty of the usual factors pointed towards Texas as the most appropriate forum. It is hard to dismiss the conduct of HCOP as "forum-shopping".

The Court of Appeal managed neither to eviscerate party choice nor commit that most usual of private international law sins, the homing principle. *Sabah* was one exceptional case which, by sheer lack of competition, risked becoming a general rule that anti-suit injunctions were appropriate in support of non-exclusive jurisdiction clauses. *Highland Crusader* corrects that and lays down a framework for future cases to follow. Unfortunately the parties settled just weeks before the Supreme Court was due to hear the appeal, so the judgment of Toulson L.J. remains an authoritative statement of the law. If contractual draftsmen are awake to it, it will not take much effort to frame non-exclusive jurisdiction clauses which do not appear to permit all parallel

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proceedings, particularly by dealing with whether actions are brought subsequent or prior to an action in the nominated court, and anti-suit injunctions may still be a relevant procedural tool. But if the history of private international law tells us anything, it is that this sort of judicial advice tends to fall on stony ground.

C.J.S. KNIGHT

IDENTIFICATION OF MONEY AT COMMON LAW

SINCE at least the 16th century, the victims of fraud have often encountered an insuperable obstacle to recovering their money by a common law claim. Money, it was said, had "no earmark". This saying was a concomitant of the pre-modern monetary system that prevailed when Tudor and Stewart judges first pronounced it. Before the new forms of fiduciary and bank money developed by 17th and 18th century financiers, metallic coin was the only kind of money in circulation. Although individual coins of the same denomination varied significantly in their weight and fineness, they were practically indistinguishable from each other in a mixture (*e.g.*, *Core's Case* (1537) 1 Dyer 20a, 22b; *Isaac* v. *Clark* (1615) 2 Bulst. 306, 314, 308, 310). They lacked distinguishing physical features that would enable the owner to "earmark" his own money. Once the claimant's money was mixed, he could not prove that it was specifically his coins that the defendant withheld from him.

In *B.M.P. Global Distribution Inc.* v. *Bank of Nova Scotia* [2009] SCC 15 a unanimous Supreme Court of Canada refused to apply the rule to a claim for damages arising from the reversal of credits in bank accounts. If English courts follow this decision, then the common law rule that money cannot be followed through a mixture will be consigned to history. For the future, rules like those applied in equity to identify mixtures of misapplied trust money may apply to common law claims.

The directors of Global were innocent participants in a fraud. Global received a cheque for $904,563 drawn on the Royal Bank of Canada ("RBC"), which it deposited in its main account at the Bank of Nova Scotia ("BNS."). The directors dispersed the proceeds to various accounts held by themselves and their related companies, some of which were already in credit. The directors then drew money from the accounts but substantial balances totalling $776,650 remained. Some days later, RBC notified BNS that the cheque was a forgery. BNS agreed to re-transfer the surviving cheque proceeds to RBC. BNS then debited the amount of the cheque proceeds that had been

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