

Let's take this fight elsewhere

Dan Smith discusses when proceedings can be stayed because of earlier proceedings elsewhere in the EU



Dan Smith is an associate at Latham & Watkins

The English Court of Appeal has considered the application of Articles 27 and 28 of Brussels Regulation 44/2001 (the Judgments Regulation) in an insurance dispute involving multiple proceedings – first in the English, then Greek, then English Courts. The Court of Appeal stayed the second English proceedings under Article 27 (where the same cause of action between the same parties has commenced in another member state) on the grounds that the Greek courts were first seised of the relevant cause of action, even though the stay was sought only on appeal. Although the point was moot, the Court of Appeal also decided it could not have granted a stay under Article 28 (where there are related actions) because the jurisdiction could only be exercised by courts other than those first seised of a related action, and here the court first seised was the English court itself in the first English proceedings.

Background facts

The background facts are complex. In essence, a shipping vessel became a total loss, and its owners brought proceedings against its insurers in the English court for the losses. The loss of the vessel involved considerable loss of life, and the dispute involved allegations of lack of seaworthiness and failure to report and repair damage. In any case, that dispute settled by agreement, and the proceedings were stayed.

The shipowners subsequently commenced proceedings in the Greek court against the insurers for non-payment under the settlement, and for losses arising from separate tortious misconduct. This misconduct

in question involved alleged witness tampering and alleged spreading of false and malicious rumours during the investigation. During the proceedings the shipowners dropped the claims in relation to non-payment under the settlement. The insurers accordingly commenced fresh proceedings in the English court for summary judgment on the settlement agreement and indemnification for losses and costs in the Greek proceedings, and applied for summary judgment. The shipowners resisted, and also applied for a stay under Article 28. The English court granted summary judgment, and declined to exercise its discretion to stay under Article 28.

The shipowners appealed on the basis of Article 28. They also appealed on the basis of Article 27, the first time they had relied on this provision.

The legal background: Articles 27 and 28

The Judgments Regulation sets out rules by which parties can establish that the courts of a particular member state should hear particular disputes. Section 9 (Articles 27-30) deals with '*lis pendens* – related actions'. In particular, Article 27 provides that:

- (1) where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

And Article 28 provides that:

'Parties should consider very carefully how and where they commence proceedings. This can have long-lasting and serious consequences in multinational disputes.'

(1) where related actions are pending in the courts of different member states, any court other than the court first seised may stay its proceedings [...] (3) actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

Under English Civil Procedure Rules, CPR11 provides that a defendant wishing to challenge jurisdiction must file an acknowledgement of service (often the first step in responding to proceedings) and bring an application within 14 days thereafter.

Challenges brought too late?

The Court of Appeal (Longmore LJ delivering the majority judgment, Toulson and Rimer LJ agreeing) held that the shipowners were not too late to rely on either Articles 27 or 28. This was because applications under Articles 27-28 were not challenges to jurisdiction within

the meaning of CPR11. Challenges to jurisdiction under CPR11 include challenges under ss1-7 of the Judgments Regulation, which regulate when claimants are entitled to bring proceedings

Articles 27-28, in contrast, appear in s9 of the Judgments Regulation and are concerned not with getting a case into a jurisdiction, but with getting a case out of a jurisdiction (or perhaps stayed), ie regulating

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in the courts of member states, eg based on the domicile of the defendant in that member state (Article 2), the nature of the cause of action (Article 5), existing proceedings in the courts of that member state for closely connected claims against other defendants (Article 6), or a jurisdiction agreement (Article 23).

proceedings in multiple member states which potentially both have jurisdiction.

Furthermore, the court held that the shipowners could apply under Articles 27-28 even at this late stage in proceedings, on the basis that the judgment remained appealable. This was the case even though they had previously



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disavowed an intention to do so and they had received an (adverse) judgment at first instance.

Article 27

The court confirmed that 'same cause of action' in Article 27 referred to both the substance of the two proceedings and the object for which they were pursued. The Court cited *The Tatry* [1999], on referral to the ECJ, in which the ECJ stated that:

39. [...] the 'cause of action' comprises the facts and

circumstances, have the same cause of action.

41. The 'object of the action' for the purpose of article 21 means the end the action has in view.

Accordingly, negative declarations and a substantive claim in relation to the same liability were mirror images of each other, and were the 'same cause of action'. The reason behind this was to prevent the risk that a court might not recognise a judgment in another court, eg for enforcement purposes, if it was

Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG & ors [2012] EWHC Civ 1714

The Tatry [1999] QB 515

was engaged, and it mandated a stay of all the English proceedings.

Article 28

The court confirmed that Article 28 concerned 'related actions' (ie proceedings) and not 'related causes of action', and operated very differently to Article 27. The court held that whether actions were related should be judged when the application was made, rather than when the proceedings commenced, and accordingly the court could consider new causes of action. However, the issue of which court was first seised should be judged by when the action commenced.

Article 28 permits any court other than the court 'first seised' to stay its proceedings. In this case, it was the English court in the first English proceedings which were first seised of a 'related action' to the second English proceedings. However, as the second English proceedings were not proceedings in 'a different member state', the court had no jurisdiction to stay under Article 28. Accordingly, the court considered that it would have upheld the first instance decision to refuse to stay under Article 28, but this issue was moot given the stay under Article 27.

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the rule of law relied on as the basis of the action.

40. Consequently, an action for a declaration of non-liability, such as that brought in the main proceedings in this case by the shipowners, and another action, such as that brought subsequently by the cargo owners on the basis of shipping contracts which are separate but in identical terms, concerning the same cargo transported in bulk and damaged in the same

incompatible with a judgment in the first court.

Indeed, the Court of Appeal went further and held that once the point came to the attention of the court second seised, Article 27 required it 'of its own motion' to stay proceedings: a stay would be mandatory.

The court found that the key assertions in the second English proceedings were in substance that the insurers were not liable in the Greek proceedings, and that the Greek court was first seised of the remaining tortious causes of action. Accordingly, Article 27

Key points arising from this decision

- Parties should consider very carefully how and where they commence proceedings. This can have long-lasting and serious consequences in multinational disputes.
- Applications under Articles 27-28 of the Judgments Regulation are not challenges to jurisdiction under CPR Rule 11, unlike, eg, arguments based on domicile, place of contractual performance, location of damage, jurisdiction agreements, etc. This means that they can be brought at a late stage even after 14 days after service of an acknowledgement of service.
- Challenges under Article 27 are concerned with mandatory stays based on the identity of the substance of relevant causes of action, which can include 'mirror images' such as negative declarations.
- Challenges under Article 28 are concerned with discretionary stays based on related actions (ie proceedings), and apply only where the court first seised is in a different member state.

Notes

This case highlights both the complexity of the EU rules on forum shopping, and their importance in multi-jurisdictional litigation. It is important for parties to consider carefully not only what causes of action they rely on in their claims in a particular forum, but also the factual matters they rely on. The Judgments Regulation often rewards claimants who race to litigate and establish the court first seised in a forum of their preference. However, if not approached carefully, it can still leave them permanently exposed to related proceedings elsewhere. The case also demonstrates that some jurisdictional battles are not necessarily to be resolved at an early stage in proceedings. ■