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What Happens in England, Stays in England?

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In the decision *In the matter of "The Alexandros T"*[1], the UK Supreme Court restricted the application of Articles 27 and 28 of Council Regulation (EC) No 44/2001 in a long-running insurance dispute involving multiple proceedings – first in the English, then Greek, then English courts.

Note: This article discusses the Supreme Court's view on a Court of Appeal decision which *In Practice* reported in our April 2013 edition — *Starlight Shipping Co. v. Allianz Marine & Aviation Versicherungs AG & ors*[2].

What will the decision mean?

The ruling means that proceedings in a foreign EU Member State will not prevent the English Court hearing claims that the foreign proceedings were brought in breach of a settlement of prior English proceedings.

The Supreme Court has affirmed the willingness of the English court to uphold the effectiveness of settlement agreements, in this case one with an exclusive jurisdiction clause in favour of the English court. Thus the Court has reduced the prospect of satellite litigation in other Member States preventing enforcement of such agreements.

However, under well-established case law, the English court would not have been able to restrain such satellite litigation on jurisdictional grounds. That issue remains for the foreign court to decide. Accordingly, this decision increases the prospect of multiple proceedings in Member States arising from the same dispute.

Overview

The facts and legal background are set out in our article on the Court of Appeal decision in our April 2013 edition. In essence, insurers applied in existing English proceedings (stayed pursuant to a settlement agreement under which the parties had resolved the original insurance claim) against the Greek shipowners of the *Alexandros T*. The insurers alleged that the shipowners had commenced proceedings in the Greek courts for various tortious claims in breach of the settlement agreement . The insurers sought an indemnity under that settlement agreement in the English proceedings.

On application by the shipowners, the Court of Appeal had stayed the English proceedings under Article 27 (applicable where proceedings involving the same cause of action between the same parties had already commenced in another Member State) on the grounds that that Greek proceedings in relation to tortious liability were in substance the same cause of action, and the proceedings were "mirror images" of each other. In a judgment handed down on 6 November 2013, all five Supreme Court justices disagreed, and permitted the English proceedings to continue. The key aspects of the decision are:

1. The Supreme Court overturned the Court of Appeal decision below and refused to grant a stay under Article 27, because the English proceedings involved a different *cause* (a contractual rather than tortious claim) and a different *objet* (an indemnity against the Greek proceedings rather than liability for tort).

2. The Supreme Court upheld the finding that the English Court had no jurisdiction to exercise discretion to stay under Article 28 (on the grounds of prior foreign related proceedings) because the English Court was itself the court first seised of the action based in the original English proceedings. The Supreme Court would in any case have refused to exercise its discretion to do so.

3. The shipowners' challenge was plainly a challenge to jurisdiction and so should have been brought at the start of the application within the strict time limits set down in the English Civil Procedure Rules.

Article 27 – no mandatory stay

Following general principles laid down by the Court of Justice of the European Union (CJEU, formerly the ECJ), the Supreme Court recognised that Article 27 applied where multiple proceedings involved the "*same cause of action*". This phrase had an independent and autonomous meaning under EU law; namely that the two proceedings must have identity of (a) *cause*, and (b) *objet*, which comprised both the facts and the legal rule which the claimant invoked[3]. Furthermore, this assessment should be made by reference only to the claims in each proceedings, and not to the defences to those claims[4].

As to *cause,* the Supreme Court held that the claims in Greece (allegations of witness tampering and similar misconduct in the earlier English proceedings) were claims in tort, while the claims in England were in contract for an indemnity under the settlement agreement in relation to the Greek proceedings. As to *objet*, the Greek proceedings were to establish a tortious liability, while the English proceedings were to establish a right to be indemnified in respect of such a liability. Accordingly Article 27 did not apply. The Supreme Court applied similar reasoning to other aspects of the two sets of proceedings, Lord Clarke giving the reasoning of the majority opinion:

> "*The critical point is that on the facts here the legal basis of the claims in tort in Greece is different from the legal basis of the contractual claims in England…the two claims are not the mirror image of one another*"

In reaching this decision, the Supreme Court disagreed with the Court of Appeal's treatment of the question "*as a broad one focusing on the overall result in each jurisdiction*", and the Court of Appeal's focus on comparing the claims alongside their defences.

The Supreme Court also considered when a court would first be seised of a particular cause of action for the purposes of Article 27. The Supreme Court held that this was an issue properly referrable to the CJEU, depending on whether the insurers continued to maintain certain causes of action (an open issue at the time of judgment).

Article 28 – no discretionary stay

The Supreme Court also considered the exercise of discretion by a court second seised of an "*action*" to stay "*related actions*" under Article 28. The Supreme Court confirmed existing case law that this involved a consideration of the two actions as a whole, and not merely a consideration of causes of action as occurs under Article 27.

The Supreme Court considered that the English court was the court first seised by virtue of the earlier English proceedings, and so there was no scope for engaging Article 28, although the Supreme Court held that this issue was sufficient uncertain that it could be referred to the CJEU for a final ruling. However, this issue was moot because the Supreme Court agreed with the first instance judge's refusal to exercise his discretion, based on the application of three factors: the extent of the relatedness of the actions and the risk of mutually irreconcilable decisions; the stage reached in each set of proceedings; and the proximity of the courts to the subject matter of the case. Each factor weighed in favour of the English court.

Challenges brought too late?

The Supreme Court held that challenges under Articles 27 and 28 in English proceedings must be made under Civil Procedure Rules Part 11(1)(b), which provides that applications must be made within 14 (or in some cases 28) days after filing an acknowledgement of service at the commencement of the claim. Thus the period had passed in which shipowners could have made such a challenge in any case.

In deciding this, the Supreme Court overturned the decision in the Court of Appeal below, which had held that applications under Articles 27 and 28 were not challenges under CPR Part 11, and could be made even after a decision at first instance. The Supreme Court disagreed. It held that an such an application was precisely within CPR Part 11.

Furthermore, the English Court was entitled to follow its own procedural time limits restricting challenges, and that this would not impair the effectiveness of Article 27:

> "*In general, EU law does not require national courts to disapply their own procedural rules in order to secure the vindication of EU rights [...] EU law does not require a national court to reopen a final judicial decision, even if failure to do so would make it impossible to remedy an infringement of a provision of EU law*"[5]

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1 [2013] UKSC 70 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2013_0023_Judgment.pdf

2 [2012] EWCA Civ 1714 http://www.bailii.org/ew/cases/EWCA/Civ/2012/1714.html

3 *The Tatry*, Case C-406/92

4 *Gantner Electronic GmbH v. Basch Exploitatie Maatschappij BV* [2003] ECR (I-4207)

5 *Interfact Ltd v. Liverpool City Council* [2001] QB 744, per Lord Judge CJ, adopting the Austrian Supreme Court decision in *Kapfere v. Schlank & Schick GmbB*