

## **LIS PENDENS: RECENT DEVELOPMENTS UNDER THE JUDGMENTS REGULATION**

### **1. Changes to *Lis pendens* under the new regulation**

- New Regulation (1215/2012) in force from 10 January 2015.
  
- Articles 33 and 34 of the new Regulation now provide a power to stay proceedings in favour of proceedings in a non-Regulation state (reversing in part *Owuzu*).
  - Article 33: Proceedings involving same cause of action and parties
  - Article 34: Proceedings involving related actions.(See Appendix for text of articles)
  
- Only applies if action in non-Regulation state commenced first and where jurisdiction under Regulation is founded under Articles 4, 7, 8 or 9.
  
- Third state must be expected to give judgement capable of recognition/enforcement in member state.
  
- Key condition under both articles is that court satisfied “*stay is necessary for the proper administration of justice*”.
  - Per Recital 24, has to take into account all circumstances of case including how advanced proceedings are in third state and whether judgment can be expected within a “*reasonable time*”.
  - Query whether some common standards regarding what constitutes “proper administration of justice” in a third state. Italian court may have very different idea of what is a “reasonable time” for judgment than an English court!
  
- See also Article 31(2): where parties have agreed to submit a dispute to the exclusive jurisdiction of the court of one Regulation state, that court will have primacy over determining its jurisdiction even if another court is first seised.
  - Query what happens if dispute over whether jurisdiction clause applies.

## 2. The *Alexandros T* [2013] UKSC 70

- Supreme Court decision concerning application of Articles 27 and 28 of the old Regulation (reproduced in Articles 29 and 30 of new Regulation)
- Concerned an insurance dispute arising out of the loss of the *Alexandros T*, a Greek bulk carrier, off the coast of South Africa in 2006.
- Claims under insurance policy originally commenced in England in 2006, settled in 2007/2008 under Tomlin order.
- Fresh claims then brought in Greece in 2011 claiming damages against insurers for defamation and malicious falsehood arising under same facts.
- Insurers sought summary relief in England for breach of settlement agreement; shipowners argued English action should be stayed under Regulation.
- Case went to Supreme Court where considered five issues relating to *lis pendens* under Regulation, three under Article 27 and two under Article 28.
- Article 27 applies where the “same cause of action” is proceeding between the same parties in the courts of two or more Member States, and requires all but the court first seised to stay proceedings before them. The issues raised under Article 27 were:
  - Were English claims under insurance policies “same cause of action” as Greek claims on same facts but brought in tort?
    - The Supreme Court held unanimously that they were not to the extent that the English courts might require the shipowners to indemnify the insurers against any awards made in the Greek proceedings.
    - However the Court split 3:2 (in favour of the insurers) as regards the claim in the English proceedings for a declaration that the subject matter of the Greek proceedings had already been settled, with a consensus that the point should be referred to the CJEU.
  - Was the relevant date of seisin of the English court the date proceedings were first issued in 2006, or when new parties and claims were added in 2011? The

Court held tentatively that it was the former, but again thought the issue should be referred to the CJEU.

- Was the court required to examine the position under Article 27 of its own motion, even if the parties had agreed that it did not apply? Again, the Court held that the point, if it had to be decided, should be referred to the CJEU.
- Article 28 applies where “related actions” are proceeding in the courts of two or more Member States, and give all but the first court seized a discretion to stay proceedings.
  - Related actions are defined as those where it is “*expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*”.
  - It was common ground in the *Alexandros T* that, to the extent the English and Greek claims did not involve the same cause of action, they were related.
- Under Article 28, the issues were:
  - Were the (stayed) English proceedings pending at the time the Greek action was brought? It was held that they were. A stay is not equivalent to dismissal or discontinuance, as it can be lifted by the Court. In any event, under the terms of the Tomlin order, the stay was expressly provided not to apply to any proceeding for enforcement of the settlement agreement.
  - Was the relevant date of seisin that on which the English proceedings were issued, or the time at which the “related” claims were introduced? As under Article 27, the Court tentatively preferred the former but held that a reference to the CJEU would be required for a definitive answer.
- In the event the case was resolved without any references being made. The three points considered under Article 27, and the second point under Article 28, therefore remain outstanding and the subject of considerable uncertainty as to their application.

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## APPENDIX

### **Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)**

[Recitals]

[...]

(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.

(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.

[...]

[Articles]

#### ***SECTION 9***

##### ***Lis pendens — related actions***

###### **Article 29**

1. Without prejudice to Article 31(2), 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.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

### **Article 30**

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.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, 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 resulting from separate proceedings.

### **Article 31**

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

### **Article 32**

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

### **Article 33**

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;

(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

### **Article 34**

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

- (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
  - (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
2. The court of the Member State may continue the proceedings at any time if:
- (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
  - (b) the proceedings in the court of the third State are themselves stayed or discontinued;
  - (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
  - (d) the continuation of the proceedings is required for the proper administration of justice.
3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

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