Article 29(2) Brussels Regulation Recast and the Principle of Comity

DR MANOS MAGANARIS, MODULE CONVENOR FOR CONFLICT OF LAWS

TRANSCRIPT

Welcome to the Conflict of laws video blog which is about Article 29(2) of the Brussels Regulation Recast.

When on January 10, 2015 EU Regulation 1215/2012 (the Recast Brussels Regulation) came into force, among the reforms introduced, were provisions intended to prevent the litigation tactic known as the 'Italian torpedo'.

You will remember that 'Italian torpedo' is the name given to the process, which is often used in cross-borders disputes. where a party to a dispute may seek to frustrate its opponent by bringing an action in an EU member state which has no connection to the claim, simply on the basis that that state has a reputation for a slow judicial system. The court of the member state in whose favour the jurisdiction clause is drafted must then wait until the first court seised has dealt with the jurisdiction dispute. This tactic has been assisted by the drafting of the lis pendens provisions in article 27of the Brussels Regulation which has been interpreted as obliging a second seised court in a member state to stage action preventing it as such from interfering for example by granting an antisuit injunction.

It was an attempt to utilise the 'Italian torpedo' tactic that the English High Court had to deal with in the case of *Jamieson v Wurttemburgische Versicherung AG & Anor* [2021] EWHC 178 (QB) which was decided in February 2021. The facts of the case are as follows: The claimant was working as a commodities broker for the second defendant. Whilst on a night out entertaining clients, he was struck by a taxi sustaining very severe injuries. The taxi was insured by the first defendant, against whom the claimant had a direct right of action.

The intention of the claimant was, as he was entitled to do, to initiate proceedings in England. Consequently, the parties engaged in pre-action correspondence, in which the insurers for the taxi were asked to confirm that they would not issue proceedings in another jurisdiction. The response of the insurers was to initiate proceedings in Germany for a declaration that they were not liable for the accident.

The German proceedings were initiated in July 2017. Jamieson then initiated proceedings in England in May 2018 against the insurer (the first defendant) and his employer (the second defendant).

Those proceedings were stayed by consent, in the hope that the German courts would come to a quick decision on seisin and jurisdiction. However, when it became apparent that this would not happen, the claimant attempted to have the stay lifted. And this was a subject of the healing before the High Court.

The judge, Master Davison, stated in respect of the insurer's actions that, by having issued in Germany, he was intended to disadvantage the claimant by removing from him the opportunity to litigate his claim in England, where he lives. That was contrary to the spirit of the Recast Regulation which conferred on the claimant the option to pursue his claim either in England or in Germany.

The effect of depriving the claimant of the chance of litigating in his home forum would have greatly disadvantaged him because, as a result of the accident, he had suffered a range of serious physical injuries, including a neurological injury, which has impaired his cognitive and psychiatric functioning. There was also the problem of funding, as he had exhausted or almost exhausted his legal expenses insurance. In England that problem would be solved by taking advantage of the availability of conditional free arrangements. But such arrangements were not available in Germany.

In addition, the first defendant would not be significantly disadvantaged by having to litigate in England as, wherever the trial took place, it would be German law that would apply.

The judge then went on to state that in circumstances of this nature, Article 29(2) of the Brussels Regulation Recast provides a mechanism for ascertaining which court was first seised. This mechanism takes the form of the High Court making a request to the German court that it informs the High Court about when it was seised. Master Davison said that he was willing to do that if this was requested by the parties. It would not have been appropriate for him to resolve the issue himself because, he was to do so, he would be bypassing the statutory mechanism in Article 29(2) which was introduced into the Recast Regulation and at the same time risk infringing the principle of comity.

Of interest are Master Davison's comments on the claimant's position, that the negative declaratory action was an abuse of EU law which the English court could resolve by allowing the English proceedings to continue. Whereas Master Davison left open the possibility that the insurer's actions were abusive, he stated that it would be contrary to the principle of comity for the English High Court to assume jurisdiction on the basis of an abuse of EU law in a German action, when the existence and consequences of that abuse were in the process of being worked out by the German courts.

It should, finally, be noted that after the draft judgement had been released, the claimant requested that Master Davison make a request under Article 19(2) of the Brussels Regulation Recast to the German court to inform him of the date when it was seised, or deemed seised of the claim. The judge agreed to do this, so it will be very interesting to see how this story will unfold.

(Source: Geert van Calster)