The Recast Regulation Recast? Limits on the English Court's kompetenz-kompetenz where a foreign court's date of seisin is in issue: Jamieson v. Wurttemburgische Versicherung AG.

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Mini-summary

Regulation 1215/201 on jurisdiction and the recognition of judgments in civil and commercial matters (the "Recast Regulation") provides that *"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."* (Article 29(1))

In a novel interpretation of Article 29(2) of the Recast Regulation the Court ruled that it imposed an exclusive statutory mechanism for resolving this question, *viz.*, to ask the court in question. The English Court was, therefore, unable to determine whether it was the *"court first seised"* under Article 29(1), and thus whether it was appropriate to allow the claimant's application to lift a previously agreed stay. The application was accordingly refused, pending the German Court's answer to a request for it to state the date of seisin.

Practical Implications of the Case

Whilst the Recast Regulation stopped applying to the UK at the end of the UK-EU transition period (31 December 2020), it will continue to apply to proceedings commenced before this date. Given that the decision arguably amounts to the creation of a new, exclusive regime to determine when a foreign court has been seised of a dispute, it will be of particular interest to those already embroiled in jurisdictional disputes under the Recast Regulation.

Its impact on new claims will be more limited. It remains to be seen whether the UK will eventually be allowed to rejoin the Lugano Convention. However, even if it does, that Convention contains no equivalent to Article 29(2), which was said to create the "statutory mechanism" in question.

However (and whilst *obiter*) the weight which the Court gave to the principle of comity may be of broader interest. Comity considerations are inevitably relevant to applications for anti-suit injunctions. Those seeking to persuade a judge not to exercise their discretion to injunct litigants from pursuing foreign proceedings (following cases such as ***Ecobank v. Tanoh*** [2015] EWCA Civ 1309, [2016] 1 WLR 223; ***Verity Shipping v. Norexa*** [2008] EWHC 213 (Comm) [2008] 1 Lloyd's Rep 652; and ***Essar Shipping v. Bank of China*** [2015] EWHC 3266 (Comm) [2016] 1 Lloyd's Rep 427) will find support for their argument in Master Davison's decision.

What was the background?

The claimant, Mr Jamieson, was hit by a taxi insured by Wurttemburgische Versichering AG ("Wurttemburgische"), whilst he was in Munich. The circumstances of the collision were in dispute. Given that the Recast Regulation entitles the injured party to bring his claim in his country of domicile, Mr Jamieson appointed English solicitors, who entered into pre-action correspondence with Wurttemburgishe's UK representatives.

Meanwhile, in July 2017, Wurttemburgische issued a claim for a declaration of non-liability in Germany. This action was described by the English Court as *"lacking in transparency"*, and designed to advantage himself at Mr Jamieson's expense, *"contrary to the structure and intention of the Recast Regulation."*

The German proceedings were not disclosed to Mr Jamieson until spring 2018, whereupon he issued protective proceedings in England, and launched a jurisdictional challenge in Germany. The English proceedings were stayed by consent pending resolution of the German proceedings, or their stay in favour of the English action.

The Munich Regional Court ruled that it had not been *"deemed seised"* until June 2018 (after the English Court); and that the German proceedings should therefore be suspended in favour of the English. On appeal, the Munich Regional Higher Court set aside this order; but also ruled that Wurttemburgische's claim in Germany was "inadmissible" because it undermined the intention of the Recast Regulation. Wurttemburgische was invited to withdraw their claim (which was

labelled *"abusive"*, and a *"torpedo action"*). However, rather than doing so, they indicated that this point may be appealed to Germany's highest civil court, or even the CJEU.

Mr Jamieson applied to lift the stay of English proceedings on the basis that: (1) England was the court first seised; alternatively (2) that the German proceedings were an abuse of EU law, and that the Court should give effect to the Regional Higher Court's finding by allowing him to proceed in England.

What did the court decide?

Article 29(2) provides that, *"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."*

On one view, this simply obliges a national court to answer a question, if asked. However, on the Master's interpretation it goes father, laying out a *"statutory mechanism"* which cannot be *"sidestepped"* by the English Court itself applying Article 32 to ascertain when the German court was deemed seised. On this construction, Article 29(2) allocates to the courts of each Member State sole jurisdiction to determine when they have been deemed seised according to Article 32 – at least where this is in issue before a Court considering a stay under Article 29(1). The Court therefore declared itself unable to address the question as to when the German Court had been *"deemed to be seised"* under Article 32; and therefore unable to determine whether the English proceedings should remain stayed under Article 29(1).

This is apparently the first time the English Courts have so construed the Recast Regulation: as the Master himself recognised, there are other cases in which English Courts have calculated the date on which a foreign court was *"deemed to be seised"* according by applying Article 32 (with the aid of expert evidence where necessary).

Moreover, even if the Court could determine whether it was the Court first seised (and thus whether the German Court should be the one to stay proceedings), the Master professed that he would be reluctant to do so, in deference to the German Court – which had been first seised with the question of first seisin. This hesitation to resolve the issue before him was not based on the rules of the Recast Regulation - which are designed to be applied fairly mechanistically - but on the principle of comity, a consideration more usually encountered where courts are applying common law rules of private international law to jurisdictional disputes.

Case Details

Court: QBD

Judge: Master Davison

Date of Judgment: 5 February 2021

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Claudia has a broad and international commercial practice, covering banking and finance, international trade, professional negligence, cross-border insolvency, shipping, and insurance and reinsurance.

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