

# Lis pendens: the parties' choice of jurisdiction matters under the Recast Regulation

## KEY POINTS

- The Recast Regulation (1215/2015) gives a new primacy to the parties' choice of jurisdiction and governing law in a way that its predecessor, the Brussels Regulation (EC 44/2001), did not.
- The English courts appear willing to treat asymmetric jurisdiction clauses, often used by banks, as being exclusive jurisdiction clauses for the purpose of the Recast Regulation.
- Applications in respect of jurisdiction and summary judgment may be heard together in rare circumstances, particularly where the parties are fully prepared to present their arguments and evidence.

The Recast Regulation gives greater priority to parties' choice of jurisdiction contained in jurisdiction clauses when determining jurisdiction. This article considers the Commercial Court's decision in *Barclays v ENPAM* which provides useful guidance as to the principles involved in determining whether two sets of proceedings concern the same cause of action and guidance as to when summary judgment applications will be heard concurrently with jurisdictional applications.

## INTRODUCTION

As explained in a recent edition of this journal ([2016] 6 JIBFL 362), in respect of proceedings instituted on or after 10 January 2015, Council Regulation 1215/2015 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Regulation) has replaced Council Regulation (EC) 44/2001 (the Brussels Regulation).

The Recast Regulation has tweaked the *lis pendens* rules to take account of the lessons learnt in the previous decade and introduced a significant change by giving primacy to the parties' chosen court in determining jurisdiction. The *lis pendens* rules are now contained in s 9 (Arts 29 to 34) of the Recast Regulation. Article 29(1) (which replaced Art 27 of the Brussels Regulation) provides that, without prejudice to Art 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.

The reference to Art 31(2) in Art 29(1) is new and crucial as it deals with the parties' choice of jurisdiction. Article 30 of the Recast Regulation replaces Art 28 of the Brussels Regulation with only some minor, immaterial changes in wording. Article 30(1) provides that where "related actions" are pending in the courts of different member states, any court other than the court first seised *may* stay its proceedings. Article 30(3) deems actions 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'.

In order to understand the remainder of the new *lis pendens* rules, it is first necessary to consider some earlier articles of the Recast Regulation. Article 24 sets out the circumstances in which courts of a member state shall have exclusive jurisdiction regardless of the domicile of the parties. Article 25 deals with the "prorogation of jurisdiction", providing that if the parties, regardless of their domicile, have agreed that a court is to have jurisdiction to settle any disputes in connection with a particular

legal relationship, that court shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. An agreement conferring jurisdiction which forms part of a contract *shall* be treated as an agreement independent of the other terms of the contract. Article 26 provides that, apart from jurisdiction derived from other provisions, a court of a member state before which a defendant enters an appearance shall have jurisdiction (except where the appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Art 24).

Article 31 of the Recast Regulations introduces an important change in giving primacy to the parties' choice of jurisdiction. Article 31(2) provides:

'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.'

## INTERPRETATION OF "SAME CAUSE OF ACTION": *BARCLAYS v ENPAM*

In *Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri* [2015] EWHC 2857 (Comm); [2015] All ER (D) 92 (Oct), Blair J considered the application of Arts 27 and 28 of the Brussels Regulation. Whilst the Brussels Regulation is no longer in force, the decision's guidance on the meaning of "same cause of action" and other aspects of the Brussels

## Feature

Regulation which have survived into the Recast Regulation remains valuable. The Court of Appeal is due to hear the appeal in November 2016.

### Factual background

In 2007, Barclays Bank Plc (Barclays) entered into a transaction with an Italian pension fund, *Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri* (ENPAM) by way of a Conditional Asset Exchange Letter, whereby ENPAM exchanged €140m in its assets for securities in the form of credit-linked notes. The letter agreement contained a jurisdiction clause which provided that:

'This letter is governed by and interpreted in accordance with English law. The parties hereby agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this letter.'

The parties subsequently entered into a Professional Client Agreement (PCA) which contained an asymmetric jurisdiction clause (discussed below). Both agreements also made provision for ENPAM to indemnify Barclays following breach by ENPAM of its obligations under the respective agreements.

ENPAM subsequently claimed to have suffered a major loss as a result of the transaction. It claimed that the securities were very risky and wholly inappropriate for its investment objectives.

In June 2014, ENPAM issued proceedings against Barclays and five others in the Civil Court of Milan (the Milan proceedings). It claimed that Barclays had supplied it with a number of investment and ancillary services, including the provision of advice and management of its investment portfolio, without the prior execution of a written framework agreement, which was required by Italian law.

ENPAM's primary claim was in tort seeking damages for pre-contractual and extra-contractual liability on the basis that, had it not proceeded with the transaction, it would have been approximately €96m better off. Its secondary claim, which relied upon the same vitiating factors as in the

main claim, was for nullity of the transaction and for restitution of €165m. It argued that the jurisdiction clause in the transaction documents was null and void because such clauses are required by Italian law to have been included in the preliminary investment framework agreements (which had not been put in place) (see [17(2)]). It also sought to rely upon Italian jurisprudence to the effect that jurisdiction should be determined by reference to its main claim and that the clause was not wide enough to cover claims for tortious or non-contractual liability (see [17(3)]).

In September 2014, Barclays issued proceedings in London claiming declaratory relief, damages and an indemnity on the basis that, by the Milan proceedings, ENPAM had breached the jurisdiction provisions in the letter agreement and the PCA (however Barclays ultimately did not pursue the indemnity claim). In response, in April 2015, ENPAM applied for an order that the English court should not exercise its jurisdiction on the basis that the Milan court had been first seised. In May 2015, Barclays applied for summary judgment. Both the summary judgment application and ENPAM's jurisdiction application were heard in the Commercial Court in October 2015.

### Did the two sets of proceedings concern the same cause of action?

ENPAM's primary application was based on Art 27 of the Brussels Regulation. It was agreed that the Italian proceedings and English proceedings were between the same parties and were related. Blair J held that where Art 27 applies, the court second seised must cede jurisdiction to the court first seised, even in the face of an exclusive jurisdiction clause in favour of the former (at [63]). This is of course no longer the case under the Recast Regulation.

The first issue was therefore whether the two sets of proceedings involved the same cause of action. Blair J relied on the seminal case of *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590. He distilled the following principles in respect of the meaning of the phrase "same cause of action" from the authorities and commentary (at [68]):

- (a) 'In order for proceedings to involve the "same cause of action", a phrase which has an independent and autonomous meaning as a matter of European law, they must have "le même objet et la même cause".'
- (b) Identity of "cause" means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action. The phrase "rules of law" means "the juridical basis upon which arguments as to the facts will take place", and the analysis involves examination of "the basic claimed rights and obligations of the parties to see if there is co-incidence between them".
- (c) Identity of "objet" means that the proceedings in each jurisdiction must have the same end in view.
- (d) The assessment of identity of cause and object is to be made by reference to claims only, not defences.
- (e) Article 27 is not engaged merely because common issues might arise in both sets of proceedings. This is a point of distinction with Art 28. Under Art 28 it is actions rather than claims that are compared in order to determine whether they are related.
- (f) Given the existence of the more flexible Art 28, there is no need to strain to fit a case into Art 27.
- (g) It is necessary to consider the claims advanced separately and, in the case of each cause of action relied upon, to consider whether the same cause of action is being relied upon.
- (h) It is not sufficient for Art 27 to be engaged that the issue of jurisdiction could arise in both actions.
- (i) The essential question is whether the claims are "mirror images of one another and thus legally irreconcilable" (relying upon Briggs, *Civil Jurisdiction and Judgments* (6<sup>th</sup> edn, 2015) at [2.265]).

These principles are likely to be equally applicable to the Recast Regulation. The court's first task was to compare the claims in Milan and English proceedings (at [73]). Blair J noted as an important consideration

that, under both domestic and European law, a jurisdiction agreement, like an arbitration agreement, constitutes an agreement separate from the contract in which it is incorporated (at [80]).

Blair J concluded that neither the main claim nor the secondary claim in the Milan proceedings mirrored the English proceedings because the central dispute in the English proceedings, namely as to the scope of the relevant jurisdiction clauses, was not mentioned in ENPAM's requests for relief in the Milan proceedings. Whereas the *objet* of the English proceedings had as the end in view the recovery of damages for breach of the jurisdiction clauses, the *objet* in the Italian proceedings was different, namely, damages in tort (main claim), and restitution on the basis of the nullity of the substantive agreements (secondary claim) (at [83]). It followed that Art 27 did not apply to Barclays' claim in the English proceedings, since the proceedings did not have "*le même objet et la même cause*" as those in Milan ([91]). Hence, the court was not required automatically to impose a stay.

### Related proceedings

It must be recalled that unlike Art 27, Art 28 is discretionary. Whilst under Art 27, the court *must* decline jurisdiction if another court is first seised and the proceedings are between the same parties and involve the same cause of action, Art 28 gives the court second seised a discretion to stay its proceedings where related actions are pending in the two courts.

In its alternative case, ENPAM submitted that, having regard to the strong presumption in favour of a stay, the English court should exercise its discretion under Art 28 to stay/decline jurisdiction in the English proceedings because of common issues with the Milan proceedings, the risk of conflicting decisions on these issues, fundamental principles relating to the court first seised, and the factual and legal proximity with Italy (at [94]). Further, it asserted that since Barclays faced a cross-claim by an Italian defendant, it would be a party to the Milan Proceedings in any event, and could claim the relief that it was presently claiming in the English proceedings in the Milan proceedings, which were more advanced.

Blair J refused ENPAM relief under Art 28 on the basis that common issues in the proceedings were not substantial. He did not attribute much weight to the submission that Barclays would be a party to the Milan proceedings in any event (at [95]). Perhaps with one eye on the Recast Regulation, he held that the existence of the jurisdiction clauses was a "powerful factor in support of refusal of stay" (at [96](1)) and noted that timing considerations militated against a stay since the matters raised in the English proceedings could be resolved more quickly in England (at [96]). The existence of the jurisdiction clauses seemed to have largely saved the day for Barclays: it could not be shut out from pursuing a case for breach of the clause in the parties' chosen forum.

### The summary judgment application

ENPAM submitted that the court should not hear Barclays's summary judgment application until it had determined the jurisdiction application and that the hearings should not take place concurrently. Blair J relied upon the test set out in *Speed Investments Ltd v Formula One Holdings Ltd* [2004] EWHC 1772 (Ch): the court's power to hear the claimant's summary judgment application before or concurrently with the jurisdictional challenge will be exercised only in rare cases (at [102]). The rationale behind this rule is that foreign defendants should have a real opportunity to decide whether to submit to the jurisdiction.

However, ENPAM had conceded that it had no further evidence that it wished to adduce at a later hearing and maintained its position as a point of principle (at [105]). Blair J was ultimately persuaded by the fact that the parties were ready and another hearing would only add expense (at [106]). He considered the facts of the case to be 'out of the usual, raising questions as to the relationship between proceedings in two jurisdictions in a particular context' and that it was 'one of those very rare cases' in which the two applications could be heard together (at [106]).

Barclays was awarded summary judgment on most of its claim for damages for breach

of the exclusive jurisdiction clause. Much of the reasoning is specific to the facts of the case. Blair J rejected ENPAM's argument that granting summary judgment would be akin to an anti-suit injunction as that argument had been rejected by the Court of Appeal in *The Alexandros* [2014] EWCA Civ 1010. He also rejected ENPAM's argument that by awarding damages for breach of the jurisdiction clause, he would be tying the hands of the Italian court any way in determining the Milan proceedings.

### The asymmetrical jurisdiction clause

The jurisdiction clause in the PCA provided that:

'... each of the parties irrevocably: (a) agrees ... that the courts of England shall have jurisdiction to settle any suit, action or other proceedings relating to this Agreement ... and irrevocably submits to the jurisdiction of such courts (provided that this shall not prevent us [Barclays] from bringing an action in the courts of any other jurisdiction ...'

Blair J rejected ENPAM's argument that it had not breached the clause given that it was not strictly exclusive, reasoning that even though Barclays was not restricted in jurisdiction, ENPAM certainly was – the clause being asymmetrical. He therefore accepted that the clause was exclusive for Barclays' purposes, relying on *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm), noting that such clauses are 'frequently agreed for good practical reasons in financing transactions' (at [124]).

### CONCLUSION

Whilst the relevance of the *Barclays v ENPAM* decision is limited given that it concerned the now replaced Brussels Regulation, it is submitted that it nonetheless provides key guidance as to the English courts' approach to certain kinds of jurisdictional disputes (until the Court of Appeal hands down its judgment, probably no earlier than 2017). Blair J noted that by

## Feature

### Biog box

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virtue of the Recast Regulations, which did not apply to the proceedings before him, 'the jurisdictional rules are significantly altered by giving primacy to the parties' chosen court to determine jurisdiction' (at [34]) and made reference to Art 31(2) of the Recast Regulation (at [35]). Article 31(2) effectively directs all courts of members states which are not named in a choice of court agreement, to decline jurisdiction in favour of the courts named in that agreement once the named court is seised.

Whilst the introduction of Art 31(2) of the Recast Regulation has no doubt narrowed the scope for certain jurisdictional arguments, to some extent disarming the Italian torpedoes, heated jurisdictional battles are likely to prevail but with a shifted focus: the issues are likely to concern the interpretation of choice of courts agreements. Blair J's *obiter* comments suggest that English courts might well consider asymmetrical jurisdiction clauses to fall within the scope of Art 31(2). ■

### Further Reading:

- Life set upon the recast: the (recent) past and (near) future of questions of jurisdiction within the EU.
- The Recast judgments regulation: imminent reform of the rules of jurisdiction and enforcement of foreign judgments in the EU [2014] 11 JIBFL 709.
- Lexisnexis dispute resolution blog: key features of Brussels 1 (Recast) – a guide.