

Insight: Dispute Resolution

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An alternative to the anti-suit injunction? Supreme Court considers ability to obtain damages for EU proceedings brought in breach of an exclusive jurisdiction clause

In the landmark decision *Alexandros T* [2013] UKSC 70, the Supreme Court has held that, where parties have agreed that disputes between them will be resolved exclusively by the English courts, a party can seek damages for breach of that agreement and related declarations if the other party commences proceedings in the courts of another EU Member State. The Supreme Court's decision confirms that the English courts can and will hold parties to their agreement to refer their disputes to the English courts, even where related proceedings are already before the courts of another EU Member State.

In recent years, it has become all-too-common for parties to seek to frustrate exclusive jurisdiction clauses in favour of the English courts (and, indeed, in favour of the courts of other Member States) through "torpedo" litigation – i.e. pre-emptively commencing proceedings in the courts of a Member State renowned for taking considerable periods of time to hear proceedings, so as to delay the parties' dispute being dealt with by the court named in their jurisdiction clause. Whilst it is not possible to obtain an anti-suit injunction to prevent "torpedo" proceedings in the courts of another Member State, the Supreme Court has now confirmed that EU law does not prevent a party from pursuing claims in the English courts for damages and for certain declarations in respect of such proceedings. This provides parties with a new way to fight back against "torpedo" litigation.

This decision follows approval of amendments to Council Regulation (EC) No 44/2001 (the Brussels Regulation) due to come into effect from 10 January 2015, which will also significantly curtail the ability of parties to break agreements on jurisdiction through the use of "torpedo" litigation (see our previous Client Alert by clicking [here](#)).

Background: the dispute

The Greek owners of the vessel *Alexandros T*, which sank in 2006, commenced proceedings in the English courts against the insurers. The insurance policies were governed by English law and provided for the exclusive jurisdiction of the English court. The proceedings were settled and stayed. The settlement agreements, like the insurance policies, were governed by English law and provided for the exclusive jurisdiction of the English courts. Unexpectedly, and more than three years later, the owners brought fresh proceedings against the insurers and other related individuals/entities in the Greek courts claiming damages under Greek civil and criminal law in relation to matters concerning the sinking of the *Alexandros T*.

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The insurers made applications to enforce the settlement agreements – effectively reviving the 2006 English proceedings. They also sought to join new parties to the 2006 proceedings and issued various new proceedings in the English courts. The insurers sought damages for breach of the exclusive jurisdiction clauses, indemnification under indemnification provisions in the settlement agreements and related declarations.

Articles 27 and 28 of the Brussels Regulation

In short, the owners argued before the English courts that both the original and new English proceedings should be stayed in favour of the Greek court proceedings under Articles 27 and 28 of the Brussels Regulation. Article 27 provides that where proceedings involving the same cause of action and between the same parties are commenced in the courts of more than one Member State, any court other than the court first seised must stay proceedings until the court first seised has determined that it does not have jurisdiction. Article 28 provides that, where simultaneous proceedings are related (but don't meet the narrower requirements of Article 27), any court other than the court first seised has a discretion to stay the proceedings before it.

At first instance, Burton J held that the Greek proceedings were in breach of the settlement agreements and that the insurers were entitled to the benefit of the indemnity against the claims brought in Greece. The Court of Appeal reversed this decision, granting a stay of the English proceedings under Article 27. The insurers appealed to the Supreme Court.

The Supreme Court's decision Practical implications

The Supreme Court overturned the Court of Appeal's decision, permitting the insurers to continue their claims for damages/indemnification and certain declarations (although, as discussed below, the Supreme Court referred a number of questions to the Court of Justice of the European Union (the "CJEU"), formerly known as the European Court of Justice).

The Supreme Court considered whether the Greek proceedings should be stayed pursuant to Article 27, i.e. on the basis they involve the same parties and the same cause of action. The Court considered that, for the relevant proceedings to involve "*the same cause of action*," the proceedings must have the same object and the same cause. This was viewed as providing a fairly narrow test and as regards the claims for (i) damages for breach of the jurisdiction agreement; (ii) damages for breach of the settlement agreement; and (iii) liability under the indemnity, the Court unanimously held that the legal basis for the claims in Greece and the claims in England were different, were not inconsistent with each other and that they did not therefore fall within the scope of Article 27. The majority of the Supreme Court also considered that the insurers' claim for a declaration that the subject-matter of the Greek proceedings had already been settled, fell outside the scope of Article 27 because the Greek claims were claims in tort and the English claims were claims in contract (i.e. breach of the insurance policies and the settlement agreements and indemnity claims). However, there was some disagreement on this latter point and the Court therefore decided that the question of whether the claim for a declaration involved "the same cause of action" as the claim in Greece should be referred to the CJEU.

The Court also refused to stay the current proceedings under Article 28: the fact that the parties had agreed that the English courts would have exclusive jurisdiction was "*a powerful factor*" in support of refusing such a discretionary stay.

The Supreme Court's confirmation that the Brussels Regulation does not prevent the English courts from hearing a claim for breach of an exclusive jurisdiction clause in favour of the English courts, or a claim under a suitably-worded indemnity, is a welcome development. Even if a party is precluded from seeking an anti-suit injunction to restrain proceedings in another Member State, it is clear they can still seek recourse from the English courts for loss caused by those proceedings. This is a useful tool to combat "torpedo litigation".

It may also be helpful to obtain declarations, as the court of any other Member State should consider these when deciding whether it has substantive jurisdiction to hear any dispute before it. However, the Brussels Regulation still limits the scope of declarations which can be made. In *Alexandros T*, the majority of the Supreme Court considered that it was possible to make a declaration that the Greek proceedings had been commenced in breach of the insurance policies and the settlement agreements; but the English courts could not go further and declare that the insurers owed no liability to the owners and other claimants in the Greek proceedings. The latter would have been a "*mirror image*" of the Greek proceedings and would have to be stayed under Article 27.

Is this the last word?

Alexandros T is unlikely to be the last word on Articles 27 and 28. As discussed above, the Supreme Court left open the possibility of referring a number of questions arising out of this decision to the CJEU. Any developments will be closely watched. In the meantime, however, the Supreme Court's decision in *Alexandros T* provides welcome clarification of the English courts powers to enforce exclusive jurisdiction agreements.