



LIS PENDENS IN THE BRUSSELS I RECAST

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1. Introduction

An example: SPA, Turkish businessman domiciled in Belgium (S), consortium of German GmbH and Luxemburg société (B), 100% shares in Belgian tech company

- Cross border setting: S initiates proceedings in BE for payment of remaining installments, B initiate proceedings in LUX for breach of reps & warranties

The problem: broad heads of jurisdiction Brussels Ibis regulation: risk of parallel proceedings and potentially irreconcilable judgments – recognition without any special procedure being due (art. 36)

The solution: section 9 of the Brussels Ibis regulation

What is lis pendens?

- Proceedings involving the same cause of action and between the same parties are brought in the courts of different states
- Any court other than the court first seised must stay its proceedings until such time as the jurisdiction of the court first seised is established
- If and when the jurisdiction of the court first seised is established, any other court shall decline jurisdiction in favour of that court

Lis pendens operates on the basis of a chronological priority rule

2. Intra-European *lis pendens* (art. 29 Brussels Ibis)

- A clear priority rule
- An extensive body of ECJ case law on the conditions of application

Proceedings brought in the court of different Member States

- SPA example
- But also regardless of the head of jurisdiction being relied upon (thereby including residual jurisdiction rules under art. 6): ECJ 27 June 1991, C-351/89, *Overseas* (promote the recognition and enforcement of judgments in States other than those in which they were delivered, limit the risk of irreconcilable decisions)

When do proceedings involve the same parties and the same cause of action?

- Interpreted **independently** and **broadly** (to facilitate recognition in each contracting state of judgments given in another)
- Examine **cause of action** (the facts and rules relied upon) and **subject-matter** (the action's object, what is intended by it): common core

E.g. *Gubisch*, proceedings to enforce a contract and proceedings to deprive that contract of any legal effect (ECJ 8 December 1987, C-144/86, *Gubisch Maschinenfabrik*; ECJ 22 October 2015, C-523/14, *Aannemingsbedrijf Aertssen*)

- Based on the claims in the respective proceedings **at the outset** of those proceedings (ECJ 8 May 2003, C-111/01, *Gantner Electronic*)
- Lis pendens>related proceedings
- The SPA example

How do we determine when the courts concerned have been seized?

- Originally: national law of each of the courts concerned (ECJ 7 June 1984, C-129/83, *Zelger*)
- Now: autonomous answer but due regard for national differences: art. 32
- The Belgian point of view: service prior to lodging the document instituting the proceedings with the court
- Bailiff as 'authority responsible for service' - first authority receiving the documents to be served (comp. B. Hess, T. Pfeiffer and P. Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, 2007, nr. 478)
- Note the date of receipt of the documents to be served (art. 32.2)
- Court's duty to inform the other court of the date when it was seised without delay and when so requested (art. 29.2)

Role of the second court?

- Sit and wait (ECJ 27 June 1991, C-351/89, *Overseas*: second court cannot and may not itself examine the jurisdiction of the court first seised)
- Problematic in the face of “*delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause.*” (ECJ 9 December 2003, C-116/02, *Gasser*)
- The SPA example: a forum clause for the Luxemburg courts, S initiates proceedings of no breach (negative declaration) before the Belgian courts, in spite of the forum clause
- The court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction, even when in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long (ECJ 9 December 2003, C-116/02, *Gasser*)
- Torpedoes galore?

Role of the second court?

- Gasser-stance ECJ major impetus for reconsidering the lis pendens-mechanism of the Brussels regulation 44/2001.
- *“In order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule”* (recital 22).
- Art. 31.2: priority designated court, as soon as it has been seised, to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it
- Risk of reverse torpedo tactics?

Role of the second court?

- Section 6 of the Brussels Ibis regulation (art. 24)
- The court second seised is no longer entitled to stay its proceedings or to decline jurisdiction, and it must give a ruling on the substance of the action before it in order to comply with the rule on **exclusive jurisdiction** (ECJ 3 April 2014, C-438/12, *Weber*).
- Because of art. 45.1, (e), the court second seised will have to perform a prognosis on the possibility to recognize a decision on the substance by the court first seised.
- ≈ **Protected party** as defendant (see art. 45.1, (e), i)), i.e. a policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee.

3. International *lis pendens* (art. 33 Brussels Ibis)



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- A modest proposal to coordinate parallel proceedings with third States
- Art. 45.1, d): refusal of recognition if the judgment is irreconcilable with an earlier judgment given in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed

Intra-European <i>lis pendens</i>	International <i>lis pendens</i>	
Chronological priority	Idem, provided that Court of Member State is second seised	
Identity of parties and cause of action	Idem	
Irrespective of head of jurisdiction	Jurisdiction of second court of Member State based on Art, 4, 7, 8 or 9	
Second court must stay proceedings	Second court of Member State may stay proceedings if:	<p>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</p> <p>(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice</p>
Second court stays proceedings until jurisdiction first court established/declined	Second court of the Member State dismisses proceedings if proceedings in third State concluded and have resulted in a judgment capable of recognition	

4. Concluding remarks



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- Intra-European *lis pendens*: clearly rooted in legal culture of EU and its member states, priority rule reigns but no longer supremely (forum clauses, exclusive jurisdiction, protected parties)
- International *lis pendens*: an attempt at coordination but too entwined with national (residual) mechanisms on recognition and enforcement of third States' judgments
- A Hague Convention on Parallel Proceedings?

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