Université du Luxembourg
Faculté de droit, d'économie et de finance

Master en droit

EUROPEAN CIVIL AND COMMERCIAL LITIGATION

Professor Gilles Cuniberti

Parallel Litigation

1 Lis Pendens

The traditional tool to address the issue of parallel litigation in the civil law tradition is the doctrine of *lis alibi pendens*. Under this doctrine, the issue of parallel litigation is resolved through the application of a mere chronological factor: the court seised first is preferred, and the court seised second must decline jurisdiction once it becomes clear that the first court will exercise jurisdiction.

Lis pendens only applies where the two courts are seised of the same dispute. In most civil law jurisdictions, a dispute will be considered as being the same if it is identical in three respects (triple identity): the parties to the proceedings before each court should be the same, the legal ground of the action should be the same, and the remedies sought should be the same.

Lis pendens was initially a doctrine developed in the domestic civil procedure of civil law jurisdictions. The goal, therefore, was to decide which of two courts of the same country should be preferred. By definition, these courts were identical in most respects: they would apply the same civil procedure, they were staffed with judges who had received the same training, and so on. As it would not have been acceptable to actually compare those courts (is a judge in city X known to be less competent than a judge in city Y?), a tool was developed which would only rely on a neutral factor: time. Is the situation the same in international litigation? Are courts of different jurisdictions fungible, interchangeable? And even if they are not, should they be considered so? The answer to this question might be different depending on whether parallel litigation develops in a truly international environment (1.1) or in a federal ensemble (1.2).

1.1 With respect to litigation in foreign nations

In most civil law jurisdictions, the doctrine of *lis pendens* also applies to international parallel litigation.[1] This has a number of consequences. The most obvious one is that a civil law court may only decline jurisdiction on the ground that proceedings were also brought before a foreign court if the foreign court was seised

[1] See, e.g., in France, Civ. 1ère, 26 Nov. 1974, *Société Miniera di Fragne*, (1975) Rev Crit DIP 491; in Italy, Art. 7 of the 1995 PIL Law; in Belgium, see Art. 14 of the 2004 Code of PIL.

first. Another important consequence is that both courts must be seised of the dispute. This means that proceedings must be pending in both courts. The *lis pendens* doctrine is designed to resolve actual conflicts of proceedings. It does not apply at any earlier stage. It is thus not possible to challenge the international jurisdiction of a civil law court on the ground that a foreign court, if seised, would be a more appropriate forum: as long as a second court has not been seised, there is no '*lis pendens* situation', and thus no problem to address.

The *lis pendens* doctrine posits that courts are interchangeable, and that each court could equally resolve the dispute. An important difference between domestic and international *lis pendens*, however, is that the contemplated judgments will not automatically produce the same effects. While two domestic judgments are indeed interchangeable, a foreign judgment will only produce effect in the forum if it satisfies the test for being recognized and declared enforceable in the forum. This is the reason why civil law jurisdictions add a requirement that the foreign judgment be capable of recognition in the forum.[2] It would indeed be unacceptable that the forum declines jurisdiction on the ground that a foreign court was seised first if its judgment could not be recognized: this would mean that no judgment producing effect in the forum would resolve the dispute and grant a remedy to the judgment creditor.

If these requirements are met, is the forum under an obligation to decline jurisdiction, and does it only have discretion to do so?

Swiss Law of Private International Law (1987)

Article 9 – *Lis pendens*

1 If the same parties are engaged in proceedings abroad based on the same causes of action, the Swiss court shall stay the proceeding if it may be expected that the foreign court will, within a reasonable time, render a decision that will be recognizable in Switzerland.
2 To determine when a court in Switzerland is seized, the date of the first act necessary to institute the action shall be decisive. The initiation of conciliation proceedings shall suffice.
3 The Swiss court shall dismiss the action as soon as a foreign decision is submitted to it which can be recognized in Switzerland.

European Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and on the enforcement and recognition of judgments in civil and commercial matters (Brussels Ibis)

PREAMBLE

(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.
(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time

[2] See all the laws and cases cited in the previous note.

SECTION 9 *Lis pendens* — related actions

Article 33

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

(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
(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;
(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion

NOTES AND QUESTIONS

1 The EU law of jurisdiction has traditionally been concerned with intra--European disputes. However, in 2012, the EU lawmaker introduced a new provision dealing with parallel litigation with third States. A different rule applies to *lis pendens* between courts of Member States (see *infra* 1.2).

2 In a domestic context, the *lis pendens* doctrine operates mechanically. If another court was seised first, the court seised second must decline jurisdiction. It is an obligation, and the court has not discretion in this respect. Should the doctrine operate as automatically in an -international context? Article 9 of the Swiss Law of Private International Law provides so, and imposes an obligation on the Swiss court seised second to stay proceedings and eventually decline jurisdiction. In many other civil law countries, however, the doctrine of *lis pendens* operates differently in an international context. The forum may decline jurisdiction if it is seised second, but it is under no obligation to do so.[3] Certain legislations expressly provide a test for exercising this discretion. Article 33 of the Brussels Ibis Regulation provides that a stay should be necessary for the proper administration of justice. By granting discretion to the forum to retain jurisdiction irrespective of when it was seised, these countries recognize that courts of different countries are not always interchangeable, and that it might be necessary to take into account other considerations before declining jurisdiction. What do you think these other considerations should be?

3 Besides the *lis pendens* rule, civil law jurisdictions often also provide for the possibility to stay proceedings where the actions are not identical, but merely related: see, for instance, Art. 34 of the Brussels Ibis Regulation.

1.2 With respect to litigation in sister states

Brussels Ibis Regulation (2012)

PREAMBLE

(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for

[3] This is the case in France, Italy and Belgium, for instance: see all the laws and cases cited in the previous note.

resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously

SECTION 9 *Lis pendens* — related actions

Article 29

1. Without prejudice to Article 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.
2. In cases referred to in paragraph 1, 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.
3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed 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.

Article 32

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or
(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.
2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

NOTE AND QUESTION

In the context of litigation within the European Union, the Brussels Ibis Regulation provides for a different *lis pendens* rule. Contrary to the rule applying to litigation involving third States,[4] it is not necessary to assess whether the judgment that the foreign court would eventually deliver would be capable of recognition in the forum. This is because under the Brussels Ibis Regulation, the grounds for denying recognition to a judgment made by the court of another Member State are extremely limited.[5] The recognition of the foreign judgment is presumed.
Additionally, Article 29 does not grant any discretion to the court seised second, which must decline jurisdiction once the jurisdiction of the court first seised has been established. Should it be the case even if the process in the court first seized would be wholly inappropriate?

[4] See Art. 33, *supra*, 1.1.

[5] See *infra*, Ch. 7.

CASE

European Court of Justice, 9 December 2003 *Eric Gasser Gmbh v. MISAT srl* (Case C-▪116/02)[6]

55 By its third question, the national court seeks in essence to ascertain whether Article 21 of the Brussels Convention [*now Art. 29 of the Brussels Ibis Regulation*] must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long. (. . .)

68 It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on *lis pendens* only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does the Convention provide that courts may use the pretext of delays in procedure in other contracting States to excuse themselves from applying its provisions.

69 Moreover, the point from which the duration of proceedings becomes excessively long, to such an extent that the interests of a party may be seriously affected, can be determined only on the basis of an appraisal taking account of all the circumstances of the case. That is an issue which cannot be settled in the context of the Brussels Convention. It is for the European Court of Human Rights to examine the issue and the national courts cannot substitute themselves for it by recourse to Article 21 of the Convention.

Findings of the Court

70 As has been observed by the Commission and by the Advocate General in points 88 and 89 of his Opinion, an interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention.

71 First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.

72 Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

73 In view of the foregoing, the answer to the third question must be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

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NOTES AND QUESTIONS

1 A fundamental principle of E.U. law is mutual trust in other Member States. In judicial matters, the principle means that the courts of the Member States must trust the judicial systems of all other Member States, and thus consider that there is no difference between a foreign court and a local court. Under such principle and assumptions, the use of a strict doctrine of *lis pendens* is logical.

2 One rationale for mutual trust in judicial matters is that all Member States are parties to the European Convention on Human Rights. But what if a Member State is regularly found in breach of its obligations

[6] ECLI:EU:C:2003:657, [2003] E.C.R. I--14693.

under this Convention, such as Italy for the delays in its proceedings? Should other Member States still trust the Italian legal system?

As the *lis pendens* rule creates an obligation for any court in Europe seised second to stay proceedings, it has the potential of being used strategically. Could a potential defendant, who knows, suspects or fears that he might be sued, use the rule to secure the jurisdiction of its preferred court? Read the following case and assess whether it could be useful for a defendant to seek first a declaration that he is not liable for a particular loss.

CASE

European Court of Justice, 6 December 1994 *The ship 'Tatry'* (Case C-▪406/92)[7]

The first question

28 The national court's first question is essentially whether, on a proper construction, Article 21 of the Convention [*now Art. 29 of the Brussels Ibis Regulation*] is applicable in the case of two sets of proceedings involving the same cause of action where some but not all of the parties are the same, at least one of the plaintiffs and one of the defendants to the proceedings first commenced also being among the plaintiffs and defendants in the second proceedings, or vice versa.

29 The question refers to the term 'the same parties' mentioned in Article 21, which requires as a condition for its application that the two sets of proceedings be between the same parties. As the Court held in Case 144/86 *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4861, the terms used in Article 21 in order to determine whether a situation of *lis pendens* arises must be regarded as independent (paragraph 11 of the judgment).

30 Moreover, as the Advocate General noted in his Opinion (paragraph 14), it follows by implication from that judgment that the question whether the parties are the same cannot depend on the procedural position of each of them in the two actions, and that the plaintiff in the first action may be the defendant in the second.

31 The Court stressed in that judgment (paragraph 8) that Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, a section intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non--recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.

32 In the light of the wording of Article 21 of the Convention and the objective set out above, that article must be understood as requiring, as a condition of the obligation of the second court seised to decline jurisdiction, that the parties to the two actions be identical.

33 Consequently, where some of the parties are the same as the parties to an action which has already been started, Article 21 requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another Contracting State; it does not prevent the proceedings from continuing between the other parties.

34 Admittedly, that interpretation of Article 21 involves fragmenting the proceedings. However, Article 22 mitigates that disadvantage. That article allows the second court seised to stay proceedings or to decline jurisdiction on the ground that the actions are related, if the conditions there set out are satisfied.

[7] *Tatry v. Maciej Rataj* ECLI:EU:C:1994:400, [1994] E.C.R.I--05439.

35 Accordingly, the answer to the first question is that, on a proper construction of Article 21 of the Convention, where two actions involve the same cause of action and some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties.

The fifth question

36 The national court's fifth question is essentially whether, on a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss.

37 It should be noted at the outset that the English version of Article 21 does not expressly distinguish between the concepts of 'object' and 'cause' of action. That language version must however be construed in the same manner as the majority of the other language versions in which that distinction is made (see the judgment in *Gubisch Maschinenfabrik v Palumbo*, cited above, paragraph 14).

38 For the purposes of Article 21 of the Convention, the 'cause of action' comprises the facts and the rule of law relied on as the basis of the action.

39 Consequently, an action for a declaration of non--liability, such as that brought in the main proceedings in this case by the shipowners, and another action, such as that brought subsequently by the cargo owners on the basis of shipping contracts which are separate but in identical terms, concerning the same cargo transported in bulk and damaged in the same circumstances, have the same cause of action.

40 The 'object of the action' for the purposes of Article 21 means the end the action has in view.

41 The question accordingly arises whether two actions have the same object when the first seeks a declaration that the plaintiff is not liable for damage as claimed by the defendants, while the second, commenced subsequently by those defendants, seeks on the contrary to have the plaintiff in the first action held liable for causing loss and ordered to pay damages.

42 As to liability, the second action has the same object as the first, since the issue of liability is central to both actions. The fact that the plaintiff' s pleadings are couched in negative terms in the first action whereas in the second action they are couched in positive terms by the defendant, who has become plaintiff, does not make the object of the dispute different.

43 As to damages, the pleas in the second action are the natural consequence of those relating to the finding of liability and thus do not alter the principal object of the action. Furthermore, the fact that a party seeks a declaration that he is not liable for loss implies that he disputes any obligation to pay damages.

44 In those circumstances, the answer to the fifth question is that, on a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss. (. . .)

NOTES

1 The European Court adopts a broad definition of the object of the action, and accepts that an action in damages has the same object as an action seeking a declaration that the alleged tortfeasor is not liable. The result is that if a court of Member State is seised first of such a negative declaration, all other courts in the European Union would be bound to decline jurisdiction if they were subsequently seised by the other party of an action in damages.

2 Granting the right to initiate proceedings to the party who should logically be the defendant has been

largely criticized in Europe as being artificial and an abuse of process. Yet, one must wonder why a choice as important as that of the court should be reserved to plaintiffs only. Certainly, plaintiffs should not receive such a tremendous advantage for the reason that they are victims: before judgment, this is only an allegation which remains to be demonstrated. The European Court of Human Rights has repeatedly held that equality of arms is a fundamental procedural right, and it is hard to see why this should not result in defendants being equally able to secure the jurisdiction of their preferred court.

3 If one accepts that any party may seise a court first for the purpose of *lis pendens*, the danger is obviously that the rule will result in a race to court. As soon as a potential dispute arises, both parties might rush to seise their preferred court in order to secure its jurisdiction. This in turn might give them an advantage in any negotiation that they might start to resolve 'amicably' the dispute with other party.

4 In such a context, the definition of seizure for the purpose of *lis pendens* becomes crucial. See Article 32 of the Brussels Ibis Regulation *supra*.

Should the violation of the *lis pendens* rule be a ground for denying enforcement to foreign judgments?

CASE

European Court of Justice, 16 January 2019 *S. Liberato v. L.L. Grigorescu*(Case C-▪386/17)

32. By its questions, which must be examined together, the referring court asks essentially, whether the rules of *lis pendens* set out in Article 27 of Regulation No 44/2001 [*now Art. 29 of the Brussels Ibis Regulation*] and Article 19 of Regulation No 2201/2003 must be interpreted as meaning that, where, in a dispute concerning matrimonial matters, parental responsibility or maintenance obligations, the court second seised delivers a judgment which becomes final, in breach of those rules, the courts of the Member State in which the court first seised is situated may refuse to recognise that judgment on the ground that it is manifestly contrary to public policy. (…)

44. In order to ensure the effective implementation of Regulation No 2201/2003 and in accordance with the principle of mutual trust on which it is based, it must be stated, first, as the Advocate General observed in point 59 of his Opinion, that it is for each court, in accordance with Article 17 thereof, to examine whether it has jurisdiction (references).

45. Second, under Article 24 of Regulation No 2201/2003, the jurisdiction of the court of the Member State of origin may not be reviewed (reference). The same is true under [the Brussels Ibis Regulation], in accordance with [Article 45(1) (e)] thereof.

46. Third, in accordance with recital 21 of Regulation No 2201/2003, that regulation is based on the idea that the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required (…).

48. In that connection it must be recalled that, according to the wording of Article 24 of Regulation No 2201/2003, the test of public policy referred to in Article 22(a) and Article 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14 thereof.

49. Therefore, it must be determined whether the rules of *lis pendens* constitute rules on jurisdiction in the same way as those in Articles 3 to 14 of that regulation.

50. In that connection, although it is true that the rules of *lis pendens* laid down in Article 19 of Regulation No 2201/2003 do not appear among the rules of jurisdiction expressly mentioned in Article 24 of that regulation, Article 19 is in Chapter II of that regulation, entitled 'Jurisdiction'.

51. Further, as the Advocate General observed in point 77 of his Opinion, where, as in the dispute in the main proceedings, the court first seised, ruling on an incidental claim for recognition, examines whether the rules on *lis pendens* have been correctly applied by the court second seised and, therefore, the reasons why it has not declined jurisdiction, the court first seised is reviewing the jurisdiction of the court second seised. As stated in paragraph 45

of the present judgment, Article 24 of Regulation No 2201/2003 does not allow such a review to be carried out.

52. Thus, notwithstanding the fact that the prohibition laid down in Article 24 of Regulation No 2201/2003 does not contain any express reference to Article 19 thereof, an alleged breach of Article 19 does not allow the court first seised — if it is not to review the jurisdiction of the court second seised — to refuse recognition of a judgment issued by the latter contrary to the rules of *lis pendens* in that provision (references).

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NOTES AND QUESTION

1. The case was concerned with a dispute relating to parental responsibility and thus governed by Regulation No 2201/2003 (Brussels IIbis). The provisions for *lis pendens* are essentially the same in the Brussels Ibis and IIbis Regulations, however, and the court could thus address the issue from the perspective of both instruments.
2. What are the reasons given by the court for ruling that violation of the ***lis pendens*** rule is not a ground for denying to the resulting judgment? Why would it be a problem to review the proper application of the ***lis pendens*** rule by the foreign court? Why would it be a problem to resort to the public policy exception?
3. If the violation of the ***lis pendens*** rule does not prevent the enforcement of the resulting judgment, how is it to be sanctioned? Could the court seized first issue an anti-suit injunction to stop the proceedings initiated second? See the ***Turner*** case below p. **XX.**
4. What if the court seized first also delivers a judgment? If it does so first, any interested party could seek to interrupt and terminate the proceedings in the other state on the basis of ***res judicata***. If It does so second (but it might not be able to do so if one party relies on the ***res judicata*** of the foreign judgment at an earlier stage), there would be a conflict of decisions. It is resolved in favour of the judgment delivered first, except if one of the judgments was rendered in the forum: the forum judgment prevails then (see Brussels Ibis Regulation, art. 45).
5. Should the result be the same with respect to third states? Even for Member States of the EU, this is a issue to determined at national level, since the enforcement of judgments originating from third states is not governed by the Brussels Ibis Regulation. French courts have reached the same outcome in Franco-US disputes: American judgments were recognised in France and French parallel proceedings were thus terminated although they had been initiated first (see, e.g., French ***Cour de cassation***, 30 September 2009, case no 08-18.769). An important difference, however, is that American courts had not violated the French (or EU) doctrine of ***lis pendens***, since it does not apply in the U.S. French courts consider that the expectations of the parties resulting from the foreign judgment should prevail.

2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

Article 7 *Refusal of Recognition and Enforcement*

2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

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NOTES AND QUESTION

1. How does the rule under the 2019 Hague Judgments Convention compare with the rule under the Brussels Regulations?
2. The 2019 Hague Judgments Convention does not include rules on jurisdiction or on *lis pendens*. This means that there might not be a *lis pendens* rule in the law of the requested state. Do you think Art. 7(2) should only be applied by states which have a *lis pendens* rule? Otherwise, why should the requested state care? But is it legitimate to sanction the "violation" of the *lis pendens* rule if there is no such rule in

the law of the foreign state? What if the foreign state regulates parallel proceedings with the doctrine of *forum non conveniens* and has ruled that it is the most appropriate forum?

3 The requirement in Art 7(2)(b) aims at avoiding strategic behaviour. A defendant could initiate proceedings in a state where he has assets for the sole reason of establishing a ground of refusal. This is not possible if the dispute is not closely connected to that state. The Official Report explains that the nationality or the domicile of that party in that state would not suffice.

4 The rationale of the last sentence of Art 7(2) is to allow a new application for enforcement if it appears that the requested state has eventually delivered a judgment which is not inconsistent with the foreign judgment.

2 Anti-suit injunctions

Anti-suit injunctions are a controversial tool used by common law courts to resolve certain cases of parallel litigation. They are judicial orders whereby a common law court restrains a party from instituting or continuing proceedings in a foreign court. If the party disobeys the injunction, he will be in contempt of court and will face sanctions in the common law jurisdiction where the injunction was issued.

In accordance with the doctrine of equitable injunctions, an anti-suit injunction only acts *in personam*. It is addressed to the party who initiated the proceedings abroad. It is not addressed to the foreign court. However, if the plaintiff discontinues his action, the proceedings will almost certainly stop (by definition, the defendant will not insist on maintaining them, since it is he who sought the injunction to stop them). Thus, an anti-suit injunction indirectly interferes with the foreign judicial process, and it could be regarded as an infringement of the sovereignty of the foreign state.[8] English and U.S. courts are aware of the problem, but believe that anti suit injunctions are necessary in certain categories of cases.

Lis pendens and *forum non conveniens* are clearly less conflictual doctrines than anti suit injunctions. They aim, however, at addressing a certain category of cases of parallel litigation. Under each of these doctrines, the forum accepts that the jurisdiction of the foreign court is legitimate. The question for the court is therefore which of two courts having legitimate jurisdiction should be preferred. But there are also cases where each of the two courts considers that the jurisdiction of the other is illegitimate. The result is that none of the two courts will unilaterally decide to decline jurisdiction in favour of the other, because each court has come to the conclusion that it is the only legitimate forum for the action. In such cases, there are only two possible outcomes. The first, which is the only one contemplated by civil law jurisdictions, is that two sets of proceedings will develop in parallel, and two judgments will eventually be rendered, which might be contradictory. The second is to attempt to indirectly force the other court to stop its proceedings.

CASE

European Court of Justice, 27 April 2004 *Turner v. Grovit* (Case C-159/02)[9]

The dispute in the main proceedings

3 Mr Turner, a British citizen domiciled in the United Kingdom, was recruited in 1990 as solicitor to a group of undertakings by one of the companies belonging to that group.

[8] The French Cour de cassation ruled so in 2004, for instance (Cass. Civ. 1ère, 30 June 2004, case no 01-03248).

[9] ECLI:EU:C:2004:228, [2004] E.C.R. I-03565.

4 The group, known as Chequepoint Group, is directed by Mr Grovit and its main business is running *bureaux de change*. It comprises several companies established in different countries, one being China Security Ltd, which initially recruited Mr Turner, Chequepoint UK Ltd, which took over Mr Turner's contract at the end of 1990, Harada, established in the United Kingdom, and Changepoint, established in Spain.
5 Mr Turner carried out his work in London (United Kingdom). However, in May 1997, at his request, his employer allowed him to transfer his office to Madrid (Spain).
6 Mr Turner started working in Madrid in November 1997. On 16 November 1998, he submitted his resignation to Harada, the company to which he had been transferred on 31 December 1997.
7 On 2 March 1998 Mr Turner brought an action in London against Harada before the Employment Tribunal. He claimed that he had been the victim of efforts to implicate him in illegal conduct, which, in his opinion, were tantamount to unfair dismissal.
8 The Employment Tribunal dismissed the objection of lack of jurisdiction raised by Harada. Its decision was confirmed on appeal. Giving judgment on the substance, it awarded damages to Mr Turner.
9 On 29 July 1998, Changepoint brought an action against Mr Turner before a court of first instance in Madrid. The summons was served on Mr Turner around 15 December 1998. Mr Turner did not accept service and protested the jurisdiction of the Spanish court.
10 In the course of the proceedings in Spain, Changepoint claimed damages of ESP 85 million from Mr Turner as compensation for losses allegedly resulting from Mr Turner's professional conduct.
11 On 18 December 1998 Mr Turner asked the High Court of Justice of England and Wales to issue an injunction under section 37(1) of the Supreme Court Act 1981, backed by a penalty, restraining Mr Grovit, Harada and Changepoint from pursuing the proceedings commenced in Spain. An interlocutory injunction was issued in those terms on 22 December 1998. On 24 February 1999, the High Court refused to extend the injunction.
12 On appeal by Mr Turner, the Court of Appeal (England and Wales) on 28 May 1999 issued an injunction ordering the defendants not to continue the proceedings commenced in Spain and to refrain from commencing further proceedings in Spain or elsewhere against Mr Turner in respect of his contract of employment. In the grounds of its judgment, the Court of Appeal stated, in particular, that the proceedings in Spain had been brought in bad faith in order to vex Mr Turner in the pursuit of his application before the Employment Tribunal.
13 On 28 June 1999, in compliance with that injunction, Changepoint discontinued the proceedings pending before the Spanish court.
14 Mr Grovit, Harada and Changepoint then appealed to the House of Lords, claiming in essence that the English courts did not have the power to make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Convention. (. . .)

The question referred to the Court

19 By its question, the national court seeks in essence to ascertain whether the Convention precludes the grant of an injunction by which a court of a Contracting State prohibits a party to proceedings pending before it from commencing or -continuing legal proceedings before a court in another Contracting State even where that party is acting in bad faith in order to frustrate the existing proceedings. (. . .)

Findings of the Court

24 At the outset, it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to

respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and -enforcement of judgments (Case C--116/02 *Gasser* [2003] ECR I--0000, paragraph 72).

25 It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them (see, to that effect, Case C--351/89 *Overseas Union Insurance and Others* [1991] ECR I--3317, paragraph 23, and *Gasser*, paragraph 48).

26 Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State (see, to that effect, *Overseas Union Insurance and Others*, paragraph 24).

27 However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

28 Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paragraphs 24 to 26 of this judgment, underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.

29 Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C--365/88 *Hagen* [1990] ECR I--1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.

30 The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of *lis alibi pendens* and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.

31 Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting

in bad faith with a view to -frustrating the existing proceedings.

NOTES AND QUESTIONS

1 In *Turner*, the European Court of Justice excluded that a court of a Member State issues an anti--suit injunction against proceedings initiated in another Member State in a dispute governed by the European law of jurisdiction (then the Brussels Convention). One of the main grounds for the decision is that the European law of jurisdiction is based on a principle of mutual trust between the Member States' legal systems and institutions. The Member States of the European Union have built a federal ensemble, and a founding principle of European -integration is mutual trust between the Member States.

2 In *West Tankers*,[10] the European Court of Justice went even farther and held that anti--suit injunctions were also prohibited in a field, arbitration, which is outside of the scope of the European law of jurisdiction. In this case, the purpose of the injunction was to protect the jurisdiction of an arbitral tribunal sitting in London. Proceedings had been -initiated before an Italian court. The Court held that an anti--suit injunction against the party suing in Italy might prevent the Italian court from retaining jurisdiction under the Brussels Convention, should it rule first that the arbitration agreement was invalid or did not apply.

3 Anti--suit injunctions, however, are tools which were designed by common law courts to address certain particular problems such as the initiation of vexatious and oppressive proceedings by one party against the other. What is the remedy that the *Turner* court offers to address this issue? The court rules that the specific mechanisms provided to address parallel litigation by the Convention (now Regulation) should not be rendered ineffective by the development of others. But are those mechanisms designed to address the same issues? How efficient had those mechanisms been in this particular case?

4 As an alternative to anti--suit injunctions, it has been suggested that the violation of a choice of court agreement could be protected by allowing the aggrieved party to sue for damages in the court designated by the clause.[11] Do you think that such mechanism would be compatible with the Brussels Regulation?

5 Most Member States belong to the civil law tradition. As a consequence, most of the members of the European Court of Justice are lawyers trained in the civil law tradition. The Brussels Convention was negotiated in 1968 when there were only six Member States which all belong to the civil law tradition. A member of the European court, who was to become its president, explained:

> (. . .) inspired by civil law systems, the Brussels I Regulation (the Brussels Convention) seeks to guarantee the predictability and inviolability of rules on jurisdiction. Consequently, a balancing approach such as that traditionally followed by common law systems in the context of conflict of laws was discarded by the Union legislator. This legislative choice explains why the ECJ has held the principle of legal certainty excludes anti--suit injunctions. Since anti--suit injunctions would require a case--by--case assessment, they seem incompatible with a clear and -predictable *lis pendens* rule.[12]

[10] Case C--185/07 *Allianz SpA, & Generali Assicurazioni Generali SpA v West Tankers Inc.* ECLI:EU:C:2009:69, [2009] E.C.R. I--00663.

[11] See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008) 8.14; Koji Takahashi, 'Damages for Breach of a Choice--of--Court Agreement' (2008) X YPIL 57.

[12] Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) 59 ICLQ 287.