

The Lis Pendens and Related Actions Rules in the Brussels Ibis Regulation

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THE BASIC LIS PENDENS RULE – COURTS OF DIFFERENT MEMBER STATES

Article 29(1) Brussels Ibis Regulation:

Without prejudice to Article 31(2),

where proceedings involving **the same cause of action**

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.

**new in comparison to Article 27(1) Brussels I R*

**ECJ's autonomous interpretation*

**parallel proceedings in the EU*

**the court first seised continues its proceedings*

**the court second seised stays its proceedings
(the principle „prior in tempore”)*

**„ex officio”*

THE COURT FIRST SEISED

Article 32(1) Brussels Ibis Regulation:

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.

***Art. 30. No. 1 and 2 Brussels I Regulation**

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

***new**

Article 32(2) Brussels Ibis Regulation:

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.

***new**

Article 29(2) Brussels Ibis Regulation:
In cases referred to in Article 29(2),
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.

***new**

HOW LONG DOES THE STAY LAST?


Article 29(1) Brussels Ibis Regulation:

“...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.**”

**imprecise formulation*

ITS JURISDICTION
IS ESTABLISHED

ITS JURISDICTION
IS NOT ESTABLISHED



Any court other than the court first seised
shall decline jurisdiction in favour of that court.
(Article 29(3) Brussels Ibis Regulation)

The court second seised shall continue
its proceedings according to
the rules of national law.

**This court is not allowed to review the
jurisdiction of the court first seised.*

ECJ 27.6. 1991. – Case C-351/89 Overseas Union Insurance Ltd

***A time period within the court first seised
must decide on its jurisdiction?***

THE BASIC LIS PENDENS RULE – SEVERAL COURTS WITH EXCLUSIVE JURISDICTION

**Article 29 Brussels I Regulation*

**Member States' courts
(Article 24 Brussels Ibis Regulation)*

Article 31(1) Brussels Ibis Regulation:
Where actions come **within the exclusive jurisdiction of several courts**
any court other than the court first seised
shall decline jurisdiction in favour of that court.

the basic *lis pendens* rule

rare cases in the practice

1. EXCEPTION FROM THE PRINCIPLE „PRIOR IN TEMPORE”
JURISDICTION OF THE MEMBER STATE’S COURT SECOND SEISED IS EXCLUSIVE

No explicit rule for such a situation in the Brussels Ibis Regulation
(and the Brussels I Regulation)

The recognition of a judgment shall be refused, if the judgment conflicts with section 6 of Chapter II, that includes **Article 24** on exclusive jurisdiction.
Article 45(1)(e(ii))

ECJ 3. 4. 2014 – Case 438/12 (*Weber*), paras 55-56:

*„.....if the court first seised gives a judgment which fails to take account of **Article 22(1) of Brussels I Reg**, that judgment cannot be recognised in the Member State in which the court second seised is situated.*

*In those circumstances, **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.”*

**Should the court first seised stay its proceedings?
(avoidance of parallel proceedings; ordre public)**

2. EXCEPTION FROM THE PRINCIPLE „PRIOR IN TEMPORE” EXCLUSIVE JURISDICTION AGREEMENTS – (NEW)

Article 31(2) Brussels Ibis Regulation:

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.

**the defendant must contest jurisdiction*

**the prorogated court continues its proceedings*

**regardless of the domicile of the parties*

**the derogated court (not chosen court) stays its proceedings*

negative results from the strict application of the *lis pendens* rule
ECJ – 9. 12. 2003. – Case C-116/02 (*Gasser*)

*abusive litigation tactics:
(„torpedo actions”)

Art. 31(3) Brussels Ibis Regulation:

Where the **court designated in the agreement**

has established jurisdiction in accordance with agreement,

any other court of another Member State shall decline jurisdiction in favour of that court.

NO APPLICATION OF ARTICLE 31(2-3)

*situations where the parties have entered into conflicting exclusive choice-of-court agreements
(Recital 22)

*situation where a court designated in an exclusive choice-of-court agreement has been seised first
(Recital 22)

*the defendant has entered appearance in the court not chosen (Articles 31(2), 26)

*to matters referred to in Sections 3, 4 or 5 where
the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee
is the claimant and the agreement is not valid under a provision contained within those Section
(Articles 31(4))



**protection of the weaker party*

QUESTIONS

Recital 22 sentence 4:

„The prorogated (designated) court has priority to decide:

**on the validity of the agreement and*

**on the extent to which the agreement applies to the dispute pending before it.”*

1. May the court first seised („the derogated court”) *prima facie* review the existence of the choice-of-court agreement?

*prevention of
„reversed torpedo actions”?
-false exclusive jurisdiction
agreement

2. Should the prorogated court have a time period within it must decide on choice-of-court agreement?

3. If the derogated court didn't apply Article 31(2-3), should its judgment be recognised or not?

LIS PENDENS RULE – ACTION PENDING IN A THIRD STATE (NEW)

Article 33(1) Brussels Ibis:

When a jurisdiction is based on Article 4 or on Articles 7, 8 or 9

a jurisdiction based on other Articles of Regulation?

and proceedings are pending before a court of a third State

autonomous interpretation?

at the time when a court in a Member State is seised of

a court second seised

an action involving the same cause of action and between the same parties

autonomous interpretation?

as the proceedings in the court of the third state,

the court of the Member State may stay the proceedings if:

*a stay is not obligatory;
judicial discretion*

(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

*national rules on recognition and enforcement (*differences)*

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

meaning?

Proper administration of justice

RECITAL 24:

„When taking into account the proper administration of justice, the court of the Member State concerned shall assess **all the circumstances**.

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.”*

Does it include the application of the *forum non conveniens* doctrine?

autonomous interpretation of the ECJ

The application of the *lis pendens* rule (*prior in tempore*) is not strict, when the action is pending before a court of a third State.

Article 33(2) Brussels Ibis Regulation:

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**.

imprecise
prerequisites

Article 33(3) Brussels Ibis Regulation:

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.

Article 33(4) Brussels Ibis Regulation:

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**.

EXCLUSIVE JURISDICTION AGREEMENT – A PROROGATED COURT OF A THIRD STATE?

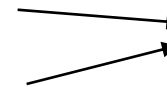


Hague Choice-of-Court Convention?

RELATED ACTIONS PENDING IN THE COURTS OF DIFFERENT MEMBER STATES

Article 30 (1,2,3) Brussels Ibis Regulation

Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.



**court's discretion*

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 questions and its law permits the consolidation thereof.

**which alternative to select?*

For the purpose of this Article, actions are deemed to be related where they are so closely connected that **it is expedient to hear and to determine them together** to avoid the risk of **irreconcilable judgments** resulting from separate proceedings.

= Article 27(1,2,3) Brussels Ibis Regulation

RELATED ACTIONS – ACTION PENDING BEFORE A COURT OF A THIRD STATE (NEW)

The rules of **Article 34(1-4)** Brussels Ibis Regulation
(related actions – action pending before a court of a third state)
are actually identical to
the rules of **Article 33(1-4)** Brussels Ibis Regulation
(*lis pendens* rule – action pending before a court of a third state),
except:

*There is an additional prerequisite in Article 34(1)(a) BIbis
that has to be fulfilled, when a court of a Member State orders the stay of proceedings:
*„it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments
resulting from separate proceedings”*

*There is an additional situation in Article 34(2)(a) BIbis,
when a court of a Member State may continue their proceedings:
„it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments”

CONCLUSIONS

to welcome Article 32(1)(2) and Article 29(2) – how to know which court is first seised
*legal predictability and certainty

to welcome Article 31(2,3) – new exception to “lis pendens” rule – exclusive jurisdiction agreement
*prevention of some abusive litigation tactics (“torpedo actions”)
*but some questions remain:
-may the court first seised prima facie review the existence of the choice-of-court agreement?
 (“reversed torpedo actions)
-time period within the prorogated court should decide on choice-of-court agreement?
-no sanctions if the derogated court didn’t apply Article 31(2,2)

to welcome Articles 33 and 34 – “*lis pendens*” and related actions in a third State
*more legal certainty
*but the question: how to interpret the term “proper administration of justice”

THANK YOU FOR YOUR ATTENTION!