THE INSTITUTE OF *LIS PENDENS* IN INTERNATIONAL CIVIL PROCEDURE

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ABBREVIATIONS USED IN THIS PAPER

Act. Doc. La Haye — Conférence de la Haye de droit international privé. Actes et documents
App. — Corte di Appello (Italian)
BayObLG — Bayerisches Oberstes Landesgericht
BG — Bundesgericht (Swiss)
BGBl. — Bundesgesetzblatt (German)
BGE — Entscheidungen des Schweizerischen Bundesgerichtes
BGH — Bundesgerichtshof (German)
Cass. civ. (req.) — Cour de Cassation, Chambre civile (des requêtes) (French)
Clunet — Journal du droit international (French)
D. — Recueil Dalloz (French)
Doc. La Haye — Conférence de la Haye de droit international privé. Documents
EGBGB — Einführungsgesetz zum Bürgerlichen Gesetzbuch (German)
EvBl. — Evidenzblatt der Rechtsmittelentscheidungen (part of ÖJZ)
Foro it. — Il Foro italiano
HD — Högsta domstolen (the Swedish Supreme Court)
IPRspr. — Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts
JW — Juristische Wochenschrift (German)
JZ — Juristenzeitung (German)
NJW — Neue Juristische Wochenschrift (German)
ÖJZ — Österreichische Juristen-Zeitung
OLG — Oberlandesgericht (Austrian or German)
RabelsZ — Rabels Zeitschrift für ausländisches und internationales Privatrecht (German)
Rec. des Cours — Recueil des Cours de l'Académie de droit international de la Haye
Rev. crit. d. i. p. — Revue critique de droit international privé (French)
RG — Reichsgericht (German)
RGZ — Entscheidungen des Reichsgerichts in Zivilsachen (German)
Riv. dir. int. — Rivista di diritto internazionale (Italian)
S. — Recueil Sirey (French)
Schw. Jb. Int. R. — Schweizerisches Jahrbuch für internationales Recht
Temi gen. — Temi genovese (Italian)

I. THE SUBJECT[1]

1. Our subject comprises two separate problems.

The first of these problems is *whether and to what extent proceedings in a foreign court have the effect of* lis pendens *in a domestic suit.* This issue presupposes that an action has first been

[1] The following works are cited by the name of the author alone, or by the author's name and a descriptive word of the title or the year of publication: *Alten,* Tvistemålsloven med kommentar (ed. 3, Oslo 1954); *Augdahl,* Norsk civilprosess (ed. 3, Trondheim 1961); *Batiffol,* Droit international privé (ed. 4, Paris 1967); *Bauer,* Compétence judiciaire internationale des tribunaux civils français et allemands (Paris 1965); *Cappelletti and Perillo,* Civil Procedure in Italy (The Hague 1965); *Dennemark,* Om svensk domstols behörighet i internationellt förmögenhetsrättsliga mål (Stockholm 1961); *Dicey and Morris* on the Conflict of Laws (ed. 8, London 1967); *Eek,* The Swedish Conflict of Laws (The Hague 1965); *Ehlers,* Litis pendens: Juristen 1955, 233–41; *Ekelöf,* Rättegång II–III (ed. 2, Stockholm 1963–4); *Gaudemet-Tallon,* La prorogation volontaire de juridiction en droit international privé (Paris 1965); *Ginsburg and Bruzelius,* Civil Procedure in Sweden (The Hague 1965); *Guldener,* Das internationale und interkantonale Zivilprozessrecht der Schweiz (Zürich 1951); *Guldener,* Schweizerisches Zivilprozessrecht (ed. 2, Zürich 1958); *Habscheid,* Zur Berücksichtigung der Rechtshängigkeit eines ausländischen Verfahrens: RabelsZ 31 (1967) 254–74; *Hambro,* Jurisdiksjonsvalg og lovvalg (Oslo 1957); *Herzog(-Weser),* Civil Procedure in France (The Hague 1967); *Hurwitz and Gomard,* Tvistemål (ed. 4, Copenhagen 1965); *Jellinek,* Die zweiseitigen Staatsverträge über Anerkennung ausländischer Zivilurteile I–II (Berlin & Tübingen 1953); *Lando,* Anerkendelse af fremmede domme: TfR 1965, 271–321; *Pålsson,* Haltande äktenskap och skilsmässor (Stockholm 1966); *Riezler,* Internationales Zivilprozessrecht und prozessuales Fremdenrecht (Berlin & Tübingen 1949); *Rosenberg,* Lehrbuch des deutschen Zivilprozessrechts (ed. 8, München & Berlin 1960); *Roth,* Der Vorbehalt des Ordre Public gegenüber fremden gerichtlichen Entscheidungen (Bielefeld 1967); *Schauwecker,* Die Einrede der Litispendenz im eidgenössischen und zürcherischen internationalen Zivilprozessrecht (Zürich 1943); *Schnitzer,* Handbuch des internationalen Privatrechts I–II (ed. 4, Basel 1957–8); *Schütze,* Die Berücksichtigung der Rechtshängigkeit eines ausländischen Verfahrens: NJW 1963, 1486–7, and 1964, 337–8; *Schütze,* Die Berücksichtigung der Rechtshängigkeit eines ausländischen Verfahrens: RabelsZ 31 (1967) 233–53; *Skeie,* Den norske Civilprosess I–II (ed. 2, Oslo 1939–40); *Undén,* Internationell äktenskapsrätt enligt gällande svensk lag (Lund 1922); *Wrede(-Palmgren),* Finlands gällande civilprocessrätt I (ed. 4, Helsinki 1953).

instituted in a foreign court and that, prior to the final judgment[2] or other disposal of that suit, a new action between the same parties and involving the same subject matter is brought in a court of the forum.[3] The issue is whether this action may be entertained, or whether the pendency of the foreign suit should be held to constitute a bar to this. The problem may also be formulated as one of *recognition of foreign lis pendens*. This terminology has the advantage of bringing out the analogy to the question of recognition of foreign judgments, with which our subject has many points of contact.

The second problem, which is closely related to the first, is *whether and to what extent the pendency of a domestic suit bars the recognition of a foreign judgment* rendered in a case between the same parties and relating to the same subject matter as the domestic proceedings. This issue presupposes that parallel actions have been taken in the forum and abroad and that a final judgment has been rendered in the foreign suit before the conclusion of the domestic proceedings. This hypothesis in its turn includes two alternatives, which should possibly be distinguished—namely, according to whether the domestic or the foreign action was the first to be instituted. The issue is whether the domestic suit—in either or both of these alternatives—should be a bar to recognizing the foreign judgment.

2. The institute of *lis pendens* has been rather poorly treated in Scandinavian literature on *domestic* civil procedure, particularly as compared with the writing on the closely related subject of "rättskraft" (the legal force of judgements; *res judicata*). This is probably due to the fact that the institute of *lis pendens* in domestic law offers few problems apart from those treated within the doctrine of "rättskraft". It seems also rather rare for issues of *lis pendens* to have arisen for court decisions.

Still less consideration has been given to the problems of *lis pendens* in *international* civil procedure. Scattered statements on this subject—usually concerning recognition of foreign *lis pendens*—exist in writings on civil procedure and on conflict of laws.

[2] The term *final* judgment is used in this paper in another meaning than in Anglo-American law, namely, as signifying a judgment that is no longer open to ordinary means of attack in the state in which it was rendered. Cf. Cappelletti and Perillo 372–3; Ginsburg and Bruzelius 387, n. 65.

[3] The term *forum* is used to designate the country where recognition of a foreign *lis pendens* or of a foreign judgment is being considered, not the country where the proceedings are pending or the judgment was rendered. Cf. Lando 272.

Mostly the subject is treated as an appendix to the problem of recognition of foreign judgements, which problem corresponds at the international level to that of "rättskraft" in domestic law.

However, the question of recognition of foreign *lis pendens,* at least, seems to arise relatively often in court proceedings. The issue is probably most common in divorce and other matrimonial causes. Several—unreported—cases dealing with this problem have been decided by lower courts in Sweden. Also, the issues of *lis pendens* in international relations are generally much more difficult to resolve than are the corresponding problems in purely domestic cases. It may furthermore be assumed that the solution of the problem is of much more far-reaching importance to the parties than in domestic cases. This may be illustrated by the following simple case:

> Two Swedish spouses have been domiciled in France. After the marriage has broken down, the wife (W) has returned to Sweden. The husband (H), who is still domiciled in France, petitions for divorce in a French court. This court has jurisdiction under the French rules of international competence. Shortly after the inception of the French proceedings, W—who also desires a divorce but wants to avoid litigating in France—approaches a Swedish court with a divorce petition. This court, too, has jurisdiction, namely, by application of the Swedish rules on international competence. The problem is, however, whether the French *lis pendens* should be recognized as a bar to the Swedish action.

It will be appreciated that the answer to this question can be of great importance to the parties. If the Swedish action is held to be barred on the ground of *lis pendens,* this means that W will be limited to the French suit instituted by H. This may be of considerable disadvantage to her, both in procedural and in material respects, cf. *infra,* section 21. These disadvantages have only to a small extent any counterpart in purely domestic cases. The difference between litigating in Stockholm and in Paris is far greater than that between litigating in Stockholm and in Gothenburg.

3. Our example calls for a distinction to be made between the question of recognizing foreign *lis pendens* and that of the *jurisdiction* of the forum. These issues are not always kept sufficiently separate, and thereby a certain confusion is produced. Thus, it is often said by writers that foreign *lis pendens* should be recognized where the action has been admitted to trial by the foreign court on the ground of a prorogation agreement valid in the eyes of the

forum.[4] This, however, is hardly a case of *lis pendens* proper but rather one of lack of jurisdiction for the courts of the forum, their competence being (validly) derogated in favour of a foreign court.[5] In other words, the reason why a new action may not be entertained in the forum lies in the prorogation clause, and the derogation of the forum's jurisdiction expressed or implied therein, not in the fact of a suit having been instituted in the foreign country. That this is the true explanation is clear from the fact that, according to the view here considered, an action in the forum is *also* barred where no prior action has been instituted in the foreign country.

In order that an issue of recognition of foreign *lis pendens* may present itself squarely, it is necessary that both courts seized with the matter, the foreign and the domestic one, should have jurisdiction under the rules prevailing as to this in the respective countries. Otherwise, the lack of jurisdiction is obviously a sufficient ground for not hearing the case. This condition is met in our illustration above. The French court holds itself to have jurisdiction on the basis of the husband's French domicile, and the Swedish court assumes jurisdiction on the ground of the Swedish nationality of the spouses.[6]

As in this example, it often happens that two or more courts have concurrent jurisdiction. This is well known already from the domestic law of procedure, the rules of territorial competence quite often offering the plaintiff a choice between different fora. The corresponding phenomenon is very common in international relations, each country being at liberty to decide for itself on its international competence, or jurisdiction.[7] Generally speaking, cases of concurrent (international) jurisdiction seem in later decades to have increased in number, owing to a tendency discernible in several countries—among them the Scandinavian states—

[4] See in Scandinavian writing, e.g., Eek 164; Ginsburg and Bruzelius 172; Hambro 92, 99–100 (who, however, admits that this is properly a case of an objection based on contract, rather than *lis pendens*). Cf. as regards English law, Dicey and Morris 1087–8, where prorogation to a foreign court is treated within the chapter dealing with *lis pendens*. Cf. also for French law, *infra*, p. 72 at n. 1.

[5] Such derogation is generally held to be possible by Scandinavian courts and writers, subject to certain conditions being fulfilled. See, e.g., the Swedish case of HD 1 Dec. 1949, 1949, N.J.A. 724; Dennemark 307–43; Eek 80–1, 281; Ginsburg and Bruzelius 170–1; Hambro 46–7, 53–91, 168.

[6] See as regards the rule of French law, e.g., Bauer 50; Herzog(-Weser) 188, 504. For the Swedish rule mentioned in the text see, e.g., Eek 245.

[7] Cf., e.g., Dennemark 12, 19–20; Riezler 211.

to extend the forum's own jurisdiction in various areas of law.[8] One consequence of this development is inevitably that questions of international *lis pendens* become more likely to present themselves than formerly.

4. In what follows there will first, as a background, be given a brief survey of the content and functions of the rules of *lis pendens* in the *domestic* law of procedure (II). In dealing with the subject proper of this paper, i.e. *lis pendens* in international relations, we shall start with a description of the rules prevailing in some foreign legal systems and in Scandinavia (III). Following that, the main part of the paper will be devoted to a systematic analysis of the questions arising in this field (IV). Within each of parts III and IV, the problem of recognition of foreign *lis pendens* and that of a pending domestic suit as a bar to recognition of foreign judgments will be given separate consideration (under A and B respectively).

II. *LIS PENDENS* IN DOMESTIC LAW

5. A rule of *lis pendens* is contained in the Swedish *Rättegångsbalk* (Code of Judicial Procedure) ch. 13, sec. 6, which reads:[9]

> While an action is pending, a new action involving the same subject matter between the same parties may not be entertained.

Similar rules, written or unwritten, exist in other Scandinavian laws and in Continental codes of civil procedure.[1]

Apart from differences in details, these rules and the doctrines attached to them have a common core. This holds true both with regard to the prerequisites and to the legal consequences of *lis pendens*. The *prerequisites* for *lis pendens* include the following points:

[8] A typical illustration of this tendency is afforded by the recent (1964) Swedish legislation facilitating access to Swedish courts 'in certain divorce, separation and other matrimonial matters, cf. Eek 248–9. For examples from foreign law, see Pålsson 209–10, 212, 215.

[9] Translation taken from: *The Swedish Code of Judicial Procedure,* translated by Bruzelius and Ginsburg (South Hackensack, N. J., & London 1968).

[1] See for Danish law, Hurwitz and Gomard 270, 334; for Finnish law, Wrede (–Palmgren) 339–41; for Norwegian law, Tvistemålsloven (Code of Civil Procedure) sec. 64. For Continental Codes of civil procedure, see e.g., secs. 232–3 Austrian Zivilprozessordnung (ZPO); the French Code de procédure civile art. 172; sec. 263 German Zivilprozessordnung (ZPO); the Italian Codice di procedura civile art. 39 para. 1. As regards Swiss law, see Guldener, 1958, 179. For English law, cf. *infra,* section 10.

(*a*) *An action must already be pending* (in the same or in another court) at the time of initiation of action no. 2. The action in case no. 1 must at this date have been initiated and not yet finally disposed of.

(*b*) *The parties to the two actions must be the same* (the requirement of *subjective identity*). This, however, does not mean that the *position* of the parties has to be the same in the two suits. If, e.g., a creditor sues his debtor for a performance judgment, the pendency of this action also prevents the debtor from suing the creditor for a judgment declaring the non-existence of the debt in question.[2]

(*c*) Finally, *the two actions must involve the same subject matter* (the requirement of *objective identity*). The meaning of this prerequisite has been the subject of elaborate discussions in Scandinavian legal writing, particularly within the doctrine of *res judicata*.[3] These difficult questions cannot be taken up here.

The *legal consequence* of *lis pendens* is that action no. 2 cannot be tried on its merits. Preference is given to the action that was the first to be started (the *principle of priority*). By the view taken in most countries, the second action must be *dismissed* (without trial of the merits), either on the court's own initiative or on objection being raised by the defendant.[4] It has been contended, however, by some Danish and Norwegian writers among others—to a certain extent also *de lege lata*—that the action in case no. 2 should be *stayed*, pending a decision in case no. 1, rather than dismissed.[5]

6. What are the functions fulfilled by the rules of *lis pendens*

[2] See on this case, e.g., Alten 86; Ekelöf, *Rättegång* III 148, 150; Guldener, 1951, 174, n. 2 b); Rosenberg 483; Skeie I 383.

[3] See, e.g., Eckhoff, *Rettskraft* (Oslo 1945) 93–131; Ekelöf, *Processuella grundbegrepp och allmänna processprinciper* (Stockholm 1956) 86–119; Ekelöf, *Rättegång* III 86–95, 110–17, 148–52; Hurwitz and Gomard 366–70; Olivecrona, Grunden och saken: *FJFT* 1954, 312–46; Olivecrona, *Rätt och dom* (Stockholm 1960) 258–342.

[4] Most commonly the court is required to take notice of *lis pendens* on its own motion. See for Finnish law, Wrede(-Palmgren) 340; for Norwegian law, Code of Civil Procedure sec. 64; for Swedish law, Code of Judicial Procedure ch. 34 sec. 1 para. 2; Ekelöf, *Rättegång* III 148. The same view is taken, e.g., by Austrian law: sec. 240 para. 3 ZPO; Petschek (-Stagel), *Der österreichische Zivilprozess* (Vienna 1963) 169–70; by German law: *infra*, n. 3 at p. 90; by Italian law: Cappelletti and Perillo 107; and by the laws of certain Swiss cantons: Guldener, 1951, 174, n. 1. *Contra*, for Danish law, Ehlers 238–9. For French law, see Herzog(-Weser) 271–3.

[5] Augdahl 154 (*de lege ferenda*); Ehlers *ibid.* (suggesting dismissal only in obvious cases, otherwise stay). And see as regards international *lis pendens*, *infra*, n. 3 at p. 106.

within the system of civil procedure? It seems possible to discern three different objectives said to be pursued by these rules:[6]

(*a*) The plaintiff has normally no reasonable interest in having his case tried in double proceedings. He cannot attain anything in case no. 2 which he cannot already attain in case no. 1, supposing him to win that case. A new action would involve a meaningless vexation of the defendant, who therefore has a legitimate claim to being protected from the inconvenience and expenses connected with such an action.

It should be noted that this reasoning applies with equal force to cases where the parties appear in reverse positions in the second action. If, e.g., the creditor has sued for payment, the debtor has no reasonable interest in suing for a judgment declaring the non-existence of the debt, such a judgment not putting him in a better position than if the creditor's performance claim in case no. 1 is invalidated. It is therefore natural that the claim for a declaratory (negative) judgment should be barred by the pendency of the first action.

(*b*) The double proceedings would involve an unnecessary waste of the time and working capacity of the courts. In this respect the rule of *lis pendens* serves a public interest of procedural economy.

(*c*) Finally, Continental and sometimes also Scandinavian writers insist on the impossibility of allowing separate adjudications of the same issue, as this would involve the risk of contradictory judgments being rendered (and opposing each other with equal authority) in the same state.

While it is undoubtedly true that double adjudications, whether contradictory or not, must be avoided, this consideration would nevertheless seem to support the rule of *res judicata*, rather than that of *lis pendens*. Even though there were no rule of *lis pendens*—and double proceedings were therefore admitted—this would normally not result in double adjudication, as long as the rule of *res judicata* was observed, this rule barring further proceedings in the case not yet disposed of. Obviously, however, it would be extremely irrational to permit double proceedings, if under the *res judicata* rule only one of them can result in adjudication.

[6] See, e.g., Augdahl 153–4; Ehlers 233; Ekelöf, *Rättegång* III 148–52; Skeie I 380; Wrede(–Palmgren) 399. For German and Swiss writers, see e.g., Baumbach and Lauterbach, *Zivilprozessordnung* (ed. 29, München & Berlin 1966), sec. 263 ZPO no. 4) A; Blomeyer, *Zivilprozessrecht* (Berlin, Göttingen, Heidelberg 1963) 244; Guldener, 1951, 175, n. 5; Riezler 452–3; Schauwecker 19–21.

Summing up, the rule of *lis pendens* is a natural and rational complement to the rule of *res judicata,* more particularly to the negative side of this rule (*ne bis in idem*). As little as an issue decided by a judgment enjoying the force of *res judicata* can be reexamined in a subsequent action, as little should it be possible to reexamine it while it is being tried in a suit which is capable of resulting in such a judgment. The relation between the two institutes may also be expressed by saying that where the *lis pendens* effect ceases, the *res judicata* effect commences.[7]

III. *LIS PENDENS* IN INTERNATIONAL RELATIONS

A. *Recognition of Foreign* lis pendens

7. This problem is solved differently in different countries. A survey will first be given of the solutions prevailing in certain foreign countries, mainly in (West) German, French and English law, which represent three different approaches to our issue (sections 8–10). Following that, Scandinavian law will be considered (section 11).

8. The view prevailing in *(West) German* law is that foreign *lis pendens* should be recognized if the expected decision in the foreign proceedings will be entitled to recognition in Germany. This principle was formulated by the *Reichsgericht* as early as the end of the 19th century.[8] It is embraced by nearly all writers[9] and has repeatedly been affirmed by court decisions.[1] Thus, e.g., in

[7] Ekelöf, *id.* 148.

[8] RG 26 Jan. 1892, JW 1892, 124, Clunet 1893, 905; RG 23 June 1893, JW 1893, 350; RG 13 April 1901, RGZ 49, 340, 344.

[9] See in the recent literature, Baumbach and Lauterbach (*supra,* n. 6 at p. 67) sec. 263 ZPO no. 2) B; Habscheid (*supra,* n. 1 at p. 61); Jellinek I 201–5; Kegel, *Internationales Privatrecht* (ed. 2, München & Berlin 1964) 382; Neuhaus, *RabelsZ* 20 (1955) 219–20; Riezler 452–3; Rosenberg 479–80, 482; Roth 116–7; Schneider, Wann ist die Rechtshängigkeit ausländischer Verfahren zu beachten?: *NJW* 1959, 88; Schweickert, *NJW* 1964, 336–7; Stein and Jonas (–Schönke, Pohle), *Kommentar zur Zivilprozessordnung* I–II (ed. 18, Tübingen 1953–56) sec. 263 no. III 5, sec. 615 no. II 1 c). The view that foreign *lis pendens* should be refused recognition is taken in modern writing only by Schütze, articles referred to *supra,* n. 1 at p. 61.

[1] See, among others, those cited *supra,* n. 8 and *infra,* n. 2–3 at p. 69. In addition, there are several cases involving the *lis pendens* effect of a suit instituted in *East Germany,* see Schütze, 1963, 1486, n. 6. These cases, however, are not applicable without further ado to suits pending in a *foreign* country *stricto sensu.*

one case from the 1930s, where the first action had been instituted in Geneva (Switzerland), the decision of the *Reichsgericht* reads:[2]

> Das auf die Genfer Klage zu erwartende rechtskräftige Urteil des zuständigen Schweizer Gerichts ist fähig, im Gebiet des Deutschen Reiches anerkannt zu werden ... Deshalb steht die durch jene Klage begründete Rechtshängigkeit ... der durch Anrufung eines deutschen Gerichts bewirkten Rechtshängigkeit gleich.

The *Bundesgerichtshof*, too, has expressed its approval of this rule and referred to it as a "für das internationale Recht gültiger Rechtsgrundsatz" (a principle of law valid in international law).[3]

The same standpoint has, finally, been espoused in a number of bilateral conventions on recognition and enforcement of judgments concluded by the Federal Republic of Germany.[4]

The considerations underlying the prevailing German view may be very briefly summarized as follows: A foreign judgment which is entitled to recognition in Germany constitutes a bar to a new action in a German court involving the same issue as that decided by the foreign court. The position is in this respect the same as if the decision had been rendered by a domestic court. It is then only natural and consistent that a new action also cannot be entertained by a German court during the course of the foreign proceedings capable of leading to such a judgment. The reasons militating in favour of *lis pendens* are, subject to the condition of (expected) recognition of the foreign judgment, the same as in purely domestic cases.

So much for the principle prevailing in German law. Though this principle has not given rise to much difference of opinion, such differences exist with regard to its practical applications. This question will be more closely considered later (*infra*, section 17).

The above principle further applies, at least according to the

[2] RG 25 Aug. 1938, RGZ 158, 145, 147. The passage cited in the text may be translated thus: "The final judgment of the competent Swiss court to be expected on the Geneva action is capable of being recognized in the territory of the German Reich ... Therefore, the *lis pendens* founded by that action is equivalent to the *lis pendens* effected by the seizing of a German court."

[3] BGH 2 Oct. 1957, NJW 1958, 103. For an exception, see BGH 26 Oct. 1960, IPRspr. 1960/61 no. 200, cf. *infra*, n. 2 at p. 96.

[4] See the German-Belgian convention of 30 June 1958, *BGBl.* 1959 II 766, art. 15; the German-Austrian convention of 6 June 1959, *BGBl.* 1960 II 1246, art. 17; the German-Greek convention of 4 Nov. 1961, *BGBl.* 1963 II 110, art. 18; and the German-Dutch convention of 30 Aug. 1962, *BGBl.* 1965 II 27, art. 18. Certain other conventions, however, do not contain any clause on the subject. See Schütze, 1967, 241–3.

prevailing opinion, in *Austrian*[5] and *Swiss*[6] law, and apparently in certain other legal systems.[7]

9. The position under *French* law is, or at any rate has traditionally been, quite different. Already in the early 19th century the French *Cour de Cassation* held that the pendency of an action abroad was no good defence to an action involving the same parties and the same subject matter in France.[8] In other words, foreign *lis pendens* was not recognized. Since then, until quite recently, French courts and writers have constantly affirmed this to be the general rule of French law.[9]

Various reasons have been given for this negative attitude. One point of view often underlined in this connection is the lack at the international level of any procedure corresponding to the French "règlement de juges", that is, a procedure for solving

[5] E.g., Köhler, Bewirkt gleichzeitiges Vorliegen eines Verfahrens in Ehesachen vor einem ausländischen Gericht Streitanhängigkeit im Sinne des § 232 ZPO?: *ÖJZ* 1951, 559–61; Köhler, *Internationales Privatrecht* (ed. 3, Vienna 1966) 69; Loewe, *Österreichische Hefte für die Praxis des internationalen und ausländischen Rechts* 1958, 111; Petschek(–Stagel) (*supra*, n. 4 at p. 66) 272. For judicial decisions, see OLG Graz 5 July 1946, ÖJZ 1946, 365 EvBl. no. 437, with references to older cases; OLG Wien 18 July 1946, ÖJZ 1946, 415 EvBl. no. 493; OLG Wien 12 March 1947, ÖJZ 1947, 196 EvBl. no. 256. In all these cases recognition of foreign *lis pendens* was actually refused on the ground that the expected judgment was not entitled to recognition. Cf. also two recent German cases, in which German *lis pendens* had been disregarded by Austrian courts: BayObLG 16 Jan. 1959, IPRspr. 1958/59 no. 208, and OLG München 2 April 1964, NJW 1964, 979.

[6] See in Swiss writing, Gmür(–Beck), *Kommentar zum Schweizerischen Zivilgesetzbuch* V: Schlusstitel, II. Abschnitt (Bern 1932) 97 (no. 130), 339–40 (no. 31), 413 (no. 64); Guldener, 1951, 175–7; Kallmann, *Anerkennung und Vollstreckung ausländischer Zivilurteile und gerichtlicher Vergleiche* (Basel 1946) 36 (n. 38), 114; Schauwecker 47–54, 60–117; Schnitzer II 862–4. For judicial decisions, see, e.g., BG 8 April 1938, BGE 64 II 71, 72 (where, however, no final position was taken); BG 8 April 1954, BGE 80 II 97, 100–1; cf. BG 13 Sept. 1960, BGE 86 II 303. In most cases (except divorce and separation actions), it should be noted, the matter falls under cantonal competence, see BG 22 Jan. 1959, BGE 85 II 80, 84. For further references to court decisions, including cantonal decisions, see Schauwecker 74–8, 81–5; Schnitzer II 863, n. 65–6; Schw.Jb.Int.R. 18 (1961) 319.

[7] See as regards *Hungarian* and *Spanish* law, Szászy, *International Civil Procedure* (Leyden 1967) 541–3.

[8] E.g., Cass. req. 30 May 1827, S. 1827. 1.425. Further references to older cases are given by Gaudemet-Tallon 165.

[9] E.g., Gaudemet-Tallon 248; Herzog(–Weser) 204; Lerebours-Pigeonnière (–Loussouarn), *Droit international privé* (ed. 8, Paris 1962) 489; Niboyet, *Traité de droit international privé français* VI/1 (Paris 1949) 465–6. Among recent court decisions, see Cass. civ. 21 March 1950, Rev.crit.d.i.p. 1951, 666; Cour Paris 5 May 1960, Rev.crit.d.i.p. 1960, 603, with note by Mezger; Cour Paris 23 Dec. 1960, Rev.crit.d.i.p. 1962, 339, with note by Bellet. For references to further cases, see Batiffol, 1967, 777, n. 32 bis.

conflicts of jurisdiction between the two courts seized with the matter.[1] This fact, however, though by itself incontestable, is hardly a tenable reason for withholding recognition of a foreign *lis pendens*. Indeed, as has been pointed out by French writers, if the French court recognized the foreign *lis pendens* and therefore refused to entertain the domestic proceedings, no conflict with the foreign court would arise; in consequence, there would not be any need of a "règlement de juges".[2]

Other explanations of the traditional French attitude to this question seem more realistic. One important reason probably lies simply in a desire of French courts, evidenced also in other connections (particularly where either party to the proceedings is a French national), to extend their own competence as far as possible.[3] Another factor that is likely to have contributed is the view of foreign judgments taken by French law.[4] Such judgments —with the important exception of those relating to personal status—are not recognized and cannot be enforced in France, until they have received an exequatur from a French court. In the exequatur proceedings French courts until recently applied the system known as "révision au fond", meaning that the matter was reexamined on the merits, both on points of law and as to the facts found. The exequatur proceedings, therefore, did not differ very considerably from an entirely fresh action. In keeping with this, it was held that the beneficiary of a foreign judgment seeking enforcement in France could choose between instituting exequatur proceedings (with "révision au fond") and suing in France on his original cause of action.[5] It was then natural that the foreign proceedings had no *lis pendens* effect in France. Indeed, if even the foreign *judgment* was no bar to a new action in France, such action could, *a fortiori,* not be barred by the foreign *proceedings*.[6]

Exceptions to the rule of non-recognition of foreign *lis pendens* have been made under bilateral conventions with certain countries on recognition and enforcement of judgments (without "révision au fond"). Two of these conventions, viz. those with Bel-

[1] See on "règlement de juges", the French Code of Civil Procedure art. 172 para. 3; Herzog(–Weser) 271–3, 459.
[2] E.g., Batiffol, 1967, 777; Bauer 184–5; Bellet, *Rev.crit.d.i.p.* 1962, 345.
[3] According to Herzog(–Weser) 204, this is the most plausible explanation.
[4] See on this subject, Herzog(–Weser) 587–600.
[5] Cass. civ. 8 Oct. 1940, Rev.crit.d.i.p. 1964, 100, with note by Niboyet.
[6] Cf. Mezger, *Rev.crit.d.i.p.* 1960, 605–6; Schauwecker 38–40.

gium and with Italy, contain express provisions on recognition of *lis pendens*.[7]

Furthermore, reference should be made in this connection to certain judicial decisions taken under art. 14 of the French Civil Code. Pursuant to this well-known provision, as interpreted by the courts, an action may always (subject to few exceptions) be brought in France, if the plaintiff is a French national.[8] This far-reaching rule has in practice been somewhat modified by its being held that the French party may, expressly or impliedly, waive his privilege. Such a waiver has on several occasions been held to be implied where the French party has first initiated proceedings as plaintiff in a foreign court.[9] In consequence, he has not been able subsequently to approach a French court with the same action. Strictly speaking, this is perhaps not a true case of recognition of foreign *lis pendens* but rather one of *lack of jurisdiction* ("incompétence"),[1] comparable to cases involving an express waiver of the French jurisdiction by a prorogation agreement designating the competence of a foreign court. The difference from recognition of foreign *lis pendens* is, however, more subtle here than in other cases, the waiver of French jurisdiction being inferred from the initiation of proceedings abroad, that is, from the same circumstance that constitutes the ground of the foreign *lis pendens*. At all events, the practical results will largely be the same whether the doctrine of implied waiver of the forum's jurisdiction or that of recognition of foreign *lis pendens* is adopted.[2]

Modern French legal writers usually advocate a more liberal approach to recognition of foreign *lis pendens* than according to

[7] French-Belgian convention of 8 July 1899, Jellinek II 261, art. 4 § 1; French-Italian convention of 3 June 1930, Jellinek II 311, art. 19. Cf. on these provisions, Jellinek I 108, 126–7, 202-4. The same solution has sometimes been given under the French-Swiss convention of 15 June 1869, Jellinek II 316, which does not contain any express clause on the subject of *lis pendens*. See Arminjon, Litispendance et connexité: *Répertoire de droit international* IX (Paris 1931) no. 59; Schauwecker 39–40 (n. 49).

[8] Batiffol, 1967, 750–9; Herzog(-Weser) 176–82.

[9] E.g., (dictum in) Cass.civ. 21 March 1950, Rev.crit.d.i.p. 1951, 666. See further: Batiffol, *id.* 762–9; Gaudemet-Tallon 165–8, 248–51; Herzog(-Weser) 183–6.

[1] See, e.g., Batiffol, *Rev.crit.d.i.p.* 1963, 105; Bauer 183.

[2] A difference exists, however, in that the institution of an action abroad is not *necessarily* interpreted as amounting to a waiver of art. 14; rather, this is a question of fact to be decided in the light of the circumstances of each case. Where no such waiver is held to be implied, a new action can be brought in France. See, e.g., Gaudemet-Tallon 165–7. This would not be possible under the doctrine of recognition of foreign *lis pendens*, the *lis pendens* attaching to the purely objective fact of the initiation of proceedings.

the above rules. Thus, e.g., *Holleaux,* a judge of the *Cour de Cassation,* commenting upon a decision rendered by that court in 1962, stigmatizes the traditional view of courts and writers as indefensible in our days.[3] According to this eminent writer, it would be "absolument déraisonnable et contraire à un juste esprit de collaboration juridictionnelle de prétendre ignorer uniformément toute instance étrangère" (absolutely unreasonable and contrary to a just spirit of jurisdictional collaboration to claim to ignore uniformly all foreign proceedings).

In recent years this opinion has begun to leave its traces on judicial decisions also. In the above decision of the *Cour de Cassation*—in which Holleaux participated as "rapporteur" (reporting judge)—a defence of foreign *lis pendens* was disallowed, but apparently only because it was found that the French action had started *before* the one pending abroad. The opinion expressed in this decision probably foreshadows a softening of the traditional rule.[4] This impression is to some extent confirmed by subsequent French decisions.[5]

This turn of the trend is in keeping with the notable change that has lately taken place with regard to recognition of foreign judgements in France. In this respect the system of reviewing the merits of the foreign judgment has gradually been abandoned by the courts.[6] In consequence, the exequatur, which is still necessary (with the aforementioned exception for judgments relating to personal status), will now be accorded to the foreign judgment, subject only to the "classical" requirements (of jurisdiction, application of the proper law under French conflict rules, etc.) being met.[7] This new state of things, obviously, will also facilitate recognition of foreign *lis pendens.*

[3] Holleaux, *D.* 1962, 719. The decision noted is that of Cass.civ. 5 May 1962, D. 1962, 718, also in Rev.crit.d.i.p. 1963, 99, with note by Batiffol. For other writers criticizing the traditional rule, see, e.g., Arminjon (*supra,* n. 7 at p. 72) no. 12–30; Batiffol, 1967, 777–8; Bauer 184–5; Bellet, *Rev.crit.d.i.p.* 1962, 345–6; Level, *Clunet* 1964, 81–2.

[4] See the case notes by Batiffol and Holleaux referred to in the preceding note.

[5] Cour Paris 3 June 1966, Rev.crit.d.i.p. 1967, 734, with note by P. L. See, however, Cour Paris 6 July 1965, Clunet 1966, 365 (with note by Bredin), where the old rule seems to have prevailed.

[6] The final link in this chain of decisions is Cass.civ. 7 Jan. 1964, Rev.crit. d.i.p. 1964, 344, with note by Batiffol, foreshadowed by a dictum in Cass.civ. 8 Jan. 1963, Rev.crit.d.i.p. 1963, 109, with note by Holleaux. Cf. Batiffol, 1967, 831–2; Einmahl, Die Vollstreckung ausländischer Zahlungsurteile in Frankreich und die Verbürgung der Gegenseitigkeit: *RabelsZ* 33 (1969) 114–40, 115–8.

[7] See on these requirements, Batiffol, 1967, 813–30; Einmahl, *id.* 118–33; Herzog(-Weser) 589–93.

It would, however, be premature to say how far the tendency in this direction will go (or perhaps even whether the new signs will prove to mean much more than lip service). French writers, while agreeing that the rigid traditional rule should be abandoned, disagree, or are inclined to be vague, on the conditions to which recognition of foreign *lis pendens* should be made subject. Sometimes a rule similar to that prevailing in German law has been suggested, the expected recognition of the foreign judgment in France being proposed as the relevant test.[8] Most writers, however, seem to hold that the courts should have a wider discretion in each case, not being obliged but only *permitted* to allow the defence in appropriate circumstances, where the foreign court appears to be "in a better position" to decide the dispute.[9] In particular, it has been emphasized that the foreign proceedings, in order to be a good defence to a new action in France, must offer satisfactory guarantees of a fair trial, especially if the defendant is a French national, and that they should not have been instituted fraudulently, i.e., with a view to preventing litigation in France.[1]

The traditional rule of French law still prevails in *Italian* law. The Italian Code of Civil Procedure contains an express provision on the subject (art. 3), reading that "Italian jurisdiction is not excluded by the pendency of the same case, or another connected with it, before a foreign court."[2] This rule has been explained as a consequence of the principle that foreign judgments (even though satisfying the conditions of recognition) have no effect in Italy until they have been validated by an Italian court.[3] As in France, exceptions to the rule have been made in certain bilateral conventions.[4]

10. An intermediate position is taken by *English* law.[5] There is

[8] Bauer 184–5. Cf. the decision of Cour Paris 3 June 1966, Rev.crit.d.i.p. 1967, 734.

[9] Bellet, *Rev.crit.d.i.p.* 1962, 345. Cf. Batiffol, 1967, 778.

[1] Batiffol, *Rev.crit.d.i.p.* 1963, 102–3; Bellet, *id* 346.

[2] For court decisions applying this provision, see e.g., App. Genova 19 Nov. 1952, Riv.dir.int. 1954, 404, with note by Bentivoglio; Trib. Genova 29 Jan. 1955, Temi gen. 1955, 239; App. Cagliari 17 March 1961, Foro it. 1961 I 682.

[3] E.g, Schütze, 1967, 237–8. On the requirement of validation ("delibazione") in Italian law, see further Cappelletti and Perillo 367–9, 381–4.

[4] Italian-French convention of 3 June 1930 (*supra*, n. 7 at p. 72); Italian-Swiss convention of 3 Jan. 1933, Jellinek II 336, art. 8; Italian-Dutch convention of 7 March 1935 (not ratified), Jellinek II 327, art. 9; Italian-German convention of 9 March 1936, Jellinek II 291, art. 11. Cf. Cappelletti and Perillo 97–8.

[5] Cheshire, *Private International Law* (ed. 7, London 1965) 108–12; Dicey and Morris 1081–4; Wolff, *Private International Law* (ed. 2, London 1950) 245–7.

no institute of English law exactly corresponding to that of *lis pendens* as known in Continental and Scandinavian law. However, English courts have a discretionary power to dismiss or stay an action which is deemed to be "vexatious and oppressive", *inter alia*, on the ground that an action about the same matter is pending in another court. Where both actions are brought in England, there is apparently always held to be vexation, and the defendant may therefore demand that the plaintiff shall elect between the two actions.

The powers thus vested in English courts differ in several respects from those conferred by Continental and Scandinavian rules of *lis pendens*.[6] First, as will be clearly seen when dealing with cases where one of the actions has been instituted abroad, the power of the court is a discretionary one. Secondly, the exercise of this power is not confined to cases where a simultaneous action is pending elsewhere. Thirdly, where this is the ground for the court's interference, its power is not subject to any requirement of identity—within the meaning of, e.g., Scandinavian law of procedure—between the two actions. Fourthly, the power may be used not only in relation to the second but also in relation to the first action, the court not being bound by the principle of priority. Finally, the possible solutions open to the courts when they choose to interfere are more differentiated than under Continental and Scandinavian law where, as we have seen, dismissal of case no. 2 is ordinarily the only solution available.

It is well settled that English courts also possess the powers now referred to where one of the actions is pending abroad.[7] In this situation, if the court chooses to interfere, it may, theoretically at least, act in one of three ways, viz. (1) by directing the suing party to elect between the two proceedings, (2) by staying the English proceedings, or (3) by issuing an injunction restraining the plaintiff from continuation of the foreign proceedings (disobedience of which is punishable as contempt of court). The last alternative—to which there is no counterpart in Continental and Scandinavian law—is, however, very rarely used in practice.

[6] Cf. Benjamin, *Le divorce, la séparation de corps et leurs effets en droit international privé français et anglais* (Paris 1955) 62.—The powers of the English courts are comparable to those held by American and Scots courts under the doctrine of *forum non conveniens*. See on this doctrine, e.g., Anton, *Private International Law* (Edinburgh 1967) 148–54; Ehrenzweig, *A Treatise on the Conflict of Laws* (St. Paul, Minn., 1962) 120–39.

[7] See the judicial and statutory authorities cited by Dicey and Morris 1081, n. 1–3.

The reason for this has been said to be that such an injunction, though not directed to the foreign court but to the party concerned, will easily create the appearance of undue interference with that court.[8] Normally, therefore, where the English court acts at all, it will be by staying (or possibly dismissing) the domestic action. So far, then, there is no very considerable difference from the Continental and Scandinavian approach.

However, as mentioned above, the powers inherent in the English courts are in this respect, too, discretionary. In order to obtain a stay of the English proceedings it has been held that the defendant must prove two conditions to be satisfied, viz. (1) that the continued prosecution of the two actions would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way, and (2) that the stay will not cause an injustice to the plaintiff.[9] The exact meaning of this cludes, of course, any attempt at a definition in general terms, each case depending upon its particular facts. In practice, however, the courts have shown great caution in exercising their discretion. There is no presumption in favour of a stay, even if the English action concerns the same subject matter as the pending foreign suit.[1] Rather, the plaintiff is deemed to have a legitimate interest in starting the double proceedings, until the contrary has been proved. Such interest may, e.g., consist in the expectation of a speedier decision or a more effective enforcement of the judgment in England.

This tendency is even more pronounced in cases where the plaintiff in England is the defendant abroad, or vice versa. There are very few decisions staying the English action (or restraining the foreign proceedings) in this situation. The reason given for this is that a stay would result in confining the party stayed to an action of which he (as defendant) is not equally in control.[2]

In view of the heavy restrictions to which the stay of an Eng-

[8] *Cohen* v. *Rothfield* [1919] 1 K.B. 410 (C.A.), 413; *Settlement Corporation* v. *Hochschild* [1966] Ch. 10, 15.

[9] *St. Pierre* v. *South American Stores Ltd.* [1936] 1 K.B. 382 (C.A.), 398.

[1] In one case, *McHenry* v. *Lewis* (1882) 22 Ch.D. 397 (C.A.) at 400, 408–9, a distinction in this respect was suggested, as to whether the other action was pending in a politically foreign country, or in Scotland, Ireland or elsewhere in a territory under the British Crown; in the latter case, though not in the former one, the double proceeding might be held to be prima facie vexatious and one of the actions therefore stayed as a matter of course. It is extremely doubtful, however, if this distinction can and will be upheld. See Cheshire (*supra*, n. 5 at p. 74) 111–2; Dicey and Morris 1084.

[2] *Cohen* v. *Rothfield* [1919] 1 K.B. 410 (C.A.), 414.

lish action on the ground of a suit pending abroad is thus made subject, it seems most realistic to say that, *as a rule,* foreign *lis pendens* is not recognized in England.

11. In *Scandinavian countries,* as in most other states, there is no general statutory regulation of our problem. Nor do the few reported court decisions shed much light on the matter. Among Scandinavian writers the weight of opinion is in favour of recognizing foreign *lis pendens* to the same extent as foreign judgments are entitled to recognition. This solution, which accords with and probably goes back to German law, has been advocated particularly in Sweden but also in Denmark and Norway.[3] It is also in accordance with the view taken on various occasions by these countries at the Hague Conference on Private International Law.[4]

Further support of this view may be derived from the preparatory materials relating to the Scandinavian conventions on the private international law of marriage, adoption and guardianship (1931), and on the recognition and enforcement of judgments (1932).[5] Neither of these conventions expressly regulates the question of recognition of foreign *lis pendens.* In the preparatory materials, however, an affirmative answer is given, as regards all cases where the judgement to be rendered in a suit pending in another Scandinavian state is entitled to recognition under the respective conventions.[6]

Further action on the above view has been taken in a recent Swedish expert report submitted to the Minister of Justice.[7] This report includes proposals for a general Swedish Act on the rec-

[3] *Denmark:* Ehlers 234–5. *Contra,* Lando 316, who considers recognition of foreign *lis pendens* to involve technical difficulties. *Norway:* Alten 86; Augdahl 155, n. 1; Hagerup, *Den norske civilproces* I (ed. 3, Kristiania 1918) 115; Hambro 91–100, 168; Skeie I 382. *Sweden:* Beckman, *Svensk domstolspraxis i internationell rätt* (Stockholm 1959) 30; Dennemark 11–3; Eek 164; Kallenberg, *Svensk civilprocessrätt* I (ed. 2, Lund 1923) 120–1; Karlgren, *Kortfattad lärobok i internationell privat- och processrätt* (ed. 3, Lund 1966) 204; Malmar, *SvJT* 1937, 380–1; Michaeli, *Internationales Privatrecht* (Stockholm 1948) 169, 208, 377; Undén 71.

[4] See, e.g., *Doc. La Haye* 7 (1951) 203, 245, 391, 426; *Act. Doc. La Haye* 10 (1964) I 188, 210, 225 (Scandinavian answers to question 33, at p. 142).

[5] For English translations of these conventions, see *League of Nations Treaty Series* 126 (1931/32) 141, and 139 (1933/34) 181. For an account of these and other Scandinavian conventions, see Philip, The Scandinavian Conventions on Private International Law: *Rec. des Cours* 96 (1959 I) 241–348.

[6] See the Swedish committee reports published in *SOU* 1929: 12, 113, and *SOU* 1931: 9, 29. For the Norwegian preparatory materials of the 1932 convention, see Hambro 142. Cf., however, Hurwitz and Gomard 59, n. 39.

[7] *SOU* 1968: 40.

ognition and enforcement of foreign judgments in civil and commercial matters, largely modelled on the 1966 Hague convention on this subject. The proposed Swedish law—which is intended to apply only in relation to such foreign states as will be determined (on the basis of conventions or otherwise) by a separate enactment—provides for recognition of foreign *lis pendens* in all cases where the foreign proceedings may result in a decision which the Swedish authorities would be bound to recognize under the terms of the proposed law.[8]

In two more special connections, where rules are given for the recognition of foreign judgments, our problem has long been expressly regulated. The first of these passages is in the Finnish Act on certain family relationships of an international nature, of December 5, 1929. Sec. 54 of this act reads as follows (author's translation):

> If when an action is initiated in a Finnish court the case is shown already to be pending in a foreign court which under this law has jurisdiction to entertain it, the (Finnish) court shall proceed as if the case were pending in another Finnish court.

The meaning of this rule seems to be that foreign *lis pendens* must be recognized in Finland—within the areas of family law covered by the enactment in question—subject to the sole condition of the foreign court having jurisdiction by the standards of Finnish law.

The second place where such a rule exists is in the convention between Sweden and Switzerland on the recognition and enforcement of judicial decisions and arbitral awards, of January 15, 1936, and implementing Swedish legislation.[9] Art. 7 of this convention provides as follows:

> The judicial authorities of one of the two States shall abstain from hearing disputes brought before them when, to their knowledge, such disputes are already pending before a court of the other State,

[8] Sec. 14 of the draft law. For the motives of the proposed rule, see *SOU* 1968: 40, 123–6. The rule is similar to the corresponding provision (art. 20) of the Hague convention. Unlike this provision, however, which is only optional, the proposed Swedish rule is obligatory.—For the English text of the Hague convention, see e.g., 15 *Am.J.Comp.L.* 362 (1966/67).—On recognition of foreign judgments see Welamson's paper *infra*, pp. 251 ff. (editor's note).

[9] For the text of the convention and of the implementing Swedish Act on the recognition and enforcement of judgments rendered in Switzerland, of 27 March 1936, and for the *travaux préparatoires*, see *NJA* II 1937, 1–33. For an English translation of the convention, see *League of Nations Treaty Series* 169 (1936/37) 349. Cf. on this convention, Eek 85; Ginsburg and Bruzelius 390–1.

provided the latter court has jurisdiction under the terms of the present Convention.

This provision, too, makes recognition of the foreign *lis pendens* subject to the sole condition that the foreign court should have jurisdiction under the rules of the convention. For the recognition of *judgments,* it should be noted, the convention and the Swedish statute based thereon require further conditions to be satisfied. Thus, e.g., as regards decisions rendered in respect of personal status, family rights or succession rights, it is a prerequisite to recognition that the Swiss decision should not be based on a law the relevant provisions of which are contrary to those of the law applicable in accordance with Swedish private international law.[1] For the purpose of deciding an issue of *lis pendens,* however, once the Swiss court has been found to have jurisdiction under the terms of the convention, the Swedish court must disregard the possibility that the prospective Swiss judgment may prove not to satisfy such additional requirements. In consequence, it may conceivably occur that Swiss proceedings are accorded *lis pendens* effect in Sweden but that the Swiss judgment must subsequently be denied recognition because it does not meet some of the requirements of the convention not relating to jurisdiction. In this respect the convention—as well as the Finnish statute referred to above—provides for recognition of foreign *lis pendens* to a somewhat larger extent than is generally proposed by Scandinavian writers. Indeed, these writers seem to assume that regard should be had, in deciding on recognition of foreign *lis pendens,* to *all* factors affecting the recognition of the expected foreign judgment, not only to the factor of jurisdiction.

In any case, according to the above-stated view of Scandinavian law, recognition of foreign *lis pendens* can be considered only in so far as foreign judgments are at all capable of being recognized. In this respect, however, the principle hitherto prevailing in all the Scandinavian countries is—in the absence of treaty provisions or some other positive rule of law to the contrary—that foreign judgments are *not* entitled to recognition.[2] Exceptions to this are admitted as regards so-called "constitutive" (or "investitive")

[1] Art. 4 no. 3 of the convention; sec. 4 no. 3 of the above Swedish act. Cf. the decision of HD 27 March 1957, 1957 N.J.A. 207, where a Swiss divorce decree was refused recognition on the ground of having misapplied Swedish law.

[2] See, e.g., Eek 86–8; Ginsburg and Bruzelius 386–7; Hambro 100–29, 143–7; Lando 293–6; *SOU* 1968: 40, 18–27.

status judgments (annulment, separation, divorce, adoption, incompetency decrees, etc.), which are generally held to be recognizable (subject to certain conditions being fulfilled) even without express legislative support.[3] On the basis of this state of law, recognition of foreign *lis pendens* will be possible, apart from the rather few cases where recognition of foreign judgments is prescribed by a treaty or other legislative provision, mainly in divorce and other cases involving a request for a "constitutive" judgment.

It is very questionable, however, at least as regards Swedish law, whether the traditional restrictive view on recognition of foreign judgments will not soon be abandoned. The time now appears to be more than ripe for such a change of policy. The above-mentioned Swedish proposed statute on the subject is a clear indication of the turn of the trend.[4] Obviously, if such a change is brought about, the rules on recognition of foreign *lis pendens* will assume a considerably increased importance.

Finally, it should be noted that Scandinavian writers have occasionally suggested recognition of foreign *lis pendens* even where the foreign judgment is not entitled to recognition in the proper sense of this word but will only be considered as more or less strong *evidence* as to the facts found and/or the law applied by the foreign court.[5] Indeed, as has been pointed out, the difference between according evidential value and recognition proper to a foreign judgment is a matter admitting of degrees, and the two sorts of "recognition" may in certain circumstances come rather close to each other.

Another case where Scandinavian writers generally agree that the courts of the forum should decline to entertain a new action is where the jurisdiction of the foreign court is based on a (valid) prorogation agreement excluding adjudication in the forum.[6] However, as has previously been pointed out, this case does not properly fall within the domain of *lis pendens,* the bar to domestic adjudication being constituted by the prorogation agreement rather than by the pendency of the foreign suit.

[3] E.g., Augdahl 152; Borum(–Philip), *Lovkonflikter* (ed. 5, Copenhagen 1965) 202–5; Eek 88–9; Ginsburg and Bruzelius 387–8; Hurwitz and Gomard 361–2.

[4] The voices urging such a change are becoming ever more numerous. See, e.g., Eek 89–91; Hambro 169–70; Karlgren (*supra*, n. 3 at p. 77) 200–4; Lando 297–321.

[5] Eek 164 (cf. 87–8, on the meaning of according "effect as evidence" to foreign judgments); Hambro 92.

[6] See the references *supra*, n. 4–5 at p. 64.

B. *Domestic Suit as a Bar to Recognition of Foreign Judgments*

12. Where a foreign *lis pendens* is disregarded and concurrent actions have therefore been admitted to trial in the forum and abroad, the question arises whether the pendency of the domestic proceedings should affect the recognition of the judgment rendered in the foreign suit. In order that this problem may present itself squarely, there must be assumed to be no *other* factors—apart from the pendency of the domestic suit—barring recognition of the foreign judgment.

According to one view, the foreign judgment must be refused recognition in this situation, irrespective of whether the domestic or the foreign suit was started first. An express provision to this effect exists in the *Italian* Code of Civil Procedure.[7] The same opinion prevails among *French* courts and writers.[8] This is all the more important inasmuch as French and Italian law generally do not recognize foreign *lis pendens* and therefore do not prevent domestic proceedings from being initiated during the pendency of the foreign action (*supra,* section 9). In this way recognition of the foreign judgment may be effectively paralysed by suing in the forum on the same subject matter.

A rule apparently to the same effect is contained in the 1958 Hague convention on the recognition and enforcement of decisions involving obligations to support minor children, to which, *inter alia,* Denmark, Finland, Norway and Sweden have acceded.[9] Pursuant to this convention (art. 2, no. 4), recognition and enforcement of such decisions may be refused if, before the foreign *decision* was pronounced, the matter had been pending in the forum. The relevant time being that of the decision, recognition may seemingly be withheld not only where the foreign suit had been started in disregard of domestic *lis pendens* but also where the domestic suit was started in disregard of foreign *lis pendens.* This standpoint is open to serious objections, cf. *infra,* section 28.

[7] Art. 797 para. 1 no. 6. Cf. Cappelletti and Perillo 377–8. For bilateral conventions concluded by Italy, see Jellinek I 203–4.

[8] See, e.g., Cass. civ. 10 March 1914, Rev.crit.d.i.p. 1914, 449; Batiffol 1967, 829; Lerebours-Pigeonnière(–Loussouarn) (*supra,* n. 9 at p. 70) 508; Niboyet, *Traité* (*supra, ibid.*) VI/2 (1950) 126. And see the French-Italian convention (*supra,* n. 7 at p. 72) art. 1 no. 5, criticized by Jellinek *ibid.*

[9] For the French text of this convention, see *Act. La Haye* 8 (1956) 351; for an English translation, 5 *Am.J.Comp.L.* 658 (1956).—Non-Scandinavian parties to the convention include Austria, Belgium, France, West Germany, Italy, the Netherlands and Switzerland. See *Rev.crit.d.i.p.* 1969, 197.

According to another view, which has been advocated by many Continental (particularly German) writers and which, it is submitted, is greatly to be preferred, a distinction should be made in the present respect, as to whether the domestic or the foreign suit was initiated first. In the former case the foreign court has disregarded domestic *lis pendens*, and its decision should therefore not be entitled to recognition.[1] In this, as it were, indirect way the forum should demand respect for its own *lis pendens*.[2] On the other hand, where conversely the forum has disregarded foreign *lis pendens*, the pendency of the domestic suit should not prevent recognition of the foreign judgment.

A rule of this kind is included in the 1966 Hague convention on the recognition and enforcement of foreign judgments in civil and commercial matters, and also in the above-mentioned proposed Swedish act on the same subject. Pursuant to art. 5 of the convention:

> Recognition or enforcement of a decision may nevertheless be refused in any of the following cases—
> (3) if proceedings between the same parties, based on the same facts and having the same purpose—
> (*a*) are pending before a court of the State addressed *and those proceedings were the first to be instituted*, . . .[3]

Confined in this way, the rule, which—it is submitted—contrasts favourably with the above-cited rule of the 1958 convention, means that preference is always to be given to the *first* action, whether domestic or foreign (assuming of course the foreign judg-

[1] See, e.g., Arminjon (*supra*, n. 7 at p. 72) no. 38–47; Aubert, *Rev.crit.d.i.p.* 1959, 364; Frankenstein, *Internationales Privatrecht* I (Berlin-Grunewald 1926) 350; Gmür(-Beck) (*supra*, n. 6 at p. 70) 97 (no. 130), 377–8 (no. 158); Guldener, 1951, 177; Habscheid 258–9; Jellinek I 205; Kegel (*supra*, n. 9 at p. 68) 385–6; Lando 315–6; Schauwecker 54–6. For court decisions refusing recognition in this situation, see Cour Paris 27 June 1964, Rev.crit.d.i.p. 1965. 366; BayObLG 9 Dec. 1958, NJW 1959, 533; OLG München 2 April 1964, NJW 1964, 979; BG 22 July 1958, BGE 84 II 469, 478. Occasionally, the foreign decision has been held to be recognizable even in this case. See the German case of BayObLG 16 Jan. 1959, IPRspr. 1958/59 no. 208, where an Austrian decision concerning custody of children was recognized, although the same issue was pending in Germany at the time of the institution of the Austrian proceedings. See also Kallmann (*supra*, n. 6 at p. 70) 22, n. 23; Köhler, 1951 (*supra*, n. 5 at p. 70) 560; Roth 116–7.

[2] Cf. the French concept of "compétence indirecte", that is, the jurisdiction conceded to foreign courts for the purpose of recognition of their judgments in the forum.

[3] Italics supplied. For the corresponding (proposed) Swedish rule, see the draft referred to *supra*, p. 77 at n. 7, sec. 4 no. 4 (alternative 1), sec. 4 no 3 (alternative 2) and the motives given in *SOU* 1968: 40, 127–8.

ment to be recognizable in other respects). The rule is therefore in accordance with the so-called principle of equality, cf. *infra,* section 13.

Finally, the possibility should be envisaged that the domestic suit, too, has been concluded by judgement at the time when the question of recognition of the foreign judgment arises. In this situation it is generally assumed that preference must be given to the domestic decision, at any rate if it was rendered and became final *before* the foreign one.[4] This view, however, has been criticized by certain modern writers as too nationalistic. It has been argued—it is submitted, on very pertinent grounds—that preference should rather be given, here too, to the judgment rendered in the proceedings that were instituted first.[5]

IV. ANALYSIS OF THE SUBJECT

A. *Recognition of Foreign* lis pendens

13. A fundamental postulate is that the rules on recognition of foreign *lis pendens* should be in accordance with the so-called *principle of equality* (or of *reciprocity*).[6] This means that foreign *lis pendens* should be recognized to the same extent as the forum demands respect for its own *lis pendens* abroad (by refusing to

[4] For express rules to this effect, see the Italian Code of Civil Procedure art. 797 para. 1 no. 5, cf. Cappelletti and Perillo 377; the 1958 Hague convention (*supra,* n. 9 at p. 81) art. 2 no. 4; the 1966 Hague convention (*supra,* n. 8 at p. 78) art. 5 (3) (b); the Scandinavian convention on the enforcement of alimony orders, of 23 March 1962, art. 1 para. 2; and provisions of several bilateral treaties, see Jellinek I 197–201. For other writers endorsing the rule mentioned in the text, see, e.g., Batiffol, 1967, 829; Guldener, 1951, 102, 148, 177; Jellinek I 205; Kallmann (*supra,* n. 6 at p. 70) 220–3 (n. 17); Lando 315; Riezler 521, 547; Schauwecker 51.

[5] *SOU* 1968: 40, 129–30. According to still another view, voiced in modern German writing, preference should, in principle, be given to the *last* decision rendered (seemingly without regard to the order in which the actions were instituted). See Habscheid 261; Roth 108–15.

[6] See on this principle in Scandinavian writing, e.g., Borum(–Philip) (*supra,* n. 3 at p. 80) 33; Eek 107; Gaarder, *Internasjonal privatrett* (Oslo 1963) 30; Karlgren (*supra,* n. 3 at p. 77) 29–30, 34; Siesby, *Søretlige Lovkonflikter* (Copenhagen 1965) 14–5. The principle has chiefly been invoked for choice of law purposes but is, or should be, equally applicable to issues of international civil procedure. In English (and Commonwealth) law, one of the most well-known expressions of the principle is the jurisdictional rule of *Travers* v. *Holley* [1953] P. 246 (C.A.).

recognize a foreign judgment rendered on an action which was instituted in disregard of a prior suit in the forum).

Under this point of view, the rules of, e.g., Italian law (and of French law, as hitherto applied) on the subject may be criticized. On the one hand, as we have seen, under these rules foreign *lis pendens* is refused recognition in Italy; on the other, a foreign judgment is refused recognition, where the same subject matter is being litigated in an Italian court (even irrespective of the order in which the two actions were instituted). Here different yardsticks are manifestly used for the two questions and a marked preference is given to the domestic suit.[7]

From the point of view of the principle of equality, a general refusal to recognize foreign *lis pendens* would be defensible only if the forum in return allowed recognition of foreign judgments rendered in disregard of an earlier domestic suit. Such a standpoint would mean that the forum in international relations neither itself paid, nor required foreign countries to pay any consideration to *lis pendens*.[8] This alternative, however, which would be highly irrational from other points of view, is merely a theoretical model. In reality the premise fails, since it may be assumed that foreign judgments will almost invariably be refused recognition if rendered in disregard of an earlier domestic suit (*supra*, section 12). Hence, on the basis of the principle of equality, consistency can in fact be attained only by recognizing foreign *lis pendens*.

Obviously this argument stands or falls with the postulate of the principle of equality, which may be accepted or not. It is here submitted that the principle should be regarded as a natural lodestar for the elaboration and application of the rules in this field. Indeed, the principle of equality accords with elementary ideas and ideals of justice in international relations. This by no means implies that the validity of the principle could be derived from any "superior" legal order (like public international law), nor that the principle should in fact be generally accepted within the doctrine of conflict of laws.

14. Even assuming the above principle to be accepted, however, it will be necessary to distinguish—as is done above all in German and Scandinavian law—as to whether or not the expected foreign judgment is entitled to recognition. In the latter case the

[7] Habscheid 256–7; Roth 116.
[8] Habscheid 257–8.

principle of equality is, so to speak, *a priori* set out of play, the foreign suit not being, in the eyes of the forum, equivalent to a domestic one. As a natural consequence of this, the foreign *lis pendens* should not be recognized either. As we have seen, there is a close connection between *lis pendens* and *res judicata*. The rules of *lis pendens* have a rational sense only in so far as the expected judgment is capable of acquiring legal force in the forum. Indeed, if the subject matter in question can be adjudicated in the forum *after* the foreign proceedings have been concluded—as to which there is no doubt when the judgment is not entitled to recognition in the forum—the same must *a fortiori* apply *before* the rendition of the foreign judgement.

Accordingly, at least in cases where it can be predicted with certainty that the foreign judgment will not be recognized, the foreign *lis pendens*, too, should be disregarded.[9]

This hypothesis should be distinguished from another one, to which undue weight seems often to have been attached, namely, where the foreign judgment, though satisfying the conditions for recognition in the forum, in order to be so recognized must receive the hall-mark of exequatur, or similar validation, from the courts of the forum. Such requirements are rather common and may apply either generally (as in Italian law), or generally with exceptions (as in French law), or only for particular categories of judgments (as in German and Swedish law).[1] Though validation cannot, of course, be granted until the foreign judgment has actually been rendered and presented for recognition, such requirements should be regarded as merely procedural formalities and should not in themselves affect the recognition of the foreign *lis pendens*.[2] Indeed, it may for this purpose be assumed that the requisite validation proceedings will be instituted once the foreign judgment has been rendered. The decisive test should be whether the expected foreign judgment will meet the conditions for validation or not. Only in the latter alternative should recognition of the foreign *lis pendens* be excluded.

[9] It may be left open, however, whether this should necessarily be so if the forum, though not prepared to recognize the foreign judgment properly, will accord particular "effects as evidence" to it. Cf. *supra*, p. 80 at n. 5

[1] See for French and Italian law *supra*, sec. 9 (n. 4 at p. 71) and n. 3 at p. 74). In German and Swedish law exequatur is required for certain divorce and other matrimonial judgments. See, e.g., Eek 247–9; Kegel (*supra*, n. 9 at p. 68) 274.

[2] Accord, e.g., Habscheid 269–71; Schauwecker 51–2.

15. Where, on the other hand, the expected foreign judgment is entitled to recognition in the forum, not only principles but also practical considerations require the foreign *lis pendens* to be recognized as well. In fact, the arguments militating in favour of *lis pendens* as a complement to the doctrine of *res judicata* in domestic law, are very largely applicable to foreign actions also, in so far as such actions may result in a judgment recognizable in the forum.

Thus, it may be said, first, that where the outcome of the foreign proceedings will become binding in the forum, the plaintiff has generally no reasonable interest in bringing a new suit on the same subject matter. It would often be unfair—or, to use the expression coined in English law, vexatious and oppressive—to the other party to force a new suit upon him, in addition to the one already pending abroad.

Secondly, from the point of view of procedural economy, to entertain the new action would involve a meaningless waste of time and money. This is so, at any rate, where the foreign proceedings, which were instituted first, are also the first to lead to (a final) judgment. This judgment being entitled to recognition in the forum (as is here assumed) constitutes a bar (*res judicata*) to continuing with the domestic proceedings. These proceedings will therefore have been unnecessary and served no sensible purpose. This embarrassing situation would have been avoided had the foreign *lis pendens* been recognized.

In the other alternative, that is, if the domestic proceedings, though instituted later than those pending abroad, should be the first to lead to (a final) judgment, the situation becomes even more complicated. This judgment is very unlikely to be recognized in the foreign country, having been rendered in disregard of an earlier suit pending in that country. Assuming recognition to be refused, there is nothing preventing the foreign action from being pursued. There is therefore a risk of different, possibly contradictory, adjudications in the matter.

True, this conflict is not insoluble, as seems sometimes to have been assumed. Such a conflict would presuppose that the two judgments opposed each other with equal authority. In practice, however, preference will be given to either of them. If both countries accorded preference to the foreign judgment—which there would be good reasons of principle to do (cf. *supra,* section 12) —the domestic proceedings would obviously have been in vain. Probably, however, the forum will stand by its own judgment,

even though it was rendered in disregard of foreign *lis pendens*.[3] In the foreign country, of course, the judgment rendered in that country will prevail. Though the conflict between the two judgments is thus solved *within* each of the countries concerned, it remains unsolved from a point of view encompassing *both* countries. This is certainly bad enough for the *parties* (or at least for the winner of the foreign suit), whose problems require a single solution. All these complications would have been avoided if the forum had recognized the foreign *lis pendens*.

As will be seen from the above, if a foreign *lis pendens* is not recognized the question whether the foreign or the domestic judgment will prevail in the forum will be dependent upon the order in which the decisions are rendered (and become final). This state of things is deplorable, because it may stimulate the parties to embark on a disloyal conduct of the proceedings, either at the forum or abroad. Each party will have an interest in pressing the proceedings in the country where his chances to win appear more favourable, and conversely to delay the proceedings in the other country.[4] This may often be successfully done, particularly of course as regards delaying the proceedings.

The above objections to a general refusal of recognition of foreign *lis pendens* are fully applicable only where the forum is prepared to recognize a foreign judgment delivered during the pendency of a domestic suit instituted after the foreign one. Where foreign judgments are refused recognition in this situation, as in French and Italian law, the same inconsistencies do not arise. This system, however, is open to other objections which are no less weighty, cf. *infra*, section 28.

To conclude, it seems clear that foreign *lis pendens* cannot be denied recognition absolutely. Such a standpoint would be as anachronistic as a general refusal of recognition of foreign judgments. Reasonable international considerations and the postulate of consistency within each legal system concur in leading to the conclusion that foreign *lis pendens* should be recognized where the expected foreign judgment is entitled to recognition in the forum.

16. Unfortunately, our investigation cannot end here. Indeed, the most difficult problem in recognition of foreign *lis pendens* remains—namely, that this question arises at a stage when the

[3] *Supra*, n. 4 at p. 83.
[4] Cf. Ehlers 240; Habscheid 258; Schauwecker 51.

foreign judgment does not yet exist (or at any rate has not yet acquired legal force). This necessitates a *prediction* as to whether the judgment will be recognized or not. Such predictions, however, often cannot be made with any certainty. In so far as foreign judgments are recognized at all, this is usually done subject to several different conditions. As a typical example, under the Swedish Act concerning international questions with regard to deceased persons' estates, of March 5, 1937, ch. 2, sec. 12, decrees of foreign courts and other authorities concerning distribution of estates of decedents are recognized on condition, *inter alia,* (1) that the decedent was a national of or was domiciled in the country where distribution was made; (2) that the distribution did not concern property which was subject to administration in Sweden or which should have been distributed by administration in Sweden; (3) that the distribution, in so far as it concerned property situated in Sweden at the time of the death, was not based on a law the provisions of which are contrary to those of the law that would have been applied pursuant to Swedish choice-of-law rules; and (4) that the decree is not manifestly incompatible with the bases of the Swedish legal order.[5]

Looking at these various requirements for recognition, it is at once clear that nos. (3) and (4) cannot be ascertained until the foreign decree has been rendered. This is particularly obvious as regards the public policy clause (no. 4), which—as is well known —recurs in one formulation or another in most rules on recognition of foreign judgments.

On the other hand, it should be feasible to ascertain, already at the time when the question of *lis pendens* arises, whether conditions nos. (1) and (2) of the above-cited provision—both relating to the jurisdiction of the foreign authority—are satisfied or not. If, e.g., the decedent was neither a national of, nor domiciled in the foreign country, the expected foreign decree can clearly *not* be recognized. It follows that the foreign proceedings, too, should be denied *lis pendens* effect in Sweden. If, on the other hand, the jurisdictional conditions are met, it cannot be positively inferred from this that the foreign decree will be recognized, this being dependent also on conditions nos. (3) and (4).

Generally speaking, as in the above example, it is often possible to predict with certainty that a foreign decision will *not* be recognized (particularly, of course, in fields where foreign deci-

[5] Cf. Eek 263–4; Ginsburg and Bruzelius 390.

sions are generally refused recognition), whereas a reliable *positive* prognosis can very rarely be given.[6] How then is one to proceed in all those cases where the recognition of the expected judgment appears more or less uncertain?

17. On this question, which has been very little considered by Scandinavian writers, various opinions have been voiced by Continental writers.

According to one proposal, recognition of foreign *lis pendens* should be confined to cases where recognition of the expected judgment can be predicted with *certainty*.[7] In all cases where such recognition appears to be in the least doubtful, the new action should be allowed to be entertained in the forum. If this view were really acted upon (which seems to be somewhat doubtful), foreign *lis pendens*—for the reason indicated above—could only very rarely be recognized.

Most writers, however, seem to hold that a certain degree of *probability* ("begründete Erwartung") for recognition of the expected judgment should be sufficient.[8] Sometimes this view is formulated in more exact terms. Thus, e.g., it has been maintained that the forum, for the purpose of deciding on recognition of a foreign *lis pendens,* should disregard the possibility that the expected foreign judgment may prove not to be recognizable on the ground of its being contrary to the forum's notions of public policy (whereas other conditions of recognition should apparently be positively established).[9] Other writers extend the test of probability so as also to apply, e.g., to the requirement (in so far as it is upheld at all) of application of the appropriate law under the

[6] One of the few cases where such a prognosis appears to be possible is under the 1931 Scandinavian convention on matrimony and related matters (*supra,* n. 5 at p. 77). Pursuant to art. 22 of this convention, decisions on matters covered by the convention shall apply in the other states without further ado (although of course it will be necessary to ascertain that the decision is one falling under the convention). See *SOU* 1929: 12, 110–1.

[7] See for Austrian law, Köhler, 1951 (*supra,* n. 5 at p. 70) 559–61, and 1966 (*supra, ibid.*) 69. Accord for German law, Stein and Jonas(–Schönke, Pohle) (*supra,* n. 9 at p. 68, sec. 615 no. II 1 c).

[8] A certain analogy to this is afforded in some Continental countries (Austria, Germany, Switzerland) in which jurisdiction over foreigners in divorce and certain other matrimonial matters may be assumed only if the prospective judgment will be recognized in the home country of the parties (or of the husband), this condition being held to be satisfied where such recognition appears to be (highly) probable. See, e.g., Köhler, 1966 (*supra,* n. 5 at p. 70) 61–2; Raape, *Internationales Privatrecht* (ed. 5, Frankfurt a. M. 1961) 303; Schnitzer I 380.

[9] Cf. Guldener, 1951, 175 (with n. 7); Schauwecker 52–3, 106–10.

forum's conflict rules.[1] Hence, a somewhat less stringent standard is held to be applicable for this purpose than in the subsequent examination of the foreign judgment for the purpose of its actual recognition.

Certain modern West German writers have gone further than this in facilitating recognition of foreign *lis pendens*. According to these writers, such recognition should be granted, provided only that recognition of the expected judgment appears to be *possible*, or at least that "ernstliche Bedenken" (serious doubts) cannot be entertained in this respect.[2] Such a rule, it has been argued, would best be in keeping with the *mandatory* (non-waivable) nature of *lis pendens* as a bar to a new action;[3] an action should not be admitted to trial on the merits, unless it were established that such a bar did *not* exist. Support for this view may be derived from the following proposition laid down by the West German *Bundesgerichtshof* in a case (in which, however, the first action was pending in East Germany) decided by that court in 1957:[4]

> Solange aber nicht mit einer an Sicherheit grenzenden Wahrscheinlichkeit der Erlass eines Urteils zu erwarten ist, das auf Grund des § 328 ZPO oder Art. 30 EGBGB nicht anerkannt werden könnte, muss die Rechtshängigkeit eines bereits vor einem ostsektoralen Gericht anhängigen Rechtsstreits beachtet werden.

According to yet another view, recognition of the foreign *lis pendens* should be subject only to the condition of the foreign court having *jurisdiction* (by the standards applied in the forum).[5] This solution is sometimes provided for in conventions on

[1] See, e.g., Batiffol, *Rev.crit.d.i.p.* 1963, 103; Bauer 185; Level, *Clunet* 1964, 82.

[2] E.g., Rosenberg 480; Schneider (*supra*, n. 9 at p. 68) 88. Accord, Bauer 185.

[3] Admittedly sec. 263 of the German ZPO speaks of "die *Einrede* der Rechtshängigkeit" (the *objection* of *lis pendens*). In accordance with this, *lis pendens* was earlier held to be a waivable bar to the new proceedings. In the 1930s, however, the Reichsgericht abandoned this view and held that the obstacle must be regarded as mandatory and therefore noticed by the courts on their own motion, see RG 17 May 1939, RGZ 160, 338, 344–5. This view seems now to be generally accepted in German law. See, e.g., Baumbach and Lauterbach (*supra*, n. 6 at p. 67) sec. 263 ZPO no. 4) A; Blomeyer (*supra*, *ibid.*) 247; Rosenberg 481, 483–4.

[4] BGH 2 Oct. 1957, NJW 1958, 103. The passage cited in the text may be translated thus: "As long as the rendition of a judgment that would not be capable of recognition by sec. 328 ZPO or art. 30 EGBGB is not to be expected with a probability approaching certainty, regard must be had to the *lis pendens* effect of a suit already pending before a court of the east sector."

[5] Arminjon (*supra*, n. 7 at p. 72) no. 17.

recognition and enforcement of judgments; an example of this is the Swedish-Swiss convention on the subject referred to above.[6] In support of this rule it has been argued that the prediction of recognition of a foreign judgment—that is, a prediction taking into account all the factors affecting this question—is an impossible task, the satisfactory discharge of which would require divinatory gifts.[7] Under the view here considered, no attempt to give such a complete prognosis is made; rather, a single condition for recognition of the judgment—albeit normally the most important one—is exclusively relied on, a condition as to which ascertainment is possible already at the stage when the issue of *lis pendens* arises.

In the present writer's opinion, the principle should be retained that all conditions that are material to the recognition of foreign judgments should be taken into account also for the purpose of recognizing a foreign *lis pendens*. This, however, is not to say, neither that certainty as to the recognition of the judgment should be required (a requirement that would be fatal to recognition of a foreign *lis pendens* in almost all cases), nor that guesswork should be substituted for such certainty. The proper course —in recognizing a foreign *lis pendens* no less than in recognizing foreign judgments—appears to be to make a *differentiation* among the factors that may *in abstracto* affect the question, according to whether a "positive" or a "negative" function should be assigned to them.[8]

This distinction, which is presumably known to all laws of procedure, although the concepts used to express it may vary, is essentially the same as that made in Swedish procedural literature between "*grundrekvisit*" ("basic requisites") and "*motfakta*" ("counterfacts").[9] The former concept refers to the facts necessary and prima facie (that is, in the absence of "motfakta") sufficient for the legal effect in question, the latter to the facts capable of neutralizing the basic requisite and to rebut the presumption created by it.

The question *how* the differentiation between "grundrekvisit" and "motfakta" should be made for the purpose of the particular

[6] *Supra*, p. 78 at n. 9. For other conventional provisions to the same effect, see Guldener, 1951, 177; Jellinek I 202.

[7] Cf. Schütze, 1963, 1487 (who, however, takes this as a reason for refusing recognition of foreign *lis pendens* altogether).

[8] For such a differentiation in recognition of foreign judgments, see, e.g., Guldener, 1951, 97; Habscheid 263–6; Roth 20.

[9] Olivecrona, *Rätt och dom* (*supra*, n. 3 at p. 66) 205, 208–9.

issue of recognition of a foreign *lis pendens* cannot be given a general answer. In the first place, of course, one has to know what facts the forum regards as at all (i.e. *in abstracto*) relevant for the recognition of foreign judgments. This varies from country to country and from one subject matter to another.

However, as regards Scandinavian law, it would seem sufficient, in general, to consider the *jurisdiction* of the foreign court (i.e. the facts prerequisite to such jurisdiction by the rules prevailing in the forum) as a basic requisite.[1] On this point, then, facts warranting an affirmative answer should be required to be established. In this respect it seems that the same standard of proof should be used for the purpose of recognizing a foreign *lis pendens* as in the subsequent examination of the actual recognition of the foreign judgment.

If this requirement is satisfied, the foreign *lis pendens* should be recognized, unless other facts are known to exist which will exclude recognition of the foreign judgment, or (possibly) if they render such recognition (highly) improbable.[2] Such facts should, in other words, be regarded as "motfakta". If, e.g., it can be assumed that the foreign court will decide the case by application of another law than that which is designated by the conflict rules of the forum, this circumstance may conceivably in certain situations render recognition of the expected foreign judgment more or less improbable and, if the degree of improbability is high enough, justify the disregarding of the foreign *lis pendens*.

In practice, it is believed, the difference between the view here proposed and the one according to which the jurisdiction of the foreign court should be solely decisive will be rather small. Indeed, once it has been ascertained that the foreign court has jurisdic-

[1] In so far as *reciprocity* is made a condition for recognition to be observed by the courts—as in German and largely in Swiss law, see sec. 328 para. 1 no. 5 of the German ZPO; Guldener, 1951, 95, 103–5—this condition, too, must (mostly at least) be referred to the basic requisites. Cf. Guldener, 1951, 97; Schauwecker 45; and the German case of RG 13 April 1901, RGZ 49, 341, 345.

[2] Whether certainty or only some degree of probability of the non-recognition of the judgment should be required is a question closely connected with that of the *legal consequence* of recognition of foreign *lis pendens*. Where such recognition leads to *dismissal* of the new action, there is reason to require a high degree of probability for recognition of the expected judgment and, conversely, to accept a relatively low degree of uncertainty in this respect as a "motfaktum". Where, on the other hand, recognition of the foreign *lis pendens* results only in a *stay* of the domestic action, such recognition should be more easily accorded. In consequence, a relevant "motfaktum" should be assumed to exist only where there is certainty or at least a very high degree of probability of non-recognition of the expected judgment. Cf. *SOU* 1968: 40, 125, and *infra*, sec. 27.

tion, it will rarely be possible to give any well-founded prediction as to the non-recognition of the expected judgment. Only in the most exceptional cases—if at all—will it, e.g., be possible to assume in advance that the foreign judgment will have such a content as to be contrary to the public policy of the forum. Nevertheless, it seems preferable, as a matter of principle, when considering recognition of a foreign *lis pendens,* to be able to have regard also to other factors than those relating to the jurisdiction of the foreign court.

By way of summing up, the rule here suggested could be formulated thus:

> Foreign *lis pendens* shall be recognized if the foreign court has jurisdiction to entertain the suit pursuant to the rules prevailing in the forum, and no other facts are known to exist which would exclude recognition of the expected foreign judgment in the forum or render such recognition (highly) improbable.

18. This rule requires further specification, as regards certain cases to be dealt with in what follows.

First, recognition of a foreign judgment may in some cases be affected by the question whether the judgment accedes to the plaintiff's claim or not. Thus, e.g., though the forum may be prepared to recognize a foreign decree granting the petitioner a divorce, it may be unwilling to recognize a decision, rendered in the same circumstances, whereby a divorce petition has been *dismissed* (on the merits).[3] It might therefore be argued, and would indeed be in accordance with the rule suggested above, that the forum, in deciding an issue of recognition of a foreign *lis pendens,* should have regard also to the probabilities of there being the one result or other of the foreign action. Such difficult calculations, however, should preferably be avoided. For the purpose of deciding the issue of *lis pendens,* it seems reasonable to proceed on the assumption of a foreign decision entitled to recognition in this respect, i.e., in the illustration above, of a decree *granting* the petition.[4]

Another situation calling for some comment is where the foreign judgment will not be entitled to recognition as a whole but only *in part.* A practical example of this is that the forum may be willing to recognize a foreign divorce decree but not the "an-

[3] Cf. for Swedish law, Undén 71, 91; *SOU* 1929: 12, 112. For Swiss law, see Schauwecker 67 (but cf. Guldener, 1951, 66).

[4] Of the same opinion, Schauwecker 67–8; Undén *ibid.* (implicitly).

cillary" conclusions of that decree regarding custody of the children of the marriage, support, etc.[5] How is one to proceed if a divorce petition involving also such ancillary questions is presented in the forum during the pendency of a foreign suit on the same matters?

As regards the divorce petition itself, the foreign *lis pendens* must be recognized, the expected foreign judgment being (assumedly) entitled to recognition in that part. As for the ancillary questions, on the other hand, no bar to entertaining the domestic suit may seem to exist, the foreign proceedings having to be disregarded in that part. However, the ancillary issues obviously cannot be litigated (except in so far as questions of interlocutory relief are concerned),[6] until the divorce petition has been granted, those issues being concerned with the regulation of the post-divorce situation. The only adequate solution seems therefore to be for the forum to stay the domestic proceedings as regards the ancillary questions, pending the result of the foreign action. These questions will then have to be resumed for examination on the merits if and when the foreign court has acceded to the divorce petition and its decree has been found to be recognizable in that part.

Finally, a few words should be said about the case where the relief claimed in the foreign action is for payment of money or specific performance, i.e. for a judgement requiring enforcement. In this case the foreign *lis pendens* should not be recognized unless the foreign judgment can be expected to be "recognized" for the purpose of enforcement also.

This does not mean that the expected foreign judgment must be entitled to "immediate" enforcement in the forum in the same way as a domestic judgment (such far-reaching effect being very rarely accorded to foreign judgments), but only that it should satisfy the requirements for obtaining the exequatur usually required for enforcement. Hence, if the forum subjects such exequatur to certain conditions in addition to those applying to

[5] Cf., e.g., Borum(–Philip) (*supra*, n. 3 at p. 80) 203; Undén 81–2.

[6] Issues of provisional relief are generally held to be entertainable without regard to foreign *lis pendens* and, incidentally, also in certain other cases where the forum lacks jurisdiction for the final disposal of the case. See, e.g., the draft EEC-convention (*infra*, n. 9 at p. 105) art. 24; the 1966 Hague convention (*supra*, n. 8 at p. 78) art. 20 para. 2; the Swedish Act on certain international relationships concerning marriage, guardianship, and adoption, of 8 July 1904, ch. 3 sec. 3 (cf. Undén 91–2); Bauer 185; Guldener, 1951, 112–3.

"ordinary" recognition, regard should be paid to these conditions, too, for the purpose of recognition of the foreign *lis pendens.*[7]

19. Although recognition of foreign *lis pendens* should, as a rule, be the corollary of recognition of foreign judgments, the question may be asked whether this rule should not be subject to certain *exceptions.* At least if the rule, as here submitted, is held to apply *generally*—i.e. in relation to all countries, not only to certain selected countries, as determined, e.g., by conventions—such exceptions will probably prove necessary.

The pendency of a foreign suit, even though it may result in a judgment entitled to recognition in the forum, does not, in all cases, exclude the possibility that the plaintiff may have very legitimate reasons for instituting a new action on the same subject matter. Possibly the interests of the plaintiff cannot be satisfactorily safeguarded in the first suit, because the integrity, quality or efficiency of the administration of justice in the foreign country are not acceptable from the point of view of the forum.[8] The plaintiff may have reasons to expect a speedier decision in the forum, or a decision that is more favourable to him, e.g. because the courts of the forum will decide the case on the basis of another law than that which is applicable in the foreign court.

In all these respects the situation is undeniably different from where the first action is pending in another *domestic* court. The courts *within* each jurisdiction are *a priori* equivalent. Normally, e.g., where two domestic courts have concurrent territorial competence for a certain case, the plaintiff cannot count on a speedier or more favourable decision if he brings his action in one of those courts rather than in the other. In any case, even though such assumptions should exceptionally be possible, they must obviously be disregarded in this connection. This, however, is not self-evident, at least not in the same degree, when the first proceedings are taking place abroad, on the basis of procedural law, conflict rules and substantive law different from those obtaining in the forum.

In the further discussion of this, there seems to be good reason to distinguish, on the pattern of English law, as to whether the parties to the action appear in the *same,* or in the *reverse,* position in the two countries.

[7] Cf. Ehlers 235; Köhler, 1951 (*supra,* n. 5 at p. 70) 559; Schauwecker 53–4, 83–4.

[8] Cf. Schnitzer II 862. In such cases, however, recognition of the *lis pendens* will often fail already on the ground that the forum will not be prepared to recognize the expected foreign judgment.

20. In the former case there should rarely be reason to depart from the rule of recognition of foreign *lis pendens*. Indeed, in these cases the place of litigation has been chosen by the plaintiff himself when he brought the foreign suit. The considerations affecting the choice of forum should have been made *then*. Should the plaintiff find, during the course of the foreign proceedings, that his interests would be better served by suing in the forum, this can hardly be a valid reason for permitting him to do so (unless he withdraws his foreign action). On rare occasions, however, an exception may be appropriate. This may be illustrated by the following case imagined by a German writer:[9]

> A German, A, has advanced money to B, who is domiciled and has his assets in Libya. A sues B in Libya for recovery of the sum due. After years of litigation this suit has led nowhere, and no end to the proceedings is within sight. It then happens that B acquires property in Germany, with the result that jurisdiction for a suit against B is conferred upon German courts.[1] Even if a future judgment rendered in the Libyan suit may be recognized in Germany, A should in this situation be able to sue B in a German court, in order finally to obtain his relief. Such a new action would by no means be idle or involve an undue vexation of the defendant, or be wasteful from the point of view of procedural economy.

On these facts the best arguments decidedly militate against recognizing the foreign *lis pendens*. Indeed, the fact supporting the concurrent domestic jurisdiction had in this case occurred long *after* the foreign proceedings were instituted, and the plaintiff had therefore originally not had any choice between domestic and foreign litigation. Even in cases where the plaintiff actually had such a choice, it is exceptionally conceivable, where the foreign proceedings have proved to be manifestly ineffective and the plaintiff has no practical possibility of obtaining a decision from the foreign court, that he should not be barred from approaching the courts of the forum with the matter.[2]

It will possibly be objected to this reasoning that the plaintiff should withdraw his action in the foreign country and that the domestic suit should not be entertained until this has been done

[9] Schütze, 1967, 248–9, cf. 1963, 1487. Some details have been supplied.

[1] Under sec. 23 ZPO.

[2] See the German case of BGH 26 Oct. 1960, IPRspr. 1960/61 no. 200. In this case, English divorce proceedings, which had been stayed for more than four years without any chances of being resumed, were held to be no bar to entertaining a new action in Germany. Of the same opinion, Bauer 185.

and the foreign proceedings have by reason thereof been dismissed. This, however, will often require the consent of the defendant, who then can obstruct the termination of the foreign proceedings by withholding his consent.[3] There should therefore be a residual discretion—to be exercised with the utmost caution—to disregard the foreign *lis pendens.*

21. Such exceptions to the rule are more likely to be justified in cases of *reverse* position of the parties in the two proceedings. In these cases the plaintiff in the forum has not been the initiator of the foreign suit, and he has therefore not had any reason to consider the choice of forum. He is hardly to blame if after being sued abroad he prefers to bring the case to a court of the forum. Possibly he has more confidence in the domestic administration of justice, or judges his chances of winning the case to be more favourable than in the foreign suit. In most cases where the issue arises, the plaintiff is likely to have a strong connection with the forum, e.g. by nationality and/or domicile, cf. the example given above in section 2 (divorce petition by H in France, new action in Sweden by the Swedish W domiciled in Sweden). It will therefore be an advantage to him from procedural points of view (with regard to costs, time, convenience, etc.) if he can bring the suit in the courts of the forum. As the plaintiff may thus have very respectable motives for his action, the new proceedings will—from his point of view at least—rarely have any vexatious character. To restrain him from this action on the ground of foreign *lis pendens,* appears unsatisfactory also from the point of view that it would then be of great significance *which of the parties was the first to sue.* Indeed, if the plaintiff in the forum had come first with his action, there would have been no obstacle to entertaining it.[4]

These points of view, on the other hand, should—it is submitted—not be allowed to lead as far as to destroy the *rule* of recognition of foreign *lis pendens* in these situations. All things considered, this rule is reasonable as a consequence of the forum being prepared to recognize the expected foreign judgment. As previously pointed out, if the foreign suit becomes the first to

[3] Cf. the German case of RG 13 April 1901, RGZ 49, 341; Schütze, 1967, 250, n. 57.

[4] This, in its turn, illustrates the risk of the foreign proceedings being instituted "fraudulently", that is, with a view to avoiding litigation in the forum. This point of view has been stressed in French writing, cf. *supra,* n. 1 at p. 74.

result in a judgment (with legal force), the domestic action will have been in vain, however legitimate may have been the motives of the plaintiff in instituting it. Nevertheless, exceptions to the rule will probably have to be made in certain cases of this type.[5] It is hardly possible to formulate any definite rules for this, the concrete empirical material being too scanty.

It may, finally, be noted that the practical importance of recognition of a foreign *lis pendens* in cases involving reverse position of the parties in the two proceedings will probably be rather limited for another reason, viz. that the requirement of the "same subject matter" being involved will very often not be satisfied in these cases, the demand for relief and/or the grounds alleged in support thereof being at least partially different in the two suits, cf. *infra,* section 25.

22. The questions discussed in the foregoing may be said to have concerned the issue whether and when a foreign suit may, for the purpose of *lis pendens,* be *equated* with a domestic action. The foreign suit will, naturally, not be accorded a *wider lis pendens* effect than a domestic one.

This means, from another point of view, that the requirements for *lis pendens* of the *domestic* law of the forum must in all circumstances be satisfied, even where the question is one of recognizing foreign *lis pendens.* The application of this principle may, however, give rise to certain practical difficulties, and also bring with it some unsatisfactory consequences, as will be illustrated in what follows.

23. Difficulties may occur already in determining whether a suit is in the proper sense *pending*—that is, whether the action has been duly initiated and not yet finally disposed of—in the foreign country. This question must be decided on the basis of the foreign law of procedure.[6] More particularly, the decisive tests are the acts of procedure to which the foreign law attaches the beginning and the end of *lis pendens.* Obviously, the forum cannot "recognize" any *lis pendens* which is not operative in the foreign country itself.

The procedural act decisive for the beginning of *lis pendens* is not the same everywhere. In Norwegian and Swedish law, e.g.,

[5] The need of such exceptions is denied in *SOU* 1968: 40, 126, n. 11. This difference of view may probably be accounted for by the fact that the proposed Swedish law is intended to apply only in relation to *selected* foreign states.

[6] Beitzke, *JZ* 1957, 715; Schauwecker 57–8. For a judicial decision, see the Swiss case of BG 22 July 1958, BGE 84 II 469, 475–6, noted by Aubert, *Rev.crit.d.i.p.* 1959, 353–64, 362–3.

lis pendens is held to begin, as a rule, when application for summons is filed with the court.[7] Under many other legal systems, e.g. Finnish and German law, the relevant time is that of the service of the summons upon the defendant;[8] this means that *lis pendens* takes effect at a somewhat later stage of the proceedings.

In this connection attention should be drawn to certain rules, existing in many countries, according to which the proceedings proper before the court should be preceded by a stage of *conciliation* or *mediation,* to be carried out under the supervision or with the cooperation of a public authority. Such rules may be of a general nature, relating to all types of cases, or be confined to special types of litigation, particularly to divorce and other matrimonial causes. Examples of general rules requiring conciliation proceedings to take place before a special authority may be found in Norwegian and Swiss law.[9] Special rules providing for mediation in divorce and similar actions are very common. Such rules exist in the legal systems of all the Scandinavian countries and in those of numerous Continental states.[1]

In most cases such preparatory proceedings do not seem to be considered as grounds for *lis pendens.* Several exceptions to this exist, however. The Norwegian "forliksklage", e.g., by an express rule of law entails *lis pendens.*[2] It is therefore necessary, in each case where an action is initiated in the forum during this stage of

[7] Norwegian Code of Civil Procedure sec. 63; Swedish Code of Judicial Procedure ch. 13 sec. 4 para. 3; Ginsburg and Bruzelius 171. The same rule seems to prevail in Danish law, see Hurwitz and Gomard 268, 270; *Kommenteret Retsplejelov* I (ed. 2, Copenhagen 1964) sec. 279 no. 2 e); cf., however, Ehlers 237–8. In Swiss law, the rule is the same in the majority of the cantons, see Guldener, 1958, 241 (n. 6).

[8] See for Finnish law, Wrede(-Palmgren) 338, and for German law, sec. 253 ZPO. Similarly in Austrian law, sec. 232 para. 1 (Austrian) ZPO, and in certain Swiss cantons, see Guldener *ibid.* (n. 7).

[9] See for the Norwegian rules of so-called "forliksklage" (conciliation action), Augdahl 14–5, 24–5, 155, and for the Swiss rules of "Sühnverfahren" (conciliation proceedings), Guldener, *id.* 391–5. Similar rules existed in French law until 1949, see Herzog(-Weser) 234.

[1] See the Danish Ægteskabslov (Marriage Act) sec. 76; the Finnish Äktenskapslag (Marriage Act) secs. 69 a, 84 a; the Norwegian Ekteskapslov (Marriage Act) sec. 44; and the Swedish Giftermålsbalk (Marriage Code) ch. 14, ch. 15 secs. 7–9. For analogous rules in Continental countries, see, e.g., the French Civil Code art. 234–8; secs. 608–10, German ZPO; and as regards Swiss law, Guldener, *id.* 468.

[2] Norwegian Code of Civil Procedure sec. 63. In Swiss law, there are cantonal variations, see Guldener, *id.* 240. Cf. the following Swiss cases: BG 2 June 1938, BGE 64 II 175, 177–8; BG 7 July 1938, BGE 64 II 182, 184–5; BG 24 June 1948, BGE 74 II 68, 70–1; BG 13 Dec. 1955, BGE 81 II 534, 538; BG 22 Jan. 1959, BGE 85 II 80, 82–3.

the foreign proceedings, to enquire into the position taken by the foreign law in this respect.

24. A further problematic issue may be to ascertain whether there is *objective identity* between the foreign and the domestic action, that is, if they involve the "same subject matter". In this respect, as is well known, problems often arise also in purely domestic law (problems usually canvassed within the doctrine of *res judicata*). These problems may become particularly pronounced, however, at the international level. The presentation of an action is inevitably "coloured" by the legal categories and ways of thinking prevailing in the respective fora. In order to decide whether there is objective identity between the foreign and the domestic suit, it will therefore be necessary to proceed to an analysis of the concepts of the foreign law. For instance, does—as was the issue in one Swedish case—a South African suit for "legal separation and division of the joint estate" involve the same subject matter as a subsequent Swedish application for "boskillnad" (creation of separate estates, as regulated by the Swedish Marriage Code, ch. 9)?[3] Such questions may be thorny enough, as we know, *inter alia,* from the doctrine of characterization. No general directives for the solution of such difficulties can be given.

25. If the conclusion is reached that there is not objective identity between the two actions, *lis pendens* cannot be invoked in the domestic suit. The two actions will therefore continue in parallel. This may sometimes lead to consequences which seem objectionable *de lege ferenda,* consequences to which there is hardly any counterpart in purely domestic cases. A good illustration of this is afforded by a recent Swedish case.[4] The facts of this case were quite simple:

> Two Swedish spouses were domiciled in Switzerland. W petitioned a Swiss court for divorce on the ground of H's adultery. A few days later H petitioned the City Court of Stockholm for divorce under the Swedish Marriage Code, Ch. 11, sec. 8, on the ground of W's adultery.

The Swedish court had jurisdiction to entertain H's action, both parties being Swedish nationals, and the action had also been brought before the proper court under the Swedish rules of

[3] HD 31 July 1931, 1931 N.J.A. 403.
[4] HD 6 Aug. 1964, 1964 N.J.A. 352.

territorial (specific) competence.[5] So far there was no problem. W, however, sought to have H's action dismissed on the ground of *lis pendens*. She invoked the above-mentioned Swedish statute implementing the Swedish-Swiss convention on recognition and enforcement of judicial decisions. The condition posed by that statute, namely, that the Swiss court should have jurisdiction, was undoubtedly met, both parties being domiciled in Switzerland.[6] The City Court, however, held this defence to be inadmissible on the following ground:

> In view of the fact that the ground of the action instituted by H in this court is not the same as that urged in support of W's action, the City Court finds her action not to preclude the court from entertaining H's action.

On appeal, this decision was affirmed by the Court of Appeals and eventually by the Supreme Court, in both instances unanimously.

This case, it is submitted, was correctly decided in the light of the prevailing Swedish doctrine of objective identity, such identity not being assumed where the grounds for the divorce petition are different.[7]

Probably the solution is similar in many, perhaps even most divorce cases in which recognition of foreign *lis pendens* is at issue. The grounds urged in support of the petition in the foreign and in the domestic suit are often likely to differ even where the position of the parties is the same in the two proceedings. This is, indeed, natural in view of the fact that the grounds alleged must stand in relation to the *law* applicable under the choice-of-law rules of the respective fora and that these rules may designate

[5] See for the question of international jurisdiction, *supra*, n. 6 at p. 64; and for the question of territorial competence, Marriage Code ch. 15 sec. 4 para. 1 sent. 4; Ginsburg and Bruzelius 153, 167.

[6] In general, the domicile of the *respondent* party is requisite and sufficient for this purpose. See the Swedish statute in question (*supra*, n. 9 at p. 78) sec. 5 para. 2 (based on art. 5 para. 2 of the convention) as compared with the Act of 8 July 1904 (*supra*, n. 6 at p. 94) ch. 3 sec. 1 para. 1.

[7] See, e.g., Agge, *Bidrag till läran om civildomens rättskraft* (Lund 1932) 273–5; Olivecrona, *Grunden* (*supra*, n. 3 at p. 66) 326, and *Rätt och dom* (*supra, ibid.*) 285. Similarly in Norwegian law, see Alten 86; Eckhoff (*supra, ibid.*) 59, 204–5; Skeie II 235–9. Another view, partially according with that of sec. 616 German ZPO, has recently been put forward in Swedish writing by Ekelöf, *Rättegång* III 115–6, 152, who suggests that a divorce petitioner should be precluded from bringing further such petitions on other grounds (existing at the time of the first petition). Even under this view, however, there seems to be nothing preventing a new action from being instituted by the *respondent* party in the first proceedings.

different laws in the two countries. In so far as the subject matter involved is, in consequence, held not to be the same, recognition of the foreign *lis pendens* is excluded.

De lege ferenda, however, the result reached in the above-cited decision is very far from being satisfactory. In order to illustrate this, some speculations as to the further development of the two actions will be entertained. In this respect two main alternatives may be distinguished, as to whether the Swiss or the Swedish action will be the first to be concluded with a final judgment. In either case, of course, the judgment may be for the petitioner or for respondent. In the latter alternative no particular complications seem to arise. In what follows it will therefore be assumed that the petition is *granted,* whether by the Swiss or by the Swedish court.

(*a*) If a Swiss divorce decree is granted (and acquires legal force), this decree must be recognized in Sweden under the above-mentioned convention and the Swedish implementing legislation.[8] The fact that there is a pending Swedish suit for divorce on another ground does not seem to affect this question. As a consequence of the recognition, the Swedish proceedings will from now on be barred on the ground of *res judicata.* Indeed, by reason of the recognition of the divorce, the marriage is dissolved from the point of view of Swedish law also. And the doctrine of *res judicata* does not give room for a second divorce decree, even though based on another ground than the first one.[9] So far the concept of "identity" seems to be different within the doctrine of *lis pendens,* on the one hand, and the doctrine of *res judicata,* on the other. *Lis pendens,* according to the prevailing Swedish conception, presupposes identity both with regard to the *petitum* and to the *causa petendi,* whereas the *res judicata* effect of a judgment granting a divorce petition (though not of a decree dismissing such a petition) precludes not only the grounds relied upon in the decree but other possible grounds as well.

Why then is the development outlined above unsatisfactory? As to this, two different points of view may be advanced.

In the first place, the matter may be seen from the angle of

[8] Cf. art. 4 of the convention. In our case the Swiss court had jurisdiction (*supra,* n. 6 at p. 101), and the ground on which the decree is assumed to be based (adultery) is admitted also by Swedish law (Marriage Code ch. 11 sec. 8).

[9] See, e.g., Candolin, Om gentalan i äktenskapsskillnadsmål: *FJFT* 1963, 380–94, 389; Eckhoff (*supra,* n. 3 at p. 66) 202; Ekelöf, *Rättegång* III 152. Cf. the German case of RG 4 May 1939, RGZ 160, 191, 192.

procedural economy. The Swedish proceedings have obviously been in vain; unnecessary inconvenience and costs have been incurred by the parties and the state. This, it will be recalled, is a consideration militating in favour of *lis pendens*.

Secondly, and perhaps more significant, the ground on which the divorce is granted and the question of guilt are often of great importance—though generally in a lesser degree in Scandinavian than in Continental legal systems—for the determination of the *effects* of the divorce, in respect of support, damages, custody of the children, the name of the wife, etc.[1] In our case H will be held to be the sole guilty spouse, the marriage having been dissolved on the ground of his adultery; he will be so held in Sweden also, as a consequence of its recognition of the Swiss divorce. H's allegation that W, too, had committed adultery will not be tried. This is a product of chance, inasmuch as it is due solely to the fact that the Swiss proceedings were the first to be concluded.

(*b*) Assuming now, conversely, that the *Swedish* proceedings are the first to lead to a final judgment (granting H's petition), the consequences will be different, according as this decree will be recognized in Switzerland or not. On this it seems impossible to say anything with certainty.[2]

(*ba*) If the decree is recognized, the consequences will be similar to and no less objectionable than are those of alternative (*a*) above. The only difference is that it will in this case be the Swiss proceedings that have been in vain and that it will be W who meets with the misfortunes. The Swedish divorce decree being based on her adultery, she will be subjected to the detrimental

[1] Cf. in Swedish law, Marriage Code ch. 11 sec. 24, 26 (para. 2) and Föräldrabalken (Code on Parents and Children) ch. 6 sec. 7. For references to certain provisions of foreign law, see Pålsson 417, n. 33.

[2] On the one hand, it seems clear, apart from the pending Swiss proceedings, that the Swedish jurisdiction will be recognized in this case. This follows from art. 5 para. 2 of the convention, in conjunction with the fact that Switzerland claims jurisdiction for itself over Swiss nationals even though domiciled abroad, see Schnitzer I 376–7. It is even conceivable that the Swiss court in the present case would consider itself barred from continuing with the proceedings in case no. 1, in order to prevent conflicts with the home country, cf. Schauwecker 73–4. It seems more probable, however, that the Swiss court—in view of the fact that the Swiss action was the first to be instituted—would hold itself to have exclusive jurisdiction for the cross-petition and for this reason refuse recognition of the Swedish judgment, cf. particularly BG 22 July 1958, BGE 84 II 469, 478, where the situation was analogous. This view is the more likely to be taken as a Swiss court in the *converse* situation—that of an action being first instituted in Sweden—would seemingly hold itself to lack jurisdiction for the cross-petition because of "Sachzusammenhang" (subject matter connection) with the first action, see *infra*, p. 105 at n. 8.

effects of the divorce, and her allegation as to H's adultery will never be tried.

(*bb*) If, on the other hand, the Swedish decree is *not* recognized in Switzerland, the divorce will, in the beginning at least, be a limping one; the parties will be divorced in Sweden but still married in Switzerland. However, as there is in this case nothing to prevent the Swiss proceedings from being continued, a later divorce decree (based on H's adultery) may possibly be rendered in Switzerland. This decree apparently cannot be recognized in Sweden, a Swedish divorce being already in existence.[3] In this situation, then, the marriage will be held to be dissolved in both countries, but the dissolution will be deemed to have taken place at different times and—more important—the decrees will constitute very different bases for determining the effects of the divorce.

26. The only rational solution in cases of this type is that the two actions should be brought in the same court, where they may then be joined and tried together. In this way the unsatisfactory consequences referred to above will be avoided, and the question of guilt can be considered with regard to both spouses. The element of chance will be eliminated.

This is the way in which the difficulties are ordinarily solved, or rather forestalled, in *domestic* law. In Swedish law, e.g., there is an express rule enabling the respondent party in a matrimonial cause to bring a cross-action (e.g. for divorce on another ground than that alleged by the petitioner in the main action) in the court where the main action is pending, even though this court would otherwise lack territorial competence.[4] A more far-reaching, and—it is submitted—preferable, rule prevails in German and Swiss law, where the court in which the first divorce action is pending is held to have *exclusive* competence for a cross-petition by the respondent party to the first action.[5] In this way parallel proceedings in different courts are effectively prevented.

[3] *Supra*, p. 102 at n. 9.

[4] Marriage Code ch. 15 sec. 4 para. 1 sent. 5. For the *ratio* of this rule, see *NJA* II 1954, 308–9. A similar rule seems to be recognized in Finnish law, see Hakulinen, *Familjerätt* (Helsinki 1964) 193; Candolin (*supra*, n. 9 at p. 102) 380–94.

[5] See for German law, where this case is referred to as one of "erweiterte Rechtshängigkeit" (extended *lis pendens*), Stein and Jonas(-Schönke, Pohle) (*supra*, n. 9 at p. 68) sec. 615 no. II 1 a), and for judicial decisions, RG 6 March 1922, RGZ 104, 155, 156–7; RG 4 May 1939, RGZ 160, 191, 192. For Swiss law, see Aubert, *Rev.crit.d.i.p.* 1959, 361–2; Guldener, 1958, 93; BG 2 June 1938, BGE 64 II 175, 177; BG 7 July 1938, BGE 64 II 182, 183–4; BG 24 June 1948, BGE 74 II 68, 69; see also the cases cited *infra*, n. 8 at p. 105.

The rules on forum for cross-petitions and on joinder of actions in domestic law fulfil partially the same functions as the rules of *lis pendens*. They may be said to supplement these rules, in that they prevent parallel proceedings in cases which, though not involving "the same subject matter" within the meaning of the rules of *lis pendens*, are yet so closely related that they should not reasonably be litigated and decided separately.[6]

Is there anything corresponding to this at the international level? As regards most countries, the answer must probably be in the negative.[7] An affirmative answer, however, has been given by *Swiss* courts and writers.[8] According to their view, a court of the forum, though having jurisdiction in the matter, should decline to entertain an action which has "Sachzusammenhang", or "connexité" (subject-matter connection) with a case previously pending abroad, even though the two cases do not involve the same subject matter. Prerequisite to this is, first, that the expected foreign judgment is entitled to recognition in the forum and, secondly, that the foreign court holds itself to have jurisdiction for case no. 2. It is of interest to note that such rules (as well as rules on recognition of foreign *lis pendens*) have been included in the recently signed EEC-convention on jurisdiction and the enforcement of civil and commercial judgments.[9]

De lege ferenda there can be no doubt that such rules are desirable. If they had existed in Sweden, the decision cited above as the starting point for our discussion could have been avoided. The Swedish court ought then to have declined to entertain H's action, thereby restricting him to the Swiss suit instituted by W. Unfortunately, this solution could hardly be reached in the present state of Swedish law.[1]

27. Finally, a few comments should be made on the *legal con-*

[6] Cf. Ekelöf, *Rättegång* II 171–2, III 149.

[7] For French law, see Batiffol, 1967, 778; Herzog(-Weser) 205; Lerebours-Pigeonnière(-Loussouarn) (*supra*, n. 9 at p. 70) 489. For Italian law, see Code of Civil Procedure art. 3 (*supra*, p. 74 at n. 2).

[8] BG 8 April 1954, BGE 80 II 97, 100; BG 22 July 1958, BGE 84 II 469, 475; Aubert, *Rev.crit.d.i.p.* 1959, 362–3; Guldener, 1951, 178. For an exception to the prevailing rule, see BG 19 May 1939, BGE 65 II 177, 179.

[9] Art. 22. For an English translation of the draft convention (signed on 27 Sept. 1968), see Supplement to *Bulletin* No. 2—1969 of the European Communities, 17–45.

[1] Even in Swedish *domestic* law, unlike German and Swiss law, the competence of the court where the main action was instituted is not exclusive but only alternative to the competence of the court where the action should otherwise (apart from its being a cross-petition) be brought. Similarly in Finnish law, see Candolin (*supra*, n. 9 at p. 102) 381–2. *De lege ferenda* the German and Swiss rule submittedly deserves preference.

sequence of *lis pendens* when recognized. In domestic law, as we have seen (*supra*, section 5), it is usually held that action no. 2 should be *dismissed* (whether ex officio or only on objection being raised), although it has been suggested that a *stay* of the action should be sufficient. The reason why some writers prefer the latter solution is that the *lis pendens* issue may arise at a stage when the development of case no. 1 is still more or less uncertain. There may eventually prove to be some bar to entertaining *this* action, e.g. for lack of territorial competence. In such a situation, unnecessary inconvenience and loss of time will have been caused by the dismissal of case no. 2, which is no longer precluded from being heard. Sometimes there is even a risk of the plaintiff being deprived of his action by the dismissal, namely, where the action has to be brought within a specified time and this time has expired before the bar of *lis pendens* has been removed and the action can be instituted anew.[2] These disadvantages would be eliminated, if only a stay of the action in case no. 2 had been ordered.

In international relations there are additional arguments militating in favour of this view. In particular, even where a foreign *lis pendens* is recognized, there is generally a risk that the foreign judgment will eventually not be recognized in the forum, the predictions in this respect being more or less uncertain. If the domestic action has been dismissed by reason of the foreign *lis pendens*, this is therefore more likely to lead to inconveniences and actual losses of right or of action than in purely domestic cases.

It is submitted therefore, even though dismissal may be prescribed by domestic law (as it is in Sweden), that staying should be preferred in recognition of a foreign *lis pendens*.[3] It should be possible to accept this solution also *de lege lata*, the rule of domestic law not being directly applicable to situations involving international *lis pendens*. At any rate, staying should be admitted as an alternative to dismissal. This is the compromise arrived at both in the 1966 Hague convention on recognition and enforcement of foreign judgments and in the EEC-convention on this matter (which, however, confines the choice between the two

[2] See, e.g., Augdahl 154 (n. 2), 158; Skeie I 386–7. Cf. as regards German law, secs. 209, 212 *Bürgerliches Gesetzbuch;* Rosenberg 480–1; Habscheid 268.

[3] For this solution, see besides the writers cited *supra*, n. 5 at p. 66, Alten 86; Hagerup (*supra*, n. 3 at p. 77) 115; Hambro 93, 100. The same view has been supported by Sweden at the Hague Conference, see *Act. Doc. La Haye* 10 (1964) I 225. Cf. in French writing, Level, *Clunet* 1964, 82.

alternatives to cases where the court's jurisdiction in case no. 1 is contested, dismissal being compulsory in other cases).[4]

B. *Domestic Suit as a Bar to Recognition of Foreign Judgments*

28. Assuming the above principle of recognition of foreign *lis pendens* to be accepted, it is certainly natural and consistent for the forum to demand observance of its own *lis pendens* abroad and therefore to refuse recognition of foreign judgments rendered in disregard thereof, that is, on an action instituted *after* the suit pending in the forum. This is in accordance with the principle of equality.[5]

On the other hand, if the foreign action was started *before* the domestic suit, the latter suit should properly not have been entertained at all. If this has nevertheless been done, there is submittedly no tenable reason why this should prevent recognition of the foreign judgment.

To refuse recognition in such a case would, first, be in glaring conflict with the principle of equality, there being no doubt whatsoever that the forum will stand by its *own* judgment rendered before the conclusion of foreign proceedings instituted in disregard of a domestic *lis pendens*.

Secondly, such refusal would bring with it a risk of different, possibly contradictory, judgments. On the complications arising out of this, see *supra*, section 15.

Finally, non-recognition of the foreign judgment would open the door to dilatory and other disloyal manoeuvres by the parties. A party who fears to lose the foreign suit or who has already lost it by a judgment which has not yet become final in the foreign country will be able to prevent recognition and/or enforcement of it in the forum by bringing a new action there on the same matter.[6] The typical example is that a debtor who has been sued for performance in the foreign country may sue in the forum for a declaratory judgment of the non-existence of the debt, in order

[4] EEC-convention (*supra*, n. 9 at p. 105) art. 21; Hague convention (*supra*, n. 8 at p. 78) art. 20 para. 1. And see the proposed Swedish Act on the recognition and enforcement of judgments (*supra*, n. 7 at p. 77) sec. 14, cf. *SOU* 1968: 40, 126. For staying as an alternative in certain cases, see also Habscheid 266–9.

[5] Conversely, this standpoint coupled with the principle of equality is an argument for recognition of foreign *lis pendens*, see *supra*, sec. 13.

[6] Cappelletti and Perillo 378; Guldener, 1951, 176, 177, n. 15; Jellinek I 108, 204; Schauwecker 51.

to prevent or at any rate to delay the execution of the performance judgment obtained (or on the point of being obtained) by the creditor from the foreign court.[7]

All these consequences are, it is submitted, unacceptable. They can and should be avoided by granting recognition to the foreign judgment without regard to the pending suit no. 2 in the forum.

[7] Cf. the facts of the French case of Cass. civ. 10 March 1914, Rev.crit.d.i.p. 1914, 449.