

The Brussels/Lugano *Lis Pendens* Rule and the “Italian Torpedo”

Michael Bogdan

1	The Brussels/Lugano System	90
2	The Rule on <i>Lis Pendens</i>	91
3	The Principle of Mutual Trust and the Italian Torpedo	92
4	The Prohibition of Prohibitions	94
5	Concluding Remarks	96

1 The Brussels/Lugano System

The jurisdiction of courts of the EU Member States in civil and commercial disputes is today in most situations governed by Council Regulation No 44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the so-called Brussels Regulation or Brussels I Regulation).¹ If the defendant is domiciled in Denmark, similar (albeit not always identical) jurisdictional rules are found in the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,² while rules almost identical to those of the Brussels Convention apply to defendants domiciled in Iceland, Norway and Switzerland due to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988³. The fundamental principles of all three instruments are the same and there is practically unanimous consensus that the case law of the European Court of Justice (ECJ) regarding the interpretation and application of the Brussels Convention or the Brussels Regulation is more-or-less automatically to be followed in respect of all three instruments, unless the existing (usually minor) differences in wording warrant making an exception.

The main jurisdictional principle is stated in Articles 2 and 3 of all three instruments: persons domiciled in a Member State⁴ *shall*, whatever their nationality, be sued in the courts of that state, although there are some exceptions stipulated in the subsequent provisions, for example the *forum delicti* as defined in Article 5 point 3 or the *forum prorogatum* allowed by Article 23 of the Brussels Regulation. If none of such exceptions is applicable, all courts other than the defendant's *forum domicilii* are obliged to dismiss the case due to the lack of jurisdiction. This is compensated for by the recognition and enforcement of judgments made in the other Member States, so that there is no risk of a legal vacuum or *déni de justice* that could happen if legitimate plaintiffs were at the same time refused both jurisdiction and recognition/enforcement. If the defendant is not domiciled in any of the Member States, the jurisdiction of the courts of each Member State shall, subject to minor exceptions, be determined by the law of that state (Article 4), but even those decisions are entitled to recognition and enforcement in all Member States pursuant to the Regulation/Conventions.

This so-called Brussels/Lugano system, which is here described in an oversimplified manner, does not exclude the possibility of more than one Member State having jurisdiction in relation to the same dispute. For example, the rule on *forum delicti* in Article 5 point 3, as interpreted by the ECJ, means that in matters relating to tort a defendant domiciled in a Member State may, at the option of the plaintiff, be sued not only in the Member State where he is

1 Official Journal of the European Communities 2001 L 12 p. 1.

2 Official Journal of the European Communities 1998 C 27 p. 3.

3 Official Journal of the European Communities 1988 L 319 p. 9.

4 With regard to the two conventions, it is more appropriate to speak about a Contracting State, but for the sake of brevity this paper speaks in the following of Member States only.

domiciled but also in the Member State where the damage occurred or in the Member State where the event which gives rise to that damage took place.⁵ It may also happen that the courts of more than one Member State consider themselves to have jurisdiction because they understand some of the Brussels Regulation's provisions differently or rely on different sets of facts. It may, of course, also happen that the plaintiff initiates proceedings in a court which pursuant to the Brussels/Lugano rules does not have jurisdiction, in which case that court is obliged to decline to adjudicate.

2 The Rule on *Lis Pendens*

The situations described in the previous paragraph can give rise to problems of *lis pendens*, which are regulated in Article 27 of the Brussels Regulation (the two Conventions contain a corresponding rule in Article 21). Article 27 provides that where proceedings involving the same cause of action and the same parties are brought in the courts of different Member States, then any court other than the court first seized shall stay its proceedings until the court first seized establishes whether it has jurisdiction. If the court first seized finds itself to have jurisdiction (which does not mean that the court must have made a formal ruling about its jurisdiction, as it suffices normally that nobody objected against it), then other courts must respect this and decline to deal with the dispute.

It seems that the requirement that both proceedings must be between the same parties can be dispensed with when it is established that, with regard to the subject-matter of the two disputes, a party in one of the cases has identical and indissociable interests with a party in the other case, for example when a carrier is sued in one Member State by the owner of the cargo and in another Member State by that owner's insurer.⁶ The requirement in Article 27 that both proceedings must involve the same cause of action can sometimes be considered fulfilled even when the two proceedings, based on the same legal relationship, deal with different types of demands, for example when one party sues in one Member State for a declaration that a contract is invalid or inoperative while the other party sues in another Member State for the enforcement of the same contract. In such a case, in the words of the ECJ, the same question whether the contract is binding "lies at the heart of the two actions".⁷ The ECJ has also made it clear that the terms "the same cause of action" and "the same parties" in Art. 27 have an autonomous meaning which is independent of the laws in force in the Member States, so that the distinction drawn in a Member State between an action *in personam* and an action *in rem* is not material for the interpretation of Art. 27.⁸ It is also important to note that in order to determine whether the two proceedings have the same cause of action, account is taken only of the claims of

5 See *Bier v. Mines de Potasse d'Alsace*, case 21/76, [1976] European Court Reports 1735.

6 See *Drouot v. CMI*, case C-351/96, [1998] European Court Reports I-3075.

7 *Gubisch v. Palumbo*, case 144/86, [1987] European Court Reports 4861 (*see in particular* point 16 of the judgment).

8 *Tatry*, case C-406/92, [1994] European Court Reports I-5439.

the respective plaintiffs and not of the defenses raised by the defendants (for example a set-off).⁹

The decision to stay the proceedings on the ground of *lis pendens* shall be made of the court’s own motion, thus even if none of the parties requests it. This applies regardless of the domicile of the parties and of the legal basis of the jurisdiction of the court first seized; thus even in a case where the defendant is not domiciled in a Member State and the jurisdiction of the court first seized depends therefore on its own national jurisdictional rules pursuant to Art. 4.¹⁰

The *lis pendens* rule applies regardless of whether the proceedings in the court first seized have international implications or are purely domestic. To what extent proceedings initiated in a non-member state have the effect of *lis pendens* is not controlled by the Regulation, and is left to be decided by the national law of the Member State where the *lis pendens* effect is to materialize. It is reasonable to assume that such effect will only be given to those proceedings taking place in a non-member country that are expected to result in a decision which will be recognized and enforced in the Member State in question.

3 The Principle of Mutual Trust and the Italian Torpedo

The *lis pendens* rule in the Brussels/Lugano instruments grants to the court first seized the exclusive right – one may say monopoly – to decide on its own jurisdiction and thus indirectly also on the jurisdiction of the courts subsequently seized in the other Member States.¹¹ The latter courts are obliged to stay the proceedings and wait, without any time limit, until the court first seized has established whether it has jurisdiction or not. If the court first seized comes to the conclusion that it has jurisdiction, all the other courts must decline jurisdiction even if they are of the opinion that the conclusion of the court first seized was erroneous. This means that the *lis pendens* rule delegates to the court first seized a very significant power, which is clearly based on a great deal of confidence and trust.

Assume that a Swedish enterprise (the buyer) has purchased some goods from an Italian company (the seller). After delivery, which, pursuant to the contract, took place in Stockholm, the buyer finds that the quality of the goods is inferior to that specified in the contract. He demands damages from the seller, who refuses to pay. As the agreed place of delivery of the goods is Stockholm, the Italian seller can be sued there by the buyer in accordance with Article 5 point 1 of the Brussels Regulation and the resulting Swedish judgment can be enforced in Italy by virtue of Article 38 of the same Regulation. However, the Italian seller, anticipating that he will be sued in Sweden, rushes to an Italian court and

9 See *Gantner v. Basch*, case C-111/01, [2003] European Court Reports I-4207. Cf. also *Mærsk v. de Haan*, case C-39/02, [2004] European Court Reports I-9657.

10 *Overseas Union v. New Hampshire Ins.*, case C-351/89, [1991] European Court Reports I-3317.

11 *Overseas Union v. New Hampshire Ins.*, case C-351/89, [1991] European Court Reports I-3317.

applies for a declaratory judgment confirming that he is not guilty of a breach of contract. The Italian court lacks jurisdiction pursuant to the Regulation and it must decline to deal with the dispute. The lack of jurisdiction would be even more conspicuous if the seller had started proceedings in a third Member State having no relation whatsoever to the parties or to the dispute. The seller is, of course, aware of this, but the main purpose of his action in Italy or a third Member State is not to obtain a favorable judgment there on the merits of the dispute. Instead, he wishes to benefit from the fact that the courts in some Member States are notoriously slow and it may take them years to finally dismiss the case due to lack of jurisdiction. In the meantime, while waiting for the Italian or third-state court to declare itself incompetent, the Swedish buyer cannot have his claim tried by the competent Swedish court, as the *lis pendens* rule obliges the Swedish court to stay proceedings until the court first seized makes up its mind about its jurisdiction. The seller hopes that the long delay, together with the potential costs and inconveniences of taking part in court proceedings abroad, will make the Swedish buyer to give up his claim or accept a settlement favorable to the seller.

Such use (or rather abuse) of the *lis pendens* rule for the purpose of "sinking" proceedings in a competent court has become known as "the Italian torpedo"¹² and opinions used to be divided on whether the rule can really lawfully be applied in this way.¹³ The question was finally answered by the ECJ (Full Court) on 9 December 2003 in the case of *Erich Gasser BmbH v. MISAT Srl*.¹⁴ An Austrian company (Gasser) sold under several years goods to an Italian company (MISAT), but MISAT started in April 2000 proceedings against Gasser before an Italian court seeking a ruling that the contract between the parties had been terminated and that MISAT had not failed to perform the contract. In December 2000, Gasser brought in turn an action against MISAT before an Austrian court, claiming payment of outstanding invoices. In support of the jurisdiction of the Austrian court, Gasser could refer to an exclusive choice-of-court clause in the contract. MISAT contested the existence of such a prorogation clause, and in addition referred to the proceedings pending in the Italian court in respect of the same relationship. Pursuant to the *lis pendens* rule in Article 21 of the Brussels Convention, the Austrian court decided to stay the proceedings and wait for the Italian court's decision about its own jurisdiction. Facing the risk of a very long waiting period due to the notorious slowness of Italian courts, Gasser appealed to a higher Austrian court which turned to the ECJ for a preliminary ruling on, *inter alia*, whether the *lis pendens* rule had to be interpreted as meaning that it

12 The Italian court system seems to be particularly slow, with delays of many years. A substantial part of the judgments of the European Court of Human Rights deals with the inability of Italian courts to make decisions within a reasonable time.

13 See, for example, Lando, Ole, *Being first. On uses and abuses of the lis pendens under the Brussels Convention*, Modern Issues in European Law. Essays in Honour of Lennart Pålsson, Stockholm 1997, pp. 105-122; Hartley, Trevor, *How to abuse the law and (maybe) come out on top: bad-faith proceedings under the Brussels Jurisdiction and Judgments Convention*, Law and Justice in a Multistate World. Essays in Honor of Arthur T. von Mehren, Ardsley, N.Y. 2002, pp. 73-81.

14 Case C-116/02, [2003] European Court Reports I-14693.

may be derogated from, where, in general, the duration of proceedings before the court first seized is established as excessively long.

Gasser, supported by the Government of the United Kingdom, argued before the ECJ that the *lis pendens* rule excluded excessively protracted proceedings. Such proceedings might even be contrary to Article 6 of the European Human Rights Convention, which guarantees fair and public hearing "within a reasonable time". A potential debtor in a commercial case could otherwise bring, before a court of his choice, an action seeking a judgment exonerating him from liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years. On the other hand, MISAT, the Italian Government and the Commission were of the opposite view and advocated the full applicability of the *lis pendens* rule regardless of the excessive duration of court proceedings in the court first seized. In particular, the Commission stated that the Brussels Convention is based on mutual trust and that it was for the European Court of Human Rights and not for the national courts to examine the human rights aspects of whether and when the duration of proceedings has become excessively long.

The ECJ pointed out in its judgment that the Brussels Convention contained no provision under which its articles, and in particular Article 21, ceased to apply because of the length of proceedings before the court first seized. The Convention was based on the trust which the Contracting States accorded to each other's legal systems and judicial institutions. It was this mutual trust which enabled a compulsory system of jurisdiction and a simplified mechanism for the recognition and enforcement of judgments to be established. This made it also possible to ensure legal certainty by allowing the parties to foresee with sufficient certainty which court will have jurisdiction. Therefore, the ECJ concluded that the *lis pendens* rule must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seized is established is excessively long.

4 The Prohibition of Prohibitions

The procedural law of some Member States, for example the United Kingdom, makes it possible for their courts to issue injunctions prohibiting a party to institute or continue judicial proceedings in another country (the so-called anti-suit injunction). In view of the ECJ judgment in the *Gasser* Case (see *supra*), such a prohibition might seem to be a useful tool for fighting the attempts by a party to torpedo proceedings in courts having jurisdiction under the Brussels Regulation by suing in slow courts in another Member State having no jurisdiction. The question is, however, whether such use of the anti-suit injunctions would itself be compatible with the Brussels/Lugano rules.

This question arose and was answered by the ECJ (Full Court) in the case of *Gregory Paul Turner v. Grovit et al.*, decided on 27 April 2004.¹⁵ The request

¹⁵ Case C-159/02, [2004] European Court Reports I-3565.

for a preliminary ruling came from the English House of Lords in view of a dispute between Mr. Turner, a British citizen domiciled in the United Kingdom, and his former employers concerning breach of his employment contract. Mr. Turner had instituted proceedings before the Employment Tribunal in London, which awarded him some damages. A few months later, the employers sued him in a Spanish court claiming damages for losses allegedly resulting from his professional conduct. The real purpose of their action seems to have been to vex Mr. Turner in the pursuit of his case before the Employment Tribunal in England (this situation differed consequently from a typical "Italian torpedo", as it was not the first but the second action that constituted an abuse). Mr. Turner asked the High Court of Justice of England and Wales to issue an injunction, backed by a penalty, restraining the employers from pursuing the proceedings commenced in Spain. The injunction was issued, but the employers appealed to the House of Lords, claiming that the English courts did not have the authority to restrain the continuation of proceedings in foreign jurisdictions covered by the Brussels Convention. The House of Lords turned to the ECJ and requested a preliminary ruling on whether it is inconsistent with the Convention to grant a restraining order against defendants in English proceedings who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent of obstructing proceedings properly pending before the English courts.

As in the *Gasser* judgment, the ECJ pointed out that the Convention was based on the trust which the Contracting States accorded to one another's legal systems and judicial institutions. The Convention did not permit the jurisdiction of a court of a Contracting State to be reviewed by a court in another such state. An injunction prohibiting a claimant from bringing an action in another Contracting State must be seen as constituting interference with the jurisdiction of the foreign court and is, as such, incompatible with the system of the Convention. Such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process. The grant of an injunction is liable to give rise to situations involving conflicts for which the Convention contains no rules, such as judgments given in one Contracting State in spite of an injunction made in another or even contradictory injunctions issued by the courts of two Contracting States. The ECJ concluded, therefore, that the Brussels Convention must be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings. Even though the *Turner* Case did not deal with a typical "Italian torpedo", this conclusion will certainly make it impossible to use anti-suit injunctions in torpedo cases as well.

5 Concluding Remarks

The most important conclusion to be drawn from the two ECJ judgments described above is that in the eyes of the Court the principle of mutual trust between the Member/Contracting States carries more weight than the need to fight abuses. This conclusion seems to apply even beyond the scope of the Brussels Regulation and the Brussels and Lugano Conventions, in particular with regard to the *lis pendens* rule in Article 19 of Council Regulation No 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (the so-called Brussels II Regulation).¹⁶ In disputes in the field of family law, such as proceedings on divorce or custody, the "Italian torpedo" may potentially lead to even more negative consequences than in commercial disputes. Nevertheless, there are no reasons to believe that the ECJ would not interpret the *lis pendens* rule in the Brussels II Regulation in the same manner as in the *Gasser* Case or that it would allow anti-suit injunctions in family-law proceedings within the scope of the Brussels II Regulation.

The attitude of the ECJ facilitates, no doubt, certain types of abuse. The admission of new Member States into the European Union may increase the problem, as it may add new countries whose slow courts can be used in order to "sink" legitimate proceedings in Member States having jurisdiction pursuant to the Brussels/Lugano rules. The author of these lines has had the opportunity to discuss the matter with some Central and Eastern European judges who admitted that the court personnel in their countries has been known to speed up or slow down a case in exchange for a reward.

The immediate practical consequence of the *Gasser* judgment seems to be that lawyers will more often have to advise their clients not to postpone suing in the hope of reaching an amicable settlement of the dispute. It has become crucial from a party's point of view to be the first to start judicial proceedings. This might in the long run contribute to making Europe more "American" with regard to litigiousness. A discussion among a group of members of the Swedish Bar Association has shown that most of them consider the active use of the "Italian torpedo" to be contrary to the ethical standards of the Bar; but they also consider that a speedy start of judicial proceedings, which might have previously been deemed premature, to be legitimate if the purpose is to prevent the use of the "Italian torpedo" by the opposing party.

In spite of all the negative consequences, I sympathize with the ECJ's decision to protect the Brussels/Lugano system. To allow the courts of one Member State to review the jurisdiction of the courts in other Member States could lead to chaos and undermine not only the jurisdictional rules but also the rules on recognition and enforcement of judgments. It is no coincidence that Article 35 point 3 of the Brussels Regulation forbids even the test of public policy (*ordre public*) with regard to the jurisdiction of the courts of other Member States (a corresponding prohibition is found in Article 28 of the Brussels and Lugano Conventions). Within the judicial "common market"

¹⁶ Official Journal of the European Union 2003 L 338 p. 1.

created by the Brussels/Lugano rules, it simply should not happen that it takes an excessively long time to dismiss a case due to lack of jurisdiction, just as it should not happen that some judges are corrupt or partial. The – hopefully relatively infrequent – occurrence of such problems is not a sufficient reason for abandoning the fundamental principles of judicial cooperation in this field. Should the problems increase and cause difficulties on a larger scale, the most appropriate solution seems to be for the Council to take measures pursuant to Article 65(c) of the EC Treaty (“eliminating obstacles to the good functioning of civil proceedings”), for example by imposing time limits within which the courts of the Member States have to decide whether they have jurisdiction or not.

An additional factor complicating the issue is that the European Court of Human Rights in Strasbourg may in some extreme cases hold that the *lis pendens* rule, as interpreted by the ECJ in *Gasser*, can force other Member States to become accessories in the *déni de justice* committed by the Member State of the court first seized when that court is excessively slow. It should be remembered that the Strasbourg court has held that the recognition of a judgment violating the European Human Rights Convention constituted also a violation of the Convention by the recognizing state.¹⁷ In this context it is rather surprising to read the submission of the Commission in the *Gasser* case,¹⁸ indicating that the Commission is of the view that the human rights aspects must be left to the European Court of Human Rights and should not be taken into account by the Member States at the interpretation of the *lis pendens* rule. Even apart from the fact that human rights are today considered to belong to the fundamental principles of EC law, it is clear that the Member States are obliged to respect human rights so that the complaints to the European Court of Human Rights are not necessary.

17 See the case of *Pellegrini v. Italy*, application no 30882/96.

18 See point 69 of the judgment.