

Choice of Court Clauses and *Lis Pendens* under Brussels I Regulation

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Keywords

European Contract Law, EC, ECJ, Brussels I, Regulation, Lis Pendens, Litigation, Forum Shopping

Abstract

The principle of party autonomy, known not only in the common law legal system but also in the civil law system, provides parties contracting in civil and commercial matters with the right to establish their own rules, as long as these rules do not contradict mandatory law. This right is presumed to be protected by the force of law. It follows, that when a choice of court clause is included in the contract, disputes are supposed to be solved by the court chosen by the parties.

This principle is not compromised by the Brussels I Regulation (or previously, the Brussels Convention). Moreover, it is repeated in its Articles 1 and 23. At the same time, the rule of *lis pendens*, provided for by its Article 27, aims to preclude subsequent actions in other Member States if a court is already seized and allows the appearance ‘on the legal scene’ of a court other than the court chosen by the parties. And the *lis pendens* rule prescribes the latter to stay proceedings until the court not chosen, but first seized, examines and declines its jurisdiction.

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Merkourios 2010 – Volume 27/Issue 71, Article, pp. 12-16.

URN: NBN:NL:UI:10-1-100918

ISSN: 0927-460X

URL: www.merkourios.org

Publisher: Igitur, Utrecht Publishing & Archiving Services

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I. Introduction

The principle of party autonomy, known not only in the common law legal system¹ but also in the civil law system,² provides parties contracting in civil and commercial matters³ with the right to establish their own rules, as long as these rules do not contradict mandatory law. This right is presumed to be protected by the force of law. It follows, that when a choice of court clause is included in the contract, disputes are supposed to be solved by the court chosen by the parties. This principle is not compromised by the Brussels I Regulation⁴ (or previously, the Brussels Convention). Moreover, it is repeated in its Articles 1 and 23. At the same time, the rule of *lis pendens*, provided for by its Article 27, aims to preclude subsequent actions in other Member States if a court is already seized and allows the appearance ‘on the legal scene’ of a court other than the court chosen by the parties. And the *lis pendens* rule prescribes the latter to stay proceedings until the court not chosen, but first seized, examines and declines its jurisdiction.

This rule and the decisions of European Court of Justice (ECJ) on this matter generated a large discussion among European law specialists, some claiming the need for courts to apply the common law doctrine of *forum non conveniens*,⁵ following the party autonomy concept, others, on the contrary, mentioning the danger of ‘déní de justice’⁶ (refusal of the legal system to solve the dispute) if the party autonomy is not assisted in such a case by the provisions of mandatory law.

The target of this Article 27 is to manage and prevent parallel proceedings and avoid irreconcilable decisions within the EU. But in the mean time, it opens the field to parties’ ‘forum shopping’,⁷ enabling them to start parallel proceedings in courts not chosen in order to delay the final enforceable decision. Such a ‘torpedo’⁸ is to a certain extent an abuse of rights.

The following questions arise: under current legal provisions, if more than one court is seized, which law could, should and will respect the party autonomy as defined in the choice of court clause? Is it possible that the applicable rules respect the economic and legal interests of parties and at the same time respect due process rights and avoid a ‘déní de justice’?

In order to answer these questions we shall examine the rules applicable under Brussels I in the case that, despite a choice of court agreement, a parallel proceeding is started (part I); then in the second part, we shall try to analyze the main problems which could arise from these parallel proceedings in practice, and their possible solutions (part II).

II. The Competent Court in the Case of a Choice of Court Clause

Under the current European rules, when a valid choice of court clause is included in the contract (A), the *lis pendens* rule must be applied if a parallel proceeding with the same cause of action and between the same parties is started (B).

A. Scope of European rules applicable to various types of forum choice clauses

The main scope of rules applicable to the question of jurisdiction in civil and commercial matters in the EU is defined in the Brussels I Regulation. The exception is Denmark, for which the text of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters,⁹ the predecessor of Brussels I, applies. To those parties seated in Norway, Iceland and Switzerland, the Lugano Convention is applicable.¹⁰

Moreover, the understanding of the application of these documents is extended by the decisions of the ECJ, the most important being *Gasser GmbH v. MISAT Srl*,¹¹ *Turner v. Grovit*¹² and some other relevant cases to which we will refer.

Article 23 of Brussels I provides a presumption of the exclusivity of jurisdiction, unless parties expressly agree otherwise.

1 Edwin Peel, ‘Introduction’ in *Forum shopping in the European judicial area* (Hart, Oxford 2007) 1-4.

2 On this matter, for instance the French Civil Code, serving as a basis for many European civil codifications, contains in article 1134 the provision that ‘the legally concluded contracts constitute a law for those who entered the contract’ (*Les conventions légalement formées tiennent lieu de loi ceux qui les ont faites*), and the art. 4:248 of the Civil Code of the Netherlands stipulates that ‘a contract not only has the legal effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of law, usage or pursuant to requirements of reasonableness and fairness.’

See respectively Code Civil of France, www.legifrance.gouv.fr [Accessed 1 December 2009]; Hans Warendorf, Richard Thomas, Ian Curry-Sumner, *Civil Code of the Netherlands* (Kluwer Law International, Alphen aan den Rijn 2009) 711.

3 We refer in the present work to the concept “civil and commercial matters” as autonomous and independent of corresponding definitions in national laws of the Member States, Michal Bogdan, *Concise introduction to EU Private International Law* (Europa Law Publishing, Groningen 2006) 45.

4 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Communities, L 12/1 (hereinafter referred to as Brussels I).

5 Pascal de Vareilles-Sommières, ‘Avant-propos’ in *Forum shopping in the European judicial area* (Hart, Oxford 2007), xi.

6 Ibid, xii.

7 Edwin Peel (n 1) 1-4.

8 Michal Bogdan, ‘The Brussels/Lugano Lis pendens Rule and the “Italian Torpedo”’ (2008) *Scandinavian Studies in law* 90-96.

9 Official Journal of the European communities 1998, C 27, 3.

10 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Official Journal of the European Communities, 1988, L 319, 9.

11 Case C-116/02, 2003, ECR I-14693.

12 Case C- 159/02, 2004 ECR I-3565.

The ECJ has clarified that the choice of court clause in the contract, and the rest of the contract should be treated as separable parts of the contract. This is important when it is necessary to decide on the validity of such a clause.¹³ But the effect of the choice of forum clause is extended to this clause itself, meaning that the submission of the disputes on the validity of this clause must be to the chosen court as well.¹⁴ Article 23 provides the parties with three ways of agreeing upon non-exclusive jurisdiction. It is also to be noted that the mandatory exclusive jurisdiction (for weaker parties contracts and some others) can in most of the cases not be changed by the parties.¹⁵

It is to be noted that the *lis pendens* rule is equally applicable to all types of choice of court clauses.¹⁶ This rule is defined as follows, according to Article 23: if more than one proceeding involving the same cause of action has started in different Member States, ‘any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.’¹⁷ This means that the decision about which court is competent (real decision on jurisdiction) is transferred from the court chosen by the parties to the court first seized, the latter having been unilaterally chosen by the claimant. The ECJ expressly confirmed this interpretation in the case *Overseas Union Insurance Limited v. New Hampshire Insurance Co.*¹⁸ Even the unconditional appearance of both parties in the court chosen by the choice of court clause does not stop the pending proceedings in the court first seized.¹⁹ The court first seized thus has considerable power to decide on the validity of the party autonomy expressed in the forum choice clause.²⁰ In order for parallel proceedings to occur, the same parties must be involved in both cases and the same cause of action must be at hand. At this point, it is important to be more precise about the meanings of the terms ‘same parties’ and ‘same cause of action’ under Brussels I. These will be expanded upon in the section below.

B. Notion of parallel proceedings and its relevance for application of the *lis pendens* rule

According to Article 23 of Brussels I, parallel proceedings are two or more actions in different EU states, which have been started despite the presence of the forum choice clause, which take place between the ‘same parties’ and which have the ‘same object’.

The definition of the ‘same parties,’ despite the fact that the concept is relatively uniform in national legal systems, raised doubts about application of conflicts of law rules. According to the ECJ, there is no need that the parties have the same procedural position in both cases. Therefore, parties in a case can be considered the ‘same’ as another case even if the parties are not legally identical, so long as they have the same legal interest. For instance, a person who sues the defendant by virtue of subrogation can be considered the same party as it often happens in case of subrogation claim submitted by an insurance company.²¹ The ECJ thus gave an extensive interpretation to, and regarded as autonomous, the concept of ‘same parties’ under Brussels I.

The ECJ also gave an extensive interpretation to the concept of the ‘same cause of action.’ Professor Michael Bogdan gave a summary of the possible interpretations in his article in *Irish Law Times*, where he points out that this concept is different in different countries. Many national courts have dealt with this issue, each solving it differently, before the ECJ came with its autonomous definition: a wholly owned and controlled subsidiary can be considered the same party as the mother company, as well as a company of the same group in case of manifest misuse of party identity,²² but a licensee cannot be considered as the same party as the trademark owner.²³

Because of these rather extensive definitions, the notion of parallel proceedings constitutes a risk of decreasing the legal certainty supposed to be created by the choice of court agreement and can cause problems for lawyer practitioners, as well as to the legislature with regards to the efficiency of the system in place.

III. Main Problems Relating to the Application of the *Lis Pendens* Rule and Possible Solutions

The *lis pendens* rule can lead to situations of what the civil law countries call ‘abus de droit,’ or abuse of rights (A). Countries often have means to sanction such abuse but are these sanctions suitable for the Brussels I model (B)?

13 Michael Bogdan (n 8) 67.

14 *Benincasa v. Dentalkit*, case C-269/95, 1997, ECR I-3767.

15 See sections 3-5 of the Brussels I Regulation.

16 As can be concluded from the cases of the ECJ mentioned here.

17 Brussels I (n 4).

18 Case C-351/89 *Overseas Union and others*, 1991, ECR-3317.

19 Case *Popely v. Popely*, 2006, IEHC 134.

20 Michal Bogdan (n 8) 90-96.

21 *Drouot Assurances SA v. Metallurgical Industries and Ors* case C-351/96, 1996, ECR-375.

22 *Turner v. Grovit* Case C- 159/02, 2004 ECR I-3565.

23 Michael Bogdan, ‘A single judgment fro the single market – *lis pendens* in the Brussels I Regulation’ (2007) 25 *Irish law times* 124.

Two forms of the abuse of rights 'strategy' will be discussed here: forum shopping and the Italian torpedo. The general way of using the *lis pendis* rule to delay proceedings is that one of the parties aims at creating parallel proceedings by submitting a claim to the court not chosen in the contract. When the opposing party starts proceedings in the court chosen in the contract, the former party makes it known that a court has already previously been seized. The latter court will be obliged to apply the *lis pendens* rule of Brussels I and stay proceedings.

At this point, there are two options: first, the court first seized declares itself competent and the choice of court clause void; second, the court first seized decides, after some deliberation, that it does not have jurisdiction. As a consequence of these options, the enforceable final result of the proceedings in the forum chosen can be considerably delayed. In the *Gasser GmbH v. MISAT Srl* case,²⁴ one of the parties tried to refer to the exclusive jurisdiction clause and addressed the higher court of Austria, requesting an Austrian court not to stay proceedings, because an Italian court was seized and the time of functioning of this Italian court was lengthy. The ECJ, in the preliminary ruling, pointed out that since Brussels I does not deal with the question of duration of the proceedings, the *lis pendens* rule should be applied.²⁵

This behavior of the parties is sometimes called 'forum shopping' *malus*, opposing it to forum shopping *bonus*²⁶ and is commonly recognized as bad practice.²⁷ Moreover, it reduces the pre-litigation strategy of the parties to being the first to seize a court, simply in order to stall or complicate the case for the other party. The party creating parallel proceedings will thus be creating a 'torpedo,' or with reference to the slowness of Italian courts, an 'Italian torpedo,'²⁸ which waits to 'sink' the opposing party in multiple actions.

The Brussels I system was criticized for allowing such situations. Both in common and civil law countries, abuse of law is generally not tolerated. The opinions are divided about whether the court not chosen in the contract should invoke the doctrine of *forum non conveniens*. The ECJ rejected the application of this doctrine in *Andrew Owusu v. NB Jackson, trading as Villa Holidays Bal-Inn Villas and Others*.²⁹ As the ECJ mentions in the *Gasser* case, the Brussels Convention and Regulation are based on mutual trust between countries, it will not allow a court of one Member State to decide upon or evaluate the jurisdiction of a court of another Member State, or evaluate their speed of proceedings.

However, the problems generated by this approach are not denied by the European Commission. In fact, the Commission addresses many of these problems in their 'Green paper' on the review of Brussels I, in which some solutions are presented as well.³⁰

B. Anti-suit injunctions, *forum non conveniens*, reversal of seized courts rights, damages for breach of forum choice clause, imposing deadlines on courts - possible solutions?

As mentioned above, some national legal systems contain measures to sanction starting parallel proceedings and most legal systems punish the abuse of rights in some way. This sanctioning can be done by way of anti-suit injunctions and the *forum non conveniens* doctrine from the court's side; and claims for damages for breach of choice of court clauses on a party's initiative. Modification of the Brussels I system by introducing, for example, a deadline by which the court first seized must decide upon the jurisdiction or leaving the decision on the jurisdiction to the chosen court if the contract contains an exclusive choice of court provision are also ways to remedy the problems.³¹

First, the sanctioning of starting parallel proceedings could also be done by granting anti-suit injunctions by the court,³² and as it happened in the *Turner v. Grovit* case, the national court granted the parties such an injunction, but then the ECJ stated that the court did not have any legal grounds under Brussels I to do so.³³ So, unless Brussels I is modified to provide sanctions for starting parallel proceedings in violation of a choice of court agreement, anti-suit injunctions are incompatible with the current European *lis pendens* provisions.

24 Case C-116/02, 2003, ECR I-14693.

25 Michal Bogdan (n 8) 94.

26 I understand the 'bonus' form as normal non-abusive behavior of a party choosing the most appropriate forum. For example, anticipation of an easier execution of the judgment can be a good reason to decide to start proceedings in the court of the country where the assets of the other party are located. See Marie-Laure Niboyet, 'La globalisation du procès civil international (dans l'espace judiciaire européen et mondial)' (2005) Cour de Cassation (France), Bulletin d'information n° 631.

27 A. Nuyts, 'Forum shopping et abus du Forum shopping dans l'Espace judiciaire européen' (2003) 3 *Global jurist advances* 1.

28 Michal Bogdan (n 8) 90-96.

29 Case C-281/02, 2005, ECR I-1383.

30 Green paper on the review of Council Regulation (EC) No 44/2001 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2009, www.eplaw.org, 5 [Accessed 1 December 2009].

31 Green Paper (n30).

32 Arnaud Niuts 'The Enforcement of Jurisdiction Agreements Further to Gasser and the Community Principle of Abuse of Right' in *Forum Shopping in the European judicial Area* (Hart, Oxford (2007) 55-73.

33 Case C-159, 2004, ECR I-3565.

The *forum non conveniens* doctrine is also not applicable, but in the light of the general construction of Brussels I, the refusal of competence by the court first seized, could be in some way considered a ‘déni de justice.’ Taking into account the mutual trust policy of Brussels I, it does not seem that this doctrine could be integrated into this document.

Moreover, sanctioning legal proceedings by granting damages for breach of choice of court clause is also mentioned in the Green paper, as well as by some authors.³⁴ It is to be noted that the idea of damages for breach of such clauses is included in the material law of the Member States, but the issue here is about including such sanctions in the Brussels I regime, in order for the party to claim these damages in the same process. It seems, however, that the question of damages, being a matter of the material law (and related to very different principles in common law and civil law countries) does not have to be regulated by conflicts of law rules, but can remain in the field of the national material law, as long as enforceability is provided for the latter by international agreements.

Among other solutions proposed by the Green paper, there are two interesting ones: standard choice of court clauses in Brussels I and establishing deadlines for courts first seized for deciding on jurisdiction.³⁵ The first proposal would eventually facilitate the work of the judge and in some cases speed up the procedure, but on the other hand, it would not facilitate the work of parties with the contract, as it would require professional legal assistance. Moreover, such formalization risks bringing ‘bureaucratization’ and contains a risk of unjust decisions based only on formal grounds. The second solution – establishment of deadline – seems to be realistic, taking into account that the legally fixed deadlines the court has to respect, for example in cross border exchange of evidence established by other European legislation, are relatively successful.

IV. Conclusion

In this paper we examined the current European provisions on the *lis pendens* rule and its application in international litigation. This rule, stated in Article 27 of the Brussels I Regulation aims to prevent parallel proceedings and avoid incompatible decisions within the EU. It is applicable even if the parties previously agreed to a court, either by an exclusive or a non-exclusive choice of court agreement.

It appears that despite the submission of parties to a concrete forum, the court to which it falls to respect party autonomy and provide it with legal protection, is not the court jointly-chosen by the parties, but the court first seized, meaning the court chosen by only one of parties. The Brussels I system allows therefore parties to ‘forum shop’ and enables them to start parallel proceedings in courts not chosen, in order to create a delay or other obstacles to the final enforceable decision, a sort of ‘torpedo’,³⁶ being to a certain extent an abuse of rights. It can also violate the principle of party autonomy, allowing the court not chosen by the parties to be involved in the solution of a dispute.

The current vision of the ECJ on the application of Brussels I is based on the idea of mutual trust between the Member states, and thus no sanctions or common law doctrines such as *forum non conveniens* are allowed. The debates over the possible sanctions and prevention of the parallel proceedings continue; it is to the law makers to adopt convenient solutions. Eventually,³⁷ when the new Convention on Choice of Court Agreements³⁸ comes into force, new legal interpretation and consequences will come into the picture. It is to be hoped, that the surprises contained in new rules (and in each discipline, including law, account should always be taken of potential surprises) will be positive ones. ■

34 Koji Takahashi, ‘Damages for breach of a choice-of-court agreement’ (2008) 10 *Yearbook of Private international law*.

35 Green paper on the review of Council Regulation (EC) No 44/2001 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2009, www.eplaw.org [Accessed 1 December 2009].

36 Michal Bogdan (n 8) 90-96.

37 Some authors already predict the absence of a role for this Convention on cases similar to Gasser, see Richard Fentiman, ‘Parallel proceedings and jurisdiction agreements’ in *Forum shopping in the European judicial area* (Hart, Oxford 2007) 48-49.

38 Convention on Choice of Court Agreements, 30 June 2005, http://www.hcch.net/index_en.php?act=conventions.text&cid=98 [Accessed 15 March 2010].