

Lis pendens – related actions in the Brussels I

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Lis pendens

- Well known institute of procedural law
- Purpose – to avoid parallel proceedings concerning the same thing
- No problem within the national context
- Parallel proceedings before courts of different states
 - Proceedings before a court of another state is not automatically relevant
 - Regulation by an international convention or a Community act is necessary

Articles 27, 28

- Address the problem of irreconcilable judgments originating in different Member States
- Prevent parallel proceedings which might give rise to irreconcilable judgments
- Art. 27 – conflicting judgements (having mutually exclusive legal effects)
- Art. 28 – inconsistent judgements (different conclusions, legally compatible)
- Art. 27 regulates a particular aspect of a more general problem addressed by Art. 28

Articles 27, 28

- Art. 27

- Requires the second court to decline jurisdiction if the first court asserts jurisdiction
- Requires the second court to stay its proceedings to allow the first court to determine competence
- > the second court has no choice but to desist

Articles 27, 28

- Art. 28
 - Permits the second court to stay its proceedings whenever there are related proceedings in two MS
 - Permits the second court to decline jurisdiction if both actions may be consolidated in the first court
 - > confers upon the second court discretion to stay or dismiss proceedings

Articles 27, 28

- Do not confer substantive jurisdiction upon the first court
- Regulate the behaviour of the court second seised
- Confer procedural jurisdiction upon the first court (jurisdiction to determine jurisdiction)

Articles 27, 28

- Objectives
 - To prevent irreconcilable judgements
 - To ensure procedural efficiency
 - To promote mutual trust between MS

Articles 27, 28

- Scope

- The subject matter of the Regulation
- Prior proceedings and exclusive jurisdiction
- > art. 27, 28 continue to operate even if it is alleged in the court second seised that the latter has exclusive jurisdiction under Art. 23 (*Case C-116/02 – Erich Gasser v MISAT*)

Articles 27, 28

- Prior proceedings and interim relief
 - > Arts. 27, 28 do not regulate paralel proceedings where the second action is merely for interim relief
- Prior proceedings and national law
 - > Arts. 27, 28 apply even when the courts of two MS have asserted jurisdiction under their national law, pursuant to Art. 4

(Case C-315/89 Overseas Union Insurance Ltd. V New Hampshire Insurance Co.)

Articles 27, 28

- Prior proceedings in non-Member States
 - > the Brussels regime does not regulate such cases at all, so that national law applies instead
 - > the regime does not apply with the consequence that no stay or dismissal is possible, because the Regulation plainly supplies no rules for doing so
 - > the Regulation applies, but warrants a stay or dismissal on grounds which mirror those in Arts. 27, 28

Where the courts of a non-Member State are first seised the only conceptually sustainable alternative is the first one.

Article 27

- The two actions have to correspond to the extent that incompatible judgements may be obtained
- The proceedings need not be identical, they must be congruent
- Art. 27(2) ensures that, if the jurisdiction of the court first seised is established, any other court must cede jurisdiction to that court
- Art. 27(1) – confers upon the court first seised exclusive jurisdiction to determine in which MS proceedings might be brought
- Allows the court second seised no discretion

Article 27

- Four key questions:
 - 1) When is each court seised?
 - 2) When are two actions congruent, such that there is a risk of irreconcilable decisions?
 - 3) When is a court's jurisdiction established?
 - 4) What rules of evidence and procedure govern the second court's actions?

Article 27

- The requirement of congruence
 - Art. 27 does not require that the parallel actions be identical in a literal sense
 - Materially congruent – they correspond sufficiently that there is a risk of irreconcilable judgements
 - The same parties
 - The same substance of the proceedings

Article 27

- The same parties
 - What if some, but not all, of the parties are the same in both actions? -> Art. 27 operates between the common parties
(Case C-406/92 – Tatry v Maciej Rataj)

Article 27

- What if the parties are different legal persons, but have common legal interests? (*Case C-351/96 – Drouot Assurances Sa v Consolidated Metallurgical Industries*)
- > the possible identity of interests between insurer and insured
- > whether in any action an insurer and its insured were to be regarded as sharing the same legal interest was a matter for national law
- > where an insurer had sued in the insured's name under the doctrine of subrogation, insurer and insured must be considered to be one and the same party

Article 27

- The same substance
 - Common legal and factual basis and the same legal objective („cause of action“)
 - The same object
 - > legal purpose
 - > intended legal outcome
 - > the end the action has in view

Article 27

- The same cause of action
 - > not the claim itself or the relief sought
 - > juridical basis of the claim
 - > the facts and rules of law relied on as the basis of the action – the foundation of the action

Article 27

- Subject matter of an action
 - > introduced by ECJ
 - > replaced the requirement of an objective
 - > the end the action has in view

Article 27

- Case 144/86 – Gubisch v Palumbo
 - A dispute between Gubisch Maschinenfabrik (Germany) and Mr. Palumbo (Italy)
 - Mr. Palumbo brought proceedings against Gubisch before District Court Rome for a declaration that the contract was inoperative on the ground that his order had been revoked before it reached Gubisch for acceptance

Article 27

- Gubisch objected that the District Court lacked jurisdiction on the ground that it had already brought an action before the Landgericht Flensburg to enforce performance by Mr. Palumbo of his obligation under the contract (payment for the machine he had purchased)
- District Court dismissed the objection of lis pendens, Gubisch appealed to the Supreme Court of Cassation

Article 27

- Supreme Court of Cassation referred to the ECJ the following question:

„Does a case where, in relation to the same contract, one party applies to a court in a Contracting state for a declaration that the contract is inoperative whilst the other institutes proceedings before the courts of another Contracting state for its enforcement fall within the scope of the concept of lis pendens pursuant to Article 21 of the BC?“

Article 27

- The terms used in Art. 27 must be regarded as independent
- Art. 27 applies where two actions are between the same parties and involve the same cause of action and the same subject matter
- In this case parties are engaged in two legal proceedings in different MS which are based on the same „cause of action“, that is to say the same contractual relationship

Article 27

- The action to enforce the contract is aimed at giving effect to it
- The action for its rescission or discharge is aimed precisely at depriving it of any effect
- The question whether the contract is binding therefore lies at the heart of the two actions
- The two actions have the same subject matter, for that concept cannot be restricted so as to mean two claims which are entirely identical

Article 27

- Cace C-406/92 – Tetry v Maciej Rataj
 - In September 1988 a cargo of soya bean oil belonging to a number of owners („th cargo owners”) was carried in bulk aboard the vessel Tetry, belonging to a Polish shipping company („the shipowners”)
 - The voyage was from Brazil to Rotterdam for part of the cargo and to Hamburg for the rest
 - The cargo owners complained to the shipowners that in the course of the voyage the cargo was contaminated with diesel or other hydrocarbons

Article 27

- Three groups of cargo owners
 - > Group 1: owners of cargo carried to Rotterdam under separate bills of lading
 - > Group 2: the company Phillip Brothers Ltd (UK), which owned another part of the cargo carried to Rotterdam under separate bills of lading

Article 27

- > Group 3: four owners of cargo carried to Hamburg under four separate bills of lading
- Actions brought by the shipowners
- > November 1988 – an action before the Rotterdam District Court against Groups 1 and 3 seeking a declaration that they were not liable or not fully liable for the alleged contamination

Article 27

- > September 1989 – proceedings in the Netherlands against Group 2 for a declaration that they were not liable for the contamination of the cargo delivered to Group 2 in Rotterdam
- > October 1990 – proceedings in the Netherlands to limit the liability in respect of the entire cargo

Article 27

- Actions brought by the cargo owners seeking damages for their alleged loss
- > Group 3 brought an action in rem (Folio 2006) before the High Court of Justice, Admiralty Court against the Tetry and another ship, the Maciej Rataj, whose owners are the same as the owners of the Tetry

Article 27

- > Group 2 commenced an action in rem before the same court (Folio 2007) against the ship Maciej Rataj
- > Group 1 brought an action for damages in the Netherlands

Article 27

- As regards Folio 2006 the shipowners moved the Admiralty Court to decline jurisdiction in favour of the Netherlands court pursuant to Article 21 or, in the alternative, pursuant the Article 22
- As regards Folio 2007 they requested that the Court decline jurisdiction on the basis of Article 22

Article 27

- The Admiralty Court decided that it was under no obligation to decline jurisdiction or stay proceedings in accordance with Art. 21 and it decided that it was not appropriate to decline jurisdiction or stay proceedings under Art. 22
- The shipowners appealed to the Court of Appeal which referred to the ECJ several questions

Article 27

- The question whether the parties are the same cannot depend on the procedural position of each of them in the two actions
- Where some of the parties are the same as the parties to an action which has already been started, Art. 21 requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another MS; it does not prevent the proceedings from continuing between the other parties

Article 27

- The cause of action comprises the facts and the rule of law relied on as the basis of the action
- An action for a declaration of non-liability (brought by the shipowners) and another action (by the cargo owners on the basis of shipping contracts) concerning the same cargo transported in bulk and damaged in the same circumstances, have the same cause of action

Article 27

- The object of the action means the end the action has in view
- The two actions has the same object – the issue of liability is central to both actions
- The distinction drawn by the law of a MS between an action in personam and an action in rem is not material for the interpretation of Art. 21

Article 27

- Establishing jurisdiction
 - No indication in the Regulation
 - A finding in the first court to the effect that jurisdiction exists or not

Article 27

- Procedure in the second court
 - The second court shall of its own motion stay its proceedings
 - The court doesn't have the option of dismissing rather than staying the action
 - The court can act in the absence of an application by the defendant

Article 27

- A court must examine whether a stay is justified in any case where the circumstances suggest that Art. 27 may be relevant
- To oblige a court to examine each case before it for signs that Art. 27 may operate would exceed what is necessary to give meaning to the provision
- The national procedural law may require courts to make such enquiry when their jurisdiction is invoked

Article 28

- To avoid irreconcilable judgements by preventing parallel proceedings
- Proceedings are related (the subject matter need not be the same, nor need both proceedings involving the same parties)

Article 28

- To improve coordination in the exercise of judicial functions within the Community
- To avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded

Article 28

- Confers upon the second court discretion to decline to exercise jurisdiction
 - Art 28(1) – stay of proceedings
 - Art 28(2) – dismissal of proceedings
- Art 28(2) engages only if the related proceedings are both at first instance x Art 28(1) operates even if the second court is seised after appellate proceedings have started in the first court

Article 28

- Art 28(2)
 - The first court has jurisdiction over both actions
 - The application of one of the parties (x Art. 28(1))
 - The second court „must“ examine the jurisdiction of the first court – limited exception to the principle that the courts of one MS may not examine the jurisdiction of another MS

Article 28

- The concept of pending proceedings
- The concept of related proceedings
- The nature and the scope of the second court's discretion
- The relationship between Arts. 28(1) and (2)

Article 28

- Pending proceedings
 - Art 28(1) – related actions are pending in different MS
 - Art 28(2) – actions are pending at first instance
 - Both courts are seised in accordance with Art. 30
 - Pending at first instance
 - > there should be no necessity that the courts have accepted jurisdiction
 - > judgement has been given provided that no further application to the trial court remains possible

Article 28

- Related proceedings
 - Art 28(3)
 - Irreconcilable judgements
 - > narrow interpretation – judgements involving inconsistent orders -> tend to make Art. 28 redundant by requiring that both proceedings have the same legal objective
 - > broader interpretation – the findings made in both courts are incompatible, although the terms of the orders made are not (*Case Tatry v Maciej Rataj*)

Article 28

- The Art. 28 discretion
 - The scope of the discretion
 - > a court is required merely to decide whether proceedings are related, such that a stay is mandated (x the language of Art. 28 – the existence of related proceedings is but a pre-condition for the exercise of discretion)

Article 28

- > a court has discretion not to stay proceedings, limited only by the purpose of the Regulation in general and Art. 28 in particular => the court second seised should favour granting a stay whenever a risk of irreconcilable judgements exist

Article 28

- The relationship between Art 28(1) and (2)
 - The broader power to stay proceedings under Art 28(1) is residual, available only if the narrower power to dismiss for consolidation under Art 28(2) is not
 - The general power to stay is the primary power
 - No particular ordering is required by the language of Art 28
 - There is no indication as to which power is paramount

Article 30

- Community definition of seisin for the purpose of Arts 27, 28
- The first authoritative step is taken in the initiation of proceedings under the national law
- Art 30 reflect differences between MS -> two mutually exclusive definitions of seisin

Article 30

- Art 30(1) – applies to those MS where proceedings are initiated by the filing of the claim with the court
- Art 30(2) – applies to those MS where service of the claim represents the formal commencement of proceedings