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Brussels Ibis Regulation

Changes and Challenges of the Renewed Procedural Scheme

Vesna Lazić
Steven Stuij
Editors

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Chapter 1
The Revised Lis Pendens Rules in the Brussels Ibis Regulation

Christian Heinze and Björn Steinrötter

Abstract In line with the old adage "something old, something new, something borrowed, something blue, and a silver sixpence in her shoe", the lis pendens rule is shining in a new light since the recast of Brussels I Regulation. That old wedding saying also sums up quite well the way the lis pendens rule was retained, reorganized and amended.

Keywords Brussels Ibis regulation · Lis pendens · Exclusive jurisdiction · Choice of court agreement · Jurisdiction agreement · Forum non conveniens · Torpedo action

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The paper is based on a presentation by the first author in the TMC Asser Instituut in The Hague on 19 March 2015.

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1.1 Introduction

As is well known, the revised[1] Brussels I Regulation (hereafter referred to as "Brussels Ibis Regulation") shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015 (Article 66, 81 Brussels Ibis Regulation). For legal proceedings instituted earlier, the previous version[2] of the Brussels I Regulation (hereafter referred to as "Brussels I Reg") continues to apply. Although more evolutionary than revolutionary as a whole, the new version of the Regulation is substantially different from the previous text in several aspects.

This contribution deals with the *lis pendens* rules[3] as one of these aspects.[4] These rules ought to prevent or resolve conflicts of international jurisdiction when there are legal actions (potentially) pending in different states. As this is of paramount importance to the operation of the Regulation, the provisions of this part of the Regulation have to be interpreted broadly.[5] This avoids parallel proceedings

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 351, p. 1; see Crawford/Carruthers 2013, p. 89; Dickinson/Lein (eds.) 2015; see also Alio 2014, p. 2395; Cadet 2013, p. 218; Domej 2014, p. 508; Hau 2014, p. 1417; Hay 2013, p. 1; v. Hein 2013, p. 97; Lenaerts and Stapper 2014, p. 280; Mari and Pretelli 2013/14, p. 211; Moses 2014, p. 1; Nielsen 2013, p. 503; Pohl 2013, p. 109; Queirolo 2013/14, p. 113; Schramm 2013/14, p. 143; Seatzu 2013/14, p. 175; with regard to the proposal see Heinze 2011a, p. 581; Illmer 2011, p. 645; Magnus and Mankowski 2011, p. 252.

[2] Council Regulation (EC) No 44/2001 of December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 12, p. 1.

[3] Chapter II, Section 9 of both the respective EU legislative acts; see also recitals 15 Brussels I Reg and 21–24 Brussels Ibis Regulation.

[4] See in particular Lazic 2013, p. 5 and also Auernig 2015, p. 6; Dittrich 2014, p. 219 et seq.; Heckel 2012, p. 272; Hohmeier 2014, p. 217; Mankowski 2015, p. 17; Queirolo 2013/14, p. 127 et seqq.; Wagner 2015, p. 50 et seqq.; Zhang 2014, p. 1.

[5] Rogerson 2015, paras 11.01, 11.03.

and—as a consequence—irreconcilable judgements. Furthermore, in principle an autonomous interpretation of these provisions is mandated.[6]

The Brussels Ibis Regulation deals with four different scenarios: One has to distinguish whether legal proceedings are pending in Member States (Articles 29–31) or third States (Articles 33–34) and whether proceedings involve the same cause of action (Articles 29, 33) or related actions (Articles 30, 34). As the latter probably will be of limited practical relevance,[7] the following remarks concentrate on the "same cause of action"-scenarios.

The following text firstly analyses the *lis pendens* rule in favour of the court first seised to decide about jurisdiction (2.). This is followed by remarks on the new *lis pendens*-mechanism for actions pending in third States (3.), the reversal of the general *lis pendens* rule in favour of the court chosen in a jurisdiction agreement (4.) and, finally, on notification obligations (5.). The authors summarise the main findings in the end (6.).

1.2 Something Old: Court First Seised Has Priority to Decide About Jurisdiction

1.2.1 Basic Rule: Strict First-in-Time Approach

Pursuant to Article 29(1) Brussels Ibis Regulation the court first seised with the action is given priority where proceedings involving the same case of action[8] and between the same parties are brought in the courts of different Member States. Any other court shall stay its proceedings of its own motion until the jurisdiction of the court first seised is established. Once jurisdiction is established, any other court shall decline jurisdiction in favour of the court first seised, Article 29(3) Brussels Ibis Regulation.

Article 29(1),(3) Brussels Ibis Regulation thus reflect the situation under the provisions of Article 27(1),(2) Brussels I Regulation. As was well established under the old law, the court second seised must not review the jurisdiction of the court first seised,[9] even if the duration of proceedings before the court first seised is excessively long.[10]

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[6] Different opinion with regard to the term "same cause of action" in third State cases Weber 2011, p. 634: recourse to the understanding of the term in the national law of the respective Member State.

[7] Cf. Magnus and Mankowski 2010, p. 19; see also Rogerson 2015, para 11.30 et seqq.; EJC 6.12.1994—Case C-406/92 (Tatry), E.C.R. 1994, I-5439, paras 51–58.

[8] Regarding the term "same cause of action" see ECJ 8.12.1987—Case C-144/86 (Gubisch), E.C.R. 1987, 4861, paras 14–19. Two causes of action do not need to be identical to fulfill the prerequisities of the term. This is also true regarding negative declaratory actions, EJC 6.12.1994—Case C-406/92 (Tatry), E.C.R. 1994, I-5439, para 45.

[9] See ECJ 27.6.1991—Case C-351/89 (Overseas Union Insurance Ltd), E.C.R. 1991, I-3317, para 26.

[10] ECJ 9.12.2003—Case C-116/02 (Gasser), E.C.R. 2003, I-14693, para 73.

1.2.2 Exceptions

As the first seised-rule is fundamental for the operation of the Regulation, only few exceptions are made to this basic principle.

1.2.2.1 ECJ Case *Weber*: Exclusive Jurisdiction

First of all, the strict first seised-rule does not apply if jurisdiction of the court second seised is exclusive, i.e. based on Article 24 Brussels Ibis Regulation (Article 22 Brussels I Regulation).[11] In its judgement in *Weber*, the ECJ decided that

> in a situation such as that issue in the main proceedings, if the court first seised gives a judgement which fails to take account of Art. 22 (1) of Brussels I Reg, that judgement cannot be recognised in the Member State in which the court second seised is situated.[12]

At first sight, this result seems to be a predictable consequence from the fact that Article 35(1) Brussels I Regulation (Article 45(1)(e)(ii) Brussels Ibis Regulation) excludes recognition and enforcement of a potential judgement of the court first seised, thereby ruling out a potential conflict of judgements. At the same time, however, this decision may also be regarded as a modification of the former "strictly formal" reading of the *lis pendens* provisions by the ECJ:

> In those circumstances, the court second seised is no longer entitled to stay its proceedings or to decline jurisdiction, and it must give a ruling on the substance of the action before it in order to comply with the rule on exclusive jurisdiction.[13]

Although the decision concerned Article 22 No. 1 Alt. 1 Brussels I Regulation (Article 24 No. 1 Alt. 1 Brussels Ibis Regulation), it can be applied to all grounds of exclusive jurisdiction in Article 22 Brussels I Regulation (Article 24 Brussels Ibis Regulation).[14]

As a consequence of this decision, the court first seised will probably be under an obligation to stay its proceedings in order to avoid parallel proceedings.[15] This, however, does not follow from Article 31(2) Brussels Ibis Regulation applied by analogy.[16] Not only did the *Weber* case deal with the previous version of the

[11] ECJ 3.4.2014—C-438/12 (Weber), ECLI:EU:C:2014:212, paras 55–56; see Nordmeier 2015, p. 120; see also the "transformation" of the Weber-decision by the German BGH, 13.8.2014—V ZB 163/12; cf. before the Case Weber ECJ 27.6.1991—Case C-351/89 (Overseas Union Insurance Ltd), E.C.R. 1991, I-3317, para 26.

[12] ECJ 3.4.2014—C-438/12 (Weber), ECLI:EU:C:2014:212, para 55.

[13] ECJ 3.4.2014—C-438/12 (Weber), ECLI:EU:C:2014:212, para 56.

[14] Nordmeier 2015, 125; Wagner 2015, p. 51.

[15] Different opinion in this respect Wagner 2015, p. 51.

[16] Same view Nordmeier 2015, p. 125.

Regulation, which did not contain such a provision. More importantly, the conclusion in *Weber* is based on the rationale of exclusive jurisdiction in general.[17] In order to establish exclusive jurisdiction of the court second seised, a *prima facie* assessment by the court first seised seems appropriate.[18]

Within its (narrow) scope of exclusive jurisdiction based on Article 24 Brussels Ibis Regulation (Article 22 Brussels I Regulation), the ruling in *Weber* limits potential abuse, in particular the "torpedo"-scenario where one party may approach notoriously slow working courts just to delay proceedings. The strict application of the first seised rule seems to be inappropriate if the court second seised is competent pursuant to exclusive jurisdiction rules as the—in these cases—particularly close connection between the matter in dispute and the place of jurisdiction deserves special protection.[19]

It has to be noted that Article 24 Brussels Ibis Regulation establishes exclusive jurisdiction only in favour of Member States' courts. If there is exclusive jurisdiction of a third State's court, Article 33(1) Brussels Ibis Regulation applies.[20] Exclusive jurisdiction is then a (significant) factor the court of the Member State has to take into consideration within its discretionary powers under Article 33(1) Brussels Ibis Regulation (see explicitly recital 24[2] Brussels Ibis Regulation).

1.2.2.2 Exclusive Jurisdiction Agreements

The second exception concerns jurisdiction agreements. Article 31(2) Brussels Ibis Regulation[21] states that "where a court of a Member State in which an agreement as referred to in Article 25 confers exclusive jurisdiction[22] is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."[23] Recital 22 sentence 4 Brussels Ibis Regulation adds that courts designated in the choice of forum clauses do not only decide about the effectiveness of the agreement, they also decide to what extent the respective clauses apply to the pending case. If the court seised based on the agreement declares that it has jurisdiction, the other courts must decline jurisdiction.[24]

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[17] Cf. Heinze and Dutta 2005, p. 227 regarding exclusive jurisdiction in third States.

[18] Regarding exclusive jurisdiction agreements see 1.4.

[19] Cf. Nordmeier 2015, p. 127.

[20] In detail below 1.3.2.

[21] See also recital 22 Brussels Ibis Regulation.

[22] Note Article 25(1) sentence 2 Brussels Ibis Regulation.

[23] Reversing ECJ 9.12.2003—Case C-116/02 (Gasser), E.C.R. 2003, I-14693, para 54.

[24] See in detail below 1.4.2–1.4.3 (in particular to a *prima facie* evaluation of the court first seised).

1.2.3 Consequences of a Strict Priority Rule

The strict priority of the court first seised and the broad understanding of "the same cause of action"[25] in the case law of the Court of Justice have far-reaching implications, in particular regarding abusive procedural tactics ("torpedo"). Beyond potential delay by such tactics, as decisions of the court first seised on jurisdiction are binding on any court second seised[26] and there used to be no exceptions for abuse,[27] any court first seised which has not been chosen by the parties might even be more likely to strike down jurisdiction agreements.[28]

The Brussels Ibis Regulation solves these problems with regard to (exclusive) choice of court agreements only.[29] In these cases, prorogated courts are given priority to decide about jurisdiction, Article 31(2) Brussels Ibis Regulation.[30] For the remaining cases Article 29(2) Brussels Ibis Regulation establishes only a weak "notification obligation" (upon request of another court).[31]

1.2.4 Possible Alternatives to the Status Quo

This raises the question of whether the EU legislator could have done a better job in adopting a general solution. The EU Commission had proposed a provision under which the "court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible."[32] It is questiona-

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[25] ECJ 8.12.1987—Case C-144/86 (Gubisch), E.C.R. 1987, 4861, paras 15–19; EJC 6.12.1994—Case C-406/92 (Tatry), E.C.R. 1994, I-5439, paras 40–45, 47–48.

[26] ECJ 15.11.2012—Case C-456/11 (Gothaer Allgemeine Versicherung), ECLI:EU:2012:10989, para 41: "Thus, a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause, on the ground that that clause is valid, binds the courts of the other Member States both as regards that court's decision to decline jurisdiction, contained in the operative part of the judgment, and as regards the finding on the validity of that clause, contained in the *ratio decidendi* which provides the necessary underpinning for that operative part."

[27] ECJ 9.12.2003—Case C-116/02 (Gasser), E.C.R. 2003, I-14693, para 53: "Finally, the difficulties (…) stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose."

[28] Domej 2014, p. 531.

[29] Note the new case law of the ECJ concerning exclusive jurisdiction rule since ECJ 3.4.2014—C-438/12 (Weber), ECLI:EU:C:2014:212; see 2.2.1.

[30] See 1.4.2.

[31] See 1.5.

[32] Proposal for a Regulation of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, p. 35; on the proposal see Weller 2012a, p. 42 et seq.

ble whether this approach—that did not include any sanction—could have prevented torpedo tactics.[33] The proposal was that the court first seised should provide information about how much time will be needed to make a decision upon request by another court of a Member State. Although this mechanism of notifying a delay could urge the courts to speed up decision-making,[34] that approach was deleted in the proposal of Council and Parliament.[35]

De lege ferenda is has also been proposed to go even beyond the Commission's notification obligation and provide that each court of first instance should be under an obligation to decide on jurisdiction within six months. The respective period would start to run when the court is seised.[36] If necessary, in particular where complex cases are pending, courts could extend the six months period by court order for another six months. Where jurisdiction is established in "six plus six months" from the date the court was seised, other courts must decline jurisdiction. Where jurisdiction is not established within this time, however, the court first seised forfeits jurisdiction if one party brings an action in another court competent within three months after expiration of the "six plus six period".[37] A further six months should be allowed for any appellate court. In comparison with the Commission's proposal, this approach might have been more effective to fight torpedo actions.

On the other hand, any more or less rigid time limits might be regarded as illusionary, taking into account different working speed of courts in the different Member States. Arguably, even forfeiting jurisdiction might not necessarily be regarded as a "sanction" by courts.[38] Moreover, this would constitute a significant interference with national procedural autonomy which the Member States are unlikely to accept.[39]

1.3 Something New Part I: Lis Pendens Rule for Actions Pending in Third States

1.3.1 Starting Point

The effect of lis pendens in a third state was raised in *Owusu*[40] Under the previous EU jurisdiction regime the question had arisen how Member States courts have to

[33] For a positive assessment Rogerson 2015, para 11.11.

[34] Domej 2014, p. 532; cf. Heinze 2011a, p. 597; sceptical Lazic 2013, p. 10; Weller 2012a, p. 43.

[35] Cf. Doc. 10609/12 JUSTCIV 209 CODEC 1495 and C7-0433/2010-2010/0383 (COD); see Heinze 2011a, p. 598 et seq.; Weller 2012b, p. 332.

[36] Heinze 2011a, p. 598 et seqq.

[37] Critical insofar Weller 2012a, p. 43.

[38] Weller 2012a, p. 43.

[39] Rogerson 2015, para 11.15.

[40] ECJ 1.3.2005—Case C-281/02 (Owusu), E.C.R. 2005 I-1383, paras 47–52; see Heinze and Dutta 2005, p. 224.

deal with situations in which the same cause of action is already pending in a court of a non-EU Member State at the time a court of a Member State is seised in compliance with Brussels I Regulation. May the court of a Member State stay its proceedings in such a scenario? Since the respective question referred to the ECJ did not need to be answered in Owusu the particular case, practitioners fell back on national law.[41] The national rules are, however, different in the different Member States.

For example, under German[42] and Dutch[43] law courts stay their proceedings if the foreign final judgement is likely to be recognized. In other legal systems (in particular in common law countries such as England and Ireland) foreign *lis alibi pendens* is (only) one factor in a comprehensive *forum non conveniens*[44] analysis.

1.3.2 Recast—Basic Principles

As part of the recast of Brussels I Regulation the EU legislator created separate *lis pendens* rules for actions pending in third States.[45] While Article 33 Brussels Ibis Regulation refers to "the same cause of action" (cf. Article 29), Article 34 Brussels Ibis Regulation deals with "an action which is related to the action in the court of the third State" (cf. 30). As it is uncertain whether the latter provision has significant practical relevance[46] and Article 34 is quite similar in its structure to Article 33, the following remarks concentrate on Article 33.

The wording of Article 33 Brussels Ibis Regulation reads as follows:

(1) "Where *jurisdiction is based on Article 4 or on Articles 7, 8 or 9* and proceedings *are pending* before a court of a third State *at the time when a court in a Member State is seised* of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State *may stay* the proceedings if:

(a) it is expected that the court of the third State will give a judgment *capable of recognition* (…) in that Member State[47]; and
(b) the court of the Member State is satisfied that a *stay is necessary for the proper administration of justice*.[48]

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[41] Heckel 2012, p. 276 and 278; v. Hein 2013, p. 106; Magnus 2011, p. 680; Magnus and Mankowski 2011, p. 287. This may be different however if there are *lis pendens* provisions in international conventions (e.g. Article 31[2] CMR) which may take precedence over the secondary law pursuant to Article 71 Brussels I Reg/Brussels Ibis Regulation.

[42] § 261 (3) ZPO.

[43] Article 12 Dutch Wetboek van Burgerlijke Rechtsvordering.

[44] Regarding this doctrine see Barret 1947, p. 380; Childress 2012, p. 157.

[45] For doubts concerning the need for such harmonisation see Nielsen 2012, p. 263.

[46] Cf. Magnus and Mankowski 2010, p. 19.

[47] Recital 23 Brussels Ibis Regulation: "(…) under the law of that Member State (…)".

[48] Note with regard to an "action which is related to the action in the court of the third State" the further condition in Article 34(1) lit. a Brussels Ibis Regulation.

(2) The court of the Member State *may continue the proceedings at any time* if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;
(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
(c) the continuation of the proceedings is required for the proper administration of justice.

(3) The court of the Member State *shall dismiss the proceedings* if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
(4) The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion."[49]

The term "proper administration of justice" is defined in recital 24:

"When taking into account the proper administration of justice, the court of the Member State concerned should assess *all the circumstances of the case* before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction."[50]

According to its wording, Article 33 Brussels Ibis Regulation (as well as Article 34 Brussels Ibis Regulation) applies only when jurisdiction is based on Articles 4, 7, 8 or 9 Brussels Ibis Regulation. In other cases, arguably except Article 6 Brussels Ibis Regulation, where national law applies, consideration of pendency in third States is inadmissible.[51]

For the operation of Article 33, it does not matter whether the jurisdiction of the court in the third State is exclusive or non-exclusive.[52] However, pursuant to recital 24(2) Brussels Ibis Regulation, a third State's exclusive jurisdiction deserves special attention.

There is no strict obligation for the courts to stay their proceedings if the requirements of Article 33(1) are met.[53] Rather the courts are left with considerable judicial discretion. This does not only hold true for establishing the rather openly worded requirements of this provision ("proper administration of justice") but concerns also the legal consequences ("may").[54] Moreover, as many relevant

[49] Accentuation by the authors.

[50] Accentuation by the authors.

[51] Domej 2014, p. 538.

[52] Wagner 2015, p. 51.

[53] The same applies to Article 34 Brussels Ibis Regulation.

[54] Critical Magnus and Mankowski 2011, p. 288 et seq. regarding the (even wider) version of the proposal.

aspects are already caught by the prerequisites of Article 33 required to open the discretion to stay, it is difficult to establish a clear division between the prerequisites of a stay and the factors of the court's discretion.

1.3.3 Open Questions

1.3.3.1 Order of Being Seised

Article 33 has been understood to apply only when the court of the Member State is second seised, not when it is first seised.[55] In the latter case, it has been observed that national law continues to apply.[56] This interpretation has been doubted, as the English text is not entirely clear. It reads "when a court in a Member State *is seised*",[57] which is arguably open to an interpretation that Article 33 Brussels Ibis Regulation also applies when the court of the Member State is seised first.[58] At closer sight, however, it seems likely that this is only an inaccuracy in the English text. In comparison to Article 34 No. 1 lit. a of the Commission's proposal[59] which stated that the court of the third State must have been "seised first in time", the final English text of the recast Regulation is admittedly less clear. Nevertheless, the French,[60] German,[61] Italian,[62] Spanish[63] and Dutch[64] versions support the view that Article 33 applies only when the Member State's court is the court second seised.

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55 Cadet 2013, p. 220; Heckel 2012, p. 272; Pohl 2013, p. 112.

56 Wagner 2015, p. 52.

57 Accentuation by the authors.

58 Rogerson 2015, para 11.79 et seqq.; see also Magnus 2014, p. 800 et seq.; regarding the COM proposal Magnus 2011, p. 681.

59 Proposal for a Regulation of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, p. 38.

60 "(…)au moment où une juridiction d'un État membre est saisie d'une demande entre les mêmes parties ayant le même objet et la même cause que la demande (…)".

61 "(…) bei Anrufung eines Gerichts eines Mitgliedstaats (…) ein Verfahren vor dem Gericht eines Drittstaates anhängig (…)".

62 "(…)al momento in cui l'autorità giurisdizionale di uno Stato membro è investita di una causa tra le medesime parti, avente il medesimo oggetto e il medesimo titolo del procedimento promosso (…)".

63 "(…) el momento en que se ejercita una acción ante un órgano jurisdiccional de un Estado miembro con el mismo objeto, la misma causa y las mismas partes que en un procedimiento (…)".

64 "(…) op het moment dat een vordering wordt aangebracht bij een gerecht in een lidstaat tussen dezelfde partijen een vordering aanhangig is voor een gerecht van een derde land (…)".