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TORPEDO LITIGATIONS UNDER REGULATION 44/2001

Abstract

Regulation 44/2001 deals with the *lis pendens* rule strictly. The first-come, first serve rule is among most basic rules of Regulation. It enables parties to foresee the developments of the court procedure and to avoid the irreconcilable judgements. However, the *lis pendens* rule can also be misused with an action for negative declaration filed before the overloaded court (heavy docket) where procedure is slow. This enables party to buy some time while the other party cannot seek parallel court protection. This innovation by advocates blocks further proceedings and has been named "torpedo litigations". The torpedoing can be indeed bitterly for the party who thinks that the other party violates the contract, but the latter rushes to the court first (race to the courts) and ask the court to decide the case. Article is analysing one such case as dealt with the ECJ. It focuses on issues how to deal once the torpedo litigation is launched. It is indeed not on the court to take into account interests of the parties (*iudex non calculate*), but it is the defendant before the court first seised who is without appropriate court protection and

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basically faced with a sort of a denial of justice (*déni de justice*). Some national courts are fighting against such actions. In comparative law different approaches exits; like lack of same cause of action, priority of the positive claims, application of specific summary proceedings to enforce cross-border injunctions, etc. However, no uniform approach exits. It looks like that the only exception to the *lis pendens* is possible in case of the exclusive jurisdiction as proposed in the theory. EU is still lacking the common solution to this phenomenon. Solutions are likely to be found in the general legal principles applying to bad faith and misuse of rights. In order to derogate from the *lis pendens rule* an abusive torpedo action shall be proved. However, abusive torpedo intention is, as always, hard to prove.

Ključne reči: *Regulativa 44/2001, parnični postupak, jednaki razlozi tužbe, torpedo parnice, litispendenca, princip first-come-first-served (prvi došao, prvi zaštiten), ne dvaput o jednom (ne bis in idem), nespojive sudske odluke, negativne dekleratorne tužbe.*

Key words: *Regulation 44/2001, civil procedure, same cause of action, torpedo litigation, the lis pendens, first-come-first-served, ne bis in idem, irreconcilable judgements, actions for positive declarations.*

I. INTRODUCTION

Torpedo litigations refer to lawsuits conducted by the plaintiff, who expects (more or less for sure) that the other part (defendant) will file court proceedings against him/her (due to different reasons, like non-performance of the contract, infringement of the patent etc). The plaintiff, i.e. the defaulting party, is rushing to the court asking it to give negative declaratory judgement (action for negative declaration), whether the contract is validly performed or whether the patent is respected etc. However, this is not really the first objective of the plaintiff. Above all the time is at stake. By filling the lawsuit the *lis pendens* begins and no other litigation shall, under normal circumstances, be possible. This is why such actions are also called *"race to the courts"* or *"torpedo actions"*. This is also the consequence of the strict rule *"first-come, first served"*, which usually serves as base for the *lis pendens* rule in the

national procedural laws, also in the law of the European Union (hereinafter: EU).[1] Such lawsuits are normally filed before courts overloaded with cases and with limited human resources.[2] It is therefore likely that the process will not begin shortly or/and that proceeding will be slow. Therefore, the aim is to block the second court to begin the litigation. The terms used have some logic; the "torpedoing" court because money is made from its workload; the "torpedoed" court because it is paralyzed by a mere manoeuvre by the defendant who has been quick enough to "shoot first". Such a system is unfair to the no-defaulting party and almost insulting to the courts involved. Such actions posed several questions *inter alia* why rules on international jurisdiction allow such unfair actions. We shall stick with the EU rules and European Court of Justice (hereinafter: ECJ) decisions which are faced with related issues.

II. THE TORPEDO ACTIONS UNDER REGULATION 44/2001

A. Introduction

Regulation 44/2001[3] is the main legal source under which torpedo actions are initiated. Since it is the act of unification the same rules apply across the EU Member States. Apart from Regulation 44/2001 also Regulation 2201/2003[4] defines rules on international jurisdiction including the *lis pendens* rule. However, this special regulation, concerning matrimonial matters is not so interesting in terms of torpedo actions, although it might raise the same

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[1] To be precise, it is the law of the European Communities; like Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 12, 16.1.2001, p. 1–23.*

[2] *Pierre Véron* , ECJ Restores Torpedo Power: Usually the patentee would prefer to bring a European infringement case before the Dutch, English, French and German Courts (in alphabetical order!), which are known at various degrees for their swift and efficient infringement proceedings (including granting preliminary injunctions pending the proceedings on the merits and/or expedited proceedings on the merits).
http://www.veron.com/files/publications/ECJ_Restores_Torpedo_Power.htm

[3] Supra, op. cit. 1.

[4] Council Regulation (EC) 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, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29.

issues. It is only that torpedo actions are usually linked to commercial and not often to personal disputes.

Regulation 44/2001 is based on important principle, that an action with the same cause between the same parties cannot be judged twice (*ne bis in idem* principle). Even more, when two identical litigations (same cause of action) are pending only one shall proceed (the *lis pendens* rule). It is Article 27 of Regulation 44/2001 which defines these principles:

Lis pendens

Article 27

"1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

This provision reflects strict *first-come, first-served rule*. It means that after the lawsuit is once logged, any other court than first seised stay its proceeding. Usually, when lawsuit is lodged in order to torpedo the second court proceeding, the first court seised will be the court with overloaded work. If such court needs considerable time to decide on its jurisdiction, the plaintiff will buy some time, although he might be in infringement of the contract or under any other kind of violation of the law. When the claims concern patent litigation (which is often), the plaintiff who rushed to the court first, can *in fraudem* use invention and the defendant is blocked without appropriate legal remedies.

B. The effect of the *lis pendens* rule – analysis of the case Gasser

How shall the second seised court act? This question requires some analysis. Case *Gasser* can help analysing.[5] Some important issues of the torpedo litigations are observed by the ECJ in this case. It also offers some explanation on Regulation 44/2001, especially its rules concerning torpedo litigations. In this case Gasser, company from Dornbirn in Austria, soled for several years

[5] Case C-116/02, Erich Gasser GmbH v MISAT Srl., ECR 2003, I-14693.

kids confection goods to Italy, to company named MISAT. The former resisted to pay some invoices and filed the lawsuit in Rome. MISAT seek a ruling that the contract between them had terminated *ipso jure* or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not failed to perform the contract and to order Gasser to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs. The law suit was lodged on 19 April 2000. On 4 December 2000, i.e. approximately eight months latter, Gasser also brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract, but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the latter having raised any objection in that regard.

MISAT contended that the Landesgericht Feldkirch had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established, under the general rule laid down in Article 2 of the Brussels Convention (now Regulation 44/2001, the general rule *actor sequitor forum rei*)). It also contested the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by Gasser before the Landesgericht Feldkirch, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship. Therefore, only the Rome court can continue with the proceeding.

On 21 December 2001, the Landesgericht Feldkirch decided of its own motion to stay proceedings, pursuant to Article 21 of the Brussels Convention (now Article 27 of Regulation 44/2001), until the jurisdiction of the Tribunale Civile e Penale di Roma had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but did not rule on the existence or otherwise of an agreement conferring jurisdiction, observing that although the invoices issued by the claimant systematically included a reference to the courts of Dornbirn under the heading Competent Courts, the orders, on the other hand, did not record any choice of court. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that proceedings should not be stayed. The national court considers, first, that this

is a case of the *lis pendens* since the parties are the same and the claims made before the Austrian and Italian courts have the *same cause of action* within the meaning of Article 21 of the Brussels Convention (now Article 27 of Regulation 44/2001).[6] It was in those circumstances that the Oberlandesgericht Innsbruck stayed proceedings and referred questions to the Court for a preliminary ruling. *Inter alia* the national court had asked to what extent the excessive and generalised slowness of legal proceedings in the Contracting State where the court first seised is established, is liable to affect the application of the *lis pendens* rule.[7] This question in essence seeks from the court to give judgement whether the *lis pendens* can be disregarded due to the slowness of the court first seised and whether the court second seised is competent to rule alone on this. The court begun to analyse who can decide on jurisdiction of the court first seised.

1. Who decides which court has jurisdiction – the first or the second seised court?

One of the issues was whether the second seised court can give judgement which court has jurisdiction. Namely, if the answer is positive, it can alleviate problems raised by torpedo litigations; second seised court (usually faster with the judgement making process) would resolve the issue and (most probably) continue with the case. Plaintiff from the first seised court action will be unable to buy time. This question is not resolved by Regulation 44/2001.[8] And it is even more important when dealing with an agreement

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[6] As interpreted by the Court of Justice (see, to that effect, Case 144/86, *Gubisch Maschinenfabrik* ECR 1987, p. 4861).

[7] The case was even more complex than described above. Namely the ECJ does not take into consideration any kind of preliminary questions but only those which are genuine. The procedure before the national court cannot be improvised. In addition the questions refereed to the ECJ must enable (once answered) the national court to decide on a case. This means that the national court must resolve the case in detail, being left only with the question how to apply EC law or how to interpret national law in consistency with the EC law. In this case the questions referred have also linked to the merits of which it has not yet assessed – i.e. the national court referred to the fact not yet confirmed by the trial judge, that an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention (now Article 23 of Regulation 44/2001) designates the court within whose jurisdiction Dornbirn is located as the court having jurisdiction to settle the dispute in the main proceedings. The ECJ concluded that the preposition of the national court is not purely hypothetical and accepted the case.

[8] See in particular Article 27 of Regulation 44/2001.

conferring jurisdiction (prorogation of jurisdiction). Its need to be distinguished whether or not the second seised court has exclusive jurisdiction. If yes, than no other court shall give judgement on jurisdiction issue.[9] Judgements of such courts will no be recognized or enforced in other Member States.[10] The ECJ was faced with question of the nature of the choice-of-law clauses. Regulation 44/2001 explicitly defines that the court agreed between the parties has *exclusive* jurisdiction.[11] However, Article 35 of Regulation 44/2001 (it defines reasons for non-recognition of the judgement from grounds of jurisdiction) does not apply to the infringement of Article 23, which forms part of Section 7 of Title II. A decision given in breach of the exclusive jurisdiction which the court second seised derives from a choice-of-court clause should be recognised and enforced in all the Contracting States. Therefore there is a clear difference between exclusive jurisdiction based directly on Regulation 44/2001 (i.e. Article 22) and the one agreed with the choice-of-court clause between the parties. The former is only expression of the parties' will and its validity need to be checked under the law of derogated and under the law of prorogated court. The latter bases directly on the Regulation 44/2001 and no such checking is needed. Only the latter enjoys full effects of the exclusive jurisdiction.

The continuation with the answer to the above question is now possible; which court shall decide on the jurisdiction issue of the court first seised? The rule of the *lis pendens* shall be broadly interpreted since it prevents watering the *ne bis in idem* principle. It is an obstacle for irreconcilable judgements.[12] The *lis pendens* shall be considered *ex officie* (on own motion of the court).[13] However, the court second seised in principle cannot give a judgement

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[9] Article 25 of Regulation 44/2001.

[10] Article 35 of Regulation 44/2001.

[11] Article 23 of Regulation 44/2001 provides *inter alia*:

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction *shall be exclusive* unless the parties have agreed otherwise.[…]

[12] Case C-351/89, Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company, ECR 1991, I-3317, par. 16.

[13] Article 27 of Regulation 44/2001.

whether the court first seised has jurisdiction.[14] This would be grave interference to the competences of the Member States of the court first seised. The court second seised is also in no better position to assess the jurisdiction than the court first seised. Both courts are in the same position to establish whether it has jurisdiction under Regulation 44/2001.[15]

At the same time, it flows from Article 27 of Regulation 44/2001, indeed not so clearly, that the first seised court shall establish it own jurisdiction. Moreover, the interpretation of Article 27 is confirmed by Article 25 of Regulation 44/2001 which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is seised of a claim which is principally concerned with a matter over which the courts of another contracting State have exclusive jurisdiction (by virtue of Article 22).[16] Article 23 (choice-of-court clause) is not affected by Article 25. Even more, since the choice-of-court clause effects are even not the same as are effects of the exclusive jurisdiction provision (Article 22), the choice-of-court clause can also not render a right to the court second seised to declare jurisdiction of the court first seised. Having alleged that the court second seised shall stay the proceeding and wait until the court first seised give a judgement on its jurisdiction.

2. Does excessively long court procedure derogate rules on the lis pendens?

The essence of the torpedoing is that the court first seised gives judgement on its jurisdiction or on the (declaratory) claim itself as much as possible late. For the plaintiff is not so important what will the court judged in the operative part of the judgement. In most cases the plaintiff will even expect judgement in favour of the defendant. Rather the time is of essence. The plaintiff will gain at least so much time as much as necessary for the court to decide on its

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[14] Case C-351/89, Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company, ECR 1991, I-3317, par. 26.

[15] Case C-116/02, Erich Gasser GmbH v MISAT Srl., ECR 2003, I-14693, par. 39. Also case C-351/89, Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company, ECR 1991, I-3317, par. 26.

[16] Article 25.
"Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction."

jurisdiction. If the plaintiff uses legal remedies further on, additional time can also be gained. Namely, *the lis pendens* lasts until the finality (*res judicata, Rechtskräftigkeit*, *pravosnažnost*) of the courts' judgement.[17] Therefore, the plaintiff can use the effect of the *lis pendens* rule several years. If the court decides to apply the preliminary ruling procedure (under Article 234 EC Treaty) the whole procedure will last approximately additional two years. During all the time the plaintiff can (despite the likelihood of a contract violation or improper use of patent etc) wield the rights from the relationship or even non-contractual obligations. The defendant even when lodging the new lawsuit will not be successful. The *lis pendens* rule hinders his efforts. Even more, his legal protection is possible only before the court first seised. However, it is likely that the court first seised focuses only to the question of jurisdiction, for which the defendant knows it is immaterial, since the plaintiff lodge the lawsuit only to gain time.

It can be therefore ascertained that torpedo litigation causes severe problems to defendants. Bearing in mind this one can ask whether it would not be appropriate for the curt second seised to omit the strict *lis pendens* rule. Would not be perhaps possible to find appropriate legal reasoning to continue with the litigation despite the proceeding of the court first seised? Namely, also Article 6 of the European Convention on Human Rights (hereinafter: ECHR) determines right to a fair trial.[18] Since the ECHR is forming part of all legal Member States' legal systems and since under Article 6 of the EU Treaty the EU shall respect fundamental rights as recognized by the ECHR there is perhaps enough space for more extensive interpretation of the *lis pendens* and *first-come, first-served* rules. But, without entering into more detailed analysis, how can we be sure, that the court second seised could ascertain that the proceeding before the court first seised was triggered in bad faith (*in fraudem*) or that the court first seised will need unreasonable time to give judgement on its jurisdiction? Would not such case also conflict with the *legal predictability* principle? For instance, if the plaintiff could had lodged lawsuit before the court which is not agreed by the parties, this could not have been sufficient reason for the court second seised to continue with the litigation; perhaps the plaintiff had only found out that there can be problems with the recognition and he decided not to follow the choice-of-court

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[17] *Jože Juhart*, Civilno procesno pravo FLR Jugoslavije, Univerzitetna založba, Ljubljana 1961, p. 281.

[18] "In the determination of his civil rights [...] everyone is entitled to a fair and public hearing within a reasonable time[...]."

agreement. Instead, the lawsuit is lodged before the court in the country where no recognition is needed. Or, the plaintiff could file lawsuit in the country of the performance of the contract, wishing to benefit of its procedural or applied substantive law (like transfer of *onus probandi* to the defendant etc). In other words, when the law requires proof of the intention (*dolus*) to act in bad faith (*in fraudem*), it is far from easy to prove that. A presumption of bad faith in case where the lawsuit is lodged before the Italian and not before the Austrian court is not justified. Therefore, Article 27 of Regulation 44/2001 (the *lis pendens* rule) shall not be interpreted in the light of Article 6 of the ECHR. ECJ is also not fully accepting such interpretation.[19] Its viewpoint is not as clear as above discussion. The ECJ namely only alleging that the *lis pendens rule* cannot be interpreted in a way where it can not be compatible with the philosophy and the objectives of Regulation; i.e. national courts cannot be under an obligation to respect rules on the *lis pendens* only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does Regulation provide that courts may use the pretext of delays in procedure in other contracting States to excuse themselves from applying its provisions.[20] Moreover, also European Commission alleges (and the ECJ basically agrees), the point from which the duration of proceedings becomes excessively long, to such an extent that the interests of a party may be seriously affected, can be determined only on the basis of an appraisal taking account of all the circumstances of the case. That is an issue which cannot be settled in the context of Regulation. It is for the European Court of Human Rights to examine the issue and the national courts cannot substitute themselves for it by recourse to Article 27 of Regulation.[21] Pragmatically the ECJ is also alleging that Regulation contains no provision under which its articles, and in particular Article 27, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.[22] Moreover, the ECJ reminds, that it must be borne in mind that Regulation 44/2001 is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that *mutual trust* which has enabled a compulsory system of

[19] ECJ has in fact always applied strict interpretation of *lis pendens* rule. See Julia Eisengraeber, *Lis alibi pendens* under the Brussels I Regulation - How to minimise 'Torpedo Litigation' and other unwanted effects of the 'first-come, first-served' rule, Exeter Papers in European Law No. 16, Centre for European Legal Studies, University of Exeter 2004, p. 6.

[20] Case C-116/02, Erich Gasser GmbH v MISAT Srl., ECR 2003, I-14693, par. 68.

[21] Ibidem, par. 69.

[22] Ibidem, par. 71.

jurisdiction to be established, which all the courts within the purview of Regulation 44/2001 are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that Regulation 44/2001 thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.[23]

Such interpretation of the ECJ is at least from the outset incomplete. Reasons listed for interpretation of the *lis pendens* rule has little in common with torpedo litigations. Torpedo actions are only slightly touched. The interpretation namely touches only the long duration of the litigations and it is true that the sole duration of the litigation cannot be a reason to deviate from the *lis pendens* rule. There are also other means and legal solutions to avoid long duration proceedings: choice-of-court is possible in favour of fast decisonmaking courts, choice of whichever criteria under Regulation 44/2001 for jurisdiction, etc. Since all criteria under Regulation 44/2001 are uniform they indeed raise the legal protection level for all parties involved. However, the ECJ had stopped with its reasoning where it should have begun; what to do in case where these heterogeneous jurisdiction criteria are misused or where the choice-of-court agreement is not respected in bad faith. Namely, in such cases the real problems begin. An answer to this question by the ECJ is rather mean. The sole argument the ECJ took into account is this issue concerning the limitation of its reasoning that the long duration of the proceeding cannot derogate the *lis pendens* rule. Namely, the ECJ expressed the limitation to such viewpoint. It is expressed with the words *"in general"*. I would say, this means that regularly derogation cannot be the case, but there might be case where the outcome could be different.[24] This leaves the national courts with the open doors. I would understand this way out that the national court can disregard the *lis pendens* rule, when the national court establishes bad faith in the plaintiff's action. The plaintiff acting in bad faith cannot request legal protection and a right to court remedies. There are at least some basic legal principles that are respected when the court protection is not

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[23] Ibidem, par. 72.

[24] Article 21 of the Brussels Convention (now Article 27 of Regulation 44/2001) 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 seised is established is excessively long. Case C-116/02, Erich Gasser GmbH v MISAT Srl., ECR 2003, I-14693, par. 73.

granted: *volenti non fit iniuria,*[25] *venire contra factum proprium,*[26] *estoppel,*[27] *omnia sunt incerta, cum a iure discesseris*[28] etc. Should the national courts be courageous enough in cases with sufficient certainty that there is a misuse of the *lis pendens* rule, Article 27 shall not be used and the court second seized shall continue with the proceeding. Could in such case continuance leads to negative effects, like irreconcilability[29] of judgements? Let us continue with the analysis in the conclusions.

III. THE ANALYSIS WITH THE CONCLUSIONS

A. The analysis

It was ascertained that torpedoing can be indeed bitterly for the party who thinks that the other party violates the contract, but the latter rushes to the court first and ask the court to decide the case. The plaintiff in such proceeding chooses the court that is slow due to overload or from other reasons. Once the defendant decided to look for court protection itself, the problem arises. The court second seised cannot proceed due to the *lis pendens* rule. Also different objections before the court first seised will be of no use; they will be discussed late... the court is overloaded. Could the defendant acting as a plaintiff before the court second seised persuade the court that the first proceeding is torpedoing the later started procedure in bad faith and that the *lis pendens* rule shall not be fully respected? The purpose of the *lis pendens* rule is to avoid irreconcilable judgements and to respect *ne bis in idem*

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[25] Usually loosely translated as *If you consent you cannot complain...*, See more about the principle in Gregor Bachmann, "Volenti non fit iniuria " - How to make principle work, v: German Law journal, Vol. 4, No. 10, p. 1033.

[26] No one may set himself in contradiction to his own previous conduct.

[27] Estoppel means that a party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly.

[28] Once stepped away from the law everything becomes insecure.

[29] In order to ascertain whether two judgments are irreconcilable, it must be determined whether they entail legal consequences which are mutually exclusive. See in particular case 145/86, Hoffman, ECR 1988, 645, par. 22 and C-539/03, Roche Nederland BV and Others,

v Frederick Primus, Milton Goldenberg. Not yet published. There AG proposed in point 113 that in order that decisions may be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact. The ECJ upheld this opinion.

principle.[30] Such judgements can also not be recognized.[31] This is basically rule that aims to make good if the *lis pendens* rule do not work or if *ne bis in idem* principle is not respected. The *lis pendens* tried not to duplicate litigations but if such case arises Article 34 (conditions for recognition) applies and precludes effects in the state where other judgement with the same cause of action produces effects already. This solution is not a problem even when the court second seised continues with the procedure despite the *lis pendens* (in case of torpedo litigation) and rules on the case; since the court first seised is slow, the court second seised can overtake the decision of the first seised court. The defendant before the court first seised should also use appropriate legal remedies in order to prevent *res judicata* of the judgement.[32] Namely the *lis pendens* lasts until the finality of the judgement. If the judgement of the second sized court was issued first, the plaintiff can use the judgement for recognition (or even better, for the enforcement) at once.[33]

By chance, if recognition is needed in the state where the court first seised is still adjudging, the judgement will most probably be recognized since the court first seised has not finished yet with the litigation.[34] For the enforcement (i.e. to obtain declaration of enforceability) itself the enforceability is needed in the country of origin of the judgement.[35] Recognition in the state of the court first seised (and also in general) can be disputable. It is true that the judgements will most probably not be irreconcilable, but there might be problem with the public policy reason (Article 34.1). If the recognizing court believes that disrespect of the *lis pendens* rule contravene the public policy, no

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[30] Dietmar Czernich, Stefan Tiefenhaler, Georg E. Kodek, Kurzkommentar Europäisches Gerichtsstands- und Vollstreckungsrecht, EuGVO und Lugano-Übereinkommen, 2., aktualisierte Auflage, Wien 2003, p. 234.

[31] Article 34 of Regulation 44/2001.

[32] It is true that Regulation 44/2001 does not require finality of the judgement for its recognition. However, this might prevent confirmation of enforceability in the state of origin.

[33] Also in such case it is important that recognition is not conditioned with the finality of the judgement. See comment to Article 33 in Dietmar Czernich, Stefan Tiefenhaler, Georg E. Kodek, Kurzkommentar Europäisches Gerichtsstands- und Vollstreckungsrecht, EuGVO und Lugano-Übereinkommen, 2., aktualisierte Auflage, Wien 2003, p. 252. Also Jan Kropholler, Europäisches Zivilprozeβrecht, 7. Auflage, Verlag Recht und Wirtschaft, GmbH, Heilderberg 2002, p. 375

[34] This might not be the case under national legislation, but Regulation 44/2001 forbids only reconcilability with judgement (i.e. already issued) and not with the future judgement (i.e. it is not relevant that proceeding before the court first seised is still ongoing).

[35] Aleš Galič, Pristojnost ter priznanje in izvršitev sodb v civilnih in gospodarskih zadevah, Podjetje in delo, Nr. 6–7/2005, p. 1128.

recognition will be gained. On the contrary, once recognition is obtained in the country of the court first seised, the plaintiff will lost interest to continue with the litigation.

The public policy condition shall be interpreted uniformly. If the bad faith in torpedo action is recognized as not manifestly contrary to the public policy (and it should), the plaintiff before the court second sized (party who is acting in good faith) shall succeed.

The risk of the plaintiff before the court second seised is not seen during the litigation but at the recognition stage. This risk is trivial if the country of the court second seised is also a country of the enforcement, since no recognition is necessary.

B. Conclusions

The *lis pendens* as a strict rule of the principle *first-come, first-served* enables parties to foresee the developments of the court procedure and to avoid the irreconcilable judgements. However, the *lis pendens* can also be misused with an *action for negative declaration*. Such action shall be regarded as any other action.[36] Even if plaintiff was filed the lawsuit before the most remote court with the apparent object to prevent action of the defendant in a new court proceeding. The *lis pendens* rule does not allow any derogation in such a case. Some titled such misuse of the *lis pendens* as a spider in the web.[37] Comparatively some courts are fighting against such actions. Approaches are different: lack of same cause of action,[38] priority is given to the positive actions, application of specific summary proceedings to enforce cross-border injunctions,[39] etc. However, no uniform approach exits.

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[36] *Julia Eisengraeber*, *Lis alibi pendens* under the Brussels I Regulation - How to minimise 'Torpedo Litigation' and other unwanted effects of the 'first-come, first-served' rule, Exeter Papers in European Law No. 16, Centre for European Legal Studies, University of Exeter 2004, p. 53.

[37] Ibidem, p. 33.

[38] Ibidem, p. 35.

[39] Ibidem, p. 35.

It looks like, however, that currently the only exception to the *lis pendens* is possible in case of the exclusive jurisdiction as proposed in the theory.[40] Namely, exclusive jurisdiction in the EU under Regulation 44/2001 shall be interpreted differently as exclusive jurisdiction under the national systems; under Regulation 44/2001 exclusive jurisdiction prevents any other court than the court of excusive jurisdiction to adjudicate.[41] This is not the case with the choice-of-court agreement (although exclusive in nature)[42] and with the national exclusive jurisdiction rules. The latter do allow courts to adjudicate even if courts of other state would have exclusive jurisdiction. It is only likely that the court judgement in such a case will not be recognized in country which courts have exclusive jurisdiction. This is consequence of the uniform approach of Regulation 44/2001. It forms a unique system of international jurisdiction and this is a main peculiarity in relation towards national legal system of international jurisdiction.

However, apart from exclusive jurisdiction derogation, EU is still lacking any other common solution to this phenomenon. And there are number of cases where no exclusive jurisdiction exits and torpedo litigations are possible. A solution should perhaps be close to what has been suggested to the ECJ by different parties involved: the court second seised shall be entitled to ascertain the misuse (bad faith) of the *lis pendens* rule in the procedure first commenced. The court first seised shall also decide on its jurisdiction as soon as possible. Both courts shall cooperate and exchange information. Finally, it is also in the interests of the court first seised to resolve case where one plaintiff uses it to buy some time.

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[40] Ibidem, p. 37. Compare in this regrad also case C-4/03, Gesellschaft für Antriebstechnik mbH & Co. KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK), not yet published.

[41] Article 25 of Regulation 44/2001 determines that where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

[42] As explained above under B.1.

Dr. Rajko Knez

TORPEDO PARNICE PREMA UREDBI BROJ 44/2001

Sažetak

Torpedo parnice koje se pokreću sa tužbom o kojoj se najčešće traži deklaratorna sudska odluka; naime da tužitelj nije povredio pravni odnos odnosno, neka sud ustanovi, kako je sve u redu. Takve tužbe mogu teško pasti tuženiku. Naime, takva se parnica najčešće pokreće kod suda, koji je preopterećen sudskim primjerima, a pokreće je tužitelj, da bi pridobio na vremenu. Tako će je najčešće pokrenut samo iz razloga, da tuženik to ne bi učinio prvi. Znači tužitelj požuri na sud, za kojeg zna da će doneti odluku tek posle izvesnog vremena, a tuženik zbog litispendencije neće moći uspješno pokrenuti nove parnice kod suda, koji bi bio nadležan (a verovatno i brži). Na taj način žurba na sud u kombinaciji sa pravilom u litispendenciji omogućava tužitelju, da „kupi vreme". Usko tumačenje pravila o litispendenciji po Regulativi 44/2001 ne dozvoljava izuzetke. Pravilom o litispendenciji želi se postići efikasna zaštita za nespojive sudske odluke. Ipak, autor pokušava otkriti, da je moguć izuzetak kod isključivih nadležnosti a dapostoji i još jedan način borbe protiv ove invencije advokata. Putem interpretacije koja poštuje principe venire contra factum proprium, volenti non fit iniuria, estoppel itd može se doći do zaključka, da zloupotreba sudske zaštite može opravdati neprimenjivanje litispendencije.