



# Transnational civil litigation and International commercial arbitration

*Lis pendens*

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# LIS PENDENS

## *Introductory remarks*

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- Literally the Latin term *Lis Pendens* indicates the situation in which a lawsuit is brought before a court and it is still ongoing. The case is pending and not yet decided
- In the context of cross-borders disputes, the same term indicates also the pathological situation where proceedings concerning the same case and between the same parties are pending before the courts of two different states at the same time. Two **parallel proceedings** are pending before courts of two different Member States.
- When a situation of parallel proceedings arises, it gives rise to the problem of potentially contradictory judgments. As matter of fact, if the two courts seised were to hear and decide the same dispute, it is possible that they would reach inconsistent decisions. But even if they would reach consistent decisions, it would be contrary to the efficient functioning of the judicial system. Therefore, it is necessary to coordinate the exercise of the jurisdiction over the two actions.
- Parallel proceedings before court of different Member States might occur as abusive tactic litigation (**torpedo actions**) or just because there are doubts about the competent court.



## LIS PENDENS

### *Regulation 1215/2012 – Priority rule*

- Where a *lis alibi pendens* situation occurs within the European Union, only one proceeding shall continue until the final judgment. The elimination of one set of proceedings eliminates the risk of irreconcilable judgments and ensures the sound, harmonious and efficient administration of justice
- In order to select which proceedings shall be dismissed due to *lis pendes*, Regulation Brussels I-bis provides for the so-called **priority rule**. The proceedings that shall continue is the first proceedings, while the second must be canceled.
- More precisely, art. 29 of Brussels I-bis provides that “*any court other than the court first seised shall of its motion **stay** its proceedings until such time as the jurisdiction of the court first seised is established. 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*”

## LIS PENDENS

### *Regulation 1215/2012 – Which is the court first seised ?*

- To eliminate the differences among the procedural rules of every Member State as to the determination of the time when a case is regarded as pending and/or a court is considered seised (which is the same), Brussels I-bis provide for an autonomous definition of that concept.
- According to article 32 of Bruxelles I-bis *“A court shall be deemed to be seised: (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court”*
- Whichever is the modality according to which a proceedings is to be instituted according to national procedural law, article 32 gives relevance to the first act performed by the claimant. The uniform rule laid down by article 32 Brussels I-bis means that it does not matter if, according to national procedural law, the proceeding is regarded as pending only when the document, after being lodged with the court, has been served to the defendant.



## LIS PENDENS

### *Regulation 1215/2012 – What does “the same cause of action” mean ?*

- The *lis pendens* rule is based on a broad notion of the scope of proceedings, which is the one arising from the interpretation made by the Court of Justice of the European Union. Two sets of proceedings have the same cause of action if the main objective or purpose of the claim brought is essentially the same.
- A *lis pendens* situation occurs, for example, where one party has brought an action before a court of a Member State seeking payment of the price agreed upon in a sale contract and the other party brought against him in another Member State an action seeking a declaration that the same sale contract is null and void. In that case the question whether the contract is binding lies at the heart of the two actions, therefore it must be held that the two actions have the same subject-matter, as that concept cannot be restricted as to mean that the two claims must be entirely identical (ECJ, 8 December 1987, Case C-144/86, *Gubisch*)
- Two actions have the same object when the first seeks a declaration that the plaintiff is not liable for damage as claimed by the defendants, while the second, commenced subsequently by those defendants, seeks on the contrary to have the plaintiff in the first action held liable for causing loss and ordered to pay damages (ECJ, 6 December 1994, Case C-406/02, *Tatry*)

## LIS PENDENS

### *Regulation 1215/2012 – What does “the same parties” mean ?*

- The lis pendens rule applies also in the so-called “reversed parties’ cases” where the plaintiff in the proceedings pending in the Member State A is the defendant in the proceedings pending, at the same time, before the courts of the Member State B, and vice versa (*“The question whether the parties are the same cannot depend on the position of one or other of the parties in the two proceedings”*, see **ECJ, 22 October 2015, C-523/14**)
- Where the parties of the two set of proceedings involving the same cause of action are not exactly the same – meaning that parties to the proceedings **1** are Y, X, Z e W but parties to the proceedings **2** are Y and X – the lis pendens rule shall apply only to the parties that are common to the two set of proceeding, therefore the action subsequently instituted can continue its course for the other parties



## LIS PENDENS

### *Regulation 1215/2012 – Choice of courts agreement and lis pendens*

- Article 31, para 2 and 3, Brussels I-bis, provides that “*where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction 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. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court*”.
- To ensure the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, Brussels I-bis provides that the priority rule set forth in article 29 does not apply when the court second seised is the court to which a choice of court agreement confers exclusive jurisdiction pursuant to article 25.
- Where a court not designated in an exclusive choice-of-court agreement has been seised and the designated court is seised subsequently of proceedings for the same cause of action and between the same parties, the court first seised must stay its proceedings until such time as the designated court declares that it has no jurisdiction under the exclusive choice-of-court agreement.