Project ***EU-En4s — Diversity of Enforcement Titles in cross-border Debt Collection in the EU***

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„Lis pendens“ and related actions

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Pendency rules B IA

- two identical concurrent proceedings in different MS
- personal and subject matter identity of two claims
- traditional civil law solution - if another court is already seised of a matter, the second court seized must decline jurisdiction (now Art. 29 B IR).
- assesment of identity – diffucult issue not just for „**lis pendens**“, but also for **modification of claim** and later-on for determining the objective dimensions of **res judicata**.

The identity of the subject matter (Objektive Identität des Anspruchs)

- „same *cause of action*“
- „wegen desselben Anspruchs“ (the same claim)
- „o istem zahtevku“ (the same claim)
- “*samma sak*” (the same claim)
- „le même objet et la même cause“, (the same object of the action and the title on which it is based)
- „el mismo objeto y la misma causa“(the same object of the action and the title on which it is based)
- CJEU - a uniform meaning of the different terms adopted

Gubisch case

- an action for the **performance of a sales contract**, whereby the seller sought payment of the price from the buyer.
- an action for a negative declaration, whereby the buyer sought a declaration holding either that the contract **was null and void** or that the seller had committed a **fundamental breach of the contract**, discharging the buyer from his obligations.
- The CJEU held that because the **execution of the same contract** was **at the heart** of the two actions (**Kernpunkttheorie**), the actions were to be assumed as having the same object and the same title, even though pursuant to the domestic legal conceptions of the relevant MS the identity of the object of the two actions apparently could not be affirmed.
- The object of the subsequent action for a negative declaration might well have been **introduced as a defense** to the previous action for the enforcement of the contract since it did not extend the limits of the object of the dispute as set by the latter action

EU definition of identity of the subject matter

- CJEU in *Gubisch* and in the *Tatry* case stated that ‘the "cause of action" comprises **the facts** and **the rule of law** relied on as the basis of the action (compare with procedural equivalency theory)
- CJEU also **same end in view**.
- All together simply said: how one claim affects the other, resulting in the possibility of conflicting judgments that cannot be enforced in the other country.
- E.g. An action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss. The strategic intentions or underlying motives of the parties are of no relevance. The assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims.

Cyprus

- ‘A "cause of action" includes the total of facts that found the right to bring a claim, but in contractual claims this does not necessarily mean the whole cause of action
- The courts of Cyprus adopted the EU law concept of a ‘cause of action’.

Identity of the parties

- The term 'same parties' has an independent or autonomous meaning, as established in the *Tatry* case
- whether they act as the claimant or the defendant in case set of proceedings is irrelevant.

Negative declaratory action

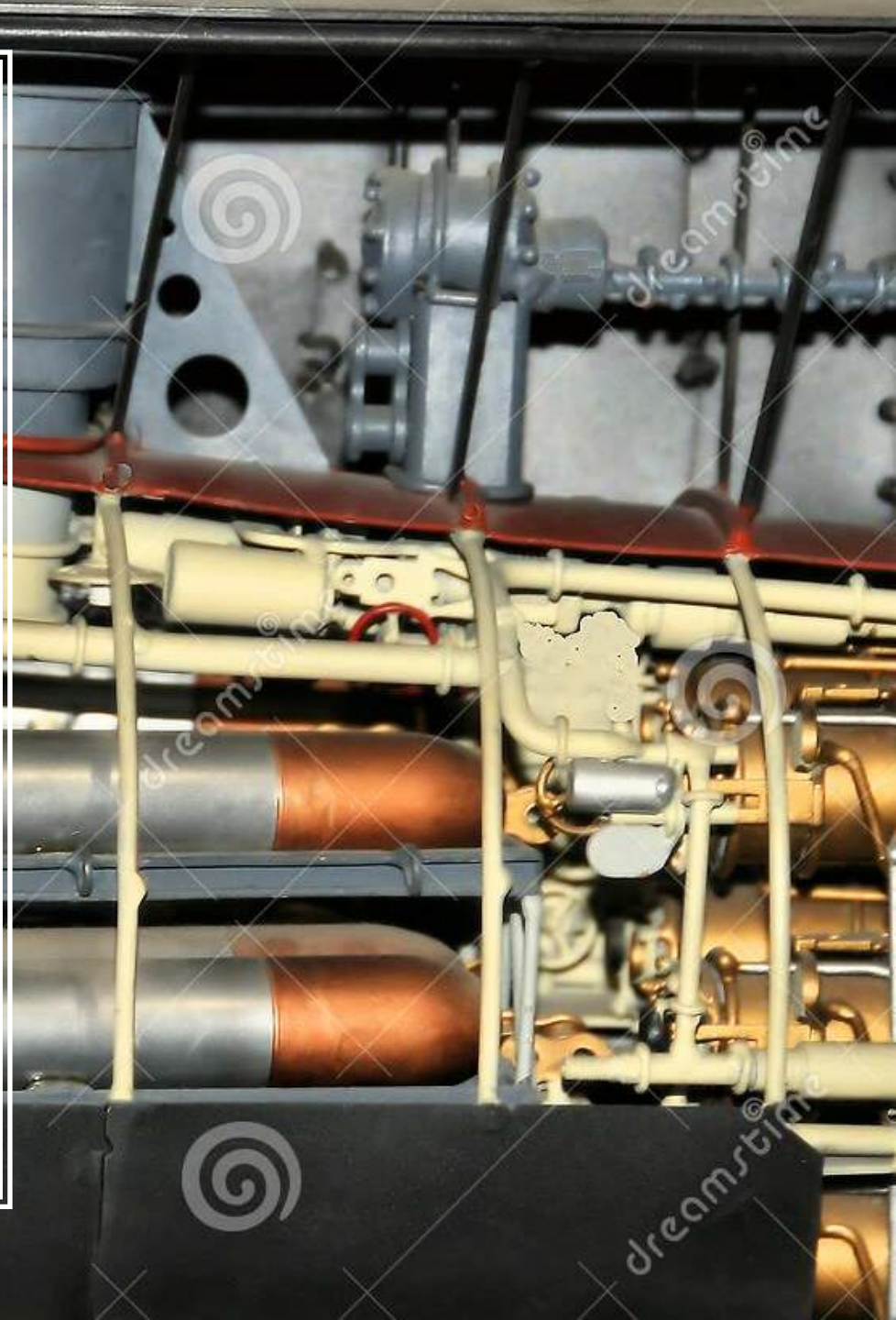
- Tatry case: identity between an action for damages and a previously filed action finding that the defendant is not liable for the damage
- Changed perception in many places
- Before, the approach of national procedural law in Germany and Austria used to be that a negative declaratory claim could not prevent a subsequent positive condemnatory action because the condemnatory action is, in essence, a more comprehensive legal protection
- Pro negative declaratory actions: On the EU level, "lis pendens" is given even in cases where the claims are not completely the same, but they are mutually exclusive. Mutually exclusive claims are when the grant of the first claim automatically means that the second claim is not entitled and vice versa: when the rejection of the first claim automatically implies that the second claim is justified. Therefore, the relationship between a positive action and a negative declaratory action is a typical example of mutually exclusive claims.

Tatry‘s facts are reversed from those in *Gubisch*

- *Tatry v. Maciej Rataj in the* case, an action for a negative declaration was instituted in the Netherlands by the owners of a ship, wherein they tried to exclude their liability for damages to the ship‟s cargo before the owners of the cargo sued them in England to recover their damages.
- in *Tatry* the action for a negative declaration preceded that for performance so that it could not be said that the object of the latter action could have been introduced as a defense in the first proceedings.
- Nonetheless, the Court still held that the same question lied at the heart of the two actions (the shipowners‟ liability for damage to the cargo) and believed that the subsequent claim for damages might well be considered dependent on a ruling finding the shipowners liable, as that was the main object of the action subsequently introduced by the owners of the cargo

Italian Torpedo

- torpedo lawsuits (eg a negative declaratory action against a finding that there is no violation of a right or that there is no liability for damages)
- A negative declaratory action as a means of securing international jurisdiction is an Italian invention (Milan's Franzosi in 1997 thus responds to the threat of a patent infringement action before the London courts)



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Austria neighbours with Italy

- „Drava flood case“
- after heavy rainfall in 2012, in Carinthia, Austria, the hydroelectric power plant did not deal with excessive waters in apropriate manner what causes floods on the Drava river banks in Slovenian Styria,
- Slovenian victims sue on the basis of the provisions of Regulation B Ia on optional international jurisdiction in the place where the tort / delict occurred or may occur;

So called „Drava flood case“

- Slovenian court, upon defendant's objection in one case Insurance Comp. V Power plant suspended the proceedings because proceedings were pending before the Austrian court between the same litigants in which the defendant claims that he did not have liability for the flood events in November 2012 (negative declaratory action).
- The Austrian court first denied its jurisdiction in favour of the Slovenian court due to the deficiencies concerning submission of the action. If this decision became final, the obstacle to lis pendens would disappear ex tunc, and the Slovenian court would no longer be obstructed to proceed. However, in the second and third Austrian instances, the opposite decision was reached that accepted Austrian jurisdiction. Slovenian court continued the stayed procedure and issued a decision that denied Slovenian jurisdiction but did not dismiss the action.

Legal interest for declaratory action

- Acc. to SLO law, a plaintiff must have legal interest to submit a declaratory action. A plaintiff lacks the interest if he is already entitled to claim performance from a mature obligation. However, that does not mean that the debtor does not show this interest for the negative declaratory action. With the negative action, the **non-existence** of a **specific legal relationship** is asserted to prevent liability for the debt.
- Redefining legal interest in negative declaratory actions?

Sufficient determination of the negative declaratory claim

- Identity problem of negative declaratory action might be the content of a claim. According to SLO jurisprudence, the action must contain a description of the legal relationship, stating its specific elements to such an extent that it cannot be confused with any other legal relationship. Therefore, it is inadmissible for action by which the plaintiff in general without describing the specific legal relationship seeks a declaration that he has no obligation toward the defendant. In the present case the plaintiff in the claim only requires a finding that he does not owe anything from a particular very broad life event.
- The term legal relationship presupposes the existence of a concrete factual situation between identified parties and not an abstract hypothetical case.

Beginning of pendency

- Definition in B IA Art. 32
- When is action 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.

What shall the plaintiff fulfill to achieve the effect of "lis pendens"?

- To acquire the "lis pendens," the plaintiff must subsequently take the steps he was required to take to have service effected on the defendant (Art. 32 (1) B IR).
- All the measures incumbent on him, particularly the necessary advances on costs (in Germany according to Art. 12 GKG), must be paid immediately.
- However, a call within the meaning of Art. 32 presupposes that the document submitted names the plaintiff and the defendant with an address for service.
- If the lawsuit is **later expanded or otherwise changed**, it is disputed whether the point when the amended lawsuit was filed or when the original lawsuit was filed is relevant. The purpose of Art. 32, to avoid competing proceedings, should be based on the point in time at which the original action was filed, which are probably only permitted to a limited extent everywhere

Which procedural act constitutes a determination of jurisdiction

- B IR does not specify an admission notice. This issue is interpreted differently in the literature. Acceptance of jurisdiction is already in place if the defendant has started to address the matter of a case and has not objected to lack of jurisdiction (paragraph 1 of Article 26 of the B IR). The view that jurisdiction is considered accepted if a decision is issued it is convincing. Such a decision is formally final when no legal remedies are available.

Conduct of the second court getting knowledge of prior proceeding

- The **decision to stay the proceedings** on the ground of *lis pendens* shall be made of the court "s **own motion**, thus even if none of the parties requests it.
- wait, without any time limit, until the court first seized has established whether it has jurisdiction or not.
- When the court first seized concludes that it has jurisdiction, all the other courts must decline jurisdiction even if they believe that the court's conclusion **was erroneous**
- However, the two courts might not have the same opinion on the identity of claims and priority of action. Still, it remains open what happens if both courts demand priority or if the latter court finds no identity and continues processing. Therefore, in the second State, the decision might be different from the decision in the first State. However, both states are obliged to interpret requirements euro autonomously.

Conduct of the second court when the first court accepts its jurisdiction

- Question how the second court finds out when a foreign court has reached a decision on its jurisdiction – no duty of a foreign court to send a notice of acceptance of jurisdiction, nor of its refusal. The B IR only determines the duty to inform each other when each court has started a procedure.
- B IR only says that the second court **shall decline jurisdiction** in favour of the court first seised, which established its jurisdiction. According to B IR, this might be understood that the court just issues a declaratory decision. On the other hand, a procedural barrier of lis pendens requires dismissal/rejecting the claim (Zurückweisung der Klage).

Rejection/dismissal on formal grounds

- Rejection of the subsequent action is the method to end the open case under SLO law when the Slovenian court has no jurisdiction. The positive decision on jurisdiction from a foreign State related to the procedural issue of jurisdiction must be recognised upon B IR and is binding.
- However, as a result of incompetence Art. 29. BIR orders only a decline of jurisdiction. It makes unclear what happens to the pending action that was not dismissed/rejected. Is the litigation still pending and de facto suspended until the end of the procedure under negative declaratory action. When so, the procedure may revive if the negative declaratory claim is refused or dismissed. In the opposite situation, when the negative declaratory action is justified, still exiting condemnatory action should be withdrawn by the plaintiff or dismissed by the court. The Slovenian rules do not support such a solution but simply impose the rejection of the action if the court has no international jurisdiction.

Action for performance/condemnatory action

- A condemnatory action represents more comprehensive protection than declaratory one. “Res judicata” effect of negative declaratory decision does not embrace the claim for performance if the negative declaratory action is rejected. Therefore, it might be possible to advocate a solution to keep the pending proceedings in the second court suspended until a decision is made upon the first lawsuit.

Counterclaim

- **CJEU case law: a counterclaim is defendant's action connected with the claim but seeking for a separate judgment or decree. It does not apply to the situation where a defendant raises, as a pure defence, a claim that he allegedly has against the plaintiff. The defences which may be raised and the conditions under which they may be raised are governed by national law.**
- **The counterclaim can be proceeded even if the claimant's claim is dismissed. It must be separable from the claimant's action and seek a separate judgment.**
- **Lis pendens rules must also be considered for counterclaims, as well as for claims the debtor invokes for set-off (compensation in judicial proceedings). The debtor cannot raise separate actions for these claims. Furthermore, partial *lis pendens* is also possible, where only part of a claim is the subject of ongoing litigation.**

Statute of limitations

- The general question is how the defendant protects himself from the expiration of the statute of limitations period in case the condemnatory action is dismissed.
- The limitation period is qualified as a substantive law matter under Slovenian law governed by the applicable law, not, like in some other states, as a procedural question governed by *lex fori*.
- According to the substantive law e.g. OZ (Article 367), a new lawsuit filed within three months after the dismissal of the lawsuit for jurisdictional reasons causes the statute of limitations period to remain interrupted by the first lawsuit. It may be resubmitted only if the obstacle due to which the action was dismissed/rejected, e.g. end of the first proceeding without granting the claim.

Interruption of the statute of limitation period

- In SLO, the limitation period is not interrupted only by filing a lawsuit but by any other creditor's activity against the debtor before a court or other competent authority to establish, secure, or recover the claim (Art. 365 OZ). In a negative declaratory action, the active party is the debtor. The creditor only defends himself. However, his actions before the court, even if only in response to the lawsuit, in my opinion, imply his claim is being addressed in the sense of Art. 365 OZ and interrupts the statute of limitations period. In the case of a negative declaratory action, the court may issue a judgment and grant the claim. The decision implies that there is no obligation. On the other hand, if the court rejects the claim, it means that the obligation under the merits definitely exists.
- Therefore, submitting another identical condemnatory action this time in the State where the negative declaratory action is pending just to interrupt the statute of limitations period seems unnecessary and even questionable. A new condemnatory claim in the state where negative declaratory action is pending can still be burdened by obstacle of “lis pendens” and the same the condemnatory counterclaim to the negative declaratory action. On the other hand, in pure national cases B IA does not apply. In Austria for example a condemnatory action is more extensive legal protection from negative declaratory action. It would be therefore considered that two claims are not identical and new condemnatory action would be admissible.

Risk of *forum shopping* and *forum running*

- Current rules in B IR regarding "lis pendens" still **encourage tactics designed to delay the lawsuit** from proceeding in the forum proscribed by the Regulation. The improvement with the rule in B IR that the jurisdiction expressly agreed by parties has exclusive nature only solved a small part of the problem.

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Prorogation clauses and torpedo actions

- B Ia contains new rules - limitation of torpedo claims: Art. 31(2): prorogation clause serves as a legal basis for a false exclusive jurisdiction.
- Torpedo lawsuit is only possible if elective jurisdiction is given.
- Excluded in consumer matters and in matters of exclusive jurisdiction (short term rent is not such a matter).
- Restricted to individual labor disputes (Article 21 of the Regulation).

Prohibition of the abuse of rights

- Nevertheless, B IR in general prohibits the abuse of procedural rights. Abuse are activities meant to achieve unjustified advantages. The unjustified advantage might also include the fact that the plaintiff creates for himself the **position of the domestic party**. Some of the party's motives should be, per se, inadmissible (e.g., the **motive of achieving success that could not be expected in another country, achieving the highest possible compensation, silencing critical public voices, and preventing public interest debate**).
- CJEU ruled that plaintiff's attempt to avoid a foreign court in a race to **hijack a forum** (forum running) because he does not trust the other forum is justified. But, in that case, the court seised was an English court. According to a different Common law system, due to specific rules of procedural management and usual delays, English jurisdiction was difficult to be accepted by a continental litigant.

Drava flood case forum running or torpedo?

- The case of concurrence between the Austrian and Slovenian courts also initiated a dispute on the illegitimate seizure of jurisdiction by a negative declaratory action.
- Here are no essential differences in systems like in the aforementioned English case. Therefore, the excuse is not the fear of being judged at Slovenian court. Still, it should be considered an illegitimate goal to gain the advantage of the home field. The maneuver of a negative declaratory action unreasonably delays resolving the case. The plaintiff hopes that the long delay, together with the potential costs and inconveniences of taking part in court proceedings abroad, will make the other party give up his claim or accept a settlement favorable to the former.

Collective redress

- From the perspective of the B IR, collective redress raises issues of jurisdiction and of pendency and relatedness (with regard to represented plaintiffs and the moment of pendency) and of recognition (regarding the binding effects of judgments and court approved settlements on parallel claims). Some basic clarifications in this area would definitely be useful and appropriate.38
- Regarding pendency, there should be a rule that only cross-border collective claims based on (explicit) opt-in are permissible.42 Furthermore, article 30 of the B IR should be made mandatory in order to avoid overlapping collective claims. Finally, the moment of pendency (article 32 B IR) should be clarified in the sense that the relevant moment in time should be identified in the application to be admitted as a (lead) plaintiff in a collective case. As a general rule, the first step to file a collective lawsuit should be decisive.

Related actions (Article 34 B IA)

- interest of the coordinated operation of the judiciary to reduce the possibility of concurrent proceedings and to prevent incompatible judgments in different MS.

- These are not identical claims but claims that are closely interlinked
- The interrelationship must be such that their joint consideration and decision-making make sense, in order to avoid the risk of incompatible judgments arising from separate proceedings.
- The subsequent court is not obliged to suspend the proceedings as in the case of lis pendens, **but MAY suspend** it under the following conditions:
- If it has jurisdiction to decide in the proceedings in question;
- if the proceedings before the first court are still pending;
- if the claims are related;
- if the national law of the first court allows for the joinder of litigation.

Conclusions

- The mechanisms of "lis pendens" still much too negatively influence access to justice. Even if the courts of the court first seised are not particularly slow parallel proceedings every time cause **delays,** not possible to omit. In principle, the **first stage waiting for the acceptance of jurisdiction** in principle **requires decisions in more instances in both countries**. Every time the "lis pendens" rule obliges the court second seized to stay proceedings until the court first seised makes up its mind about its jurisdiction.
- Most promising to the problem posed by the abusive use of negative declaration actions may be careful control of the admissibility of those actions performed directly by the judge seised.
- To set the time limit to finalise the decision on jurisdiction in transnational litigations, now left to the national rules of procedure.