Brussels I Review – Lis Pendens and Related Actions

The fifth topic considered in the Green Paper concerns possible adjustments to the lis pendens rules in Arts. 27 and following of the Brussels I Regulation (excluding aspects specifically related to choice of court agreements).

In the Commission's view:

> *With respect to the general operation of the lis pendens rule, it should be reflected whether the current problems might not be addressed by strengthening the communication and interaction between the courts seized in parallel proceedings and/or the exclusion of the application of the rule in the case of negative declaratory relief (cfr. supra, point 3).*
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> *Concerning the rule on related actions, it should be reflected to what extent it may be appropriate to permit a grouping of actions by and/or against several partieson the basis of uniform rules. The risk of negative conflicts of jurisdiction could be addressed by a cooperation and communication mechanism between the courts involved and by an obligation on the part of the court which declined jurisdiction to re-open the case if the court first seized declines jurisdiction. In Article 30(2), it should be clarified that the authority responsible for service is the first authority receiving the documents to be served. Also, in the light of the importance of the date and time of receipt, the authorities responsible for service and the courts, as appropriate, should note when exactly they receive the documents for purposes of service or when exactly the document instituting proceedings is lodged with the court.*
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> *One other possibility could be to provide for a limited extension of the rule in Article 6(1), allowing for a consolidation if the court has jurisdiction over a certain quorum of defendants.*

The Commission asks the following questions:

> *Question 5:*
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> *How do you think that the coordination of parallel proceedings (lis pendens)*

before the courts of different Member States may be improved?

Do you think that a consolidation of proceedings by and/or against several parties should be provided for at Community level on the basis of uniform rules?

Outside cases involving choice of court agreements, the *lis pendens* rules are one of the key features, and should remain a central element, of the Brussels I Regulation framework. With the adoption in 2001 of the uniform date of seisin rule (Art. 30), these rules set out a clear priority system and work reasonably well in practice, although they are not always straightforward to apply to the facts of particular cases. Significant changes would appear unnecessary and, perhaps, undesirable.

That said, the proposed clarification of Art. 30(2), to confirm the date of seisin where more than one authority is responsible for service, seems sensible, as does a requirement to stamp or indorse the claim document with the date and time of receipt for issue/service (as applicable). There would, however, at least outside the specific area of consumer redress, appear no imperative to adopt uniform procedural rules on the consolidation of actions. Finally, the Commission's suggested modification of Art. 6(1) in cases in which the court has jurisdiction "over a certain quorum of defendants" appears arbitrary, and may be difficult to apply in practice.

Claims for negative declaratory relief should continue, at least as a starting point, to be given equal treatment, in accordance with the principle confirmed in *The Tatry*. As the Advocate-General Tesauro observed in *The Tatry* (para. 23 of Opinion):

It should also be borne in mind that the bringing of proceedings to obtain a negative finding, which is generally allowed under the various national procedural laws and is entirely legitimate in every respect, is an appropriate way of dealing with genuine needs on the part of the person who brings them. For example, he may have an interest, where the other party is temporising, in securing a prompt judicial determination—if doubts exist or objections are raised—of the rights, obligations or responsibilities deriving from a given contractual relationship.

In some cases, it will be advantageous in practical terms for a party against whom

proceedings for negative declaratory relief are brought to counterclaim for a positive remedy in the court chosen by his opponent (particularly if it is the court of the defendant's domicile). The current effect of the Brussels I Regulation, however, is to put the negative declaration defendant in a position in which, if he does not wish to take that course, his only option is to defend the action for a negative declaration and to forego any change of obtaining a positive remedy elsewhere in the EC unless and until the action concludes with a verdict in his favour, when he may seek recognition of that judgment in support of a new claim. At this stage, as the Green Paper points out in its discussion of choice of court agreements, he may be faced with time bar difficulties, having been precluded by Art. 27 from issuing a claim in his chosen court to protect his position. One possible solution to the time bar problem would be to amend Art. 27 of the Regulation so as to require the court second seised merely to *stay* its proceedings (rather than to *decline* jurisdiction) while the action before the court first seised is pending, if the latter action is for negative declaratory relief. In such a case, it might also be possible to develop a limited exception to the Art. 27 priority rule so as to entitle (but not require) the court first seised to decline jurisdiction over all or part of the proceedings in favour of the court second seised, on such terms (e.g. as to costs) as it may consider appropriate, if it would be manifestly more appropriate for the matters in issue to be determined by the court second seised having regard to the nature of the relief sought.

Accordingly, the answer to this question could be that, although improvements can be made to the *lis pendens* rules in Arts. 27-30 of the Regulation, major changes should be avoided and there is no imperative for generally applicable, uniform procedural rules on the consolidation of proceedings.