German Federal Court of Justice refers question on lis-pendens-rule to ECJ

By Jonas Steinle, LL.M.

Jonas Steinle is a doctoral student at the chair of Prof. Dr. Matthias Weller, Mag.rer.publ. at the EBS University for Economics and Law in Wiesbaden and a scholarship holder at the Max Planck Institute for Intellectual Property and Competition Law in Munich.

On 18 September 2013 the German Federal Court of Justice (*Bundesgerichtshof*) referred the question for a preliminary ruling to the European Court of Justice (V ZB 163/12) as to whether the *lis pendens*-rule in Art. 27 para. 1 Brussels I Regulation does apply even if the court second seised has exclusive jurisdiction under Art. 22 of the Brussels I Regulation.

The facts:

The claimant seeks to enforce a land charge (*Grundschuld*) against the defendant's real estate, which is located in Hamburg. He therefore brought an action in the regional court (*Landgericht*) of Hamburg. However, before this claim in Hamburg was launched, the defendant had already brought proceedings against the claimant in a court in Milan, seeking a negative declaratory relief that the land charge is invalid and that it therefore must not be enforced. As a result of this, two proceedings were pending simultaneously in Hamburg and in Milan.

The landlord and defendant in the Hamburg-based proceedings accordingly argued that the court in Hamburg must stay its proceedings according to Art. 27 para. 1 Brussels I Regulation until the court in Milan (which had been seised first) has ruled on its own jurisdiction. This application for suspension was rejected in all instances and finally was referred for final appeal (*Rechtsbeschwerde*) to the Federal Court of Justice.

The Federal Court of Justice takes the view that the regional court in Hamburg has exclusive jurisdiction under Art. 22 Brussels I Regulation to hear the case.

However, as the regional court in Hamburg had been seised second, the Federal Court had doubts as to whether the regional court in Hamburg must stay its proceedings under Art. 27 para. 1 Brussels I Regulation even if it has exclusive jurisdiction under Art. 22 Brussels I Regulation.

Comments:

The manoeuvre which was performed by the defendant in this case is not new at all. The defendant launched what is called in international procedural law an 'Italian torpedo'. However, the circumstances in which this torpedo was used are new and therefore have set a precedent.

The 'Italian torpedo' is a litigation tactic whereby the presumptive defendant of a claim anticipates the proceedings against him by bringing an action against the presumptive claimant on his part. Such claim usually consists of an application for a negative declaratory relief in a jurisdiction other than the one where the presumptive defendant is going to be sued. The objective in doing so is simply to delay the proceedings in the venue where the proceedings in the end will take place, since the court at that place which has been seised second must stay its proceedings according to Art. 27 para. 1 Brussels I Regulation until the court first seised has ruled on its jurisdiction. Usually, the courts in the jurisdiction where the Torpedo-claim is brought are known for being somewhat slow on the draw.

In the case at hand, there was hardly any connection to the courts of Italy. The enforcement of the land charge is a purely domestic claim under German law and the reason why the negative declaratory relief was sought in the courts of Italy in particular seems more like a flimsy excuse than a real substantiation of that claim. Accordingly, the appeal court (*Beschwerdegericht*) in Hamburg rejected to stay the proceedings because it alleged that the defendant in the Hamburg-based proceedings hat brought a vexatious claim in the courts of Milan, solely to delay the proceedings in Hamburg. The situation at hand can therefore very well be classified as an example of an 'Italian torpedo'-claim.

In the past, the tactic of the 'Italian torpedo' often was used to thwart a jurisdiction agreement according to Art. 23 Brussels I Regulation. This was due to the *Gasser* case (C-116/02) in which the ECJ had ruled that even where the court second seised had exclusive jurisdiction according to a jurisdiction agreement, it must nevertheless stay the proceedings until the court first seised has decided on

its jurisdiction. This ruling had opened up a debate about the *lis-pendens*-rule which finally induced the European legislator to introduce an exception to the *lis-pendens*-rule for jurisdiction agreements under Art. 31 para. 2 of the revised version of the Brussels I Regulation (Regulation (EU) No 1215/2012) which for the most part comes into force on 10 January 2015. The revision of the Brussels I Regulation will finally bring an end to the 'Italian torpedo' in connection with jurisdiction agreements.

The case at hand shows however, that the story of the 'Italian-torpedo' is not yet finished. Although this case is based on the same tactical considerations, the context is a slightly different one. It addresses an issue that had been left open by the ECJ in previous cases (C-351/89 – *Overseas Union Insurance*, para. 20 et seqq.; C-116/02 – *Gasser,* para. 44 *et seqq.*) and which has been subject to a controversial debate in legal literature (e.g. Weller in Hess/Pfeiffer/Schlosser, The Brussels I-Regulation (EC) No 44/2001, para. 403; see also the sources in para. 18 of the reference of the Federal Court of Justice).

It is conceivable that the ECJ will give precedence to the *lis-pendens*-rule yet another time and adopt the formal approach that it has been taking since the *Gasser*-case. The wording of Art. 27 para. 1 Brussels I Regulation does not provide for an exception in cases where the court second seised has exclusive jurisdiction under Art. 22 Brussel I Regulation.

The key consideration that justifies the very formal approach towards situations of *lis pendens* by the Brussels I Regulation is to avoid the risk of irreconcilable judgments in the European judicial area. Since decisions from other Member States are recognized and enforced on a regular basis under the Brussels I Regulation, the situation of irreconcilable judgments must by any means be prevented by hindering parallel proceedings from the scratch.

However, in the case at hand there appears to be one crucial difference to this argument and that is Art. 35 para. 1 Brussels I Regulation. According to Art. 35 para. 1 Brussels I Regulation a decision must not be recognised if it conflicts with Art. 22 Brussels I Regulation which is exactly the case in the proceedings at hand. If the ECJ is going to give precedence yet another time to the *lis-pendens*-rule, the Court cannot rely anymore on its argument that the *lis-pendens*-rule must prevail for the sake of hindering the issuance and recognition of conflicting decisions.

In fact, for the situation in the present case, the court in Milan is obliged to decline jurisdiction according to Art. 25 Brussels I Regulation if the Federal Court of Justice is right in holding that its requirements are fulfilled and the court in Hamburg therefore is competent to hear the case under Art. 22 Brussels I Regulation. One can however see in the case at hand that courts sometimes do not immediately use the tool provided in Art. 25 Brussels I Regulation (also the court of first instance in Milan did not use it) and that one possibly can litigate on whether the requirements of Art. 25 Brussels I Regulation are fulfilled. This does not make things easier for the present case and it is to be awaited how the European Court of Justice will decide on the issue. Eventually a decision can be expected in the near future since the higher regional court (*Oberlandesgericht*) München had already referred exactly the same question to the ECJ already in February 2012 (OLG München, 16 February 2012 – 21 W 1098/11).