

Mari and Pretelli on Choice-of-Court Agreements, Lis Pendens and Torpedo Actions

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The question we would like to address is whether the *lis pendens* rule should be amended to allow the judge designated by the parties to a contract to decide on the jurisdiction, despite the case having been previously filed with a different Court in violation of the covenant Forum agreement.

If on one hand we do think that the actual rule leads many parties to “play” with a *Forum* selection with the only aim to delay the controversy definition by filing the case in front of a Court different from the one agreed upon by the parties [and apparently without Jurisdiction, so forcing the defendant to counterclaim the lack of Jurisdiction and obviously spend time before being able to get a court decision about its jurisdiction and power to hear and decide the merits of the law suit] on the other hand we do not think that the rule should be so amended as proposed by the rapporteur in the working document of 2.12.2009, but we feel to suggest to suggest another solution for the protection of choice of forum agreements in lieu of the raised issues.

According to those in favor of the modification of the *lis pendens* rule, the choice of forum covenant is a super-agreement that no other Judge but the one selected in the forum agreement should have the power to investigate in order to decide about its validity between the parties.

Firstly, it is important to stress that the prorogation agreement concerns judicial power to decide a case and therefore should the *forum selection clause* be invalid, as it happens, why should only the judge designated by the parties declare it to be so? Why should a forum selection covenant even carry the legal effect to prohibit a court decision about its own validity?

Secondly, it should be kept in mind that the terms of validity of the agreement set out in article 23 of Bruxelles I regulation do not guarantee that we are in front of a covenant which has been actually negotiated by parties.

This happens not only in the framework of a negotiation between companies with different contractual power, even though it is self-evident that between a large corporation and a small firm, the prorogation of jurisdiction may well be not subject to debate but in particular in all the agreements among companies and professionals whereby there is no negotiation at all and the professional can only adhere to the agreement without any power to amend any of the contract provision (think about all the Bank agreements, the online purchase agreements and so on and so forth).

Another very meaningful example has been given by Mme Muir Watt whom pointed out that it is important to avoid a strategic use of choice of court agreements especially when these are contained in bills of lading passing from hand to hand. This happens every day in the field of the international carriage of goods by sea, where the rules set out in art. 23 Bruxelles I - in particular the opposability of choice of court agreements to third parties according to the *Coreck* ruling - can be used to restrict carrier liability for cargo loss or damage.

Even still there is no doubt that unfair trial tactics, better known as *torpedo actions*, should be fought effectively.

Is this use of unfair trial tactics a reason sufficient to alter the *lis pendens* rule, which is grounded on the priority of action, whatever the action may be? We would like to point out that this rule, in the *Gasser* interpretation, is a rule that guarantees predictability (as the European Court of Justice stresses in *Gasser*: “in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17)”).

On the contrary a change, as suggested as a second option in the Green Paper (COM(2009) 175 final of 21.4.2009) wouldn't be conducive and could even give new opportunities to parties in search of delaying tactics: it could lead, for instance, to the allegation of the existence of an inexistent choice of court agreement in order to continue a trial initiated in a second time in front of a judge that lacks jurisdiction.

Moreover: are we sure that the two judges will decide that there is a jurisdiction agreement and the *lis pendens* rule does not apply, in cases where the existence of the jurisdiction agreement is unclear and depends on the existence of a usage in international trade or commerce, or a usage between the parties?

If we change the *lis pendens* rule and guarantee the protection of the clause by affirming the sole jurisdiction of the judge selected in the covenant, then we should also amend the recognition and enforcement procedure and establish that any decision taken by a judge that is not the designated judge must not be recognized.

If the designated judge has to be the only one allowed to evaluate the validity of the clause (or of the commercial practice), it would become impossible to give effect to any decision coming from a different judge, in order to avoid the risk of a contrast in the judgments.

It is easy to see, in our opinion, that changing the *lis pendens* rule will lead to a great confusion.

This is probably the reason why the Lugano Convention of 30 October 2007, signed after the Gasser ruling doesn't change the rules on *lis pendens* and continue to differentiate in art. 19, the case of exclusive jurisdiction by virtue of art. 16 from all other cases, as the case of exclusive jurisdiction by virtue of art. 17.

It is more desirable, instead of changing a general rule, to find appropriate means in order to counteract unfair practices.

As regards to judges, it seems clear that if the judge of a Member State decides on clearly abusive cases, initiated only to block the other party, that State will be held responsible for violation of the principle of loyal cooperation laid down in Art. 10 of the EC treaty.

This hypothesis is hopefully exceptional: in the majority of cases judges will not be willing to uphold an unfair practice, so it should be up to them to guarantee the efficacy of the agreement.

Many European legal systems empower the judges with instruments to punish abusive conducts: in Italy, for instance the judge may condemn the party who sued or resisted in a trial with bad faith or gross negligence to pay – in addition to judicial expenses – damages to the other party. The judge may also sanction *ex officio* the abusive conduct by condemning the loser to pay a lump sum to the other party (see art. 96 of the Italian code of civil procedure and art. 32-1 et 700 of the French code of civil procedure).

Leaving unaltered the *lis pendens* rule in the *Gasser* interpretation, the new provisions on choice of forum should contain a more detailed regulation on the validity of the agreement, its opposability to third parties, the consequences of its violations (for instance providing the assessment of damages, to be quantified in a uniform rule or according to the *lex fori*).

In our opinion, changing a general rule is nothing more than a tactic to counteract an abuse of that rule, an abuse happening in a percentage of cases the importance of which is not easy to determine, while stigmatizing the abusive conduct of those who believe to be capable of escaping to justice by way of torpedo actions or other judicial unfair practices has also a high educational value and definitely contribute to build confidence in the European judicial system.