SOME CONSIDERATIONS ON THE SO CALLED “ITALIAN TORPEDO” IN THE LIGHT OF THE REFORM OF THE BRUSSELS I REGULATION

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1. Introduction

This article outlines one of the key changes introduced by the Brussels I bis Regulation regarding the *lis pendens* provisions and provides an analysis of the impact this change may have on commercial parties litigating before EU national courts.

2. The Brussels I Regulation

The most important jurisdictional instrument in the sphere of private international law within the EU is the Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is commonly referred to as the Brussels I Regulation.

The Brussels I Regulation was adopted by the EC Council on 22 December 2000. It entered into force on 1 March 2002 for the fourteen then existing Member States other than Denmark; on 1 May 2004 for the ten then

* Attorney-at-law. I would like to thank Avv. Giovanni Barone of Freshfields Bruckhaus Deringer LLP, Rome for his very helpful references.
acceding Member States; on 1 January 2007 for Bulgaria and Romania; on 1 July 2007 for Denmark; and on 1 July 2013 for Croatia.

The Brussels I Regulation lays down rules on direct jurisdiction, applicable by the court seized of the original action in determining its own jurisdiction, as well as rules on the recognition and enforcement of judgments given in other States to which the Brussels I Regulation applies. It applies to most types of civil and commercial matter. But certain matters, such as most family matters and insolvency proceedings, are excluded from its scope.

Since the scope of this article leaves out the recognition and enforcement of judgments, the main provisions of the Brussels I Regulation which will be analysed deal only with jurisdiction.

The Brussels I Regulation provides a general rule on jurisdiction according to which an action should be brought in the domicile of defendant. In fact, persons domiciled in a Member State shall in principle be sued in the courts of that Member State (Article 2(1)).

Derogations to the general rule may apply, for instance in matters relating to contracts (Article 5(1)) and matters relating to tort, delict or quasi delict (Article 5(3)).

A further derogation to Article 2(1) of the Brussels I Regulation may apply in case of (i) proceedings which involve multiple defendants (Article 6(1)), which in turn may also impact on case allocation between courts in different Member States, as well as (ii) when proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States (Article 27(1)), or (iii) when actions related one another are pending in the courts of different Member States (Article 28(1)).

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1 The 2004 enlargement of the EU was the largest single expansion of the EU, in terms of territory, number of states and population. The simultaneous accession concerned the following countries: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.
By way of summary, the scheme below attempts to recap the jurisdictional rules just explained above.

<table>
<thead>
<tr>
<th>Article of the Brussels I Regulation</th>
<th>Description</th>
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<tr>
<td>Article 2 of the Brussels I Regulation</td>
<td>General <em>forum</em> of the domicile of defendant</td>
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<tr>
<td>Article 5 of the Brussels I Regulation</td>
<td>Alternative <em>forum</em>, meaning that the Brussels I Regulation gives the claimant a choice of suing the defendant either in the State of the defendant’s domicile in accordance with Article 2, or in a competent court of another Member State pursuant to Articles 5</td>
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<tr>
<td>Article 6 of the Brussels I Regulation</td>
<td>Ancillary <em>forum</em>, according to which the Brussels I Regulation enables several defendants to be sued all together in the State of the domicile of (at least) one of the defendants (so called “Anchor Defendant”)</td>
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<tr>
<td>Article 27 of the Brussels I Regulation</td>
<td>Proceedings simultaneously pending in the court of different Member States but concerning the same cause of action and between the same parties, which is usually</td>
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referred to as the *lis pendens* provision

**Article 28 of the Brussels I Regulation**

Proceedings simultaneously pending in the court of different Member States with reference to related actions, not necessarily between the same parties.

The Brussels I Regulation recognizes the interest of the correct administration of justice within the EU and of reducing the risk of conflicting judgments providing that, as a general principle, related disputes should be decided together in a single proceeding.2

Given the foregoing, Articles 27 to 30 of the Brussels I Regulation endeavour to prevent concurrent actions in different Member States in respect of similar or related disputes by requiring or encouraging the court subsequently seized to decline jurisdiction or at least stay its proceedings in favour of the court first seized.3

First, in the event of parallel proceedings in different Member States between the same parties and involving the same cause of action, Article 27(1) imposes on the court subsequently seized a mandatory obligation to stay its proceedings.4

Second, in case of dissimilar but related actions, Article 28(1) provides that the court subsequently seized shall consider the opportunity of, but is not bound to, stay its proceeding.5

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2 See Recital n. 15 of the Brussels I Regulation.
4 Article 27(1) of the Brussels I Regulation provides: “shall stay its proceedings”.
5 Article 28(1) of the Brussels I Regulation provides: “may stay its proceedings”.
3. The Brussels I bis Regulation

After years of review, the course of reforming the Brussels I Regulation has reached a conclusion. The Brussels I Regulation will be replaced by the Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which was adopted by the European Parliament and the Council on 12 December 2012. Although the so called Brussels I bis Regulation has passed through the necessary legislative approval process, it will not be applied by national courts within the EU until 10 January 2015.

The Brussels I bis Regulation applies to civil and commercial matters and excludes revenue, customs or administrative matters and issues relating to the liability of states for acts and omissions in the exercise of state authority (acta iure imperii) (Article 1(1)). Other exclusions are set out in Article 1(2). The exclusions extend to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration; maintenance obligations arising from a family relationship, parentage, marriage or affinity; wills and succession, including maintenance obligations arising by reason of death.

Although the Brussels I bis Regulation does not modify the basic provisions on jurisdiction regulated by the Brussels I Regulation, it will introduce slightly new rules in relation to lis pendens and related actions.

4. The so called “Italian torpedo”

As mentioned, Article 27(1) of the Brussels I Regulation provides that where a court is “second seized” of a proceedings between the same parties and involving the same cause of action as in a parallel proceedings previously started before another national court in the EU, then the
“second seized” court must stay its proceedings until the court “first seized” has determined whether or not it has jurisdiction to rule on the matter at issue.

This rule applies even where a party starts proceedings in a Member State in breach of a jurisdictional clause in the relevant contract, for example by using the so called “Italian torpedo” tactic. Originally, the expression “Italian torpedo” had been used to designate a procedural practice consisting of preventing an action for the enforcement of an intellectual property right, particularly in terms of compensation for the infringement, by means of an action for a negative declaration, frequently involving issues of validity of the intellectual property right, in the courts of a Member State like Italy, known, among the European countries, for the generally longer duration of court proceedings. Subsequently, the expression has been used in other fields, such as competition law, to identify the tactical use of pre-emptive actions for a negative declaration.

The aim of the “Italian torpedo” action is to take advantage of the rules on *lis pendens* provided by the Brussels I Regulation (*i.e.* Article 27) to block proceedings for an extended time (in the mind of the claimant for negative declaration), knowing in advance that, as a common remark, if a party brings an action before the court of a certain Member State X, then the court of another Member State Y which is “second sized” in relation to the previous proceedings in X involving the same cause of action and between the same parties will have to stay its proceedings until that court in X determines whether or not it has jurisdiction to settle the dispute.

I will give an example.

Assume that a German company (hereinafter, “the buyer”) has purchased some goods from an Italian company (hereinafter, “the seller”). After

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delivery which according to the contract for the sale of goods took place in Berlin, the buyer finds that the goods do not fit for the purposes for which goods of the same description would ordinarily be used. The buyer could thus theoretically claim damages from the seller for breach of contract.

Since the agreed place of delivery was Berlin, assuming that the parties did not previously decide on an exclusive jurisdiction or arbitration for settling their disputes, the German buyer could in principle decide to sue the seller in Germany pursuant to the jurisdictional rules provided by Article 5(1)b of the Brussels I Regulation (i.e. the court of the State in which delivery had to take place), in alternative to the general rule of having to sue in the court of the defendant’s domicile. However, in order to avoid/delay being sued in a foreign country, the Italian seller could pre-emptively bring an action in Italy first, claiming a negative declaration that he is not liable for breach of contract.

Irrespective of whether the Italian court has or lacks jurisdiction according to the Brussels I Regulation, the main aim of the seller by using such pre-emptive action would be to start a proceedings in its own country and take advantage of the fact that Italian courts are notoriously slow even in deciding on jurisdictional issues, therefore the Italian court seized may take several years to decide whether it has jurisdiction to decide on the matter, let alone decide on the merits. The important consequence of this action, however, is that in the meantime, waiting for the Italian declaration, the buyer cannot bring an action in the German court based on the same contractual issue, as in case of *lis pendens* between the same parties and on the same cause of action the latter-seized court has a mandatory obligation to stay its proceedings until such time as the jurisdiction of the court “first seized” is established (Article 27(1) of the Brussels I Regulation).  

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The Brussels I bis Regulation gives priority to the court specified in a jurisdictional clause (i.e. the chosen court) and thus reverses “the first in time” rule where the parties have previously contractually agreed an exclusive jurisdiction to which they would have to submit their disputes concerning the contract at issue.

In fact, the new rules on *lis pendens* and related actions (Articles 29 to 34 of the Brussels I bis Regulation) contain provisions seeking to allow a sort of priority to the contractually chosen court to decide on its jurisdiction and progress its review of the dispute, regardless of whether or not it was the “first seized” court. Article 31(2) of the Brussels I bis Regulation in fact provides that any court other than the contractually chosen court “shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement”.

Recital 19 of the Brussels I bis Regulation (repeating Recital 14 of the Brussels I Regulation) refers to respecting the autonomy of the parties save in specified situations. The Brussels I bis Regulation now goes further. It includes a new Recital 22, which refers to enhancing the effectiveness of contractual clauses providing for an exclusive choice of *forum* and avoiding “abusive litigation tactics”. More specifically such Recital 22 provides that:

“it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with ... the situation where a court not designated in an exclusive choice-of-court agreement has been seized of proceedings and the designated court is seized subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seized should be required to stay its proceedings as soon as the designated court has been seized and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement”.

The rationale is described as follows:

“This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the
dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings?  

5. Conclusion

Even if tempered with some constraints which are briefly described below, the new rule provided by Article 31(2) of the Brussels I bis Regulation confers more binding force to the exclusive jurisdictional clause contained in commercial agreements.

However, in order to activate such protection a party would effectively need to start proceedings in the contractually designated court in order to trigger a stay of the proceedings preventively commenced somewhere else in breach of the jurisdictional clause.

Furthermore, bearing in mind that the Brussels I bis Regulation applies to civil and commercial matters, the new provisions would likely find implementation if those matters concern a specific contract, whereby it is foreseeable that such contract contains an exclusive jurisdiction clause. In other words, within the domain of contractual disputes these new provisions on *lis pendens* in the Brussels I bis Regulation may limit the ability to use the “Italian torpedo” tactic, because they go one step further than the similar rules currently provided by the Brussels I Regulation.

On the other hand, I have some doubts on the possible implementation of these new provisions in relation to matters relating to tort, *delict* or *quasi delict* (such as for example environmental damage, libel, unfair competition and antitrust violations, etc.).

For example, in case of cartel infringements in breach of Article 101 of the TFEU or its national equivalents (*i.e.* the most common antitrust infringement giving rise to private damages actions), the cartel participants

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rarely establish written agreements in which they regulate their collusive activities. Cartel participants almost always limit themselves to arranging “soft” guidelines or merely reach non-binding oral agreements.\textsuperscript{10} Most importantly, in most recent years it is unheard of that cartel participants would agree in writing on an exclusive forum to settle their disputes. Accordingly, the new Article 31(2) of the Brussels I bis Regulation would not be applicable, so the jurisdictional situation would not change compared to the one existing under the current Article 27 of the Brussels I Regulation.

As a result, even after the implementation of the new provisions on \textit{litis pendens} contained in the Brussels I bis Regulation, the “Italian torpedo” tactic could still be used especially in matters relating to tort, \textit{delict} or \textit{quasi delict}, than in contractual disputes.

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