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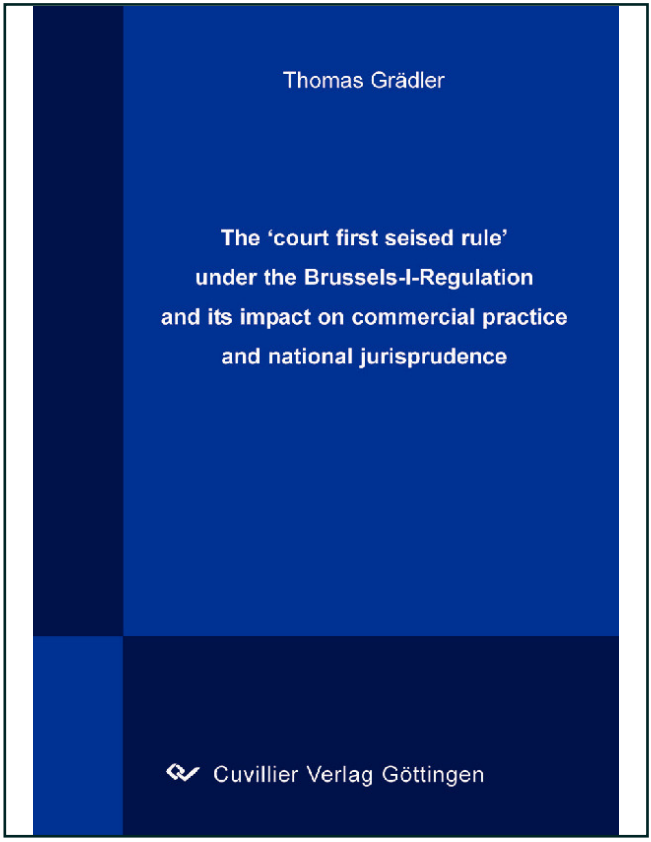
The ‘court first seised rule’ under the Brussels-I-Regulation and its impact on commercial practice and national jurisprudence



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A. Introduction

The ‘court first seised rule’ is one of the most important provisions in the Brussels-I-Regulation (the ‘Regulation’).[1] It is designed to reduce the possibility of the courts of different member states rendering irreconcilable judgments. In this dissertation, it will be illustrated that this provision indeed contributes to greatly reducing the risk of conflicting judgements. However, it will also be shown that the rule does not only have positive effects, but heavily influences both commercial practice and national jurisprudence, particularly in the form of so-called ‘torpedo proceedings’.

The first part of this dissertation will briefly illustrate the preconditions and technical effects of the ‘court first seised rule’ (part B). However, greater emphasis will be placed on the impact the rule has on commercial practice (part C) and national jurisprudence (part D). In part D, the rule’s impact on national jurisprudence will be exemplified through an elaboration of case law in the United Kingdom[2] and Germany. Possible amendments to the rule and proposed solutions to avoid its abuse will be discussed and evaluated, in part, by reviewing discussed reactions and proposals given by the national courts in the fourth part (part E). The last part (part F) will draw a conclusion with regard to the discussed consequences and problems. Each section will be supplemented by the author’s opinion on the raised issues.

[1] The Brussels-I-Regulation is Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Using the term ‘Member States’, the non-participating Member State Denmark is subsequently excluded. One commentator evaluates it as the ‘most frequently applied and commented upon’ rule within the Brussels-I-Regulation, see M. Lupoi, ‘The New Lis Pendens Provisions’ (2002) 7 *ZZPInt* 149, at 157.

[2] While the analysis of case law will focus on ‘English’ jurisprudence, it is the ‘United Kingdom’ that is specifically considered as a Member State under the Brussels-I-Regulation.

B. The 'court first seised rule' under the Brussels-I-Regulation

The importance of the Regulation is rarely doubted. For example, *Goode* calls it the 'most successful instrument on international civil procedure of all time'.[3] As the Regulation's aim is to facilitate mutual recognition and enforcement of other Member States' judgments, which happens *inter alia* by reducing the possibility of irreconcilable judgments, the significance of the rule on *lis pendens* is readily apparent.

1) The phenomenon of *lis pendens*

A consequence of the jurisdictional rules of the Regulation is that situations may arise, where the courts of more than one Member State have jurisdiction and thus, would be competent to hear the case.[4] This is generally described by the term *lis alibi pendens*.[5] *Nygh* gives an exact definition and describes *lis pendens* as a situation 'where there are parallel or concurrent proceedings pending between the same parties concerning the same subject matter in different jurisdictions at the same time.'[6] The phenomenon of *lis pendens* is not, however, a modern concept, but was recognized as early as in the time of Roman law. As *Wharton* splendidly illustrates in his historical publication, *lis pendens* arose

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[3] R. Goode [et al.], *Transnational commercial law: international instruments and commentary*, (Oxford: University Press, 2004), p. 793.

[4] C. Clarkson / J. Hill, *The Conflict of Laws*, (Oxford: University Press, 3rd edition, 2006), p. 97, giving as an example the special jurisdiction rules or the case of multiple domiciles in various Member States.

[5] Latin for 'dispute pending'; see R. Schütze, 'Lis Pendens and Related Actions', (2002) 4 *EJLR* 57.

[6] P. Nygh, 'Declining jurisdiction under the Brussels I Regulation 2001 and the preliminary draft Hague Judgments Convention: a comparison', in: J. Fawcett, *Reform and development of private international law*, (Oxford: University Press, 2002), p. 304.

from the federative character of the provincial courts under the *Justinian Code*.[7] When comparing this historical situation with modern Europe, we also see a federative structure with equal competence in jurisdictional matters given to the courts of the various Member States.[8] Thus, the goal of the Regulation to facilitate mutual recognition and enforcement of other Member States' judgments is not novel and is directly jeopardised by concurrent litigation of identical or similar disputes.

2) Procedural effect of the 'court first seised rule': 'first come, first served'

In modern Europe, mechanisms for dealing with parallel and related proceedings were first introduced in the Brussels Convention of 1968.[9] Now, Articles 27-30 of the Regulation provide the necessary means of control to encounter the danger of irreconcilable judgments. As regards the central provision of Article 27 which forms the focus of this thesis, essentially, the court 'first seised' is given precedence.[10]

If the relevant conditions are fulfilled, the second court being seised must, *sua sponte*, stay its proceedings until such time as the jurisdiction of the court first

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[7] F. Wharton, *A treatise on the conflict of laws or private international law*, (Philadelphia: Kay and Brother, 2nd edition, 1881, reprint: Littleton: Rothman, 1991), p. 679 et seq. For another good example of a very early discussion of the 'principle of reciprocity' in European nations, see J. Story, *Commentaries on the conflict of laws*, (Boston: Little, Brown and Company, 1865), p. 808 et seq.

[8] For the situation in the United States of America as another federative system of States, see R. Weintraub, *Commentary on the conflict of laws*, (New York: Foundation, 4th edition, 2001), p. 274.

[9] See Articles 21 and 22; the wording of the provisions has only changed slightly so that earlier decisions still form valid guidelines for judgments given nowadays, see P. Nygh (2002), *op. cit.*, p. 313; see also W. Tetley, *International Conflict of Laws*, (Montreal: IS Publications, 1994), p. 808.

[10] See P. Herzog, 'Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?' (1995) 43 *Am J Comp L* 379, at 381 et seq.

seised is established, Article 27 (1),[11] and where the jurisdiction of the court first seised is established, the second court must decline jurisdiction in favour of that court, Article 27 (2).[12] This places a duty on the first court to make the decision expeditiously – a duty which is sometimes not carried out, as will be seen later on in this thesis.

3) Preconditions to trigger the 'court first seised rule'

For the relevant provisions in the Regulation to be triggered, both proceedings in different Member States have to fall within the scope of the Regulation and thus have to be dealing with *civil and commercial matters*.[13] In addition, it was clarified in *Owens Bank v Bracco* that Articles 27 and 28 do not apply to proceedings regarding the recognition and enforcement of judgments given in non-Member States.[14] Moreover, the proceedings must be pending, not concluded,[15] or discontinued,[16] and provisional proceedings are excluded.[17]

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[11] Until the jurisdiction of the court first seised is in fact established, the second court remains seised although the proceedings are stayed, see *JP Morgan v Primacom* [2005] 2 All ER (Comm) 764.

[12] Jurisdiction is not 'established', if the proceedings are only stayed, see *The Xin Yang* [1996] 2 Lloyd's Rep 217, at 222.

[13] C. Clarkson / J. Hill (2006), *op. cit.*, p. 97. See also *Toepfer v Société Cargill* [1998] 1 Lloyd's Rep 379 and *The Hari Bhum* [2004] 1 Lloyd's Rep 206 where one of the proceedings involved an arbitration clause and was thus excluded by the fourth exception to Article 1.

[14] Case C-129/92 *Owens Bank v Bracco (No 2)* [1994] ECR I-117.

[15] *Berkeley Administration v McClelland* [1995] ILPr 201, per *Dillon LJ*.

[16] *Internationale Nederlanden v CAA* [1997] 1 Lloyd's Rep 80, at 93 et seq., per *Morison J.*

[17] See P. North / J. Fawcett, *Cheshire and North's Private International Law*, (London: Butterworths, 13th edition, 1999), p. 251, footnote 2, with referral to *Boss Group v Boss France* [1997] 1 WLR 351.