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DETERMINING CRITERIA FOR *LIS PENDENS* IN PARALLEL PROCESSING

CRITERIOS DETERMINANTES PARA LA LITISPENDENCIA EN TRAMITACIÓN PARALELA

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ABSTRACT

As global participation in international relations increases, the incidence of international litigations. Given the diverse jurisdictional criteria in existence, the potential for parallel proceedings becomes apparent. The primary objective of this research is to analyse instruments suitable for preventing parallel proceedings and the requirements for then. One prominent mechanism is *lis pendens,* employed in

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accordance with uniform jurisdictional rules within the European Union. As litigations grow in complexity, litigants employ diverse means to protect their rights. This article specifically addresses the contemporary issue of applying the *lis pendens* principle to related but not identical proceedings (*la même cause et le même objet*). Through an analysis of the recent court practices of Lithuanian courts in applying *res judicata*, the article compares the *lis pendens* doctrine with other instruments designed to address conflicts of jurisdictions, such as *forum non conveniens*. The research reveals that a strict rule prioritizing the first case could lead to unfair outcomes.

Keywords: conflicts of jurisdictions, *lis pendens*, parallel proceedings, cause of action.

RESUMEN

A medida que aumenta la participación global en las relaciones internacionales, aumenta la incidencia de los litigios internacionales. Dada la diversidad de criterios jurisdiccionales existentes, se hace evidente la posibilidad de procedimientos paralelos. El objetivo principal de esta investigación es analizar los instrumentos adecuados para prevenir procedimientos paralelos y los requisitos para ello. Un mecanismo destacado es la litispendencia, empleada de conformidad con normas jurisdiccionales uniformes dentro de la Unión Europea. A medida que los litigios crecen en complejidad, los litigantes emplean diversos medios para proteger sus derechos. Este artículo aborda específicamente la cuestión contemporánea de la aplicación del principio de litispendencia a procedimientos relacionados pero no idénticos (*la même cause et le même objet*). A través de un análisis de las prácticas judiciales recientes de los tribunales lituanos en la aplicación de la cosa juzgada, el artículo compara la doctrina de la litispendencia con otros instrumentos diseñados para abordar conflictos de jurisdicciones, como el *forum non conveniens*. La investigación revela que una regla estricta que dé prioridad al primer caso podría conducir a resultados injustos.

Palabras clave: conflictos de competencia, litispendencia, procedimientos paralelos, causa de acción.

Summary: Introduction. 2. The principle of non bis in idem. 3. le même objet et la même cause. 4. Priority principle for the same parties. 5. Conclusions. Bibliographic references.

1. INTRODUCTION

As individuals increasingly participate in international affairs, there is a growing number of international litigations involving complex legal issues across different countries. This article aims to analyse the situation and provide insights on avoiding parallel proceedings in various jurisdictions. Parallel proceedings may result in several incompatible judgments.

Each country is sovereign and possesses the freedom to autonomously define the jurisdictional competence of its courts. The world exhibits a vast array of legal systems, each capable of establishing distinct jurisdictional criteria to delineate when courts will be competent to investigate a case. This autonomy emanates from principles of sovereignty and equality, signifying that other states are precluded from challenging the legal acts of sovereign states. The principle of sovereignty is established in the Charter of United Nations that „the Organization is based on the principle of the sovereign equality of all its Members.[3]

The principle of sovereignty was confirmed by PCIJ in case *Wimbledon* were it was stated, that state can limits is sovereignty by signing international treaty.[4] Sovereignty is also used to describe the legal competence that a state has legislative competence within the national territory and jurisdictional competence to adjudicate the case. Jurisdiction defines the authority of courts and other tribunals to resolve disputes, rendering decisions that are binding and enforceable within their respective legal systems.

Thus, individual countries have the authority to establish the competence of their courts by imposing distinct jurisdictional criteria. For example, United States have determined that in order for court to exercise the personal jurisdiction the defendant must engage in systematic and continuous contact in that state[5]. English courts can exercise jurisdiction if defendant is physically present in the country when he was served with writ[6]. These criteria establish territorial jurisdiction. A territorially focused jurisdiction would no longer have much of a limiting function; it would largely follow the extent of state power[7]. In

[3] United Nations. The Charter of United Nations" 1945 Art. 2.1
[4] Case of the S.S. *Wimbledon*, *Britain et al. v. Germany* (1923) PCIJ
[5] *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408 (1984)
[6] *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283, Court of Appeal (England and Wales).
[7] Nico Krisch, Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance, *European Journal of International Law*, Volume 33, Issue 2, May 2022, Pages 481–514, https://doi.org/10.1093/ejil/chac028

addition jurisdiction can determined using other criteria in different countries such domicile, habitual residence, location of property, place of performance of obligation, citizenship and others.

While there exist different jurisdiction criteria there could occur situation when few country courts are competent to solve the same dispute. Due to the existence of different jurisdictional criteria in various states, a situation may arise when the courts of several states will be competent to hear the same dispute (positive conflict) or the court of no state will be competent to resolve the dispute (negative conflict). This situation is called a conflict of jurisdictions. the competition of jurisdictions is also resolved in domestic legislation by incorporating certain mechanisms of legal regulation.

This problem can solved by signing bilateral or multilateral agreements on legal assistance or by adopting multilateral conventions, regulations unifying issues of international jurisdiction. The conflicts of jurisdiction can be solved by several mechanisms: *forum non conveniens*, *lis pendens or forum necessitatis*. For example Rome IV Regulation on succession adopted by the EU provides for "*forum necessitatis*" in order to avoid a situation of "denial of justice".[8] But application of *forum necessitatis* has limits. As it is decided by ECtHR in the case *Naït-Liman case,* where a Tunisian national subjected to arbitrary detention and torture by Tunisian authorities, sought justice outside his home country and initiated a civil case in Swiss courts against his torturer, invoking the *forum necessitatis* doctrine. However, the Court determined that Switzerland possessed a considerable margin of appreciation in regulating access to its courts. It concluded that the restrictive approach adopted by the Swiss courts did not surpass this margin[9].

The recognition and execution of foreign judgments requires the creation and evolution of a system of mutual trust within the member states, through the assumption that all the states respect the fundamental rights of the European Union (hereafter EU), guarantee the fundamental freedoms, respect the European Regulations, and apply what is required by their national laws.[10] This article aims to analyse the concept of *lis pendens*, examining both its drawbacks

[8] Zhou, Jing. "The Forum of Necessity Doctrine in Comparative Private International Law." *Journal of Sociology and Ethnology* 5.2 (2023): 79-85.
[9] Nait-Liman v. Switzerland (application no. 51357/07) 15 March 2018
[10] Kalantzi, A. (2023). Parallel Arbitral Proceedings: An Analysis of the Issue of Parallel Arbitrations in International Commercial Arbitration within the European Legal Space. *The Italian Review of International and Comparative Law, 3*(1), 1-27. https://doi.org/10.1163/27725650-03010001

and advantages, and to compare it with other mechanisms such as *forum non conveniens*, assessing its application within the European Union. Article aims to reveals concept of identity of the claim and identity of "cause of actions" element necessary to apply *lis pendens* and shows the difference in comparison with *res judicata* institute in national laws. The novelty of article consist of presenting new trend in EU legislation, analyse of latest court practices and recommended model suggestions of ELI/UNIDROIT Model European Rules of Civil Procedure[11].

2. THE PRINCIPLE OF *NON BIS IN IDEM*

It is a rule of civil procedure law that courts may not hear cases in which there has been a final judgment of a court or arbitral tribunal rendered in respect of a dispute between the same parties, on the same subject matter and on the same grounds, or an order of the court accepting the plaintiff's abandonment of his claim or approving a settlement agreement concluded by the parties. Civil procedure law prohibits identical claims from being brought before a court[12] . Once proceedings have been brought before the court, it is recognised that the right to bring an action in respect of an identical dispute has already been exercised. A person has the right to bring a case before a court in the absence of a negative presumption. If the right of action has already been exercised once, the court must refuse to accept the action. If such an action is brought, the proceedings are unlawful and the court must dismiss the case[13]. The grounds for refusal to accept an action provided for in the Code of Civil Procedure are based on the prohibition of repetition of identical claims before the court (Latin: *non bis in idem*) and on the legal force of a final judgment of a court or an arbitral tribunal.

Even if from the first glance it seems obvious but in practically is occurs difficulties to apply and determine where the case has the same Couse of action.

The plaintiff filed a lawsuit with the court asking for the judgment of the property acquired from the defendants without grounds, because the plaintiff

[11] ELI/UNIDROIT Model European Rules of Civil Procedure// https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/

[12] Commentary of Civil Procedure. Vilnius. Justitia.2004.P 310

[13] Driukas, Artūras, et al. "Lietuvos Respublikos civilinio proceso kodekso komentaras: II dalis: procesas pirmosios instancijos teisme; III dalis: teismų sprendimų ir nutarčių teisėtumo ir pagrįstumo kontrolės formos bei proceso atnaujinimas: II tomas." (2005). P. 146

repaired his mother's garden house where he lived, and the court annulled the purchase and sale agreement of the garden house. However, the plaintiff had previously filed a claim for the improvement of the garden shed.

A legal question arose in the case, whether under the same factual circumstances between the same parties, it can be stated that the claim to compensate for the costs of improvement of the object is an identical claim for unjust enrichment of the defendants? The Supreme Court of Lithuania stated that the lawsuits are not identical. In order to establish the coincidence of the grounds of claim, not only the factual circumstances stated in each claim must be assessed, but the legal norm on which the respective claim is based must also be taken into account. Even if the factual circumstances coincide, but the legal norm on which the claim is based differs, there will be no legal basis for establishing the coincidence of the claim[14].

In another case Klaipėda District Court approved the settlement agreement concluded by the plaintiff and the defendants. In the settlement agreement, the plaintiff undertook to pay the debt to the defendants, and for the use of the defendants' funds, the plaintiff additionally undertook to pay annual interest. The plaintiff did not pay the defendants the entire debt, so the interest stipulated in the settlement agreement was collected from him during the execution process. The plaintiff filed a second claim against the defendants for damages and relief from his obligation to pay interest under the settlement agreement, since the debtor could not fulfill the obligation due to the fault of the creditor, because they deliberately created obstacles for him to pay the full amount of the debt in order to receive interest from the plaintiff. A legal question arose in the case, whether a claim for changing the terms of a settlement agreement, which is confirmed by a court order, should be considered an identical claim?

The Supreme Court of Lithuania stated that the legal validity of the settlement agreement depends on whether it is approved by a court order or only by the signatures of the parties that concluded it. When the settlement agreement is concluded by its parties and has not been approved by the court, its validity, change, challenge, execution, etc. questions are subject to the general rules of transaction and contract law and the procedure established therein. Meanwhile, a settlement agreement approved by the court has the force of a final court decision (lat. *res judicata*) for its parties. In the practice of the

[14] The decision of Lithuanian Supreme Court 2021-11-04 in the case No. e3K-3-272-1075/2021, R. G. v. V. L. ir R. T.

court of cassation, it has been established that the settlement agreement approved by the court is equivalent to the legal force of the court decision according to the law.

After the parties settle the dispute amicably, conclude a settlement agreement through mutual concessions and the court approves it, the agreement acquires the force of *res judicata,* becomes an enforceable document and is enforced according to such wordings and only to the extent specified in the court's procedural decision on its approval. After the court ruling approving the settlement agreement, the civil case is terminated. This means that the case is closed without making a decision on the merits of the dispute and prevents the re-examination of this dispute in court. Thus, the courts rightly refused to consider the case as identical to the dispute concluded by a valid court order.[15] Similar approach is suggested to apply in EU legislation and it is suggested that the EU lawmaker should clarify that an approval of a settlement by a court transforms it into a 'judgment' under Article 2(a) of the Brussels Ibis Regulation[16].

In one more recent case the court decided to oblige the defendant G.J. to sell ordinary registered shares of UAB "Salinta" to the plaintiff B.A. at a set price, because when the shareholders disagree, such a measure can be applied that one shareholder must have everything. The plaintiff filed another case and asked to determine that the share price is 0 because the company went bankrupt, i.e. circumstances have fundamentally changed. Legal question was raised in the court whether a person, in a another case than the determination of the forced sale price of shares, can make a claim for the change of the sale price of the company's shares determined by a court. Plaintiff asked to apply analogy the provisions of contract law that the contract can be modified in the event of a change in circumstances.

The court ruled that the court decision, which has become binding on the persons involved in the case, also has the force of *res judicata* (settled case). Legal acts stipulate that once the court's decision, order or resolution has entered into force, the parties and other persons who participated in the case, as well as their successors in rights, can no longer bring the same claim in court on

[15] The decision of Lithuanian Supreme Court 2021-10-13 Case No. e3K-3-244-469/2021 E. K. v. R. B. ir I. B.

[16] Hess, Burkhard and Althoff, David and Bens, Tess and Elsner, Niels and Järvekülg, Inga, The Reform of the Brussels Ibis Regulation (November 15, 2022). MPILux Research Paper 2022(6), Available at SSRN: https://ssrn.com/abstract=4278741 or http://dx.doi.org/10.2139/ssrn.4278741

the same basis, as well as dispute the facts established by the court in another case and legal relations; this legal norm enshrines the *res judicata* power of the legalized court decision, and therefore refused to accept the plaintiff's request. A judgment cannot be changed like a contract due to a change in circumstances.[17]

The question of the identity of the claim is not easy to determine. Actions can be recognised as identical only if there is complete identity of the three elements - the parties, the subject-matter of the action and the factual basis of the action. If at least one of these elements does not coincide, the actions cannot be considered identical.

According to the newest decisions of Lithuanian courts it is established, that *res judicata* principles applies to the settlement agreement, confirmed by court. If the settlement agreement was confirm by court so this prevents parties from re-examination of this dispute in court. Also once the court's decision, has entered into force, the parties , can no longer bring the same claim in court on the same basis, even thought the factual circumstance have changed as it possible to alter contracts. But res judicate do not applies in the case when the factual circumstances coincide, but the legal norm on which the claim is based differs, there will be no legal basis for establishing the coincidence of the claim. So it is important to mention that the same claim is defined very strictly. In order for claim to be treated as the same the legal basis of claim must be same and if parties change legal basis for the claim the claim is not treated as identical.

3. LE MÊME OBJET ET LA MÊME CAUSE

The question is clear when the dispute is national but how to solve conflicts of jurisdiction when case has international element? This question is solved at European Union level. First member of the European Economic Community concluded the Brussels Convention in 1968, addressing jurisdiction and the enforcement of judgments in civil and commercial matters.[18] "The instrument that was the cornerstone of the Brussels regime – the 1968 Brussels Convention – was adopted with the primary purpose of ensuring the free movement of judgments within the common market. The harmonized rules on jurisdiction

[17] Decision of Lithuanian Supreme Court 2022-06-23 Case No. e3K-3-180-403/2022 B.A. v. G.J.
[18] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */ *OJ L 299, 31.12.1972, p. 32–42*

and the recognition and enforcement of judgments are crucial for ensuring the integrity of the Brussels regime and avoiding conflicting judgments originating in different Member States"[19]. Convention was replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussel I)[20]. Finally the Regulation was repealed by the Regulation No 1215/2012, which started to apply from 10 January 2015 (Brussel I^{bis})[21]. One of the objectives identified in the Brussel I^{bis} is set in the preamble which states that:

"The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market."

The main principle of jurisdiction according to Brussel I^{bis} is defendant's domicile. The principle of *'actor sequitur forum rei*,' signifying the legal inclination toward the defendant, holds greater significance in the international arena than it does in domestic law. Generally, it is more challenging to mount a defence in the courts of a foreign country than in those of another locality within one's home country. But Brussel I^{bis} set a list of alternative jurisdiction criteria such as the place of performance of contractual obligation, the place of harmful event, the place of branch and ect.

Art.29 of Brussel I^{bis} establishes "where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established".[22]

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[19] Hamed, Alavi and Tatsiana, Khamichonak. "A Step Forward in the Harmonization of European Jurisdiction: Regulation Brussels I Recast" Baltic Journal of Law & Politics, vol.8, no.2, 2016, pp.159- 181. https://doi.org/10.1515/bjlp-2015-0023

[20] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ L 12, 16.1.2001, p. 1–23*

[21] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) *OJ L 351, 20.12.2012, p. 1–32*.

[22] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

So the first prerequisite for the application of the *lis pendens* rule is that an identical or related dispute must be pending simultaneously in the courts of different States. This could be understood as "*cause of action*" to describe such identity. The French term " *le même objet et la même cause*", chosen by the researchers, is broader and describes both the cause of action and the subject matter. Therefore, a claim based on a specific contract for damages against the defendant for the defective performance of the contract and a counterclaim for the termination of that contract on the ground of lack of authority of representation will have to be regarded as identical.

Art. 30 of Brussel I[bis] stipulates, that "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".[23]So there is no requirement that action will be identical.

The content of the specific claim brought is irrelevant to the determination of the identity of the dispute, i.e. the essential element on the basis of which the identity of the case is determined is the ground of the claim brought. Identity does not imply identity of the claim and its cause of action, but only identity of the factual basis of the claim. Detailing the meaning of *lis pendens* and the interconnection of disputes, provides that "proceedings shall be deemed to be related when they are so similar that it is appropriate to hear and determine them together in order to avoid the risk of inconsistent judgments which would result from the proceedings being heard separately". In other words, what is required is not complete identity, but a link between the causes of action such that the possible divergent judgments in the cases would be incompatible with each other.

The concept of related actions is explained by preliminary ruling of European Court of Justice.

A German company initiated legal proceedings in Germany against an Italian buyer to secure payment for the purchase price. The Italian buyer filed a lawsuit in Italy, seeking a declaration that the contract was invalid due to the revocation of the order before it reached the seller for acceptance. The German company invoked the "*lis pendens*" objection. The Corte di Cassazione (Italian

matters (recast) *OJ L 351, 20.12.2012, p. 1–32.*

[23] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) *OJ L 351, 20.12.2012, p. 1–32.*

Supreme Court) referred the matter of interpreting the "*lis pendens*" concept to the European Court of Justice (ECJ) for a preliminary ruling. The ECJ clarified that a situation of "*lis pendens*" occurs when the two actions involve the same parties, the same cause of action, and the same subject matter. These terms must be interpreted independently. In this case, since it was established that the actions involve the same parties and share the same cause of action, the focus shifts to determining if the two actions concern the same subject matter. The ECJ asserts that although an action for enforcing a contract (payment of the purchase price) and an action for rescission or discharge of a contract have different objectives, they share the same subject matter because the central question is whether the contract is binding. Therefore, "*lis pendens*" arises under the Brussels Convention when one party files an action in a Contracting State seeking the rescission or discharge of an international sales contract while the other party's action to enforce the same contract is pending before a court in another Contracting State[24].

In another case HanseYachts, a German manufacturer of motorboats and yachts had sold a boat to its French dealer, Port D'Hiver Yachting. Subsequently, Port D'Hiver Yachting resold the boat to SMCA. After damage was detected in the boat's engine, SMCA initiated interlocutory proceedings before the Marseilles Commercial Court in France, naming Port D'Hiver Yachting and HanseYachts, among others, and seeking measures of inquiry and preservation of evidence. Later a substantive application for compensation for the alleged loss was filed before the French courts. During the interim period, after the initiation of interlocutory proceedings but before the commencement of substantive proceedings, HanseYachts filed an action before a German court seeking a negative declaration, asserting that it was not liable for the incurred loss. Challenging the German proceedings, Port D'Hiver Yachting and SMCA contended that Articles 27 and subsequent provisions of the Brussels Regulation mandated the German court to stay its proceedings, as it was not the first court seized of the matter. In response, the German court referred the matter to the European Court of Justice (ECJ) for a preliminary ruling. In its judgment, the ECJ scrutinized the French statutory provision allowing a party to request interlocutory proceedings (Article 145 of the French Code of Civil Procedure). The ECJ determined that, despite a connection between the interlocutory

[24] Judgment of the Court (Sixth Chamber) of 8 December 1987. Gubisch Maschinenfabrik KG v Giulio Palumbo. Case 144/86.

proceedings and the substantive proceedings, both were independent of each other. Consequently, the ECJ held that the Brussels Regulation did not prohibit the initiation of legal proceedings in a second Member State, even if interlocutory proceedings had already been initiated in the same dispute before the courts of a first Member State. Therefore, the legal proceedings initiated by HanseYachts before the German court were deemed valid by the ECJ.[25]

In one more case where four German insurance companies and Krones AG, a German insured company, against Samskip, a German subsidiary of Samskip Holding BV was invloved. The dispute revolves around Samskip's delivery of a brewing installation to Cerveceria Cuauthemoc Monezum, a Mexican entity. The claimants seek compensation for alleged damage during transport. Similar actions in Belgian courts were dismissed due to an exclusive jurisdiction clause favouring Icelandic courts in the bill of lading. Samskip contends the Belgian judgment, stating Icelandic courts have jurisdiction, binds the referring German court under Arts 32 and 33 of Brussels I. The claimants argue the binding effect is limited to the lack of jurisdiction. The referring court seeks clarification from the CJEU. The CJEU, asserts that a judgment on jurisdiction and the validity of a clause binds other MS courts, encompassing both the operative part and the reasoning supporting it. This decision establishes a uniform definition of *res judicata*.[26]

The aforementioned principle should extend beyond the application of provisional measures to encompass situations where the court deliberates on the annulment or modification of such measures. The *lis pendens* rule should be adhered to, stipulating that only one court at a time should adjudicate on the application of these measures. Failure to do so may result in scenarios where litigants seek rulings from foreign courts to secure the most advantageous outcomes on these matters[27].

In one more case the tanker Prestige sank near the Spanish coast and legal dispute arose between the victims and the insurer. The insurance contract included an arbitration clause designating London as the seat of arbitration.

[25] Judgment of the Court (Second Chamber) of 4 May 2017 HanseYachts AG v Port D'Hiver Yachting SARL and Others Case C-29/16

[26] Judgment of the Court (Third Chamber), 15 November 2012. Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH. Case C-456/11.

[27] Doržinkevič, Artur and Sukhorukov, Ivan. "Effective Application of Provisional Measures under the Brussels Ibis Regulation" Socrates. Rīga Stradiņš University Faculty of Law Electronic Scientific Journal of Law., vol.2023, no.1-26, 2023, pp.75-81. https://doi.org/10.25143/socr.26.2023.2.75-81

Despite this, the victims initiated legal proceedings in the Spanish court. Subsequently, the insurer sought to enforce the arbitration clause by filing a claim before the London arbitral tribunal. The London arbitral tribunal ruled that Spain's claim fell under English law, obliging Spain to adhere to the arbitration clause. Following this, the Spanish court held the insurer liable and a Spanish judgment was issued. Seeking recognition in the United Kingdom, the Spanish judgment was brought before the English High Court, which, in turn, referred a question to the Court of Justice of the European Union (CJEU).

The question pertained to whether an English judgment confirming the enforceability of an arbitral award should be considered a "judgment" for the purpose of recognition and enforcement. The CJEU, in its judgment C-700/20 of 20 June 2022, established that a judgment based on an arbitral award should be understood as a "judgment." This implies that the English High Court could potentially refuse to recognize an inconsistent judgment. However, the CJEU introduced a crucial exception, stating that this rule does not apply if the recognition decision would lead to a result contrary to the fundamental provisions and objectives of the Brussels I Regulation In this specific case, the CJEU found that the arbitral award and, by extension, the English judgment violated the fundamental provisions and objectives of the Brussels I Regulation. This was because the English High Court failed to consider the earlier proceedings in Spain, breaching the *lis pendens* rule outlined in the Brussels I Regulation. Consequently, the English High Court's decision not take into account the ongoing proceedings in Spain was deemed inconsistent with EU law, leading to potential challenges in recognizing and enforcing the Spanish judgment in the United Kingdom[28].

From these decisions we can draw conclusion that interlocutory proceedings and substantive proceedings are not treated related actions and *lis pendens* was not used. While action for payment of the purchase price and an action for discharge of a contract share the same subject matter therefore, l*is pendens* can be used. In addition court judgment on jurisdiction establishes *res judicata* and is mandatory to parties and takes right from parties to initiate repeated process. Arbitral award in another member states also constitutes res judicata. But infringement of *lis pendens* rules can be basis for non recognition of decision.

[28] Judgment of the Court (Grand Chamber) of 20 June 2022 London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain. Case C-700/20

4. PRIORITY PRINCIPLE FOR THE SAME PARTIES

The other prerequisite for applying *lis pendens* is the same parties. According to the facts of one case a cargo owned by (respondents) was carried by boat the Tatry, owned by Zegluga Polska Spolka Alceyjna (appellants), from Brazil to Rotterdam and Hamburg. The cargo was allegedly contaminated during the voyage. Legal actions were initiated in the Netherlands and the United Kingdom by the appellants and respondents. But the defendants were not identical parties and the questions was transferred to European Court of Justice for preliminary ruling. ECJ stated:

"where two actions involve the same cause of action and some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties".[29]

So European Court of Justice clearly identified that *lis pendens* can only toward the same parties. If one party is new so *lis pendens* principle can not be applied.

The fundamental principle of *lis pendens* is based on the priority of the case first brought. While this principle has the obvious virtue of its definiteness and the simplicity of the rule, it also has the disadvantage of making the rule rigid and inflexible. This conception of the *lis pendens* rule can often lead the defendant to take a pre-emptive first step, called his "negative admission" that he has no obligation. Or to encourage the defendant to start proceedings first in a jurisdiction more favourable to him. A "rush to judgment" can adversely affect the defendant if the law is applied in a way that he or she does not feel closely connected to and that does not take into account his or her interests. The principle of *lis pendens* can lead to abuses where one party is tempted to go to court first, thus choosing the jurisdiction. In contrast, in common law countries, the doctrine of *forum non conveniens* does not give greater weight to the so-

[29] Judgment of the Court of 6 December 1994. The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj". Case C-406/92. *European Court Reports 1994 I-05439*

called court of first instance, so the debtor cannot abuse his choice of forum.

The fundamental principles of *forum non conveniens* was laid in the case of *Spiliada Maritime Corporation v Cansulex Ltd.* A stay will be granted based on *forum non conveniens* only if the court is convinced that an alternative forum, possessing jurisdiction, exists and is the more suitable venue for the trial of the action. This may be a forum in which the case can be more appropriately adjudicated for the interests of all parties involved and the interests of justice[30]. However, *forum non conveniens* is not permissible within the European Union, as affirmed in the ruling of the European Court of Justice (ECJ) in *Andrew Owusu v N. B. Jackson*. The ECJ determined that jurisdiction rules grounded in the defendant's domicile are mandatory and immune to any deviation, unless legal acts explicitly authorize derogation from this principle. Exceptions based on the *forum non conveniens* doctrine are disallowed, as the doctrine is incompatible with the mandatory jurisdictional system established by the Convention[31].

Other counties use other criteria to select suitable court where there a conflicts of jurisdiction. "The Model Act ultimately amounts to an overarching rule for selecting the appropriate forum and treatment of subsequent parallel proceedings by generally allowing the first forum with jurisdiction over a dispute to determine the appropriate treatment but not necessarily to force the litigation to occur in that first forum." [32] While in EU factors such as convenience of parties and length of litigation is not evaluated as it was decided in one case where an Austrian company engaged in the sale of children's clothing to an Italian company over an extended period. Following this business relationship, the Italian company initiated legal action in Italy, aiming to obtain a verdict declaring the termination of their contractual agreement. In response, the Austrian seller initiated legal proceedings in Austria, with the objective of securing payment for unpaid invoices from the buyer.

The Austrian court, invoking Article 21 of the Brussels Convention, opted to temporarily halt the legal proceedings, awaiting the determination of

[30] *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10, [1987] AC 460
[31] Judgment of the Court (Grand Chamber) of 1 March 2005. Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others. Case C-281/02.
[32] Teitz, Louise Ellen, Tying Parallel Proceedings to Judgment Recognition: Harmonizing Cross-Border Dispute Resolution (July 10, 2023). New York University Journal of International Law and Politics (JILP), Forthcoming, Roger Williams Univ. Legal Studies Paper No. 217, Available at SSRN: https://ssrn.com/abstract=4505554

jurisdiction by the Italian court. Subsequently, the Austrian company filed an appeal. Concerning the interpretation of *lis pendens* rule, the European Court of Justice (ECJ) asserts that the second-seized court, whose jurisdiction is claimed through a jurisdiction agreement, is obligated to suspend the proceedings until the first-seized court declares itself as lacking jurisdiction. Additionally, the provisions of *lis pendens* must be adhered to, even in cases where the duration of the proceedings before the court in the Member State of the first-seized court is unreasonably prolonged[33].

Lis pendens principle has the obvious virtue of its definiteness and the simplicity of the rule, it also has the disadvantage of making the rule rigid and inflexible. However other mechanisms such as forum *non conveniens* is not permissible within the European Union. In EU factors such as convenience of parties and length of litigation is not even evaluated and the length of proceeding sometimes can lead to situations when justice will not be achieved.

5. CONCLUSIONS

Actions can be recognised as identical only if there is complete identity of the three elements - the parties, the subject-matter of the action and the factual basis of the action. If at least one of these elements does not coincide, the actions cannot be considered identical. According to the newest decisions of Lithuanian courts it is established, that *res judicata* principles applies to the settlement agreement, confirmed by court. If the settlement agreement was confirm by court so this prevents parties from re-examination of this dispute in court. Also once the court's decision, has entered into force, the parties , can no longer bring the same claim in court on the same basis, even thought the factual circumstance have changed. But *res judicata* do not applies in the case when the factual circumstances coincide, but the legal norm on which the claim is based differs, there will be no legal basis for establishing the coincidence of the claim. So it is important to mention that the same claim is defined very strictly. In order for claim to be treated the same the legal basis of claim must be same and if parties change legal basis for the claim the claim is not treated as identical.

Situation is different in international level. First prerequisite for the application of the *lis pendens* rule is that an identical or related dispute must be

[33] Judgment of the Court of 9 December 2003 Erich Gasser GmbH v MISAT Srl. Case C-116/02

pending simultaneously in the courts of different States. This could be understood as "*cause of action*" to describe such identity. The case not necessary must be identical but must be related. Interlocutory proceedings and substantive proceedings are not treated related actions and *lis pendens* was not used. While action for payment of the purchase price and an action for discharge of a contract share the same subject matter therefore, *lis pendens* can be used and this differs from domestic situations. Arbitral award in another member states also constitutes res judicata. But infringement of *lis pendens* rules can be basis for non recognition of decision.

The other prerequisite for applying *lis pendens* is the same parties. So European Court of Justice clearly identified that *lis pendens* can only toward the same parties. If one party is new so *lis pendens* principle can not be applied.

While this principle has the obvious virtue of its definiteness and the simplicity of the rule, it also has the disadvantage of making the rule rigid and inflexible. A "rush to judgment" can adversely affect the defendant if the law is applied in a way that he or she does not feel closely connected to and that does not take into account his or her interests. However, *forum non conveniens* is not permissible within the European Union and factors such as convenience of parties and length of litigation is not evaluated.

BIBLIOGRAPHIC REFERENCES

1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */ *OJ L 299, 31.12. 1972, p. 32–42*

Case of the S.S. *Wimbledon*, *Britain et al. v. Germany* (1923) PCIJ

Commentary of Civil Procedure. Vilnius. Justitia.2004.P 310

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ L 12, 16.1.2001, p. 1–23*

Decision of Lithuanian Supreme Court 2022-06-23 Case No. e3K-3-180-403/2022 B.A. v. G.J.

Driukas, Artūras, et al. "Lietuvos Respublikos civilinio proceso kodekso komentaras: II dalis: procesas pirmosios instancijos teisme; III dalis: teismų sprendimų ir nutarčių teisėtumo ir pagrįstumo kontrolės formos bei proceso atnaujinimas: II tomas." (2005). P. 146

ELI/UNIDROIT Model European Rules of Civil Procedure//

https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/

Hamed, Alavi and Tatsiana, Khamichonak. "A Step Forward in the Harmonization of European Jurisdiction: Regulation Brussels I Recast" Baltic Journal of Law & Politics, vol.8, no.2, 2016, pp.159- 181. https://doi.org/10.1515/bjlp-2015-0023

Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408 (1984)

Hess, Burkhard and Althoff, David and Bens, Tess and Elsner, Niels and Järvekülg, Inga, The Reform of the Brussels Ibis Regulation (November 15, 2022). MPILux Research Paper 2022(6), Available at SSRN: https://ssrn.com/abstract=4278741 or http://dx.doi.org/10.2139/ssrn.4278741

Judgment of the Court (Grand Chamber) of 1 March 2005. Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others. Case C-281/02.

Judgment of the Court (Grand Chamber) of 20 June 2022 London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain. Case C-700/20

Judgment of the Court (Sixth Chamber) of 8 December 1987. Gubisch Maschinenfabrik KG v Giulio Palumbo. Case 144/86.

Judgment of the Court of 6 December 1994. The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj". Case C-406/92. *European Court Reports 1994 I-05439*

Judgment of the Court of 9 December 2003 Erich Gasser GmbH v MISAT Srl**.** Case C-116/02

Kalantzi, A. (2023). Parallel Arbitral Proceedings: An Analysis of the Issue of Parallel Arbitrations in International Commercial Arbitration within the European Legal Space. *The Italian Review of International and Comparative Law*, *3*(1), 1-27. https://doi.org/10.1163/27725650-03010001

Maharanee of Baroda v Wildenstein [1972] 2 QB 283, Court of Appeal (England and Wales).

Nait-Liman v. Switzerland (application no. 51357/07) 15 March 2018

Nico Krisch, Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance, *European Journal of International Law*, Volume 33, Issue 2, May 2022, Pages 481–514, https://doi.org/10.1093/ejil/chac028

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) *OJ L 351, 20.12.2012, p. 1–32*

Roger Williams Univ. Legal Studies Paper No. 217, Available at SSRN: https://ssrn.com/abstract=4505554

Spiliada Maritime Corp v Cansulex Ltd [1986] UKHL 10, [1987] AC 460

Teitz, Louise Ellen, Tying Parallel Proceedings to Judgment Recognition: Harmonizing Cross-Border Dispute Resolution (July 10, 2023). New York University Journal of

International Law and Politics (JILP), Forthcoming,

The decision of Lithuanian Supreme Court 2021-10-13 Case No. e3K-3-244-469/ 2021 E. K. v. R. B. ir I. B.

The decision of Lithuanian Supreme Court 2021-11-04 in the case No. e3K-3-272-1075/2021, R. G. v. V. L. ir R. T.

United Nations. The Charter of United Nations" 1945 Art. 2.1

Zhou, Jing. "The Forum of Necessity Doctrine in Comparative Private International Law." *Journal of Sociology and Ethnology* 5.2 (2023): 79-85.

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