

DABELSTEIN & PASSEHL

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Cross-border effects of CLNI limitation proceedings in Europe

–

Grenzüberschreitende Wirkungen von CLNI-Haftungsbeschränkungsverfahren in Europa

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A. Introduction

B. „Lis pendens“

C. Res iudicata

D. Conclusion





A. Introduction

I. Two issues: „Lis pendens“ and res iudicata

II. Three levels of rules:

1. European level:
Brussels convention 1968 and following,
Lugano convention 1988 and 2007,
Brussels Regulation (no. 44/2001 of 22 Dec. 2000)
2. Convention level:
CLNI 1988, CLNI 2012
(maritime: 1957, 1976, 1996)
3. Domestic law





A. Introduction

III. One judgment of the ECJ:

Maersk Olie & Gas A/S

./ . Firma M. de Haan en W. de Boer

C-39/02

judgment of 14 October 2004





B. „Lis pendens“

I. Description of the problem and relevance in practice

II. European level:

Article 27 Brussels Regulation (BR)

„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.“





B. „Lis pendens“

„Werden bei Gerichten verschiedener Mitgliedsstaaten Klagen wegen desselben Anspruchs zwischen denselben Parteien anhängig gemacht, ...“

„Lorsque des demandes ayant le même objet et la même cause sont formées entre les mêmes parties...“





B. „Lis pendens“ II. Art. 27 BR

1. Maersk Olie & Gas, ECJ 14 Oct. 2004:
 - a) „proceedings“, „Klagen“, „demandes“ (+)
 - b) „same subject matter“, „derselbe Gegenstand“, „le même objet“ → only the respective claims, not the defences (ECJ 8 May 2003, Gantner Electronic) → (-)
 - c) „same cause of action“, „dieselbe Grundlage“, „la même cause“ → facts and legal rules (ECJ 6 Dec. 1994, Tatry) → (-)
 - d) „between the same parties“, „zwischen denselben Parteien“, „entre les mêmes parties“ → (not examined)





B. „Lis pendens“ II. Art. 27 BR

e) Interim result Maersk: no lis pendens situation

f) **“BUT no. 1“**: Art. 28 BR:

„Where related actions are pending in the courts of different Member States, any court other than the first seised may stay its proceedings.“

„Sind bei Gerichten verschiedener Mitgliedsstaaten Klagen, die im Zusammenhang stehen, anhängig, so kann jedes später angerufene Gericht das Verfahren aussetzen.“

ECJ in Maersk: not examined, because proceedings in NL already finished





B. „Lis pendens“ II. Art. 27 BR

2. “BUT no. 2”: legal literature:

lis pendens is not impossible, depends on the details of the limitation proceedings under national law

- F. Smeele (IPRax 2006): in UK similar to negative declaratory actions; in NL second phase renvooi-proceedings
- J. Windahl (European Transport Law 2009): if claim contains allegation that no limitation

3. Tetry case law: „same parties“

4. Interim result





B. „Lis pendens“

III. Convention level: CLNI

1. Relevance for non-BR States

2. **CLNI 1988, Art. 13 Abs. 1:**

„Ist ein Haftungsfond nach Art. 11 errichtet worden, so kann derjenige, der einen Anspruch gegen den Fonds geltend gemacht hat, für diesen Anspruch kein Recht mehr gegen das sonstige Vermögen einer Person geltend machen, durch oder für die der Fonds errichtet worden ist.“

(cf. Art. 13 London Limitation Convention 1976/96)





B. „Lis pendens“ III. CLNI

→ not very clear whether that means that creditor has a choice?

- German literature: yes
- Purpose of the convention: no

→ Case law BGH (1988) :

Claims aiming at unlimited liability remain possible





B. „Lis pendens“ III. CLNI

3) CLNI 2012, Art. 14 Abs. 1:

„Ist ein Fonds nach Art. 12 errichtet worden, so kann eine Person, die einen Anspruch gegen den Fonds geltend machen kann, für diesen Anspruch kein Recht mehr gegen das sonstige Vermögen einer Person geltend machen, durch oder für die der Fonds errichtet worden ist.“

“Where a fund has been constituted in accordance with Article 12, any person who can make a claim effective against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.”





B. „Lis pendens“ III. CLNI

- clearly not a choice
- but only once the fund is constituted
- future of BGH case law?

Problem: The CLNI does not determine in which proceedings the question of breaking the limitation is to be examined (see below under “C. Res iudicata”).





B. „Lis pendens“

IV. Domestic law

- If neither BR nor CLNI prohibit a claim despite the application for limitation proceedings abroad, then domestic law could nevertheless provide for a stay of proceedings.





C. Res iudicata

- I. Description of the problem and relevance in practice
- II. European level

Art. 33 BR:

„A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required.“





C. Res iudicata II. European level

Art. 32 BR:

„For the purposes of this Regulation,
„judgment“ means any judgment given by a
court or tribunal of a Member State,
whatever the judgment may be called,
including a decree, order, decision or writ of
execution, as well as the determination of
costs or expenses by an officer of the
court.“





C. Res iudicata II. European level

1. Maersk Olie decision:

a) „decision“ (+)

→ must emanate from judicial body (C-414/92)

→ but not only final decisions

b) requirement of contested proceedings ? → (-)

- „Denilauler“ (21 May 1980, no. 125/79):
no enforcement of interim measure decision where there were no contested proceedings





C. Res iudicata II. European level

BUT:

- „Hengst Import“ (13 July 1995, C-474/93):

enforcement of Italian payment order in NL even without contested proceedings,

because defendant could have contested the decision





C. Res iudicata II. European level

c) Art. 34 no. 2 BR:

"A judgment shall not be recognised: (...) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;"

→ The last part ("unless...") did not exist in the version of the former Brussels Convention.





C. Res iudicata II. European level

(1) Did “defendant” enter an appearance?

→ ECJ (Maersk Olie): no (only to contest jurisdiction)

(2) Was the document which instituted the proceedings or equivalent document served in sufficient time and in such a way as to enable the defendant to arrange for his defense?

→ ECJ: for the Danish court to decide,
but guidelines:

- decision to constitute fund is “equivalent document”
- requirements of Dutch law and Hague Convention were met





C. Res iudicata II. European level

2. Interim result

3. What does “recognition” mean?

- a) ECJ 4/2/1988 (no. 145/86), Hoffmann/Krieg
- b) suggestion F. Smeele: like art. 17 EU Insolvency
 Regulation no. 1346/2000
 of 29/05/2000
 (similar result)
- c) ECJ 15/11/2012 (C-456/11), Gothaer





C. Res iudicata II. European level

4. Interim result:

Same effects as under the law of the State in which fund was constituted:

– even if in State of recognition other reservations

– even if no CLNI at all

→ That should also concern the question whether claims aimed at unlimited liability remain possible!





C. Res iudicata

III. CLNI

- relevance for non-BR States
- see above: once fund is constituted, no claims outside the limitation proceedings (CLNI 2012)

IV. National Law

- Theoretically possible to give further effects to foreign limitation proceedings, but no practical relevance.





D. Conclusion

1. No automatical *lis pendens* only because of application for constitution of limitation fund.

But depending on rules of domestic law possibility of *lis pendens* situations.

2. Decision to constitute a fund to be recognized in all EU Member States with the same effects as in the State of the fund (defense must have been possible).



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