

Lis Pendens in the Albanian Civil Procedural Code in the light of the European legislation

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Abstract

Justice reform in Albania dates back to 2014 and it is still in progress. It has the scope to reform the justice system by affecting all aspects of its organization, functioning and administration in order to strengthen and increase the independence of the justice system in Albania. Among other things, this reform approved Law 38/2017 on some additions and amendments to the Civil Procedure Code of the Republic of Albania, which aims to improve the access to justice, the adjudication of cases within a reasonable time and the non-delay of cases. In fact, the innovations of this law are numerous, so for this paper it has been selected to analyze an institute which from the

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point of view of the authors is important such as the Lis Pendens. This institute aims to regulate a situation of simultaneous pending of two proceedings with the identity of the parts, object and title that have been brought before the courts of different states. The Albanian Civil Procedural Code lacks a proper definition of international Lis Pendens, but it is regulated lately in the provision of article 38 of this code, which by law no. 38/2017, has undergone relevant changes, to be object of analysis in this article. These changes are in line with those in the European legislation. Therefore, object of our analysis will be also the problems in the judicial practice regarding the competence of judges which brought the need for changes in the European discipline of Lis Pendens and were disciplined in the EU Regulation no. 1215/2012, which for the first-time regulated cases of litigation between Member States and third States. Finally, will be analyzed the effects of these changes in the international context and the impact they will have on the Albanian civil process.

Keywords: *Lis Pendens, Law 38/2017, EU Regulation no. 1215/2012, justice reform*

I. Introduction

If we were to give the meaning of Lis Pendens, we would define it as a mechanism of civil procedural law that aims to avoid conflict between judges, in cases where two different judges are facing the same case. So there are identical issues that have in common three identical elements: personae, causa petendi, petitum. The aim is to safeguard the ne bis in idem principle through the application of the criterion of prevention, on the basis of which the judge actually competent to decide the case on the merits is the judge first seised, while the one seised subsequently must, in any state and degree of the trial, declare by order Lis pendens and order the cancellation of the case.

Judicial cases are increasing not only in Albania but also internationally the judges are more and more overloaded. Therefore in the case of the Lis Pendens, the simultaneous treatment of the same issues and with the same parties would not only increase their burden, but would often lead to conflicting decisions. So for a judicial economy and shortening the length of litigation, the European legislator has long considered the problem of Lis Pendens between Member States in its regulations.

But the case law regarding the Lis Pendens has highlighted problems that over the years have brought the need to reformulate these regulations. Based on the case law of the ECJ, the European legislator has made changes to alleviate the situation



regarding the treatment of problems related to civil proceedings that have been set up simultaneously in two different countries and that have the same parties and the same object. These changes are also reflected in the latest Brussels Ibis regulation, in articles 29-31 which will be the subject of our analysis.

Part of this paper will be also the reflections of this institute in the Albanian Civil Procedural Code. The Albanian Civil Procedural Code lacks a proper definition of international *Lis pendens*, but it is regulated lately in the provision of article 38 of this code, which by law no. 38/2017, dated 30.3.2017 has undergone relevant changes, to be object of analysis in this article. This institute aims to regulate a situation of simultaneous pending of two proceedings with the identity of the parties, object and title that have been brought before the courts of different states (Lupoi, M.A., 2002 page 615). In fact, in this paper will be analyzed the changes that the Albanian Code of Civil Procedure of 2017 has undergone compared to the old one.

In order to achieve the main purpose of this paper we have formulated some research questions which we will try to answer in this paper. How is the problem of civil proceedings that have been set up simultaneously in two different countries and that have the same parties and the same object in the EU context solved? What rules do Member States apply in cases of *Lis Pendens* and what are the regulations which lay down these rules? What happens in cases where the parties by an exclusive agreement have chosen the jurisdiction of the Court? What does the reformulated provision of the Albanian Code of Civil Procedure provide regarding the *Lis Pendens* and is it in line with the European changes? What will be the effects of European and national legal changes regarding *Lis Pendens*?

In order to answer the above questions some scientific methods have been used, such as the literature review, descriptive and analytical methods, and the study of practical cases.

II. European *Lis Pendens* and its regulation in the EU Conventions

The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was signed in 1968. Its purpose was to enable the free and easy movement of decisions. In the context of the realization of the main objective of the EU, which is the functioning of the internal market, an effective functioning of the Jurisdiction in the recognition and implementation of decisions, which is the main object of this Convention, is needed. As a result of the changes dictated by the problems encountered in the jurisprudence of the EU countries, the Brussels Convention was subsequently replaced by Regulation 44/2002 or as we call Brussels I. When the European Commission launched the process of

revising the Brussels I Regulation in 2000, it identified five main objectives, one of which was to strengthen jurisdiction clauses (Cuniberti G, 2015). Most recently, on 10 January 2015, EU Regulation 1215/2012 or as we call it Brussels I bis entered into force, it repealed Regulation 44/2001 and constitutes the latest EU regulation on the Jurisdiction and Execution of Decisions in Civil and Commercial Matters. Although the object of our analysis will be the last regulation of Brussels I-bis, in this paper we will also refer to the previous regulations which have formed the legal basis of the most relevant decisions of the European Court of Justice and have preceded the regulation of last Brussels I Bis.

We can also say that the last regulation is based on and is considered a Brussels I Recast which is also based on the previous regulation of 1968, following principles, lines and a structuring similar to the previous regulations. As the jurisdictional provisions of the Brussels Ibis Regulation will apply only to proceedings initiated on 10 January 2015 and onwards, it will take time for it to form the basic Regulation for the recognition and enforcement of judgments. Among the presently existing instruments on European international civil procedure the Brussels' Regulations are certainly the most important ones (Magnus U. & Mankowski P., 2007).

In this context we cannot leave without mentioning another important Convention in this field, such as the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988 which contains similar rules to the Brussels Convention and which applies to parties domiciled in Denmark, Iceland, Norway and Switzerland. In order to achieve the main objective of this paper, which has to do with the latest changes in Article 38 of the Albanian Code of Civil Procedure, we will make an analysis of some aspects of Articles 29-31 of Regulation 1215/2012 to understand whether this code has effectively reflected recent changes to this Convention. This analysis is important given Albania's intentions to become part of the EU, and one of the tasks set before it is to harmonize legislation with that of the EU.

Although it should be noted that the purpose of Conventions on Jurisdiction is not to unify procedural practices in the Member States, but to determine which court has jurisdiction in disputes relating to civil and commercial matters, in order to facilitate the enforcement of judgments. As stated above, the Lis Pendens rule applies to concurrent proceedings in the Member States courts, regardless of whether the jurisdiction is established on the basis of the Regulation, provided however the subject-matter is within the scope of application of the Regulation (Van Calster G., 2016 page 174).

One of the most important innovations for the Albanian context is the one brought by Article 31 of the Brussels Ibis Convention in relation to cases of litigation between Member States and third States. Referring to the provisions of the previous Regulations the orientations were contrasting. Problems arose when

the case was referred to the competent European judge according to the criteria of the Convention, after the judge of a third country. Part of the doctrine considered the respect for previous non-European litigation as a limitation of the jurisdiction of the European judges. On the other hand, it was argued that when refusal or suspension does not affect relations with another Contracting State, the derogation from the following conventional competence does not prejudice the uniformity of the application of the Brussels discipline, therefore the various national rules remain in force (C-281/02, *Owusu v. Jackson*).

III. Lis Pendens in Brussels I Bis Regulation and in the Albanian Civil Procedure Code

After an overview of the evolution of the Brussels Convention to date, let's make a brief analysis of the Brussels I bis Convention today with reference to the relevant articles governing the Lis Pendens. This analysis will help us to understand the current situation of Lis Pendens in the international context but also in the national one, because in this part of the paper we will analyze the changes that the Albanian Code of Civil Procedure has undergone, including in one of its provisions the Lis Pendens.

Article 29(1) of the Brussels I bis Convention provides that without prejudice to Article 31(2), 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. The purpose of this provision is to avoid the issuance of 2 incompatible decisions by different courts of the Member States, which would violate the central principle of mutual trust in the administration of justice in the EU. The following Article 29 (2) provides that in the cases provided for in 31 (2), upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32. Finally 29 (3), states that where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

While, according to Article 30 (1), where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. 30 (2) Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. 30 (3) For the purposes of this Article, 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.

The purpose of these two articles is to give priority to the court which was elected first, avoiding parallel proceedings, which in addition to incompatible decisions would bring unnecessary court costs for the parties, overload for the courts and a poor administration of justice.

One of the most radical recent changes in private international law internationally is the development of the law in relation to the effect of choice of court agreements (Keyes M., 2020 page 3). One of the important innovations of the Brussels Ibis Convention is Article 31 which provides a solution to one of the most common problems encountered in the Member States in relation to the application of the rules of *Lis Pendens* in cases of application of an exclusive agreement on the choice of jurisdiction. This issue was initially dictated by the critics who followed Gasser's decision. Referring to the previous discipline of Brussels I, the Regulation obliges the court elected by agreement of the jurisdiction to suspend the proceedings if another court is first seised.

Meanwhile, the Recast of the Regulation has made a very important change in this aspect, giving priority to the court elected by exclusive agreement.

According to Article 31(1) where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court. In continuation 32 (2) determines that without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement. 32 (3) Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

The main advantage of the new *lex lata* in comparison to the previous legal situation is that it strengthens jurisdiction agreements and the parties' reasonable expectations when they formed this agreement (Heinze 2011a, page. 588; Radicati di Brozolo 2010 page. 123; Lazic V. & Stuij S., 2017 page 17).

Another very important innovation of Brussels I Bis is Article 33 of the Convention. This Article refers to cases of international *Lis Pendens* between Member States and other States. Thus, without excluding the possibility of adjudicating cases in the courts of different states, Article 33 of the Convention stipulates that: Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and if proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings according to point 33(1)(a).

It is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State and 33(2)(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice, and cases when the court of the Member State may continue the proceedings at any time if: according to point 33(2)(a) the proceedings in the court of the third State are themselves stayed or discontinued, 33(2)(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time, 33(2)(c) the continuation of the proceedings is required for the proper administration of justice.

Also 33(3) determines that the court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State. Point 4 of this provision contains an instruction for the court of the Member State that shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

This article is very important also in terms of the current Albanian context regarding Albanian *Lis Pendens*. As set out in the introduction to this paper, the current Code of Civil procedure has undergone significant changes in terms of some definitions of international *Lis Pendens*. Prior to the 2017 amendments, Article 38 of the Albanian Civil Procedure Code provided that the Albanian Court does not terminate or suspend the adjudication of a dispute when the latter, or any other related matter, is being tried by a foreign court (Albanian Civil Procedure Code, 2014).

Currently, with the changes of 2017 this article has been reformulated. It provides that when the same lawsuit, between the same parties, with the same cause and object of lawsuit is being reviewed simultaneously by a court of a foreign state and the Albanian court, the latter may suspend the trial of this dispute when: the lawsuit has been filed before in time in the court of the foreign state; the decision of the court of the foreign state is possible to be recognized and / or executed in the Republic of Albania; the Albanian court is convinced that the suspension is necessary for the proper administration of justice.

While in point 2 this article provides that the Albanian court may continue the process at any time if: the possibility of having two incompatible decisions disappears; the trial in the court of the foreign state has been suspended or terminated; the Albanian court is convinced that the process in the court of the foreign state will not be completed in a reasonable time; or the continuation of the trial is required for a better administration of justice. Finally, the Albanian court terminates the trial when the court of the foreign state resolves the dispute with a final decision, which can be recognized and / or executed in the Republic of Albania court (Albanian Civil Procedure Code, 2017).

This regulation is in line with the latest amendments to the Brussels Ibis Convention, while not all states have provisions that refer to international litigation in their Codes of Civil Procedure. But from a practical point of view there is still everything to be seen as these changes are recent and we still do not have a consolidated case law on this topic. However, this article is very important and will resolve many dilemmas regarding the jurisdiction for resolving cases between the same parties, with the same cause and object of lawsuit. Judges will now find it easier to define jurisdiction when they have a special provision to which they can refer, uniformed with European Conventions.

IV. The ECJ's Case Law on Lis Pendens

1. Gasser vs MISAT (C-116/02). Exclusive Jurisdiction Agreements

Austrian supplier Gasser and Italian distributor MISAT had signed a contract for the supply of children's clothing. In a clause included in the contract, they had stipulated that in case of dispute, the court that would have jurisdiction to resolve the dispute would be the Austrian court. Contrary to what was stated in the contract clause, at the moment when a dispute arose between the parties, MISATI addressed an Italian court for the termination of the contract, referring to Article 21 of the Brussels Convention.

This article stipulates that when proceedings involving the same case and between the same parties are brought before the courts of different Member States, the second instituted court shall suspend the proceedings until the jurisdiction of the first court is established. If the first elected court is found to have jurisdiction, then the second elected court must reject the jurisdiction. This is done for a better administration of justice and to avoid contrasting decisions by the courts. Given that the parties had previously reached an agreement on the jurisdiction of the court, Gasser brought the same case before the Austrian court, where the case was finally referred to the ECJ for an interpretation of the case in question concerning Lis Pendens and the application of Article 21 of the Convention.

The parties had different views on this issue. Italy, the Commission and Misat argued that the doctrine of Lis Pendens should take precedence. While MB and Gasser argued that the choice the parties had made regarding the jurisdiction of the court should have priority. The Advocate General was also of the opinion that the contract clause should be applied in relation to the court selected by the parties to resolve the dispute. In conclusion, the European Court of Justice ruled that a court elected by court agreement should suspend its proceedings, like any other second elected court within the Brussels regime, until the first elected court declares that



it has no jurisdiction. The court decision gave priority to the jurisdictional rules of the Brussels regime over the autonomy of the parties, which was amended in the Brussels Regulation I of 2012.

2. Irmengard Weber vs Mechthilde Weber (C-438/12). Exclusive Jurisdiction

This issue has to do with the conflict between 2 sisters over a property they co-owned in Munich. M. Weber sold his share to ZbR, a company established under German law, in which M. Weber's son worked as a director. In one of the clauses of this contract concluded on October 28, 2014, M. Weber reserved the right to withdraw from the contract within March 28, 2018. In the meantime, informed of these facts, referring to a notarial deed, which defined the right of its pre-purchase, the co-owner I. Weber, on 18 December 2014 exercised through a letter the right of pre-purchase.

Thus, on February 25, 2015, the Weber sisters entered into a contract which provided for the transfer of part of M. Weber to her sister I. Weber at the price for which was accorded the sale of the property of the company Zbr. However, they asked the notary not to complete the procedures for the transfer of ownership until M. Weber exercised her right to withdraw from the contract concluded with Mr. Gbr. On 2 March, I Weber paid the agreed price of 4 million euros and on March 14, 2015, M. Weber exercised her right to withdraw from the contract with the company Zbr, according to the clause provided by this contract.

For this reason the company Zbr filed a lawsuit against the sisters in Milan claiming that the exercise of the pre-emption right was ineffective and invalid and that the contract concluded between M. Weber and that society was valuable. I. Weber subsequently instituted proceedings against M. Weber in Germany seeking an order for M. Weber to register the transfer of ownership. The German court suspended the proceedings under Article 27(1) and, under Article 28(1) and (3) of Brussels I, given that the proceedings had already begun in Milan. The case was referred to the ECJ, which in its interpretation took into account its case law for the Brussels Convention and for Brussels I.

The ECJ found that the lawsuit seeking a statement before the Italian court that was not exercised validly as regards the category of proceedings having as object a real right over immovable property under Article 22(1). According to the ECJ referring to Article 22(1) the second elected court has exclusive jurisdiction, therefore a decision given by the first elected court such as the Court of Milan which does not take into account Article 22(1) cannot be recognized in the State where the immovable property is situated in accordance with Article 35(1). It found that in those circumstances, the second elected court, the German Court,

could not suspend its proceedings or refuse jurisdiction because it had exclusive jurisdiction. This was also the opinion of the Advocate General.

3. Owusu v Jackson and Others (C-281/02).

Lis Pendens in third States and the forum non conveniens.

In the fall of 1997 Mr. Owusu, a British citizen living in the United Kingdom, was spending his vacation in Jamaica, where he had rented an apartment from Mr. Jackson who was also resident in the United Kingdom. The contract also included the provision of a private beach. Mr. Owusu, while diving in the Mammee Bay, collided with a shore of sand submerged in water and suffered a vertebral fracture, remaining tetraplegic. For this reason Mr. Owusu sued Mr. Jackson and several Jamaican companies which were licensed to offer the beach in English courts for damages caused as a result of the accident occurred as a result of lack of warning of hidden dangers that may have the private beach.

The respondent parties raised the exclusion of forum non conveniens, claiming that the dispute represented a more intense connection with the Jamaican territory, so this court would be competent to resolve the issue in question. The High Court dismissed the defendants' objections, arguing that according to European jurisprudence, Article 2 of the of the Brussels Convention would oppose an application of the forum non conveniens doctrine. Article 2 provides: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State..."

The Court of Appeals, Civil Division, addressed the case to the Court of Justice. The ECJ initially rejected an argument put forward by the defendants and the United Kingdom Government that the rules of residence in Article 2 of the Brussels Convention did not apply, because the plaintiff and one of the defendants resided in the United Kingdom and the other defendants resided in a non-contracting state. So for the Convention not to apply, the existence of an international element was required, as happened in this case. The Court also held that the doctrine of forum non conveniens was incompatible with the Brussels Convention except as expressly provided by the Convention. She also argued, inter alia, that this doctrine could not be reconciled with the Convention because it would risk the guarantee of legal certainty and the predictability of the rules of jurisdiction and that a defendant could generally exercise protection before the courts of his place of residence.

The ECJ ruled that the plaintiff has the right to institute proceedings in England, even though England had nothing to do with the accident and Jamaica appears to be a more appropriate forum for adjudication. The Court held that no matter how true the difficulties set forth in their claims concerning the costs of the English



proceedings, the logistical difficulties arising from the geographical distance, the need to assess the substance of the case by Jamaican standards, they were not such as to put in doubt the binding nature of the fundamental rule of jurisdiction contained in Article 2 of the Convention.

V. Conclusions

Recast Brussels I, is currently one of the most up-to-date and important European acts in relation to the determination of jurisdiction in cases of international Lis Pendens. The greatest achievement of this Convention are the regulations regarding the choice of the exclusive agreements of jurisdiction, which in this Convention are given priority in the cases when a certain issue can be tried in the courts of different states.

This Convention also defines certain regulations in respect of cases of Lis Pendens created between Member States and Third States. These regulations are also reflected in Article 38 of the Albanian Code of Civil Procedure which is in line with Article 33 of the Brussels Ibis Convention. These regulations will improve the work of the courts resolving many problems regarding the Lis Pendens. Consequently, we will have a resolution of court cases in a shorter time without delays and a better administration of justice.

Also, we have a recommendation regarding the regulation of the institute of Lis Pendens in the Albanian Code of Civil Procedure. It relates to the external Lis Pendens, which has been the object of this paper. Although Article 38 of the Albanian Code of Civil Procedure has brought important changes, it would be useful to have a provision for the regulation of external Lis Pendens in cases where there is an exclusivity agreement in relation to jurisdiction. In our opinion, the latter should also be in line with the provisions of the Brussels I bis Convention.

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