THEMIS COMPETITION

International Cooperation on Civil Matters

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A PURPOSIVE INSTRUMENT in JUDICIAL COOPERATION:

INTERNATIONAL PENDENCY

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INTRODUCTION

Taking into consideration the historical development of the European Union (herein after EU), it can be said that EU is based on four fundamental freedoms: free movement of persons, goods, capital and services. In order to ensure the survival of these four fundamental freedoms, making a judicial cooperation between the Member States of the EU is indispensable. The EU, a Community based on, and characterized by the common market provides the ideal background for legal disputes arising simultaneously in different Member States since contradictory decisions are undesirable[1].

The basic regulations enforced by the EU are Council Regulation EC No 44/2001 of December 2000 on Jurisdiction and the Recognition and Enforcement of the Judgments in Civil and Commercial Matters (Brussels I Regulation), Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels II bis Regulation) and Council Regulation (EC) No 4/2009 of December 2008 May 2000 on Jurisdiction, Applicable Law, Recognition and Enforcement of decisions and Cooperation in Matters Relating to Maintenance Obligations (The Maintenance Regulation). For a stronger judicial cooperation between the EU Member States, Council Regulation EC No 44/2001(Brussels I Regulation) reviewed and Council Regulation EC No 1215/2012 of December 2012 on Jurisdiction and the Recognition and Enforcement of the Judgments in Civil and Commercial Matters (hereinafter, '**Regulation**' or '**Recast**') was adopted on December 12, 2012 and entered into force on January 10, 2015.

It would not be wrong to say that judicial cooperation and coordination between the EU has increased thanks to the work carried out in cooperation and harmonization of international private and civil procedure law within the EU for a long time. Recast (EC No 1215/2012) is as an indication of this. The purpose of the Regulation is that judgments should be enforceable in other Member States without legal hurdles. For example, by virtue of article 39 of Recast *'A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'.* This regulation regarded as a very important and final step.

Furthermore, Recast regulates the conflict of laws in the EU, straight applicable to the members of EU. Articles 29 to 34 of the Brussels Recast contains the basis of *lis pendens* and related actions due to this. A well-known mean to avoid duplication of legal proceedings is the plea of *lis pendens*. According to this principle, it is not permissible to initiate new proceedings if litigation between the

[1] EISENGRAEBER J., ***'Lis Alibi Pendens Under The Brussels I Regulation-How To Minimise -Torpedo Litigaiton – And Other Unwanted Effects Of The -Fisrt-Come First-Served Rule'*** Centre for European Legal Studies, Exeter Papers in EuropeanLaw No, 2004, p. 5.
http://law.exeter.ac.uk/cels/documents/papepr_llm_03_04_dissertation_Eisengraeber_001.pdf

same parties and involving the same dispute is already pending. The European legislation on conflicts of jurisdiction has taken account of this and adopted the *lis pendens* principle in a way that it is being extended across borders if the same action is brought up in the courts of different Member States[2]. To hinder any irreconcilable judgments among the EU, a strict application of *lis pendens* has been established by the courts of Member States and European Court of Justice (ECJ) also.

In this study, it is scrutinized international pendency regulations specified by Recast besides relevant ECJ decisions. In addition, it is asserted that varied views in Turkish doctrine and decisions of Court of Appeals relevant to this issue, evaluation of Turkish Law within the framework of the Brussels.

The first chapter of the study is dedicated to historical background of European Civil Procedure. This section concludes agreement signed in the historical process leading to European Civil Procedure.

In the second chapter of the study, regulations of Recast about pendency and related actions are examined. Firstly, general overview of the New Recast of the Regulation Regarded 29-34 of the Articles is stated and secondly, definition and scope of the '*Lis Pendens', 'Related Actions', 'Exclusive Jurisdiction and Jurisdiction Agreement*' is determined and particularly 'The new rules about proceedings for Non-Member States' are examined in detail.

In the third and last chapter of the study is entitled 'Lis Pendens in Turkish Law'**.** Within this scope international pendency approaches in Turkish law is discussed, later on the principle of *"Forum Non-Conveniens*" (Regulated by the Article 30.3 of Recast) and the situation in Turkish law is compared. Finally, the conclusion we have achieved in the study is settled.

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2 EİSENGRAEBER, p. 5.

I. HISTORICAL BACKGROUND OF EUROPEAN CIVIL PROCEDURE

Judicial cooperation in civil matters has developed into an independent and separate field of European Law.

The term of judicial cooperation in civil matters originated first from the Rome Treaty, the Treaty establishing the European Economic Community (EC Treaty) based on Article 220, which defined judicial cooperation in civil matters as a subject of common interest to the Member States[3]. Various conventions have been concluded directly or indirectly on the basis of Article 220. However, the major achievement was the *1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*.

By Article 220, the Member States agreed to enter into negotiations with each other, so far as necessary, with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards[4]. In a note sent to the Member States on October 22, 1959 inviting them to commence negotiations[5]. After the negotiations, The Brussels Convention signed in Brussels on September 27, 1968, and entered into force on February 1, 1973 between the six founding States of the European Economic Community[6]. The Convention provided the criteria for determining the competent judge for procedures in the Member States. It can be stated that European Civil Procedure based on this Convention.

Over the years, all new Member States of the EU adopted the Convention. In 1988, the relationships with the European Free Trade Association (EFTA)[7] were regulated through the Lugano Convention (herein after LugC) of 16 September 1988, and has been effective since January 1, 1992. The LugC, which is a “parallel convention” to the “Brussels Convention of September 27, 1968”, concluded between Member States of the European Communities (EC) and certain members of the European Free Trade Association (EFTA). After a few years, the number of the EC Member States- later, the EU- increased, and not all present EU Member States are parties to the LugC. Consequently, the rules for jurisdiction, recognition and enforcement between the new Member States of the EU and the parties to the LugC diverged. Moreover, ambiguities and deficiencies in the text of the LugC soon

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[3] HELLNER M., ***'The Limits to Judicial Cooperation in civil matters: taking legality seriously',*** RGSL Working Papers No. 9, RIGA 2002.

[4] JENARD P., ***“Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters”***, D.z Urz.WE 1979, C.59**.**

[5]On receiving this note, the Committee of Permanent Representatives decided on February 18, 1960 to set up a committee of experts and they met for the first time from July 11 to 13, 1960. At its 15th meeting, held in Brussels from December 7 to 11, 1964, the committee adopted a "Preliminary Draft Convention" and the experts adopted The Draft Convention on July 15, 1966. P. JENARD, p.

[6] ECC included at the time of signing Brussels Convention: Italy, France, Germany, Belgium, the Netherlands and Luxemburg.

[7] EFTA included, at the time of signing of the Lugano Convention: Austria, Finland, Iceland, Norway, Sweden and Switzerland. Austria, Finland and Sweden later became Member States of the European Union.

became apparent. Therefore, EU and EFTA created a revised version of the LugC in 1999, which aimed to clarify important questions of its application[8].

The term ''judicial cooperation in civil matters'' is in also the Maastricht Treaty, the Treaty of the EU, which defined judicial cooperation in civil matters as a subject of common interest to the Member States.

On May 1, 1999, Treaty of Amsterdam came into force. By this treaty, the policy of cooperation between Member States became a matter for legislative action by the institutions of the European Community.

According to Treaty of Amsterdam Article 61.c and 67.1, 1968, Brussels Convention has converted to a Regulation[9] by European Council on December 2, 2000, called as The Brussels I Regulation, and entered into force on March 1, 2002. It replaced the previous Brussels Convention of 1968, which had the same subject matters. Brussels I sets out a closed jurisdictional system, assigning jurisdictional competence as between courts of the Member States to resolve cross-border civil and commercial disputes[10].

II. PENDENCY AND RELATED ACTIONS ON BRUSSELS RECAST

1. General Overview of the New Recast of the Regulation Regarded 29-34 of the Articles

The Brussels I Regulation was revised subsequently and a new 'recast' version of the Regulation was adopted on December 12, 2012 and entered into force on January 10, 2015 and abolished the Brussels I. Even though both regulations oversee the same regulatory sphere in EU jurisdiction, which can be designated as EU regulations on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels Recast is aimed at resolving the shortcomings of the Brussels I. In other words, Brussels Recast is more specific in scope. Although there have been several changes, there are two changes that seem to be standing out amongst the other ones. These are (i) the status of the third parties (i.e. Non-Member States) regarding the application of *lis pendens* and *related actions*, and (ii) the amendments aimed at preventing the use of 'torpedo actions.'

Regarding the *lis pendens* and *related actions*, these amendments issued in the Brussels Recast, allows the application of pendency to the cases where defendant is not domiciled in a Member State. For instance, when the Article 6.1 of the Recast examined, its scope also covers parties in the Non-Member States such as Turkish citizens. This is an exception, which is different from Brussels I

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[8] MULLER, L. , The Revised Lugano Convention From the Swiss Perspective, 18 Colum. J.Eur. L. F. 9 (2011).

[9] Council Regulation EC No 44/2001 of December 2000 on Jurisdiction and the Recognition and Enforcement of the Judgments in Civil and Commercial Matters. After the Brussels I Regulation had been in force and revised Brussels Convention 1968, the new LugC applies in proceedings between the EU Member States and Iceland, Norway and Switzerland. The new LugC was signed on October 30, 2007.

[10] EUROPEAN COMMISSION (EC), '***Judicial cooperation in civil matters in the European Union, A guide for legal practitioners',*** 2014, p.13.

Regulation. In Section 9 of the Recast, there are regulations about *lis pendens* and *related actions*. The novelty of Brussels Recast is the extension of the regulatory framework regarding the application of the pendency when one of the parties is a Non-Member State.

The other important amendment was made in order to prevent the use of what has been labeled as the 'torpedo actions.' Under the Brussels I, a party can commence hearings in a court of choice in any EU Member State disregarding the exclusive jurisdiction agreement. In this case, the other party who brings parallel proceedings in the designated court under the exclusive jurisdiction agreement would be disadvantageous as the "chosen court had to wait until the court first seised determined whether it had jurisdiction"[11]. With the Brussels Recast, competency of the chosen court as dictated by the exclusive jurisdiction agreement made clearer. In other words, no matter which court of the EU Member States that the one of the parties attempt to commence proceedings in, the chosen court has the priority to seise.

2. General Examination on the Articles

In Section 9 labeled, as "lis pendens-related actions" there are six articles outlined as articles 29-34. The changes made in the Brussels Recast I can be scrutinized as follows:

2.1 Definition and Scope of the "Lis Pendens"

Article 29[12] is about the status and application of pendency, which occurs in the courts of different Member States[13]. The pendency applies to cases where a proceeding involves the same cause of action and between the same parties[14]. When the article examined, it is seen that, the regulation has strict rules that cannot be seen in any other national regulations about pendency. The rule explicitly

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[11] COX A., ***'The Recast Brussels Regulation: What It Means for Commercial Parties'*** Group Briefing, 2015, 1, p. 2. http://www.arthurcox.com/wp-content/uploads/2015/02/Arthur-Cox-The-Recast-Brussels-Regulation-What-It-Means-For-Commercial-Parties-Feb-2015.pdf

[12] **Article 29:** *'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. In cases referred to in paragraph 1, 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. 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'.*

[13] Since the Roman law, it is deemed undesired situation that the same legal dispute has been tried more than once *(ne bis de eadem re sit actio)*. Otherwise, it causes waste of time, work and money; furthermore, the possibility of the emergence of two different court decisions may cause violation of legal certainty and reliability. B. KURU, R. ARSLAN, E. YILMAZ, **'Civil Procedure Law',** Ankara 2014, p. 291; C. ŞANLI, E. ESEN, İ. ATAMAN FİGANMEŞE, **‚International Civil Law (Private International Law)**, İstanbul 2013, p. 395-396; A. ÇELİKEL/ B.B. ERDEM, **Private International Law,** İstanbul 2016, p. 564.

[14] In ***Gubisch case*** the European Court of Justice (ECJ) stated that two actions are identical if they are between the same parties and 'involve the same cause of action and the same subject-matter'. In *Gubisch* a German limited partnership, Gubisch Maschinenfabrik KG, started proceedings in Germany against a purchaser from Italy, Mr. Palumbo, for payment arising from a contract of sale. Subsequently, Mr. Palumbo brought an action in Italy seeking a declaration that the contract between both parties was invalid. After a *lis pendens* plea was rejected by the Italian court, Gubisch appealed to the next highest court in Italy, which asked the ECJ to interpret the term 'same subject-matter'...The Article 21 of 1968 Brussells Convention applies where two actions are between the same parties and involve the same cause of action and the same subject-matter.... **(Gubicsh Mashinenfabrik KG v. Guilio Palumbo, ECJ C-144/86)** http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61986CJ0144

states that when the pendency clause is applied to a case, which involved the courts of the different Member States, any court other than *the court first seised* ought to stay its proceedings on its own motion - *ex officio*[15]. Staying the proceedings would continue until the first court that seised the jurisdiction adjudges. Thus, the first court where the actions are pending would be the one who have competency. If the court first seised concludes that it has jurisdiction, all the other courts must decline jurisdiction even if they are of the opinion that the conclusion of the court first seised was erroneous. This means that the *lis pendens* rule delegates to the court first seised a very **significant power**, which is clearly based on a great deal of confidence and trust[16].

So far, the Article 29 is exactly the same in Brussels I and Brussels Recast. Yet, there is an important change made that was not in the Brussels I. At the very beginning of the paragraph of the Article 29, an extra statement was included which is as follows: "Without prejudice to Article 31.2…"[17] which means an exception to the rule "*first seised has the competency"* rule. With the inclusion of this exception, which will be explained more in detail under Article 31, if there is a jurisdiction agreement between the parties, then the Article 29.1 cannot be applied to the dispute.

According to the Article 29.2, upon request by the court first seised of the dispute which is said in the paragraph 1, the other courts ought to inform the first court about the date when the dispute is seised immediately.

The last paragraph of the article 29 is about the decision of rejection of venue. Until the jurisdiction of the court, which is first seised, is established, the other courts have to decline their jurisdiction in favour of that court.

2.2 Definition and Scope of the "Related Actions"

The Article 30[18] is about related actions as the title suggests. It should be stated that in the Article 30, there has been no significant changes by the Brussels Recast. At the very last paragraph of this Article, the paragraph states the aim of this regulation and also gives a definition about what can

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[15] The ECJ expressly confirmed this interpretation in the case Overseas Union Insurance Limited v. New Hampshire Insurance Co. The court first seised thus has considerable power to decide on the validity of the party autonomy expressed in the forum choice clause. **(*Overseas Union Insurance Limited v. New Hampshire Insurance Co* C-351/89, 27.06.1991, ECR, ss. I.3342- I.3352)** http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0351:EN:PDF

[16] BOGDAN M., **'the Brussels/Lugano *Lis Pendens* Rule and the "Italian Torpedo",** Scandinavian Studies In Law, 2008, p. p. 92.

[17] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of December 12, 2012, L 351/12 Article 29 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF).

[18] **Article 30:** *'Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. 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. 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'.*

be accepted as related actions according to this Article[19]. In other words, the purpose of the Article is avoiding *"the risk of irreconcilable decisions resulting from separate proceedings*[20]". The related actions are defined as "… *actions are deemed to be related where they are so closely connected that is expedient to hear and determine them together*[21]*"*.

As to article, where the related actions are pending in different Member State's courts, then the court, which is first seised, may have competency. In other words, any court other than the first court may stay its proceedings.

Compared to the Article 29, which expounds the application of *lis pendens*, the Article 30 appears to be more responsive. The disputes that would be solved in accordance with the regulatory framework of the Article 29 are subject to more solid and rigid rules. On contrary, if the dispute is about related actions, which are subject to the enforcement of the Article 30, the solutions seem to be more responsive and flexible.

As to the Article 30.2, any court other than the court may decline the jurisdiction of the court first seised. This rule is stipulated the first court's competency and permission about the consolidation of the court's national law in respect thereof.

2.3 Exclusive Jurisdiction and Jurisdiction Agreement

The Article 31[22], particularly deals with the notion of exclusive jurisdiction. The first paragraph lays out that when there are more than one courts have the exclusive jurisdiction, then courts with the

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[19] In ***Tatry v. Maciej Rataj Case*,** the court states, on a proper construction of Article 21 of the Convention, [Article 27 of the Brussels I] an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the "same cause of action" and the "same object" as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss. As for the meaning of Article 22 of the Convention [Article 28 of the Brussels I], it is sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a ship owner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same ship owner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the ship owner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences (Also see: C. KORKMAZ, H. PANAHPOURSALEHI, ***'Lis Pendens in Brussels I Regulation'***, LW.433.1-2012.1: International Trade Law, p. 6-7 and for the ECJ's decision also see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992J0406:EN:HTML)

[20] Regulation (EU) No 1215/2012 Of the European Parliament and Of the Council of 12 December 2012, L 351/12 Article 30.

[21,] Regulation (EU) No 1215/2012 Of the European Parliament and Of the Council of 12 December 2012, L 351/12 Article 30, (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF).

[22] **Article 31:** *'Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favor of that court. 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 the court seised based on the agreement declares that it has no jurisdiction under the agreement. 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. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections*'.

exception of the court first seised ought to decline jurisdiction in favour of the first court[23]. Thus, if an action is pendent as to the Brussels Recast, the first court's jurisdiction hinders the other courts' competency.

The paragraph 31.2 is about the jurisdiction agreement. This paragraph is introduced with the Brussels Recast and it was not in the Brussels I. When it is examined, with the Article 29.1 which referring to this paragraph in cases of exclusive jurisdiction agreement, at the outset the paragraph dictates that if there is an exclusive jurisdiction agreement in favour of a court, then it has the priority to seise, as the proceedings starts in that chosen court. At that point, any other Member State's court have to stay its proceedings even if that court was first seised until the time chosen court has declared that it has no jurisdiction under relevant agreement. If the chosen court has the jurisdiction according to the exclusive jurisdiction agreement, then the other court must decline jurisdiction. The inclusion of Article 31 appears to aim preventing the use of "*torpedo actions"* that were defined above.

The last paragraph of the Article is about the exceptions that cannot be subject for a jurisdiction agreement under the Article 31. In other words, the exception does not apply to issues such as the policyholder, the insured, a beneficiary of the insurance contract, the injured party and when the consumer or the employee is the claimant. In such cases, the chosen court does not have the priority regardless of which court is first seised.

2.4 The Documents Determining When the Court is First Seised

This article[24] of the Recast depicts the circumstances in which a court is going to be competent. It is more like a guide that helps to determine the instances when the court is seised. In other words, to

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[23] **In the *Gasser Gmbh v. MISAT Srl* case**, (*Case C-116/02, 2003, ECR 1-14693.)* one of the parties tried to refer to the exclusive jurisdiction clause and addressed the higher court of Austria, requesting an Austrian court not to stay proceedings, because an Italian court was seised and the time of functioning of this Italian court was lengthy. The ECJ, in the preliminary ruling, pointed out that since Brussels I does not deal with the question of duration of the proceedings, the *lis pendens* rule should be applied (Also see: E. IVANOVA, ***'Choice of Court Clauses and Lis Pendens under Brussels I Regulation'***, Merkourios-European Contract Law, Volume 27/Issue 71, 2010, p. 12-16, 15).
An additional factor complicating the issue is that the European Court of Human Rights in Strasbourg may in some extreme cases hold that the *lis pendens* rule, as interpreted by the ECJ in Gasser, can force other Member States to become accessories in the déni de justice committed by the Member State of the court first seised when that court is excessively slow. It should be remembered that the Strasbourg court has held that the recognition of a judgment violating the European Human Rights Convention constituted also a violation of the Convention by the recognizing state. Even apart from the fact that human rights are today considered to belong to the fundamental principles of EC law, it is clear that the Member States are obliged to respect human rights so that the complaints to the European Court of Human Rights are not necessary(Also see: BOGDAN, p. 96 and also see ECJ's decision http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0116)

[24] **Article 32:** *'For the purposes of this Section, a court shall be deemed to be seised: (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court. The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served'.*

determine the competency of a court, this Article gives guidelines to be followed in such cases. These cases are stated in Article 32.1.a and 32.1.b. First, one relates to the document that institutes the proceedings or equivalent documents that are necessary for the court seise. When one of these documents is lodged with court, then the court ought to be deemed to be seised.

Secondly, if the document has to be served before being lodged with the court, it has to be received by the authority responsible for service. This authority responsible for the service has to be the first authority. In this case, at the time when the first authority has received the document, then the court deemed to be seised. In addition to the rule, the clause that is explained in the first place is also valid for this paragraph. In both situations, the court and the authority have to note the dates when any of the documents that are mentioned above are lodged or received, respectively.

2.5 The New Rules about Proceedings for Non-Member States

The Article 33[25] is first introduced in the Brussels Recast and it was absent in Brussels I. Thanks to this Article of Recast, there are new rules about proceedings in Non-Member States[26]. This Article ought to be applied on the application of one of the parties or under the Member State's national law *of its own motion.*

As to the Article, the third State would have the jurisdiction if it could meet certain requirements. There are two clauses, sub-grouped under the Paragraph 1. While the first one is about the judgement capacity of recognition and enforcement in the Member State, the second condition states that the Member State's court must be satisfied that a stay is necessary for the proper administration of justice.

The Article 33.2 is about the continuation of the proceedings in the court of the Member State. According to the regulation, (i) if the proceeding in the third state's court is themselves *stayed or discontinued*, (ii) if it is obvious that the court of the third state is unlikely to conclude the proceedings

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[25] **Article 33:** *'Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and 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 if: (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 (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. The court of the Member State may continue the proceedings at any time if: (a) the proceedings in the court of the third State are themselves stayed or discontinued; (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; or (c) the continuation of the proceedings is required for the proper administration of justice. 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. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion'.*

[26] Before the Recast, **in Goshawk Dedicated LTD v. Life Receivables Irl. LTD Case**, allowing forum non-conviniens in the context of Brussels Convention [Regulation] would be likely to affect the uniform application of the rules of jurisdiction. *If the court first seised is a non-member state, then there is an issue of jurisdiction and* both doctrine and courts have a different approach. In *Goshawk case*, the Ireland High Court held that, Brussels I Convention [Regulation] is not binding to the Non-Member States, therefore, *lis pendens* rule could not be applied. (Also see: http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/86102620A8CB3D408025754E003CD89E?opendocument)

within a *reasonable time* and finally, (iii) if the continuation of the proceedings is required for the proper administration of justice. If one of these clauses occurs at any time, then the court of the Member State may continue its proceedings.

According to the Article 33.3, if the proceedings in the court of the Non-Member State is concluded and if the result has the capacity of recognition and enforcement, then the court of the Member State have to dismiss its proceedings.

2.6 The Situation of the Related Actions for the Non- Member States

The Article 34[27] also concerns Non-Member State proceedings, which are *first in time*. The Article regulates the situation of the *related actions*. The court of the Member State ought to apply this Article on demand of one of the parties or *of its own motion*.

As to the Article 34.1, with the conditions that are mentioned under the paragraph, the court of the Member State may stay its proceedings. There is no statutory obligation. That is just an option that is given to a Member State in order to avoid the risk of irreconcilable judgments. If the court of the Non-Member State could give judgment, which has the capacity of recognition and enforcement in the Member State, and if the court of the Member State approves that staying the proceeding is necessary for the proper administration of justice, then the court of the Member State may stay its proceedings.

The Article 34.2 contains provisions that give an option to the Member State whether to continue to the proceedings or not. Provisions state that the Member State may continue the proceedings (i) if there would be no longer a risk of irreconcilable judgments, (ii) the proceedings in the third state is themselves stayed or discontinued, (iii) if there is a concern about reasonable time finally, (iv) if the continuation of the proceedings is required for the proper administration of justice.

3. General Assessment of the Legal Regulations

In conclusion, when all things that are mentioned above taken into the consideration, it seems that with the *lis pendens* rule, the priority is given to the court where proceedings are started first. Although the rule was not change by the Brussels Recast, novel clauses have been added to the Article

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[27] **Article 34:** *'Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if: (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings; (b) 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 (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. The court of the Member State may continue the proceedings at any time if: (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments; (b) the proceedings in the court of the third State are themselves stayed or discontinued; (c) 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; or (d) the continuation of the proceedings is required for the proper administration of justice. The court of the Member State may 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. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion'.*

29, which deals with the cases of exception. According to this exception, the first court will have the jurisdiction unless there is an exclusive jurisdiction agreement. Therefore, by the dictate of this article, the chosen court has the priority regardless of which court was first seised.

Under the Articles 33 and 34, discretion to stay proceedings are reserved to Member States' courts where *lis pendens* or *related actions* are pending in a Non-Member State's court if the third state action is first in time and the other conditions that are mentioned above are satisfied.

III. *LIS PENDENS* IN TURKISH LAW

In Turkish civil legislation, pendency is one of the negative causes of action regulated by Code of Civil Procedure No. 6100[28]. How to handle judicial process if the same action[29] is brought several Turkish courts is regulated by article 114 and 115 of Code of Civil Procedure No. 6100 In the event of national pendency, the latter proceedings should be dismissed for the reason that cause of action is unfulfilled[30]. In other words, where the action in the court first seised is pending, any other court should dismiss the same action.

However, neither Code of Civil Procedure No. 6100 nor International Private and Civil Procedure Law No. 5718 regulate what should be done if the same action is seised to both Turkish court and a foreign court. For instance, supposing that Berlin will be the place of performance concluding sales contract between a German and a Turk. The defendant is domiciled in İstanbul, Turkish courts should be competent by the reason of defendant's domicile it is likely that also German courts should be competent by the reason of place of performance. If actions are deemed to be related where they are so closely connected, even a third country court shall be authorized, so it will emerge affirmative conflict of venue between this relevant courts[31].

In the event of more than one country court having jurisdiction is defined as *international pendency* and in our legislation there is no legal regulation directly related to this matter. Still, recognition international pendency is regulated about Turkish citizen's personal actions and the Court determined by a jurisdiction agreement by Article 41 and 47 of Law No. 5718[32]. According to Article 41, wife who first filed a divorce case in foreign court has a right of plea of pendency when the other spouse's files a divorce case in Turkish court later[33]. As to Article 47, unless the Court's jurisdiction is

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[28] Code of Civil Procedure No. 6100 Article 114.

[29] In the context of the appeal of pending, the parties must be the same to be able to mention the same case. The second condition referred to as the same case is the same matter of dispute and the same cause of action. KURU/ARSLAN/YILMAZ, p. 291; H. PEKCANITEZ/O. ATALAY/ M. ÖZEKES, **Civil Procedure Law**, Ankara 2013, p. 847, S. TANRIVER, **Plea of Pending in Civil Procedure Law,** Ankara 2007, p. 66.

[30] KURU/ARSLAN/YILMAZ, p. 291; PEKCANITEZ/ATALAY/ÖZEKES, p. 521.

[31] E. ERDOĞAN, '***Lis Alibi Pendens',*** *Journal of Dokuz Eylül University Faculty of Law,* C. 16, 2014, p. 1857-1884, 1857.

[32] E. NOMER, '**International Civil Procedure Law (International Private Law)',** İstanbul 2009, p. 84.

[33] After the res judicata of a foreign court, it is not possible to reject the appeal of pendency in case of re-filing a divorce case. In these circumstances, it should be requested the recognition of foreign judgments. N. EKŞİ, '**International Competency of Turkish Courts',** İstanbul, 1996, p. 156.

defined as exclusive jurisdiction, contracting parties should negotiate foreign state court will be competent court as regards disputes involving foreign elements between them. Despite the fact that there is a jurisdiction agreement authorizing a foreign court and sued in that country to this respect, it should be filed objections about another action pending afterwards when the same action is seised in a Turkish court[34]. It should be noted that some of special provisions about international pendency is regulated by bilateral international agreements[35].

Nevertheless, there is no legal arrangement how the parties enter a plea of pendency and what will be decided by the court on this appeal if the action is brought in a foreign court by Article 41 and 47 of Law No. 5718. Then two possibilities could be considered in this case[36]: The first of these, Turkish legislator did not knowingly and willfully make legislative regulation about international pendency because it is directly related to right of independence thus international pendency is inadmissible. The second of these, this issue accepted as *"lacuna (legal gap)"* in Turkish law.

1. International Pendency Approaches in Turkish Law

1.1. The View Which Accepts the Acknowledging Plea of International Pendency Should be Regarded as Violation of Right of Independence Unless There Is Any Legal Regulation.

The prevailing view in our doctrine is that plea of international pendency should be rejected by Turkish courts. Based upon this, if international pendency plea is accepted by the Turkish court, it is claimed that Turkish courts will waive from competency in favor of foreign courts and consequently principle of national sovereignty will be violated[37]. In addition, these supporters stated that it is impossible to revoke a person's right to sue under Turkish law due to lawsuit brought against in a foreign court[38].

However, in the light of developing international relations and when we consider Turkey's membership process to EU, it seems difficult to us adopt this view.

1.2 The View Which Accepts International Pendency on the Condition That It would be Possible of Enforcement and Recognition of Foreign Court Judgments

The view put forward in recent years is that if a foreign court is closely related to the case, recognition and enforcement of foreign court's judgment is capable and applicable, the plea of

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[34] In the doctrine, it is stated that it is not plea of pendency, but it is plea of jurisdiction. According to this view, unless the foreign court dismiss the case Turkish courts will be deemed to have been lack of venue of international jurisdiction. Therefore, the existence of jurisdiction agreement will prevent the prosecution by Turkish courts and the defendant shall enter a plea of jurisdiction named on the jurisdiction agreement. Also see: F. SARGIN, **'Competency (Jurisdiction) Agreements in İnternational Procedural Law',** Ankara 1996, p. 189-190; V. DOĞAN, 'Taking **into Account of International (Foreign) Pendency in Turkish Law'**, MHB 2002/2, p. 142.

[35] ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 397, NOMER, p. 84.

[36] ERDOĞAN, p. 1875.

[37] SEVİĞ M. R., **'Synthesis of Conflict of Laws of the Republic of Turkey',** İstanbul, 1941, p. 177; NOMER, p. 85, SARGIN, p. 188,

[38] DOĞAN, p. 127.

international pendency should be accepted[39]. Hence, according to the supporters of this view it will be more appropriate for the purpose of international procedural law and natural judge principle.

Furthermore, they argue that the acceptance by the Turkish court of international pendency plea in the light of developing international relations does not mean violation of principle of national sovereignty unless Turkish law and contracts forbid it obviously. For this reason, they consequently argue that if recognition and enforcement of foreign court's judgment is capable and applicable in Turkish law, plea of international pendency should be accepted by the Turkish courts[40].

Now, the overall approach adopted by the European Civil Law is in line with this view[41].

However this view may be criticized for the following reasons: Acceptance of international pendency by taking into consideration the possibility of recognition and enforcement of the foreign court's judgment is not a proper approach even if other legal requirements of recognition and enforcement of the foreign court's judgment is predictable, reasons related to public order are unpredictable. If the recognition and enforcement of the foreign court's judgment were not possible in Turkish Law, an unsatisfactory situation would emerge in terms of the claimant[42].

1.3. The View Regarding International Pendency as A Prejudicial Question

The another view put forward about this subject is that when considered the developments and needs in the area of private international law, if recognition and enforcement of the foreign court's judgment by the Turkish courts is possible, the Turkish court will be able to ask prejudicial question[43].

The main underlying reason of this view is as it follows: The purpose of the existence of prejudicial question overlaps with the acceptance of plea of international pendency. In this context, both of them contribute to the judicial economy principle and prevent irreconcilable judgments[44].

Indeed, Court of Appeal (*Yargıtay*) render several different decisions whether accepting the plea of international pendency as a prejudicial question.

Civil Chamber 15 of Court of Appeal in 2012 adjudged that[45] "... as it is seen from the case file, the firm MKJV was sued in the court of Romania before. If sub-contractor certainly has commercial claim … proceeding in Turkey depends on outcome of the first action-seised in Romania. The outcomes of the case which is pending between parties should be waited". As so, Civil Chamber 15 admitted foreign court's judgment as a prejudicial question[46].

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[39] EKŞİ, p. 177. Also, see Court of Appeal decision in this aspect ERDOĞAN, p. 1863, footnote (fn.), and 20.
[40] ŞANLI/ESEN/ATAMAN-FIGANMEŞE, p. 399.
[41] Also, see above **'Gubisch Maschinenfabrik KG v. Giulio Palumbo Case'** and **'Tatry v. Maciej Rataj Case'.**
[42] NOMER, p. 85.
[43]ŞANLI/ESEN/ATAMAN-FIGANMEŞE, p. 402; Also see Court of Appeal Decision: Court of Appeal Civil Chamber 2, 15.6.2010, E. 2009/13541, K. 2010/11899, www.legalbank.net.
[44] ERDOĞAN, p. 1867.
[45] Court of Appeal Civil Chamber 15, 11.6.2012, E. 2011/2901, K. 2012/4661, ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 401
[46] Court of Appeal C.C. 11, 10.4.1986, E.1486/1986, K. 1986/2090.

On the contrary, Civil Chamber 2 of Court of Appeal in 2010 adjudged that[47] "… the same reasons of action would not be enough for the plea of pendency. There should some other requirements; ability of enforcement of foreign court's judgment, existence of a jurisdiction agreement between foreigner and Turkey on this issue or a regulation in Turkish Private International Law". As so, Civil Chamber 2 rejected a general international pendency objection.

There is another approach in doctrine[48], arguing, *lis pendens* cannot be named as a prejudicial question. Explicitly, an argument is deemed as a prejudicial question when it is irrelevant with the jurisdiction of the court dealing with. Whenas, in the case of pendency, Turkish court has competency with mentioned controversy.

After all these views, the primary goals of international pendency can be listed as;

*compliance with the judicial economy principle,

*practical reasons and

*notably avoiding irreconcilable decisions of varied courts in different countries.

However, in order to coincide those aforementioned aims, there is a precondition; the ability of recognition and enforcement of foreign judgment in domestic law. Otherwise, for instance, recognition of the foreign court's judgment is not capable and peculiarly, if defendant has property in Turkey, the claimant would has legal interest to sue his claim in Turkish courts as well. In such a case, the action cannot be dismissed by asserting judicial economy principle. If not, the right to legal remedies, regulated by both Turkish Constitution and European Convention of Human Rights, would be excessively restricted.

At the beginning, it is not always conceivable to say, whether recognition of foreign judgment is possible or not. Assume a case sued against Turkish courts, dependency was asserted as a reason and the case is dismissed. Later on, the foreign court also dismissed the case for procedural reasons or another existed reason, which makes recognition or enforcement of foreign judgment impossible. Meanwhile, if limitation of action ended, the claimant would be expose to loss of his right. Besides that, when non-ability of recognition becomes clear, proceeding will be inexpedient with the judicial economy principle. To sum up, uncertainty of recognition and enforcement of foreign court's judgment, pose an obstacle to apply pendency as a cause of action directly.

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[47] Court of Appeal C.C. 2, 15.6.2010, E. 2009/13541, K. 2010/11899, www.legalbank.net.

[48] NOMER, p. 85.

2. Evaluation of Turkish Law within the Framework of the Principle of *Forum Non-Conveniens* (Regulated by the Article 30.3 of Recast)

According to the principle of "*forum non-conveniens*", the court seised can dismiss the case due to the existence of a court closely related despite having international jurisdiction[49].

In common law countries, courts today generally have a discretionary power to refuse to take jurisdiction based on *forum non-conveniens*, *i.e.* if there is another, clearly more appropriate forum in other jurisdiction where it would be better to try the suit, having regard to the interests of the parties and the ends of justice[50]. *Per contra,* In Anglo-American legal system, which accepts living temporarily in the homeland of the person as an adequate cause for the presence of international jurisdiction, it seems reasonable to restrict the court of jurisdiction by virtue of *"forum non conveniens"* principle[51].

In Turkish Law, *"forum non conveniens"* principle is adopted neither by legal regulations nor by judicial decisions. Ordinary rules of competency in Turkish Procedural Law are the rules that determine the place of the jurisdiction court dealing with the lawsuit. International jurisdiction of Turkish courts should be appointed by the rules of competency of national law[52]. By this way, it refers that competency rules in national law should be taken into consideration for the determination of international jurisdiction[53].

According to the Article 36 of the Constitution of the Republic of Turkey, any competent court must not refuse to hear a case in its jurisdiction. In this context, the determination of the existence of a court closely connected will emerge challenges and uncertainties in terms of Turkish Procedural Law[54].

CONCLUSION

EU has paid significant attention to uniform rules of civil procedures among Member States. This unification regarded as *"sine qua non"* criteria of common market. Rather than other communities, it would not be unfair to say, EU has taken further steps on this issue of harmonization of separate Member States' civil procedural laws. Brussels Regulation is one of those steps, the mainstream one, and aims free movement of judgments. By this way, the existing reliance within the EU could be enhanced and procedural action is accelerated further. In addition, ECJ decisions has constituted main references to EU Member States, guiding how to apply notion of "international pendency".

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[49] AKINCI Z., **'International Pendency Based on Jurisdiction Agreement in International Civil Procedure Law',** Ankara 2002, p. 28; NOMER, p. 119.
[50] EISENGRAEBER, p. 22.
[51] NOMER E., **'Private International Law',** İstanbul, 2008, p. 457.
[52] KURU/ARSLAN/YILMAZ, p. 164.
[53] NOMER, **Private International Law,** p. 430.
[54] AKINCI, p. 29; NOMER, **Private International Law,** p. 457.

However, some regulations enacted in the Recast are likely to make difficulties in practice. That is to say, according to Article 31.2, how long any court of another Member States, except the court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, will stay the proceedings for the decision of the court seised is not clear based on the agreement. In other words, when the court seised based on the agreement declares that it has no jurisdiction under the agreement is not definite. ECJ mentions in the *Gasser* case, the Brussels Convention and Regulation are based, it will not allow a court of one Member State to decide upon or evaluate the jurisdiction of a court of another Member State, or evaluate their speed of proceedings[55]. Though, this problem is solved within the framework of mutual trust of Member States as stated in the *Gasser Case*: The ECJ underlines that *the Brussels Convention [respectively the Brussels I Regulation] is based on the mutual trust the Contracting States accord to each other's legal systems and judicial institutions and it is that mutual trust that all the courts are required to respect.* Therefore, no derogation from the 'first-come, first-served' rule is possible 'where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long. The principle of equality of all the national courts within the EU prohibits an exception based on a national distinction concerning the length of domestic proceedings[56]**.**

In spite of all the negative consequences, the ECJ's decision to protect the Brussels/Lugano system is commonly appreciated. To allow the courts of one Member State to review the jurisdiction of the courts in other Member States could lead to chaos and undermine not only the jurisdictional rules but also the rules on recognition and enforcement of judgments. It is no coincidence that Article 35.3 of the Brussels Regulation forbids even the test of public policy (*ordre public*) with regard to the jurisdiction of the courts of other Member States[57].

Thanks to Recast, there are new rules about proceedings in Non-Member States. This Article ought to be applied on the application of one of the parties or under the Member State's national law *of its own motion.*

As distinct from Brussels Recast, Turkish domestic law does not provide a certain arrangement commanding implementation of international pendency, there is also no regulation forbidding it. That is the main reason initiates discussions related to international pendency in Turkish Law. Considering the judicial economy principle, legal interests of parties and cohesion of international judgment, Turkish judge should create law (based on his authority given him by Article 1of Turkish Civil Code No. 4721[58]) and apply *lis pendens* by regarding possibility of foreign judgment enforcement and

[55] IVANOVA, p.16.
[56] EISENGRAEBER, p. 45-46.
[57] BOGDAN, p. 96, 97.
[58] **Article 1 of Turkish Civil Code No 4721:** '*The law is applied to all cases which comes within its wording and spirit of any of its provisions. Where no provision is applicable, the judge shall decide in accordance with customary law, and in its*

recognition[59]. Regarding critics mentioned above[60] the judge who applies *lis pendens* in Turkish proceeding should also be sensitive about the claimant's right to legal remedies in order not to cause any loss of right. For the beginning of the proceeding, none can certainly guarantee recognition of foreign judgment, it is solely a prediction. For that reason, the judge should not dismiss the case immediately, instead, wait for foreign courts definitive judgment. Finally, if recognition and enforcement of foreign court's judgment is incapable and inapplicable, then Turkish judge should continue to hear the case.

Turkey, as a candidate State of EU, has made many adjustments in domestic law system to accord with EU Law during the process of membership. From this perspective, to harmonize international pendency provisions of Brussels Regulation and Turkish legal system would empower both economic and commercial ties of Turkey and EU, which is what Brussels Regulation aims actually.

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default, in accordance with the rule that he/she would enact as if he/she were the legislator himself/herself. The judge shall benefit from established doctrine and case law, in doing so'. http://www.turkhukuksitesi.com/serh.php?did=11284

[59] ERDOĞAN, p. 1877.

[60] Also see, p. 18.

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