Parallel proceedings and abuse of law under the Brussels I bis Regulation

This research looks at the problem of how to counter abuse of law, in particular as presented by simultaneously pending (parallel) proceedings, under the Brussels I bis Regulation. To that end, three forms of abuse of law under the Brussels I bis Regulation have been studied. As is apparent from the ECJ’s case law, abuse of law may arise in the following circumstances: (1) in parallel proceedings in different Member States, (2) in matters of jurisdiction over multiple defendants, and (3) in matters of non-recognition of foreign judgments on the basis of ‘irreconcilable decisions’. This study addresses the question of the extent to which the ECJ’s case law on abuse of EU law provides guidelines in assessing problems of abuse of law under the Brussels I bis Regulation.

First, Chapter 2 is dedicated to Dutch law and discusses the application in procedural matters of the abuse of law provision of Article 3:13 Dutch Civil Code ("DCC"). In applying Article 3:13 DCC, the circumstances of the particular case play a central role. The criteria of Article 3:13 DCC do not provide hard-and-fast rules, but are open in nature and provide enough discretion to render a judgment in any specific case, taking into account the particular circumstances of the case. The assessment of abuse of law involves taking account of the legitimate interests of the other party to the dispute. In Dutch case law, abuse of law is mentioned from time to time as being contrary to ‘common interest’. However, since it is generally the other party to the dispute that suffers the negative (legal) consequences of an abusive action, it would be more appropriate in these cases to speak of the abusive action being contrary to the legitimate interests of the other party.

Under Dutch procedural law, there are limited possibilities to rule that instituting proceedings or making a specific argument is abusive. It is, however, possible in extreme cases to apply for an anti-suit injunction to prevent litigants from instituting proceedings. Also, instituting proceedings based on a claim that is in advance obviously without any merit whatsoever and thus amounts to a tort being commit-

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1 Para. 2.2.
2 Para. 2.3.1-2.3.3.
ted if instituted, may give rise to an application for an anti-suit injunction. The key criterion here is ‘in advance’. If the result of the claim is in any way dependent on later developments, there is less reason to rule that instituting proceedings amounts to abuse of law. It is important to note in this respect that Dutch courts show restraint in deciding that a litigant has engaged in abusive behaviour. The procedural rights of litigants may not easily be restricted solely on the basis that exercising those rights may lead to unwelcome results. Abuse of law only comes into consideration if the claim is based either on facts and circumstances the claimant knew or ought to have known to be false, or on arguments which are in advance obviously without any merit. Courts should show restraint when ruling that instituting proceedings amounts to abuse of law, in view of the right of access to court under Article 6 ECHR.

Chapter 3 is concerned with the principles underlying the Brussels I bis Regulation. The sound operation of the internal market requires the smooth operation of jurisdiction and enforcement of judgments in international civil and commercial matters. The principles underlying the Brussels I bis Regulation contribute to that. One of the main principles is that of predictability of the competent court: defendants must be able to foresee in which courts in the EU they might be sued. The ECJ interprets the Brussels I bis Regulation in such a way as to avoid a multitude of competent courts. This is also important with regard to the principle of legal certainty: litigants must be certain that they can bring a case before the competent courts under the Brussels I bis Regulation, without the competent court having discretion to refuse to exercise its jurisdiction deriving from the Brussels I bis Regulation. Mutual trust in the administration of justice is in particular reflected in how judgments rendered in a Member State are automatically recognised in other Member States. Moreover, the abolishment of ‘exequatur’ according to the recast of the Brussels I bis Regulation means a new milestone in the mutual trust between Member States. However, the negative consequences of the principle of mutual trust, apparent in the ECJ’s case law in Gasser and Turner, should not be overlooked. The ECJ seems to be unconcerned about the unfair result of its rulings in individual cases in order to uphold the system of mutual trust in the administration of justice between Member States.

Chapter 4 focuses on the mechanisms of the Brussels I bis Regulation to prevent parallel proceedings. Parallel (concurrent) proceedings must be prevented, as they run counter to the system and purpose of the Brussels I bis Regulation. The provisions on lis pendens (Article 29 Brussels I bis Regulation) and related actions (Article

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3 Dutch Supreme Court (Hoge Raad) 29 June 2007, NJ 2007/353 (Waterschappen/Milieutech). See also para. 2.6.2.
4 Para. 2.6.3.
5 Para. 3.3.
6 Para. 3.4.
7 Para. 3.5.
30 Brussels I bis Regulation) are designed to resolve the problems posed by parallel proceedings in different Member States. However, the ECJ’s case law on the lis pendens provision of Article 29 Brussels I bis Regulation has the effect of creating opportunities for unscrupulous litigants to engage in delaying tactics, for instance by instituting proceedings in order to obtain a negative declaratory judgment. The ECJ is unconvinced by practical considerations that disturb the Brussels I bis Regulation’s logic. Article 29 Brussels I bis Regulation can be used to obstruct the proceedings and functions as a tool to delay the proper administration of justice.

A solution to the problems arising from, particularly, Gasser has been implemented in the Brussels I bis Regulation. The solution is based on the same mechanism that operates under the Hague Convention on Choice of Court Agreements of 30 June 2005. Parties may institute proceedings in another forum than the chosen one if they expect to obtain an advantage (delay in the administration of justice) through operation of the lis pendens provision. After all, as long as the court first seised has not declared it has no jurisdiction, the court second seised must stay its proceedings. This situation will change when the Brussels I bis Regulation comes into force. Under the Brussels I bis Regulation, situations in which parties have agreed on an exclusive choice of forum clause are excluded from the operation of the lis pendens provision of Article 29 (1) Brussels I bis Regulation. By virtue of Article 31 (2) Brussels I bis Regulation, where a court of a Member State is seised that has exclusive jurisdiction by virtue of a choice of forum clause (Article 25 Brussels I bis Regulation), any court of another Member State must stay the proceedings until such time as the court seised on the basis of the choice of forum clause declares that it has no jurisdiction. The text of the provisions in the Brussels I bis Regulation makes it clear, unlike the Commission proposal, that the decisive factor in applying Article 31 (2) Brussels I bis Regulation is the seising of the (putatively) chosen court, not the existence of a choice of forum clause. Therefore, it is clear the chosen court takes precedence only in cases of lis pendens.

However, certain questions concerning the application of Article 31 (2) Brussels I bis Regulation remain unanswered. In particular the question which court is supposed to rule on the premise in Article 31 (2) Brussels I bis Regulation that “a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised” (italics added). In other Member States all other courts are obliged to stay the proceedings the moment the (putatively) chosen court is seised. Subsequently, it is the chosen court that decides on the validity of the choice of forum clause on the basis of Article 25 Brussels I bis Regulation. The Brussels I bis Regulation does not deal with the question of the extent to which the (non-chosen) court first seised may rule on the validity of the choice of forum clause. Also the
question may rise whether the court first seised must also stay its proceedings if the choice of forum clause is manifestly invalid.13 Despite some practical issues remaining unresolved, the solutions provided in the Brussels I bis Regulation for the problems stemming from Gasser must be welcomed.

Chapter 5 specifically assesses the problem of parallel proceedings in cases where one or both of the proceedings concern a provisional measure. Questions concerning abuse of law may arise if the decision concerning a provisional or protective measure potentially, through recognition in other Member States, could disturb the main proceedings.14 If the main proceedings are pending in another Member State, the jurisdiction of Dutch courts to issue provisional, including protective, measures can only be based on Article 35 Brussels I bis Regulation, with due regard to the requirements as stated in the ECJ’s case law on Article 35 Brussels I bis Regulation.15 If the main proceedings are pending in another Member State, no other Member State has jurisdiction on the substance of the matter in view of Article 29 Brussels I bis Regulation. The fact that no other Member State has jurisdiction on the substance of the matter by virtue of the lis pendens provision leads to the conclusion that jurisdiction for interim relief may similarly not be based on Articles 4-26 Brussels I bis Regulation. In that case, only the ‘additional’ ground for jurisdiction to issue provisional measures in Article 35 Brussels I bis Regulation may be applied. This approach has the effect of limiting the possibility of abuse of law in applying for a provisional or protective measure.16

Chapter 6 considers the notion ‘irreconcilable judgments’ in the Brussels I bis Regulation. The chapter deals with the mechanism to regulate the recognition of two conflicting decisions (Article 45 (1)(c) Brussels I bis Regulation) as well as the mechanisms to prevent such a situation in the phase of jurisdiction (Articles 8 (1) and 30 Brussels I bis Regulation). The concept ‘irreconcilable judgments’ must be interpreted differently, depending on the aim of the respective provision. The ECJ has ruled that irreconcilable judgments exist in the context of Article 45 (1)(c) Brussels I bis Regulation when both judgments have legal consequences that are mutually exclusive, while the same notion in Article 30 (3) Brussels I bis Regulation must be interpreted as meaning 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.17 The difference in interpretation relates to the different aims pursued by the rule on the recognition of judgments (Article 45 (1) (c) Brussels I bis Regulation) and the rule on related actions (Article 30 Brussels I bis Regulation). Article 45 (1)(c) Brussels I bis Regulation derogates from the principle of free movement of judgments and enables a court to refuse to recognise a foreign judgment.

Para. 4.4.2.
Para. 5.1.
Dutch Supreme Court 21 June 2002, NJ 2002/563 note PV (Spray-Telenor). See also para. 5.4.
Para. 5.5.
judgment. The objective of the provision on related actions of Article 30 Brussels I bis Regulation, on the other hand, is to improve coordination of the exercise of judicial functions within the EU and to avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded.

Additionally, it appears that the criteria for application of Article 8 (1) Brussels I bis Regulation are not fully developed yet. The criteria introduced by the ECJ of ‘a same situation of law and fact’, give rise to problems, while at the same time the exact meaning of the notion of ‘irreconcilable judgments’ within Article 8 (1) Brussels I bis Regulation is not entirely clear.\(^{18}\) The ECJ ruled in Freeport that the national court in assessing whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately, must take account of all the necessary factors in the case file.\(^{19}\) Oddly, on the basis of Reisch, the fact that the claim against the anchor defendant is (a priori) inadmissible is apparently not a necessary factor in the case file.\(^{20}\) This ruling may be reasonable from the perspective of efficient administration of justice: if one of the claims is declared inadmissible for whatever reason, why would this inadmissibility affect the jurisdiction of the court over closely related claims? However, in my view one has to be careful in this respect. To declare the claim against the anchor defendant inadmissible means that the claim on which the jurisdiction of the court vis-à-vis the co-defendants is based has disappeared.\(^{21}\) In other words, the ground on which the jurisdiction of the court to hear the claims against foreign co-defendants is based has been cut off. Therefore, it seems reasonable, in assessing whether or not several claims are closely connected in the sense of Article 8 (1) Brussels I bis Regulation, to not categorically ignore the fact that the claim against the anchor defendant is inadmissible. After all, the claim against the anchor defendant is the basis on which co-defendants are deprived of the jurisdiction of their home courts under Article 4 Brussels I bis Regulation.

Several problems arise in constructing a separate abuse of law principle for the Brussels I bis Regulation. The nature and structure of the Regulation are not fitted to a common discretionary abuse of law exception.\(^{22}\) The Dutch Supreme Court, in a dispute concerning international maintenance, applied the abuse of law exception derived from national law in a case where abuse of law under the Brussels I bis Regulation was at issue.\(^{23}\) This begs the question whether it is the right approach to apply an instrument from national law to international situations under the Brussels I bis Regulation. Particularly, it is questionable whether national law at all can alter the results prescribed by the Brussels I bis Regulation.\(^{24}\) In my view the right

\(^{18}\) Para. 6.6.  
\(^{21}\) Para. 6.11.  
\(^{22}\) Para. 6.12.  
\(^{23}\) Dutch Supreme Court 7 May 2010, NJ 2010/556 note Th.M. de Boer.
approach to counter abuse of law must be found at the international level, in particular at the level of EU law.

To that end, the research in Chapter 7 concerns the principle of abuse of law in EU law. This principle is developed in the ECJ’s case law and has slowly gained a status of its own. Former case law mainly refers to the principle of ‘circumvention’: the fundamental freedoms of EU law may not be used solely to circumvent national law. This principle of circumvention was very important for the development of the principle of abuse of law under EU law. The ECJ frequently refers to this case law as the origin of the principle that one may not apply EU law with the aim of abuse. In its case law the ECJ carefully balances between ensuring the full force and uniform application of EU law and preventing abuse of EU law at the same time. In more recent case law, the ECJ has further developed the principle of abuse of law into a full-fledged principle of abuse of EU law. According to the ECJ the principle of abuse of EU law can be interpreted along two lines. First, there are situations in which provisions of EU law are abused to bypass national law. Second, there are situations in which EU law is abused to gain an advantage, counter to the aim of the relevant provision (the criterion of ‘détournement de pouvoir’). Even though the ECJ has not ruled on the application of the principle of abuse of EU law in every subject of EU law, this does not mean in my view the principle has no (potential) effect. In fact, the ECJ frequently refers to its case law in other areas of law when assessing a situation of abuse of EU law in a certain area of EU law. Moreover, the fact that the principle of abuse of EU law does not apply uniformly to all areas of EU law is no argument against the existence of the principle itself. An appeal to EU law may not be recognised if this appeal were to amount to an abuse of law. The principle of abuse of EU law distinguishes between two types of instances:

- When on the basis of objective circumstances it appears, despite formal observance of the conditions laid down by the rules, that the purpose of those rules has not been achieved, and an advantage is obtained contrary to the purpose of the rules;
- When on the basis of objective circumstances it appears that the exercise of a right or freedom granted by EU law is used solely in order to evade national law.

Finally, in applying the principle of abuse of law one should pay due regard to the full force and uniform application of EU law. Exercising a fundamental freedom can in itself never amount to abuse of law. The principle of abuse of EU law, unlike the principle of abuse of law under national law considered in Chapter 2, may in fact apply to the provisions of the Brussels I bis Regulation. Indeed, the Brussels I bis

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Regulation is part of EU law. Hence, there is no reason why the principle of abuse of EU law would not be equally applicable to the Brussels I bis Regulation.

Chapter 8 provides a synthesis of the previous chapters. The Chapter specifically applies the doctrine of abuse of EU law to the problems of abuse of law and parallel proceedings under the Brussels I bis Regulation. In my view, abuse of law under the Brussels I bis Regulation should take example from the principle of abuse of EU law and the criterion of détournement de pouvoir, i.e. when it appears on the basis of objective circumstances, despite formal observance of the conditions laid down by the respective rules, that the purpose of those rules has not been achieved and an advantage is obtained contrary to the purpose of the rules. Specifically, if the provisions of the Brussels I bis Regulation are relied upon in an abusive manner, the courts of the Member States should deny the litigant the benefit of those provisions. When, for example, a litigant relies on a provision of EU law (for instance Article 29 Brussels I bis Regulation) with an aim contrary to the purpose of that provision, there can be situations in which this litigant may be denied the benefit of that provision, for instance, a stay of proceedings. The aim of Article 29 Brussels I bis Regulation is to prevent parallel proceedings leading to – potentially – irreconcilable decisions at the stage of recognition and enforcement. Therefore, it is an indication of abuse of EU law on the basis of the criterion of détournement de pouvoir whenever a litigant, having another purpose in mind, relies on Article 29 Brussels I bis Regulation. For example, when proceedings are instituted with no intention whatsoever of obtaining a decision resolving the dispute, but with the sole intention of obstructing possible other proceedings in other Member States, courts may refuse to apply Article 29 Brussels I bis Regulation on the basis of the principle of abuse of EU law.

Similarly, the aim of Article 8 (1) Brussels I bis Regulation is to prevent irreconcilable judgments in order to avoid problems arising in the stage of recognition and enforcement. Whenever Article 8 (1) Brussels I bis Regulation is relied on with another purpose in mind, the principle of abuse of EU law can be applied. For example, if on the basis of objective circumstances it appears, despite formal observance of the conditions laid down by the rules (the ‘close connection’ in Article 8 (1)), the purpose of this rule has not been achieved, and an advantage is obtained contrary to the purpose of the rule. In the case of Article 8 (1) Brussels I bis Regulation, the ‘objective circumstances’ have to be found mainly in assessing the claim against the main defendant. Possible angles to be considered include the admissibility of the claim against the main defendant, and the existence of a real substantive claim against the main defendant. An indication of abuse of law can be found where a litigant relies on Article 9 (1) Brussels I bis Regulation while the claim against the main defendant is a priori inadmissible. Despite formal observance of the conditions laid down by Article 8 (1) Brussels I bis Regulation, an advantage is obtained contrary to the purpose of the rule. Similarly, a clearly meritless claim against the main defendant provides an indication that Article 8 (1) Brussels I bis Regulation is relied on with other than legitimate purposes in mind. Jurisdiction under Article 8 (1) Brussels I bis Regulation is designed to allow the consolidation of
actions before a single court, not the improper removal of the defendant from his home court.

In all these cases, litigants rely on jurisdictional rules with an aim that was not foreseen by the drafters of the Brussels I bis Regulation. Accordingly, in my view the principle of abuse of EU law with the criterion of détournement de pouvoir is the most appropriate standard for assessing abuse of law under the Brussels I bis Regulation. Even though this standard for abuse of law is quite similar to the standard derived from national law, there is every reason to apply an autonomous standard based on the principles of abuse of EU law. Indeed, a standard derived from national law could lead to different results according to which national law will be applied, which compromises the uniform interpretation and application of the Brussels I bis Regulation. It is important that the uniform autonomous standard of abuse of law under the Brussels I bis Regulation should be applied with due regard to the principles of legal certainty and predictability of the competent courts. After all, abuse of law needs to be assessed without compromising the system of uniform application of the rules of jurisdiction in the Member States. However, when there is clear evidence that a litigant seeks to derive a detriment to the other party or an improper advantage contrary to the objective of the jurisdictional rules of the Brussels I bis Regulation, the principle of abuse of EU law functions as a tool to carefully correct the interpretation in those cases of the jurisdictional rules of the Brussels I bis Regulation.