

INTERNATIONAL *LIS PENDENS* AS A CONTEMPORARY PROBLEM OF TURKISH INTERNATIONAL CIVIL PROCEDURE

Gülüm BAYRAKTAROĞLU ÖZÇELİK*

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* Assist. Prof. Dr., Bilkent University Faculty of Law, Ankara/Turkey, Department of Private International Law. E-mail: gulum@bilkent.edu.tr.

I. Introduction

Lis pendens (or *lis alibi pendens*) can be regarded as one of the most important aspects of international parallel litigation, where the courts of more than one country having jurisdiction are seised to try the same dispute simultaneously.¹ This may also be viewed as a natural consequence of today's world where legal relationships including foreign elements are more easily established by the increase in free movement of persons and technical developments on the one hand and the lack of universally accepted rules of international jurisdiction on the other.

Outside the scope of international conventions and European Union (EU) regulations providing for common rules, international jurisdiction is still largely subject to national law. It follows that one of the obvious reasons of the *lis pendens* phenomenon is the possibility of establishing international jurisdiction of the courts of different countries on the same dispute on the basis of a different criteria provided in national legislation. However, even where uniform rules apply, it may also be possible to take the same action before the courts of different countries at the same time. This may arise, either as a result of the fact that general and specific rules of jurisdiction do not preclude the application of each other,² or the fact that the basis of jurisdictional rules are provided in an alternative way.³

Where the same dispute is litigated simultaneously before the courts of different countries, either by the same party or the parties against each other, there is a risk of irreconcilable judgments and waste of financial resources, time and effort incurred both by the courts in question and the parties to the dispute. Such undesirable consequences identify *lis pendens* as one of the problems of

¹ Another aspect of international parallel litigation can be considered in the context of "related actions" where the courts of different countries are simultaneously seised not for the same action but for closely connected actions. For a comprehensive analysis of parallel proceedings in international civil litigation see G. BAYRAKTAROĞLU ÖZÇELİK, *Milletlerarası Usûl Hukukunda Paralel Davalar*, Ankara 2016, p. 27 et. seq.

² See e.g. the relationship between Article 4/I as the general rule of jurisdiction (proving for the jurisdiction of the courts of the member state where the domicile of the defendant is situated) and Articles 7-9 as the special rules of jurisdiction (according to the subject-matter of the dispute) of the Brussels I Recast Regulation. For the Brussels I Recast Regulation see *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, OJ L 351/1, 20.12.2012.

³ See e.g. Article 3/I of the Brussels IIa Regulation providing for the jurisdictional rule in matters relating to divorce, legal separation or marriage annulment. For the Brussels IIa Regulation see *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, repealing Regulation (EC) No 1347/2000*, OJ L 338/I, 23.12.2003.

international civil procedure, although Anglo-American and Continental European legal systems approach the problem differently.⁴

In Turkish law – with the exception of bilateral and multilateral conventions to which Turkey is a party⁵ – international *lis pendens* has not been subject to express rules in legislation. The first comprehensive act on Turkish private international law was the Code on Private International Law and International Civil Procedure of 1982 (“CPIL-1982”)⁶ which provided rules on the international jurisdiction of Turkish courts, the conflict of laws as well as on the recognition and enforcement of court decisions and arbitral awards, leaving the issue of international *lis pendens* outside its scope.

CPIL-1982 was amended and replaced by the Code on Private International Law and International Civil Procedure in 2007 (“CPIL-2007”)⁷, considering *inter alia* the EU instruments on private international law with a view to the possible accession of Turkey into the EU.⁸ In addition to amending certain provisions of CPIL-1982, CPIL-2007 also includes new rules relating to both conflict of laws and international civil procedure.⁹ However, international *lis pendens* is one of the topics that is not subject to specific rules in CPIL 2007.¹⁰

⁴ Regarding different approaches and tools adopted for international *lis pendens* in different legal systems as well as in international instruments see C. MCLACHLAN, *Lis Pendens in International Litigation*, Leiden/ Boston 2009, p. 91 *et seq.*; G. BAYRAKTAROĞLU ÖZÇELİK (note 1), at p. 69 *et seq.*

⁵ See *infra* note 14.

⁶ Official Gazette (OG), dated 22.05.1982, numbered 17701.

⁷ OG, dated 12.12.2007, numbered 26728. For an unofficial English translation of CPIL-2007 see N. A. ODMAN BOZTOSUN, *The 2007 Turkish Code on Private International Law and International Civil Procedure*, *Yearbook of Private International Law* 2007, Vol. 9, pp. 583-604.

⁸ For the rationale of the CPIL-2007 see B. TIRYAKIOĞLU/ M. AYGÜN/ E. KÜÇÜK, *Türk Uluslararası Özel Hukuk Mevzuatı*, Ankara 2016, p. 75 *et seq.*

⁹ Regarding the rules of CPIL-2007 see G. GÜNGÖR, *The New Turkish Act on Private International Law and International Civil Procedure*, *Specificitate și complementaritate în dreptul privat european, Conflicttele de legiși de jurisdicții și integrarea juridică europeană* 2012, pp. 528-558.

¹⁰ An adverse trend can be identified in the national laws of other Continental European countries to accept international *lis pendens* as a problem and make it subject to specific rules starting at least from the second half of the twentieth century. In this regard, the Swiss Federal Code on Private International Law of 1987 (Article 9); Italian Law on the Reform of the Italian System of Private International Law of 1995 (Article 7/I); Belgian Code of Private International Law of 2004 (Article 14); Croatian Private International Law Act of 1991 (Article 80); the Polish Code on Civil Procedure as amended in 2015 (Article 1098) constitute examples of national legislation providing express rules on international *lis pendens*. In some other countries such as Germany, France or Austria although international *lis pendens* is not subject to specific rules, there is a similar tendency to accept international *lis pendens* by analogy to national rules of civil procedure regarding *lis pendens*: See R. GEIMER/ R. A. SCHUTZE, *Europäisches Zivilverfahrensrecht – Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, EuInsVO, EuVTVO, zum Lugano-Übereinkommen und zum*

In fact, in Turkish domestic law the objection of *lis pendens* has been subject to express rules since the enactment of Code of Civil Procedure of 1927 (“CCP-1927”).¹¹ CCP-1927 provided the objection of *lis pendens* as one of the preliminary objections to be raised by the defendant (Article 187/I(4)). The Code of Civil Procedure of 2011 (CCP-2011),¹² which replaced CCP-1927, also provides that “*an identical action must not be previously filed and still pending*”, however this is designated as one of the procedural requirements and not as a preliminary objection (Article 114/I(i)). As a result, under the CCP-2011, pendency of the same action can today be examined by the court on its own motion or on the objection of one of the parties during all stages of the action (Article 115/I). Based on a typical mechanical first-in-time rule, if the court second seised determines that the same action is already pending before another court, it shall dismiss the action on procedural grounds in favour of the first court (Article 115/II).

A lack of provisions on international *lis pendens* in Turkish legislation has led to controversy which has been discussed in the literature and seen in court practice over the years. As will be elaborated below, the traditional view (which constituted the majority opinion) has advocated rejection of international *lis pendens* with two exceptions: first under Article 41 CPIL-2007 that provides rules on international jurisdiction of Turkish courts in actions arising from the personal status of Turkish nationals and second under Article 47/I CPIL-2007 on the foreign choice of court agreements. According to this line of thought, international *lis pendens* is implicitly and exceptionally accepted in the application of the said provisions and the objection of international *lis pendens* could therefore only be accepted by the Turkish courts in these two situations.

In this regard, this paper aims to cover two distinct but related discussions in Turkish Law: (i) whether it is possible to generally accept the objection of international *lis pendens* before the Turkish courts notwithstanding that it is not subject to express rules (*infra* II) (ii) whether it should be possible to raise an

nationales Kompetenz- und Anerkennungsrecht, München 2010, p. 1710, N. 36; D. BUREAU/H. MUIR WATT, *Droit International Privé*, T. I, Paris 2010, p. 218, N. 209; T. PETZ, Austria, in T. Kono (ed), *Intellectual Property and Private International Law-Comparative Perspectives*, Oxford/Portland 2012, p. 336 respectively. In regard to such a trend as of 2007 in the EU member states with respect to parallel proceedings in the courts of third countries also see A. NUYTS, *General Report – Study on Residual Jurisdiction – Review of the Member States’ Rules concerning the “Residual Jurisdiction” of Their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations*, para. 99 *et seq.*: Available at <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>. Also see Article 33 of the Brussels I Recast Regulation providing clear rules on international *lis pendens* where the same action is pending before the courts of member states and third countries.

¹¹ OG, dated 2, 3, 4.7.1927, numbered 622, 623, 624.

¹² OG, dated 4.2.2011, numbered 27836. For an unofficial English translation of the CCP-2011 see M. GÖKSU, *Civil Litigation and Dispute Resolution in Turkey*, Ankara 2016, p. 287 *et seq.*

objection of international *lis pendens* in the application of Articles 41 and 47 CPIL-2007 (*infra* III).¹³

II. Divergent Views and Practices As Regards International *Lis Pendens*

Where the jurisdiction of a Turkish court is established according to an international convention to which Turkey is a party, there is unanimous agreement in both literature and in practice that the problem of parallel proceedings shall be subject to the provisions of that convention.¹⁴ This is a natural consequence of Article 90/V of the Turkish Constitution of 1982¹⁵ which states that “[i]nternational agreements duly put into effect have the force of law”.

However, outside the scope of international conventions controversy exists as to whether international *lis pendens* could be accepted if the same action is already pending before the courts of a foreign country. As in most Continental European countries, the doctrine of *forum non conveniens* is considered not to be a part of Turkish law¹⁶ mainly because of the constitutional requirement that “[n]o court shall refuse to hear a case within its jurisdiction” (Article 36/II).¹⁷ Thus, the Turkish courts do not enjoy any discretion not to hear a dispute if their jurisdiction is

¹³ For a more comprehensive analysis of the discussions relating to international *lis pendens* in Turkish law see G. BAYRAKTAROĞLU ÖZÇELİK (note 1), at p. 273 *et seq.*

¹⁴ Turkey is a party to number of international conventions which provide clear rules on *lis pendens* including the Convention on the Recognition of Decisions Relating to the Matrimonial Bond of 1967 (Article 10/I); Convention on the Contract for the International Carriage of Goods by Road (CMR) (Article 31/II); Convention concerning International Carriage by Rail as amended by the Vilnius Protocol (Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) Article 57/II; Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM) Article 46/II). Also see the Agreement between Republic of Turkey and Ukraine on Legal Assistance and Cooperation in Civil Matters providing for an express rule on *lis pendens* under Article 17/III. For an analysis of the mentioned provisions see G. BAYRAKTAROĞLU ÖZÇELİK (note 1), at pp. 276- 290.

¹⁵ Constitution of the Republic of Turkey, numbered 2709, dated 7.11.1982: An official English translation available at <https://global.tbmm.gov.tr/docs/constitution_en.pdf>.

¹⁶ E. NOMER, *Milletlerarası Usul Hukuku*, İstanbul 2009, p. 119; N. EKŞİ, *Türk Mahkemelerinin Milletlerarası Yetkisi*, İstanbul 2000, p. 73; Z. AKINCI, *Milletlerarası Usul Hukukunda Yetki Sözleşmesine Dayanan Yabancı Derdestlik*, Ankara 2002, p. 29; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE, *Milletlerarası Özel Hukuk*, İstanbul 2015, p. 355.

¹⁷ N. EKŞİ (note 16), at p. 73; Z. AKINCI (note 16), at p. 29.

established according to a rule of international jurisdiction.¹⁸ Similarly, anti-suit injunction is not accepted as a tool in international parallel proceedings.¹⁹

Therefore, the discussion outside the scope of international conventions is mainly centered on the question of whether a procedural objection on international *lis pendens* can be raised before the Turkish courts. As will be stated below, answers to this question vary depending primarily on one's interpretation of the present state of a lack of an express provision on the objection of international *lis pendens*, as well as of the scope of Article 114/I(1) CCP-2011 which provides for *lis pendens* as one of the negative procedural requirements without differentiating between Turkish and foreign courts.

¹⁸ Rules of international jurisdiction of Turkish courts are found in Articles 40- 46 of CPIL-2007. Article 40 which is the general rule of international jurisdiction provides that “international jurisdiction of Turkish courts shall be determined according to domestic rules of jurisdiction as to venue”. Between Articles 41 and 46 specific rules of jurisdiction are provided for actions regarding the personal status of Turkish citizens (Article 41), particular actions concerning the personal status of foreigners (Article 42), succession (Article 43), employment contracts and relationships (Article 44), consumer contracts (Article 45) and insurance contracts (Article 46). If the dispute falls within the scope of Articles 41-46, international jurisdiction of Turkish courts should be determined according to those provisions since they are specific rules which are provided by taking into consideration the characteristics of the disputes involving foreign elements. If the dispute does not fall under the scope of specific jurisdictional rules, domestic rules of jurisdiction (to be found mainly in CCP-2011 but also in different legislation including the Turkish Civil Code, numbered 4721 or the Turkish Labour Code, numbered 4857) should be applied by virtue of the general rule provided under Article 40 CPIL-2007: G. BAYRAKTAROĞLU ÖZÇELİK, Yabancı Unsurlu Tüketici Sözleşmelerinden Doğan Uyuşmazlıklarda Türk Mahkemelerinin Milletlerarası Yetkisinin Tayini, *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 2014, Vol. 63, p. 838 *et seq.* Also see B. TIRYAKIOĞLU, Türklerin Kişi Hallerine İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi, *Prof. Dr. Tuğrul Arat'a Armağan*, Ankara 2012, pp. 1156-1157; C. ŞANLI/ E. ESEN/ İ. ATAMAN- FIGANMEŞE (note 16), at p. 369.

¹⁹ See the decision of Küçükçekmece Civil Court of First Instance rejecting the claim of the plaintiff to issue an anti-suit injunction to restrain the defendant to continue the pending proceedings before the foreign courts on the ground that the Turkish courts do not have jurisdiction to issue such injunctions: Küçükçekmece Civil Court of First Instance [*Küçükçekmece Asliye Hukuk Mahkemesi*] (First Chamber), Registration No. 2002/1987, Decision No. 2003/90, Dated 17.10.2003. The Court of Cassation upheld the decision of the court of first instance having found that the plaintiff did not have legal interest: Court of Cassation [*Yargıtay*] (Eleventh Chamber), Registration No. 2004/1141, Decision No. 2004/10544, Dated 1.11.2004. Regarding both decisions see Z. AKINCI, *Milletlerarası Tahkim*, İstanbul 2016, pp. 140-141; H. TÜFEKÇİ, *Milletlerarası Usûl Hukukunda Dava Etmeme Emrine (Anti-Suit Injunction) İngiliz Hukuku, Brüksel Konvansiyon Rejimi ve Türk Hukuku Çerçevesinde Genel Bir Bakış*, *Prof. Dr. Ata SAKMAR'a Armağan, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi* 2011, Vol. 1, pp. 743-744.

A. Traditional View: Rejection of International *Lis Pendens*

The traditional view in Turkish legal doctrine has been the rejection of international *lis pendens*, since there is no clear provision to the contrary.²⁰ Arguments in support of the traditional view include that the acceptance of international *lis pendens* would be against the sovereignty of the Turkish state;²¹ that there is no reason to deprive the plaintiff of his action before the Turkish courts because of the fact that the other party has already filed an action before a foreign court²² or that grounds for *lis pendens* objection in domestic cases such as procedural economy, prevention of contradicting actions of the plaintiff and irreconcilable judgments on the same dispute are not equally applicable for international parallel proceedings.²³ In this regard it was stated that the Turkish courts are by no means under any obligation to assess whether the foreign court would bear any burden because of the pendency of the same action;²⁴ that the decisions of the foreign courts (regarding actions for performance) are in any case subject to *exequatur* procedure in Turkey, thus accepting international *lis pendens* would not be more advantageous regarding the costs;²⁵ and that even where the same action is taken before courts of different countries by the same party, it is not always safe to say that the plaintiff has acted fraudulently.²⁶ It is also argued that since it is not possible to recognize a decision of a foreign court if it contradicts with a previous decision of Turkish courts, rejection of international *lis pendens* would not cause any conflicting judgments.²⁷

In a similar vein, it is also argued that dismissal of an action by the Turkish courts would be a serious obstacle against the right of access to Turkish courts of the plaintiff.²⁸ Acceptance of international *lis pendens* where there is no clear provision would mean forcing the party against whom an action was taken before the foreign court to defend himself before that court although that action was taken

²⁰ M. R. SEVİĞ, *Türkiye Cumhuriyeti Kanunlar İhtilâfı Kaidelerinin Sentezi*, İstanbul 1941, p. 72; V. R. SEVİĞ, *Ticarî Sahadaki Kanunlar İhtilâfı*, İstanbul 1957, pp. 50-51; Y. ALTUĞ, *Devletler Hususi Hukukunda Yargı Yetkisi*, İstanbul 1979, p. 208; E. NOMER, *Devletler Hususi Hukuku*, İstanbul 2015, p. 451 *et seq.*; A. ÇELİKEL/ B. B. ERDEM, *Milletlerarası Özel Hukuk*, İstanbul 2016, p. 608; Z. AKINCI (note 16), at p. 45; H. DEMIRARSLAN, *Türk Devletler Hususi Hukukunda Kazai Salâhiyet*, *Adalet Dergisi* 1952, Y. 43, I. 1, p. 49.

²¹ M. R. SEVİĞ (note 20), at p. 72; Y. ALTUĞ (note 20), at p. 208; H. DEMIRARSLAN (note 20), at p. 49.

²² V. R. SEVİĞ (note 20), at p. 51; V. R. SEVİĞ, *Bir Yabancılık Unsuru Taşıyan Ticarî Davalar Hakkında Yetkili Mahkeme*, *İstanbul Barosu Dergisi* 1959, Vol. 33, I. 7-8, p. 244.

²³ E. NOMER, *Milletlerarası Yetki Alanında Derdestlik İtirazı*, *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 1968, p. 355.

²⁴ E. NOMER (note 23), at p. 355.

²⁵ E. NOMER (note 23), at p. 356.

²⁶ E. NOMER (note 23), at p. 357.

²⁷ E. NOMER (note 23), at p. 374.

²⁸ A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 608.

beyond his control or where he/she may not have the necessary financial means²⁹. In this regard it is also argued that Article 114/I (1) of the CCP-2011 on *lis pendens* is only applicable in domestic cases and does not include any clear indication to cover international *lis pendens*.³⁰

In a rather recent decision in 2014, the Turkish Court of Cassation ruled according to the traditional view.³¹ The case was a divorce law-suit where the first action was taken before the Russian courts. The Turkish court of first instance accepted the objection of international *lis pendens* of the defendant and dismissed the action, taking into consideration the fact that the action involving the same subject-matter and cause of action between the same parties was already pending before the Russian courts.³² However, in the appeal procedure the Court of Cassation ruled that international *lis pendens* can only be accepted by the Turkish courts in two exceptional situations, namely where there is an international convention to which Turkey is a party, or by virtue of Article 47/I of CPIL-2007.³³ According to the Court, acceptance of international *lis pendens* in all other situations would mean the acceptance of the jurisdiction of foreign courts within national borders; thus would be incompatible with the sovereign rights of the Turkish state.

B. Acceptance of International *Lis Pendens* Under Different Conditions

The second view that has been defended by Turkish scholars is in direct contrast to the above view. This view is based on the idea that the lack of an express provision on international *lis pendens* in Turkish legislation does not mean its rejection if the Turkish court is seised second for the same action.³⁴ However, different views and

²⁹ A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 608.

³⁰ M. TAN DEHMEN, Türk Vatandaşlarının Kişi Hallerine İlişkin Davalar Bakımından 5718 sayılı MÖHUK'ta Kabul Edilen Yetki Kuralı, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bilteni* 2013, Vol. 33, I. 1, p. 182.

³¹ See Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 2014/12316, Decision No. 2014/23427, Dated 20.11.2014 (Not published).

³² İstanbul Anatolia Family Court [*İstanbul Anadolu Aile Mahkemesi*] (Fifteenth Chamber), Registration No. 2013/321, Decision No. 2013/1014, Dated 21.11.2013 (Not published).

³³ Regarding the discussions on international *lis pendens* under Article 47/I see *infra* (III/B/1).

³⁴ M. R. BELGESAY, *Teorik ve Pratik Adliye Hukuku IV.-Devletler Hususi Hukukunda Adliye (2. Kısım: Kanunlar İhtilâfi-Türk Mahkemelerinin Ecnebler Hakkında Salâhiyeti-İstinabe-Ecnebi Mahkemesi Kararları-İflâs)*, İstanbul 1938, p. 92; V. R. SEVİĞ/ E. NÖMER/ G. TEKİNALP/ A. SAKMAR, *Devletler Hususi Hukuku Pratik Çalışmaları*, İstanbul 1976, pp. 180-181; F. TIRYAKI, *Derdestliğin Şartları*, *Ankara Barosu Dergisi* 1979, I. 2, p. 37; E. ŞEKERCİ, *Medeni Usûl Hukukunda ve İdari Yargılama Usûlünde Derdestlik*, *Yargıtay Dergisi* 1986, I. 3, p. 216; B. KURU, *Hukuk Muhakemeleri Usulü*, Vol. 4, İstanbul 2001, p. 4223; S. TANRIVER, *Medeni Usul Hukukunda Derdestlik İtirazı*, Ankara 2007, p. 46; S. ÜSTÜNDAĞ, *Medeni Yargılama Hukuku*, Vol. I-II, İstanbul 2000, p. 500; N. EKŞİ (note 16) at p. 204; F. SARGIN, *İnternet Aracılığıyla Gerçekleşen Marka İhlalleri Hakkında Milletlerarası Yetkiyi Haiz Mahkemeler ve Uygulanacak Hukuk*, Ankara 2005, p. 252; C. ŞANLI/ E. ESEN/ İ. ATAMAN-

practices can be determined on the approach to be adopted in the acceptance of international *lis pendens*, as well as on its possible consequences on the action pending before the Turkish courts.

1. Direct Application of the Provision on the Objection of Lis Pendens to International Parallel Proceedings

One of the early views declared in doctrine, even before the enactment of CPIL-1982, was that the rules on *lis pendens*, as provided in the (then) CCP-1927, should equally apply where the same action is pending before foreign and Turkish courts at the same time.³⁵ Accordingly, it was sufficient to determine whether two actions could be qualified as the same action and whether the foreign court was the first in time to be seised. In a 1998 decision, the view was also adopted by the Court of Cassation, accepting the objection of international *lis pendens* of the defendant and declining jurisdiction in a divorce law-suit based on the fact that the foreign court was seised first for the same action.³⁶

2. Recognition or Enforcement Prognosis

Particularly since the enactment of CPIL-1982 it is also possible to identify a significant number of authors arguing that international *lis pendens* can be accepted through recognition or enforcement prognosis.³⁷ However, as will be demonstrated below, different views have been expressed with regard to whether a positive recognition or enforcement prognosis should suffice or whether some other conditions should also be required. The recognition or enforcement prognosis in the acceptance of international *lis pendens* has also been stated in the decisions of Court of Cassation although no clear indication has been made by the Court regarding how such an assessment will be made.

a) Recognition or Enforcement Prognosis Suffices

According to one line of thought, in cases where the foreign court is seised first, the Turkish court second seised for the same action should decline jurisdiction once it makes an assessment that the decision of the foreign court could possibly be

FIGANMEŞE (note 16), at p. 415; E. ERDOĞAN, *Medeni Usûl Hukuku Kurallarının Yer Bakımından Uygulanması*, Ankara 2016, p. 179.

³⁵ M. R. BELGESAY (note 34), at p. 92.

³⁶ See Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 1998/10337, Decision No. 1998/12221, Dated 13.11.1998: B. KURU (note 34), at p. 4223.

³⁷ B. KURU (note 34), at p. 4222; S. TANRIVER (note 34), at p. 46; S. ÜSTÜNDAĞ (note 34), at p. 500; V. DOĞAN, *Türk Hukukunda Yabancı Derdestliğin Nazara Alınması*, Prof. Dr. Ergin NOMER'e Armağan, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 2002, Vol. 22, p. 145; N. EKŞİ (note 16) at p. 204. For a similar view on applying the rule on the objection of *lis pendens* (Article 187/I(4) CCP-1927) to international *lis pendens* by analogy see F. SARGIN (note 34), at p. 252.

recognized or enforced in Turkey.³⁸ The ground for this view was stated as that where the decision of the foreign court could be enforced in Turkey, the plaintiff has no legal interest in filing the same action before a Turkish court³⁹ or that considering the frequency and development of international private law relationships, international *lis pendens* should be accepted if it is not expressly prohibited by legislation.⁴⁰ In this regard it was advocated that as pendency is a matter of procedure, the objection of international *lis pendens* must also be subject to Article 114 CCP-2011 regarding its conditions and consequences.⁴¹ This would mean that pendency of the same action before the foreign court can be objected by one of the parties, or can be taken into consideration by the Turkish court on its own motion during all stages of action and, should the Turkish court determine that the decision of the foreign court that was seised first for the same action could be recognized or enforced in Turkey, it shall dismiss the action in favour of that court.

According to another view, Article 114 CCP-2011 on *lis pendens* cannot be applied directly or by analogy to international situations, however the Turkish judge can close the loophole in law according to Article 1/II of the Turkish Civil Code of 2001⁴² which requires that “*where there is no provision to be applied in legislation the judge shall decide according to customary law and if there is no such rule then according to a rule that he/she would have created if he/she was the legislator*”. Accordingly, a solution similar to that of Article 9 of the Swiss Federal Code on Private International Law is proposed.⁴³ In this regard, if the Turkish court that is seised second for the same action considers that the decision of the foreign court can be recognized or enforced in Turkey, it can accept the objection of international *lis pendens*.⁴⁴ However, unlike the effect of *lis pendens* in domestic cases, since it is not certain whether the future judgment of the foreign court will be recognized or enforced in Turkey, the effect of accepting the objection of international *lis pendens* should be the stay of Turkish proceedings.⁴⁵ Once the judgment of the foreign court is recognized or enforced in Turkey, the Turkish court should decline jurisdiction.⁴⁶

The recognition or enforcement prognosis has been stated in some decisions of the Turkish Court of Cassation even before the adoption of CPIL-1982. For

³⁸ F. TIRYAKI (note 34), at p. 37. Also see V. DOĞAN, *Milletlerarası Özel Hukuk*, Ankara 2016, p. 54; C. ŞANLI/E. ESEN/İ. ATAMAN-FİGANMEŞE (note 16), at p. 415; C. ŞANLI, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, İstanbul 2013, p. 152.

³⁹ F. TIRYAKI (note 34), at p. 37; V. DOĞAN (note 38), at p. 54.

⁴⁰ C. ŞANLI/E. ESEN/İ. ATAMAN-FİGANMEŞE (note 16), at p. 415; C. ŞANLI (note 38), at p. 152.

⁴¹ C. ŞANLI/E. ESEN/İ. ATAMAN-FİGANMEŞE (note 16), at p. 416; C. ŞANLI (note 38), at p. 152.

⁴² OG, dated 8.12.2001, numbered 24607.

⁴³ E. ERDOĞAN (note 34), at p. 179 *et seq.*

⁴⁴ E. ERDOĞAN (note 34), at p. 183 *et seq.*

⁴⁵ E. ERDOĞAN (note 34), at p. 184.

⁴⁶ E. ERDOĞAN (note 34), at p. 184.

instance, in 1973 the Court rejected the objection of international *lis pendens* based on the fact that the (future) decision of the German court could not be enforced in Turkey.⁴⁷ In a similar vein, in 1985 the Court approved the decision of a court of first instance⁴⁸ rejecting the objection of international *lis pendens*, since in absence of any bilateral agreement between Turkey and Syria, the reciprocity required in the enforcement of foreign court decisions in the then CCP-1927 (Article 540) could not be fulfilled and therefore the decision of the Syrian court could not possibly be enforced in Turkey.⁴⁹

In more recent decisions of the Court of Cassation, recognition or enforcement prognosis has found a place for itself although the Court does not indicate how it is to be implemented. For example in a divorce law-suit, the plaintiff took an action first before the Canadian courts and subsequently before the Turkish courts. The court of first instance accepted the international *lis pendens* objection determining that the Canadian court was seised first for the same action and declined jurisdiction in favour of that court. On the appeal of the decision in 2010, the Court of Cassation ruled that for the acceptance of the objection of international *lis pendens*, the same action (where the parties, the subject-matter and the cause of two actions are identical) must be taken before different courts at the same time and “*the decision of the foreign court must be capable of enforcement in Turkey and there must be a convention between that foreign country and Turkey or a clear provision in Turkish private international law*”.⁵⁰ Thus, the Court seems to treat recognition prognosis not as a separate condition to accept the international *lis pendens* objection, but rather as a condition to be satisfied along with the existence of an international convention between the foreign country in question and Turkey. In the specific case the Court of Cassation set the decision of the court of first instance aside on the grounds that the causes of the two actions were not the same and there existed no bilateral agreement between Turkey and Canada and Canada was also not a party to the Convention on the Recognition of Decisions Relating to the Matrimonial Bond of 1967.

In another decision of 2011 of the Court of Cassation, a divorce law-suit was filed before German courts by the wife and was subsequently taken before the Turkish courts by the husband.⁵¹ The defendant objected before the Turkish court of

⁴⁷ Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 1973/4413, Decision No. 1973/4363, Dated 2.7.1973: B. KURU (note 34), at p. 4223.

⁴⁸ Kırıkhan Civil Court of First Instance [*Kırıkhan Asliye Hukuk Mahkemesi*], Registration No. 1981/325, Decision No. 1984/215, Dated 20.6.1984: Published in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1986, I. 1, pp. 80-85.

⁴⁹ Court of Cassation [*Yargıtay*] (Eleventh Chamber), Registration No. 1985/123, Decision No. 985/1209, Dated 6.3.1985: Published in N. EKŞİ, *Milletlerarası Özel Hukuk I Pratik Çalışma Kitabı*, İstanbul 2014, p. 231 *et seq.*

⁵⁰ Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 2009/13541, Decision No. 2010/11899, Dated 15.6.2010: Published at <<http://www.kazanci.com>>.

⁵¹ Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 2010/6713, Decision No. 2011/8635, Dated 17.5.2011: Published at <<http://www.kazanci.com>>.

first instance due to the pendency of the same action in the German courts. The court of first instance upheld the objection stating that pendency of the same action before foreign courts could also be taken into consideration.⁵² In the appeal of the decision, the Court of Cassation ruled that acceptance of the objection of international *lis pendens* requires “identity of causes of two actions, the capability of enforcement of the decision of the foreign court in Turkey, existence of an international convention between Turkey and the state before which the action is pending as well as a clear provision on international *lis pendens* in Turkish Law”, thus looking for the fulfillment of the requirements cumulatively. In the specific case the Court set the decision of the court of first instance aside on the grounds that the causes of two actions were not the same and the parties to the dispute did not act in the same capacity in both of the actions.

b) *Recognition or Enforcement Prognosis and Extra Requirements*

Other views in Turkish legal doctrine follow the line of accepting international *lis pendens* according to recognition or enforcement prognosis, but they also require the fulfilment of additional conditions.

According to one view, Turkish courts should accept the objection of international *lis pendens* once they determine that it could be possible to enforce the decision of the foreign court in Turkey and that the basis of jurisdiction of the foreign court must sufficiently satisfy the objective link between the dispute and the foreign court.⁵³ According to the scholar writing on the subject when CPIL-1982 was in force, while determining whether the foreign decision could be enforced in Turkey the Turkish court should make an assessment regarding two of the conditions of enforcement of foreign court decisions, namely “reciprocity” and “exclusive jurisdiction of Turkish courts”.⁵⁴

According to another view, other than recognition or enforcement prognosis, the Turkish court should also determine whether reciprocity regarding acceptance of international *lis pendens* exists and whether the foreign court shall render its decision in a reasonable time.⁵⁵ Thus, the Turkish court should decline jurisdiction in favour of the foreign court if it can reasonably be expected that the decision of that court which will be rendered in a reasonable time could be recognized or enforced in Turkey and if the courts of that foreign country also consider the pending actions before the Turkish courts.⁵⁶ Since it is not possible to be certain whether all the conditions of recognition or enforcement of foreign decisions will be fulfilled, in assessing whether the decision of the foreign court could be recognized or enforced in Turkey, it is sufficient to determine that certain requirements of

⁵² Karacabey Civil Court of First Instance [*Karacabey Asliye Hukuk Mahkemesi*], Registration No. 2009/134, Decision No. 2009/1019, Dated 3.12.2009 (Not published).

⁵³ N. EKŞİ (note 16), at p. 204.

⁵⁴ N. EKŞİ (note 16), at p. 204.

⁵⁵ V. DOĞAN (note 38), at p. 57; V. DOĞAN (note 37), at p. 146.

⁵⁶ V. DOĞAN (note 37), at p. 146.

recognition or enforcement of judicial decisions are fulfilled including the existence of a “civil law dispute”, “reciprocity” and “jurisdiction”.⁵⁷ Furthermore, since *lex fori* applies in the area of civil procedure; Article 114 CCP-2011 does not make a distinction between internal law and private international law and Article 40 of CPIL-2007 makes a reference to the domestic rules of jurisdiction as to venue,⁵⁸ international *lis pendens* can be accepted as a procedural requirement according to Article 114 of CCP-2011, and can therefore be raised as an objection by one of the parties or can be taken into account by the court on its own motion during all stages of the action.⁵⁹

C. Evaluation of Different Views

It is very clear that the absence of a provision on international *lis pendens* in Turkish Law has led to divergent views in doctrine as well as various court practices which hamper legal certainty and consistency. Therefore, the first point to be noted is the urgent need for express rules in legislation accepting international *lis pendens*.⁶⁰

However, notwithstanding that the objection of international *lis pendens* is not currently subject to specific rules in legislation, I am of the opinion that it can still be accepted. In other words, the absence of a provision on international *lis pendens* does not necessarily mean its rejection by the Turkish legislator. There is no provision in Turkish law, either expressly or implicitly preventing the Turkish courts from considering any pending actions before the foreign courts. Thus it

⁵⁷ V. DOĞAN (note 38), at p. 54-55. See also V. DOĞAN (note 37), at pp. 145-146.

⁵⁸ Regarding Article 40 of the CPIL-2007 see *supra* note 18.

⁵⁹ V. DOĞAN (note 38), at p. 56.

⁶⁰ According to my opinion, such clear rules should also cover related actions, since express rules limited to international *lis pendens* would solve the problem of international parallel proceedings only partially. Where only international *lis pendens* is provided, that provision would apply as long as the actions pending before the Turkish and foreign courts can be characterised as the same action. Thus, a similar discussion regarding related actions will continue to arise. Regarding divergent views in Turkish literature, court decisions as well as the proposal of the present author on a provision regarding related actions in Turkish international civil procedure see G. BAYRAKTAROĞLU ÖZÇELİK (note 1), at p. 336 *et seq.* It is true that related actions are mostly not subject to clear rules even in national legislation providing express rules on international *lis pendens*: See e.g. Swiss Federal Code on Private International Law (Article 9); Belgian Code of Private International Law (Article 14); Croatian Private International Law Act (Article 80). In this respect Italian Law on the Reform of the Italian System of Private International Law is exceptional where Article 7 provides express rules not only regarding international *lis pendens* (Article 7/I) but also on related actions (Article 7/III). In regard to discretion of French courts to take a related action before the foreign courts into consideration by applying Article 101 of the Code on Civil Procedure on *connexité* by analogy see D. BUREAU/ H. MUIR WATT (note 10), at p. 222, N. 213; A.T. VON MEHREN/ E. GOTTSCHALK, *Adjudicatory Authority in Private International Law: A Comparative Study*, Leiden/ Boston 2007, p. 295. Also see Article 34 of the Brussels I Recast Regulation providing rules on related actions pending before the courts of member states and of the third countries.

cannot be inferred with certainty from any provision that silence of the Turkish legislator has to be interpreted as the rejection of international *lis pendens*. On the contrary, taking into consideration the frequency of private international law relations of the day, the undesirable consequences of international parallel proceedings, as well as the idea of international cooperation between the courts of different countries, the international *lis pendens* objection should be accepted by the Turkish courts.

Nevertheless, although it is true that Article 114/I (1) CCP-2011 on the *lis pendens* objection prohibits the pendency of the same action without differentiating between Turkish courts and courts of foreign countries, both the principle of priority required in domestic cases and the effect of acceptance of the objection of *lis pendens* on the second action may bring inappropriate and in certain cases unjust results once it is accepted that such provisions can be directly applied in international parallel proceedings. Sole acceptance of the principle of priority where the same action is pending before different Turkish courts may be justified as a result of the fact that the said courts will apply the same rules on the dispute regarding both substance and procedure. The same line of approach may also be followed in international parallel litigation where there is reciprocal acceptance of countries through bilateral or multilateral conventions or, as in the EU, where it is based on a system of mutual trust which the member states accord to each other's legal systems and courts⁶¹ with the assumption of parity between such courts.⁶² However, where such reciprocity is absent, the same kind of relationship cannot be said to exist between Turkish courts and the courts of foreign countries.⁶³

However, taking the needs and requirements of international litigation into consideration, it should be possible to apply Article 114 CCP-2011 by analogy to international parallel proceedings.⁶⁴ This will require identity of actions before the foreign and Turkish courts, the first in time of the foreign proceedings and a positive recognition or enforcement prognosis, as will be discussed under the following headings.

⁶¹ C-116/02 *Erich Gasser GmbH v. MISAT Srl*, 9.12.2003, ECLI:EU:C:2003:657, para. 72.

⁶² U. MAGNUS/ P. MANKOWSKI/ R. FENTIMAN, *Brussels I Regulation*, Munich 2012, Articles 27-30, N. 27 *et seq.* However, even in the EU *lis pendens* provisions based on the principle of priority are not free of criticism, encouraging race to court and abusive litigation strategies: J. J. FAWCETT, General Report, in J. J. Fawcett (ed), *Declining Jurisdiction in Private International Law*, Oxford 1995, at p. 35; U. MAGNUS/ P. MANKOWSKI/ R. FENTIMAN (note 62), N. 17 *et seq.*; N. EKŞİ (note 16), at p. 196; BAYRAKTAROĞLU ÖZÇELİK (note 1), at p. 174.

⁶³ Also see N. EKŞİ (note 16), at p. 204.

⁶⁴ Also see F. SARGIN (note 34), at p. 252.

1. Requirements of Accepting the Objection of International Lis Pendens

a) Identity of Actions

The first requirement for the acceptance of the objection of *lis pendens* in Turkish civil procedure, which should also be applied regarding international *lis pendens*, is that the action pending before the Turkish and foreign courts is the same action.

Although there is no clarity in CCP-2011 on what is required for the identity of actions, it is established both in doctrine and in practice that actions are deemed to be same where proceedings involve the same subject-matter and cause of action, and are between the same parties.⁶⁵ The parties are accepted to be the same even if they act in different capacities before different courts.⁶⁶

Thus the parties should be deemed to be the same even if they act in different capacities before the foreign and Turkish courts. In this regard, both where the same party takes concurrent actions against the other party before a foreign and a Turkish court and where the defendant of the first action before the foreign court subsequently takes another action before the Turkish court, the actions should be deemed to be between the same parties. Although it is possible to determine number of decisions of the Court of Cassation in which the Court required that the parties should act in the same capacity before the foreign as well as the Turkish courts,⁶⁷ in my opinion it is not necessary to make any exception for international *lis pendens* from the approach adopted for domestic cases.⁶⁸ Furthermore, requiring the parties to act in the same capacity before the courts of different countries would also be contrary to the fact that parallel proceedings usually arise from reactive litigation, i.e. where the parties take different actions against each other before the courts of different countries.

The same cause of action exists where the facts of the actions are the same.⁶⁹ Identity of claims is required for the identity of the subject-matter of the actions.⁷⁰ Where the first action taken before the foreign court is a declaratory action which is followed by an action for performance before the Turkish court, the actions are not

⁶⁵ R. ARSLAN/ E. YILMAZ/ S. TAŞPINAR AYVAZ, *Medeni Usul Hukuku*, Ankara 2016, at p. 327; S. TANRIVER, *Medenî Usûl Hukuku*, Vol. I, Ankara 2016, at p. 646.

⁶⁶ B. KURU, *Hukuk Muhakemeleri Usulü*, Ankara 1974, at p. 653; General Assembly of Civil Chambers of the Court of Cassation [*Yargıtay Hukuk Genel Kurulu*], Registration No. 1985/13-114, Decision No. 1986/591, Dated 28.5.1986; E. YILMAZ, *Hukuk Muhakemeleri Kanunu Şerhi*, Ankara 2012, at p. 768.

⁶⁷ See e.g. *supra* notes 51 and 31 respectively regarding the decisions of 17.5.2011 and 20.11.2014 of the Court of Cassation (Second Chamber) where the Court required *inter alia* that the parties should have acted in the same capacity before Turkish and foreign courts.

⁶⁸ For a comprehensive analysis of the requirement of “identity of the parties” with regard to *lis pendens* objection in domestic cases see S. TANRIVER (note 34), at p. 66 *et seq.*

⁶⁹ S. TANRIVER (note 65), at p. 653. Also see General Assembly of Civil Chambers of the Court of Cassation [*Yargıtay Hukuk Genel Kurulu*], Registration No. 1985/13-114, Decision No. 1986/591, Dated 28.5.1986; E. YILMAZ (note 66), at p. 768.

⁷⁰ B. KURU (note 66), at p. 654.

deemed to arise from the same subject-matter,⁷¹ since the claim in the first action is limited to the existence or non-existence of a legal relationship whereas the second one also includes a claim on the performance of an act by the defendant.⁷² On the contrary, where the action before the foreign court is an action for performance which is followed by a declaratory action before the Turkish court, the objection of international *lis pendens* should be admissible before the latter based on the fact that the plaintiff does not have a legal interest since the decision in the action for performance would also include determination of the (non)- existence of the legal relationship in question.⁷³

b) *Time of Seising*

When Article 114 CCP-2011 is applied by analogy on international *lis pendens*, the second requirement should be as regards the chronology of the seizure of courts. As noted earlier, under Turkish civil procedure the objection of *lis pendens* is made to the second court seised which is obliged to dismiss the action as soon as it determines that the same action is already pending before another Turkish court. The same approach is also to be adopted in the objection of international *lis pendens* in terms of seizure of courts; thus, the objection should be admissible if the Turkish court is the one that is later seised.⁷⁴ The time of seizure of the courts is to be determined by the *lex fori* of the respective courts. In Turkish civil procedure, the court is deemed to be seised when the document instituting the proceedings is registered by the court (Article 118/I CCP-2011). As one of the procedural consequences of filing an action, pendency also starts from the same date. On the other hand, the Turkish court shall apply the law of the foreign court to determine the time of seizure of that court.

c) *Recognition or Enforcement Prognosis*

In accepting the objection of international *lis pendens*, the third requirement should be that the Turkish court which is seised second for the same action should make a positive assessment that the decision to be given by the foreign court could be recognized or enforced in Turkey.

Other than the fact that the plaintiff would have no legal interest in taking the same action before the Turkish courts if the foreign judgment is recognized or enforced in Turkey, recognition or enforcement prognosis is based on the idea that the risk of irreconcilable judgments exists only if the *res judicata* effect of the foreign judgment is recognized in Turkey. Thus, acceptance of the objection of

⁷¹ S. TANRIVER (note 34), at p. 82; E. ŞEKERCI (note 34), at pp. 220-221; F. TIRYAKI (note 34), at p. 40.

⁷² F. SARGIN (note 34), at p. 254.

⁷³ S. TANRIVER (note 34), at p. 88.

⁷⁴ C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 414; V. DOĞAN (note 38), at p. 55; N. EKŞİ (note 16), at p. 204. Also see Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 2005/8685, Decision No. 2005/11319, Dated 14.7.2005: Published at <<http://www.kazanci.com>>.

international *lis pendens* according to recognition or enforcement prognosis would preclude the possibility of dismissal of the pending action before the Turkish court because of *res judicata* if the decision of the foreign court which is seised first is already recognized or enforced in Turkey.

At this point it should be underlined that, although recognition of a foreign judgment in Turkey suffices to accept its *res judicata* effect (Article 58/I CPIL-2007),⁷⁵ the distinction provided in CPIL-2007 regarding the conditions of recognition and enforcement of judicial decisions should also be followed in the acceptance of international *lis pendens*. Thus, the prognosis should be made depending on the type of action in question and considering whether the decision of the foreign court could be subject to recognition or enforcement in Turkey.

In Turkish law, conditions of enforcement of foreign judgments are provided under Articles 50/I and 54 of the CPIL-2007.⁷⁶ According to Article 50/I, that provides for the pre-requisites of enforcement, a foreign judgment can be enforced in Turkey if it is given in a “civil law action” by a foreign “court” and is “final” according to the law of that country.

Under Article 54, the Turkish court shall decide on the enforcement of a foreign judgment if;

- (i) Reciprocity exists either by an agreement between Turkey and the country by the court of which the judgment is given or where a statutory provision or practice exists in that foreign country which enables enforcement of decisions of Turkish courts (Article 54/I(a));
- (ii) The judgment is not as to a dispute which falls under the exclusive jurisdiction of Turkish courts or is not given by a court granting itself jurisdiction without having a genuine link with the subject of the dispute or the parties, on the condition that the defendant raises an objection to that effect (Article 54/I(b));

⁷⁵ Even if the decision of the foreign court is one requiring enforcement, as long as the party asking for recognition in Turkey has a legal interest, it is sufficient to decide on the recognition to accept its *res judicata* effect: F. SARGIN/ R. ERTEN, MÖHUK Hükümleri Dairesinde Tanımanın Hukukî Niteliği, Usûlü ve Karşılaşılın Bazı Sorunlar: “Yeni Bir Düzenleme Yapma Gereği”, *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* 2014, Vol. 3, I. 2, pp. 51-52; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at pp. 478-479; P. GÜVEN, *Tanıma-Tenfiz (Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi)*, Ankara 2013, p. 53; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 653; N. EKŞİ, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi*, İstanbul 2013, p. 7. Also see General Assembly of Civil Chambers of the Court of Cassation [*Yargıtay Hukuk Genel Kurulu*], Registration No. 2009/19-161, Decision No. 2009/207, Dated 27.5.2009: Published in N. EKŞİ, *5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun’a İlişkin Yargıtay Kararları*, İstanbul 2010, pp. 144-147. Cf. Court of Cassation [*Yargıtay*] (Thirteenth Chamber), Registration No. 1989/1221, Decision No. 1989/4636, Dated 30.6.1989: Published at <www.kazanci.com>.

⁷⁶ Regarding the conditions of recognition and enforcement of judicial decisions in Turkey see C. SÜRAL/ Z. D. TARMAN, Recognition and Enforcement of Foreign Court Decisions in Turkey, *Yearbook of Private International Law* 2013/2014, Vol. 15, pp. 485-508; F. SARGIN, A Critical Analysis of the Requirements of Recognition and Enforcement of Foreign Judgments under Turkish Law, *IPRax* 2008, H. 4, p. 354 *et seq.*

- (iii) The judgment is not manifestly contrary to public policy (Article 54/I(c));
- (iv) Contrary to the law of that country the party against whom enforcement is sought has not been duly summoned to that court or properly represented before that court or where the judgment was given in default of appearance and that party has not raised an objection to enforcement on these grounds before the Turkish court (Article 54/I(ç)).

It is also established that the same conditions apply for recognition of foreign judgments, with the exception of reciprocity (Article 58/I CPIL-2007). The conditions of recognition and enforcement are assessed by the Turkish court in which recognition or enforcement is sought on its own motion, except for the ones regarding exorbitant jurisdiction (Article 54/I(b)) and the rights of defence (Article 54/I(ç)), which have to be raised by the party against whom recognition or enforcement is sought.

Nevertheless, it is obvious that where the action is still pending before the foreign court, the Turkish judge cannot determine with certainty whether all the conditions of recognition or enforcement are fulfilled,⁷⁷ either because of the nature of some conditions⁷⁸ or because some require the objection of the party against whom enforcement is sought.⁷⁹ Thus, some probability of recognition or enforcement of foreign judgment should suffice to uphold the objection of international *lis pendens* if the Turkish judge can make a positive prognosis on the conditions which can be assessed with certainty on its own motion at this stage.

In this regard, as far as the pre-requisites of recognition and enforcement are concerned, the Turkish court could assess whether the decision of the foreign “court” will be as to a “civil law action”. When determining whether the judgment is given by a “court”, it should suffice if the institution that will give the judgment is accepted as a court having the authority to give judicial decisions under the law of that country.⁸⁰ However, the mere existence of an alternative court should not be sufficient to reach the conclusion that this condition is satisfied. The alternative court

⁷⁷ This argument has also been made in Turkish doctrine against the acceptance of recognition or enforcement prognosis: A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 608; E. NOMER (note 23), at p. 368. It was also stated that existence of mere probability of not recognizing or enforcing a foreign judgment on public policy grounds is a reason not to adopt recognition or enforcement prognosis: E. NOMER (note 23), at p. 369.

⁷⁸ In this regard, the Turkish court cannot determine whether the foreign proceedings shall be concluded with a final judgment (Article 50/I CPIL-2007), whether the judgment is manifestly contrary to public policy (Article 54/I(c) CPIL-2007) or whether the party against whom recognition or enforcement is sought is given judgment in default of appearance (Article 54/I(ç) CPIL-2007) since the proceedings before the foreign court are still pending.

⁷⁹ See Article 54/I(b) CPIL-2007 on exorbitant jurisdiction and Article 54/I(ç) CPIL-2007 on the rights of defence.

⁸⁰ N. EKŞİ (note 75), at p. 109 *et seq.*; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 483; V. DOĞAN (note 38), at p. 108. For the view also requiring that the foreign “court” should be accepted as a court according to the law of the country where recognition or enforcement is sought: C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 483; P. GÜVEN (note 75), at p. 29.

in question should also guarantee the right to a fair trial as provided under Article 6/I of the European Convention on Human Rights (ECHR),⁸¹ to which Turkey is a party,⁸² and Article 36/I of the Turkish Constitution.⁸³ Therefore, the foreign court must be an independent and impartial tribunal guaranteeing a fair and public hearing within a reasonable time. Although it may not always be possible to determine with certainty that the proceedings before the foreign court shall be concluded satisfying the requirements of a fair trial, if the Turkish judge has legitimate doubts that proceedings before the foreign court shall not be concluded as guaranteeing the right to a fair trial, the objection of international *lis pendens* should not be upheld.

On the other hand the Turkish court can also determine with certainty whether reciprocity (Article 54/I(a) CPIL-2007) exists as regards enforcement of judicial decisions and whether the dispute falls under the exclusive jurisdiction of Turkish courts (Article 54/I(b)).⁸⁴

Furthermore, it should also be noted that, in the recognition or enforcement of foreign court decisions, although objection of the party against whom the enforcement is sought is required for the protection of the rights of defence under Article 54/I (ç) CPIL-2007, it is still possible not to recognize or enforce a foreign judgment on public policy grounds (Article 54/I(c) CPIL-2007) if the Turkish court determines on its own motion that infringement of the rights of defence amounts to an infringement of the effective right of access of that party to the foreign court.⁸⁵ The same conclusion should also be adopted for international *lis pendens*. Therefore, if the Turkish judge has legitimate doubts that the effective right of access has not been guaranteed before the foreign court, which would result in non-recognition or non-enforcement of that judgment in Turkey, the objection of international *lis pendens* should be rejected.

⁸¹ J. J. FAWCETT, *The Impact of Article 6(1) of the ECHR on Private International Law*, *International and Comparative Law Quarterly* 2007, Vol. 56, p. 9. Also see L. R. KUESTRA, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague 2014, p. 111.

⁸² OG, numbered 8662, dated 19.3.1954.

⁸³ Article 36/I of the Turkish Constitution reads that “[e]veryone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.”

⁸⁴ In Turkish law, exclusive jurisdiction of Turkish courts is not clearly provided by legislation, but certain jurisdictional rules are interpreted as rules of exclusive jurisdiction. In this regard, unanimous opinion exists that the jurisdiction of Turkish courts as regards disputes arising from property rights on immovable property which is situated in Turkey (Article 12 CCP-2011) is exclusive in character. Different views are declared on whether the rules of jurisdiction regarding disputes arising from employment contracts and relationships, consumer contracts and insurance contracts under Articles 44-46 CPIL-2007 establish exclusive jurisdiction of Turkish courts. Regarding the latter discussion also see *infra* (III/B/2).

⁸⁵ C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 526; P. GÜVEN (note 75), at p. 146; N. EKŞİ (note 75), at p. 696.

2. *Effect of Accepting the Objection of International Lis Pendens on the Pending Action Before the Turkish Courts*

Once it is agreed that the objection of international *lis pendens* can be accepted according to the recognition or enforcement prognosis, its effect on the action pending before the Turkish court should also be further deliberated. As previously mentioned, in Turkish civil procedure once the conditions of objection of *lis pendens* are satisfied, the second court dismisses the action before it in favour of the first court (Article 115/II CCP-2011).

However, where international *lis pendens* is accepted according to recognition or enforcement prognosis, an immediate dismissal of the action pending before the Turkish court may lead to undesirable consequences since this approach mainly rests on an assumption that the foreign proceedings will be concluded with a final judgment which could be recognized or enforced in Turkey. Thus, the action before the foreign court may itself be dismissed on procedural grounds, or may be concluded with a judgment the recognition or the enforcement of which is rejected in Turkey. In such cases dismissal of the action before the Turkish courts may amount to an infringement of the right to a court of the party that has brought the action before the Turkish courts as guaranteed by Article 6/I ECHR and Article 36/I of the Turkish Constitution. It will also lead to waste of resources made in the proceedings before the Turkish courts until the date of dismissal, as well as requiring the plaintiff to take a new action before the Turkish courts and therefore bring questions of procedural economy.⁸⁶

In this regard, the primary consequence of the acceptance of international *lis pendens* according to recognition or enforcement prognosis by Turkish courts should be the stay of the proceedings rather than dismissal.⁸⁷ However, it must also be underlined that a stay of proceedings for an excessive period of time may itself amount to an infringement of the right to a fair trial.⁸⁸ In view of this, as noted earlier,

⁸⁶ Also see E. ERDOĞAN (note 34), at p. 181. Cf. E. NOMER (note 23), at p. 369.

⁸⁷ Stay of proceedings is also adopted as the primary consequence of accepting international *lis pendens* through recognition or enforcement prognosis in different national legislation (e.g. Swiss Code on Private International Law, Article 9/I; Reform of the Italian System of Private International Law, Article 7/I; Belgian Code of Private International Law, Article 14) as well as in the Brussels I Recast Regulation regarding parallel proceedings between the courts of the member states and the third countries (Article 33/D). Regarding recognition prognosis adopted in the Brussels I Recast Regulation see F. MARONGIU BUONAIUTI, *Lis Alibi Pendens and Related Actions in the Relationship with the Courts of Third Countries in the Recast of the Brussels I Regulation*, *Yearbook of Private International Law* 2013/2014, Vol. 15, p. 95 *et seq.*; G. BAYRAKTAROĞLU ÖZÇELİK (note 1), at p. 237 *et seq.*

⁸⁸ For similar concerns raised regarding delay in trial because of the stay of English proceedings on *forum non conveniens* grounds see J. J. FAWCETT (note 81), at p. 9; *Opinion of Mr. Advocate General Léger of 14 December 2004*, C-281/02 *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, para. 270. Also see *Kutic v. Croatia* where the European Court of Human Rights ruled that a stay of proceedings of over six years for the enactment of new legislation concerning the applicants' situation amounts to

depending on the circumstances of each case, the Turkish court should stay the proceedings if it can make a positive assessment that the foreign court can render a judgment within a reasonable time which can then be recognized or enforced in Turkey. The Turkish court should dismiss the action once the foreign decision is recognised or enforced in Turkey.

III. International *Lis Pendens* and Articles 41 and 47 CPIL-2007

As noted earlier, a second discussion relating to international *lis pendens* in Turkish law has been as regards Articles 41 and 47/I of Turkish CPIL-2007 (previously Articles 28 and 31 CPIL-1982), which provide rules on the international jurisdiction of Turkish courts relating to personal status of Turkish nationals and the foreign choice of court agreements, respectively. Although there is no express provision to this end, since the enactment of Turkish CPIL-1982, the majority view in Turkish doctrine has provided that in the application of two mentioned provisions, international *lis pendens*, is implicitly accepted.

A. If an Action Relating to Personal Status of Turkish Nationals is Already Pending Before the Foreign Courts

Article 41 of Turkish CPIL-2007 provides for a specific rule on international jurisdiction of Turkish courts regarding actions relating to personal status of Turkish nationals⁸⁹ with the aim of maintaining a Turkish court having jurisdiction regarding such disputes. The provision reads that “[a]ctions relating to personal status of Turkish nationals can be taken before the court which has jurisdiction according to domestic rules of jurisdiction as to venue, if there is no such court where the person concerned is resident in Turkey, if he/she is not resident in Turkey, before the court of last domicile in Turkey and if there is no court of last domicile, before one of the courts in Ankara, İstanbul or İzmir, provided that the action is not or cannot be instituted in any foreign court”.

Thus, two conditions must be satisfied for an action to be taken before the competent Turkish courts: first, the action must relate to personal status of Turkish nationals, a condition which is subject to a wide interpretation including matters relating to law of persons and family law,⁹⁰ where the plaintiff and/or the defendant

a violation of Article 6/I of the ECHR: Case of *Kutić v. Croatia*, (Application No. 48778/99), 1 March 2002, para 33.

⁸⁹ For a comprehensive analysis of Article 41 CPIL-2007 see B. TIRYAKIOĞLU (note 18), at p. 1141 *et seq.*; Z. D. TARMAN, The International Jurisdiction of the Turkish Courts on Personal Status of Turkish Nationals, *Yearbook of Private International Law* 2012/2013, Vol. 14, p. 477 *et seq.*

⁹⁰ However actions regarding matrimonial property, maintenance obligations and damages are not considered within the scope of Article 41 CPIL-2007: C. ŞANLI/ E. ESEN/ İ.

is a Turkish citizen;⁹¹ and second the action is not or cannot be instituted in any foreign court. As regards the second condition, either the parties may have not preferred to take the action before a foreign court,⁹² or the action instituted before the foreign court may have been rejected on procedural grounds.⁹³

The discussion on international *lis pendens* is mainly related with the application of the second condition. The said condition was also found in Article 28 of CPIL-1982 (which was applicable to actions relating to the personal status of Turkish nationals who are not domiciled in Turkey) but in a different way, requiring that “*the action is not or cannot be instituted in the courts of the foreign country where the Turkish nationals have domicile*”. The aim of this condition was to underline the fact that Turkish courts did not have exclusive jurisdiction regarding the actions of personal status of Turkish nationals who had their domicile in foreign countries⁹⁴ since Article 18 of CCP-1927,⁹⁵ its predecessor, had been mostly interpreted and implemented as a rule of exclusive jurisdiction.⁹⁶ Thus, when Article 18 of CCP-1927 was in force, actions relating to personal status of Turkish nationals who were not domiciled or resident in Turkey had to be instituted before the Turkish courts and the enforcement of decisions of foreign courts regarding such actions had also been rejected because of the then enforcement condition that the foreign judgment was not to be related with a dispute of personal status or family law (Article 540/IV CCP-1927).⁹⁷ Therefore, the effect of the said condition in Article 28 of CPIL-1982 was to reject the idea of exclusive jurisdiction of Turkish courts in matters regarding the personal status of Turkish nationals⁹⁸ and to provide the plaintiff with the choice to take an action either before the Turkish courts or the courts of a foreign country.⁹⁹

ATAMAN-FIGANMEŞE (note 16), at p. 377; E. NOMER (note 16), at p. 96; B. TIRYAKIOĞLU (note 18), at p. 1145, Z. D. TARMAN (note 89), at p. 480.

⁹¹ E. NOMER (note 16), at p. 97; A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 569; B. TIRYAKIOĞLU (note 18), at p. 1153.

⁹² V. DOĞAN (note 38), at p. 66.

⁹³ Z. AKINCI (note 16), at p. 50; Court of Cassation [*Yargıtay*] (Second Chamber), Registration No. 1985/11103, Decision No. 1986/97, Dated 14.1.1986: Published in *Yargıtay Kararları Dergisi* 1986, Vol. 12, I. 12, pp. 1764-1765.

⁹⁴ E. NOMER, *Devletler Hususî Hukuku*, İstanbul 2002, p. 367.

⁹⁵ Article 18 of CCP-1927 read that actions relating to the personal status of Turkish nations who are not domiciled in Turkey shall be taken before the court of their last domicile in Turkey and if there is no such court before Ankara court provided that they are not resident in Turkey.

⁹⁶ A. ÇELIKEL, *Milletlerarası Özel Hukuk*, İstanbul 1995, p. 305.

⁹⁷ A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 564; N. EKŞİ (note 16), at p. 153.

⁹⁸ See the rationale of Article 28 CPIL-1982: Published in *Millî Güvenlik Konseyi Tutanak Dergisi*, Vol. 7, No. 408, p. 1 *et seq.*

⁹⁹ Milletlerarası Özel Hukuk ve Usûl Hukuku Hakkındaki Kanunun Milletlerarası Yetkiye İlişkin Olarak Adalet Bakanlığı Hukuk İşleri Genel Müdürlüğünün yazısı ve bu yazıya Devletler Hususî Hukuku Anabilim Dalı Öğretim Üyelerinin Verdiği Cevap-

Nevertheless, neither Article 28 CPIL-1982 nor Article 41 CPIL-2007 has expressly provided for any tool for dismissing the action before the Turkish court if the same action is already pending before the court of a foreign country. However, in doctrine, it has been stated that if the action is already taken before a foreign court (under Article 28 CPIL-1982, before the court of the country where the Turkish national has his/her domicile), the defendant may raise the objection of international *lis pendens* in the second action before the Turkish court.¹⁰⁰ Therefore, although international *lis pendens* has not been subject to an express provision, it was accepted that Article 28 CPIL-1982 (now Article 41 CPIL-2007) is one of two situations where an objection can be made before the Turkish courts on the pendency of the same action.¹⁰¹ In this regard, the majority view seems to provide for the sole application of principle of priority, while some other scholars have provided for the recognition or enforcement prognosis.¹⁰²

However, in my opinion, if an action regarding the personal status of Turkish nationals has already been instituted before a foreign court and that court has established its jurisdiction, the second action before the Turkish court should be dismissed not because of pendency of the same action but rather as a result of the fact that the Turkish court does not have international jurisdiction to try the dispute.¹⁰³ It is unanimously agreed that “*the action is not or cannot be instituted in a foreign court*” is one of the conditions of Article 41 CPIL-2007. Thus, as in a case where the action is not related to the personal status of Turkish nationals, if the second condition is not satisfied, (i.e. if the action is already pending before a foreign court) the jurisdiction of Turkish courts cannot be established under the said provision.¹⁰⁴

On the contrary, one can refer to international *lis pendens* if the same action is taken before the courts of different countries, both of which have international

Notverbal, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1983, Vol. 3, No. 2, p. 51.

¹⁰⁰ A. ÇELİKEL (note 96), at p. 307; N. EKŞİ (note 16), at p. 155; Z. AKINCI (note 16), at p. 47-48; A. UYANIK ÇAVUŞOĞLU, *Türk Milletlerarası Özel Hukukunda Boşanma*, İstanbul 2006, p. 14 *et seq.*

¹⁰¹ E. NOMER (note 16), at p. 98; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 568; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 379; R. AYBAY/ E. DARDAĞAN, *Uluslararası Düzeyde Yasaların Çatışması (Kanunlar İhtilafı)*, İstanbul 2008, p. 58; Z. AKINCI/ C. DEMİR GÖKYAYLA, *Milletlerarası Aile Hukuku*, İstanbul 2010, pp. 38-39.

¹⁰² V. DOĞAN (note 38), at p. 54. Also see M. TULUAY, “Milletlerarası Özel Hukuk ve Usûl Hukuku Hakkında Kanun” Üzerine Düşünceler, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1982, Vol. 1, p. 25; V. DOĞAN (note 37), at p. 142 vd.; M. ATALI, Beachtung ausländischer Rechtshängigkeit im türkischen Recht, *ZZPInt* 2005, Vol. 10, p. 429.

¹⁰³ On the same opinion see F. SARGIN (note 34), at p. 252, fn. 553; B. TIRYAKIOĞLU (note 18), at p. 1153; G. GÜNGÖR (note 9), at p. 550.

¹⁰⁴ B. TIRYAKIOĞLU (note 18), at p. 1153.

jurisdiction to hear the dispute.¹⁰⁵ Therefore if an action regarding the personal status of Turkish nationals is instituted before a foreign court and that court has established its jurisdiction, in the second action before the Turkish court the defendant should raise the objection to international jurisdiction of the Turkish court.¹⁰⁶ However, if the foreign court does not establish its jurisdiction and rejects the action on procedural grounds, the action shall be deemed not to be instituted before that court and it should therefore be tried by the Turkish court having jurisdiction under Article 41 CPIL-2007.¹⁰⁷

B. If an Action is Already Pending Before the Foreign Courts Pursuant to a Choice of Court Agreement

Article 47 of CPIL-2007 provides two paragraphs for rules on foreign choice of court agreements. While Article 47/I provides for the conditions and effect of foreign choice of court agreements in general, the second paragraph regulates such agreements in disputes arising from insurance, consumer and employment contracts.

Article 47/I has replaced Article 31 of the CPIL-1982, without providing major changes. Both of the provisions have been subject to much comment in literature and have been accepted by the majority view as a second instance (the first instance being Article 41 CPIL-2007) where the objection of international *lis pendens* can be raised before Turkish courts. On the other hand, Article 47/II CPIL-2007 is a new provision not found in CPIL-1982 and has also been commented on extensively in literature.

Both paragraphs of Article 47 CPIL-2007 will be elaborated under the following headings in terms of the issues of international *lis pendens*.

1. If a Valid Choice of Court Agreement Exists under Article 47/I CPIL-2007

Article 47/I provides for the conditions of a valid foreign choice of court agreement as well as its effect on the international jurisdiction of Turkish courts. According to the first sentence of the provision, where Turkish courts do not have exclusive jurisdiction under the rules of jurisdiction as to venue, the parties may designate a court of a foreign country regarding a dispute involving a foreign element and arising from a debt relationship.¹⁰⁸ Although not expressly provided, it is also accepted that such an agreement can be concluded regarding a particular relationship between the parties, conferring jurisdiction on particular court(s) of a foreign

¹⁰⁵ F. SARGIN (note 34), at p. 252, fn. 553.

¹⁰⁶ F. SARGIN (note 34), at p. 252, fn. 553; B. TIRYAKIOĞLU (note 18), at p. 1154; G. GÜNGÖR (note 9), at p. 550. Even if the objection is not raised by the defendant the Turkish court should take it into consideration on its own motion: B. TIRYAKIOĞLU (note 18), at p. 1155; F. SARGIN (note 34), at p. 252, fn. 553. Cf. N. EKŞİ (note 75), at p. 205.

¹⁰⁷ B. TIRYAKIOĞLU (note 18), at p. 1159.

¹⁰⁸ Regarding validity of foreign choice of court agreements under Article 47/I CPIL-2007 see G. GÜNGÖR (note 9), at p. 552.

country.¹⁰⁹ Such an agreement does not have to be in writing, however it has to be proven in writing according to the said provision.

Where there exists a valid agreement under Article 47/I, the action can be tried by the Turkish courts only if the designated court denies its jurisdiction, or if no objection to international jurisdiction of the Turkish courts is raised (Article 47/I).

Today, it is the unanimous opinion that where there is a choice of court agreement between the parties satisfying the conditions of Article 47/I, the agreement being exclusive in nature sets aside the international jurisdiction of Turkish courts, therefore the action must be taken before the designated foreign court.¹¹⁰ Thus, if one of the parties primarily takes an action before the Turkish court disregarding the foreign choice of court agreement, an objection should be raised to the jurisdiction of Turkish courts. An objection as to jurisdiction of Turkish courts is one of the preliminary objections to be raised by the defendant (Article 116/I(a) CCP-2011) in his/her answer pleading (Article 117 CCP-2011), within two weeks from the date of service of the complaint (Article 127 CCP-2011).

However, where the designated foreign court is first seised and a subsequent action is taken before the Turkish courts involving the same subject-matter and cause of action between the same parties, the objection to be raised before the latter is not expressly provided and is thus subject to much comment. As stated earlier, it has been accepted by most scholars that in such a situation, an objection of international *lis pendens* can be raised before the Turkish court,¹¹¹ qualifying this situation as the second exceptional situation of raising such an objection in Turkish international civil procedure.¹¹² The General Assembly of Civil Chambers of the Court of Cassation ruled accordingly in a decision of 1998 where it stated that if there exists an effective choice of court agreement between the parties concluded according to Article 31 CPIL-1982 but one of the parties takes an action before the competent Turkish court disregarding the agreement, the other party enjoys a right to raise an objection against the jurisdiction of the Turkish court and, where applicable, an

¹⁰⁹ C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 393; V. DOĞAN (note 38), at pp. 75-76.

¹¹⁰ E. NOMER (note 20), at p. 480; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 404; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 594; B. TIRYAKIOĞLU (note 18), at p. 1152, fn. 27; G. GÜNGÖR (note 9), at p. 552; V. DOĞAN (note 38), at p. 78.

¹¹¹ E. NOMER (note 16), at p. 117; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 407; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 596; Z. AKINCI (note 16), at p. 45; N. EKŞİ (note 16), at p. 183. On a different view regarding acceptance of international *lis pendens* in such situations according to recognition or enforcement prognosis see M. ATALI (note 102), at p. 429 *et seq.*

¹¹² E. NOMER (note 20), at p. 452; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 407; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 596. Also see the decision of 20.11.2014 of the Court of Cassation (Second Chamber) where the Court ruled that international *lis pendens* can only be accepted either according to an international convention to which Turkey is a party or by virtue of Article 47/I CPIL-2007: *supra* note 31.

objection of international *lis pendens*.¹¹³ The same line of thought has also been followed in practice regarding Article 47/I CPIL-2007.¹¹⁴

However, in my point of view, if the plaintiff has already instituted proceedings before the designated foreign court and that court has established its jurisdiction according to the agreement between the parties, in the second action taken before the Turkish court involving the same cause of action and same subject-matter between the same parties, the defendant could only raise an objection to the jurisdiction of Turkish courts and not an objection of international *lis pendens*.¹¹⁵ Thus, in such a case, the Turkish court does not have international jurisdiction to hear the case before it, which had been set aside by the choice of court agreement itself. The said situation cannot be considered as international *lis pendens*, since international *lis pendens* requires simultaneous seizure of courts of different countries having jurisdiction in relation to the same dispute. On the contrary, where the dispute is already pending before a foreign court that has established its jurisdiction pursuant to an exclusive choice of court agreement, the Turkish courts lack jurisdiction to hear the same dispute. Therefore, in such a case, the ground of the objection to be raised before the Turkish court should be to give effect to the choice of court agreement and not the pendency of the same action before a foreign court.

Nevertheless, if the defendant does not raise an objection as to the jurisdiction of Turkish courts within the time-limit provided in CCP-2011, or if such an objection is rejected by the court, then it should be possible to raise an objection of international *lis pendens*.¹¹⁶ Thus, in such a case, the situation would be different and the same action would be pending before two competent courts; the foreign court which is seised first having jurisdiction according to the agreement between the parties and the Turkish court that is seised second, the jurisdiction of which is revived either because of the rejection of the objection as to its jurisdiction or that such an objection is not raised within the time limit.¹¹⁷

In a similar vein, if the choice of court agreement concluded between the parties is non-exclusive (i.e. if the parties have expressly designated the courts of a

¹¹³ General Assembly of Civil Chambers of the Court of Cassation [*Yargıtay Hukuk Genel Kurulu*], Registration No. 1998/12-287, Decision No. 1998/325, Dated 6.5.1998: Published at <www.kazanci.com>.

¹¹⁴ Court of Cassation [*Yargıtay*] (Nineth Chamber), Registration No. 2010/7381, Decision No. 2010/16168, Dated 3.6.2010: Published in *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* 2012, Vol. 1, No. 2, p. 289 *et seq.*

¹¹⁵ Also see F. SARGIN, *Milletlerarası Usûl Hukukunda Yetki Anlaşmaları*, Ankara 1996, p. 189; F. SARGIN (note 34), at p. 252, fn. 553; B. TIRYAKIOĞLU (note 18), at 1152, fn. 27; V. DOĞAN (note 38), at p. 52; V. DOĞAN (note 37), at p. 142; C. SÜRAL, *Hukuk Muhakemeleri Kanunu'nun Türk Mahkemelerinin Milletlerarası Yetkisine Etkisi*, *Türkiye Barolar Birliği Dergisi* 2012, No. 100, p. 196; Z. D. TARMAN, *Montreal Sözleşmesi'nin Yetki ve Tahkime İlişkin Hükümleri*, *Türkiye Barolar Birliği Dergisi* 2013, No. 107, p. 112.

¹¹⁶ Also see G. GÜNGÖR (note 9), at p. 552.

¹¹⁷ G. GÜNGÖR (note 9), at p. 552.

foreign country without removing the international jurisdiction of Turkish courts)¹¹⁸ and the same action is already pending before the designated court, an objection of international *lis pendens* could be raised before the Turkish courts.¹¹⁹ In such situations, the objection of international *lis pendens* should be accepted by the Turkish court according to the recognition or enforcement prognosis, as explained above.¹²⁰

2. *If a Valid Choice of Court Agreement Exists under Article 47/II CPIL-2007*

Article 47/II of the CPIL-2007 is a new provision not found in CPIL-1982. It provides that the jurisdiction of courts determined in Articles 44,¹²¹ 45¹²² and 46¹²³ of CPIL-2007 (regarding employment contracts and relationships, consumer contracts and insurance contracts, respectively) cannot be set aside by the agreement of parties.¹²⁴ It aims to protect the employee, the consumer, the insured and the

¹¹⁸ In regard to the view that a non-exclusive foreign choice of court agreement should also be upheld if the parties have expressly designated the courts of a foreign country without removing the international jurisdiction of Turkish courts also see C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 404; F. SARGIN, (note 115), at p. 195.

¹¹⁹ V. DOĞAN (note 38), at p. 52; F. SARGIN (note 115), at p. 190.

¹²⁰ For a similar view on the possibility of accepting international *lis pendens* according to recognition or enforcement prognosis where the agreement between the parties is non-exclusive see V. DOĞAN (note 38), at p. 54.

¹²¹ According to Article 44 CPIL-2007 “[t]he court of the workplace in Turkey where the employee habitually carries out her/his work shall have jurisdiction in actions arising from individual employment contracts or employment relationships. In actions filed by the employee, the Turkish courts where the domicile of the employer or where the domicile or the habitual residence of the employee is situated shall also have jurisdiction”.

¹²² According to Article 45 CPIL-2007 “[i]n actions arising from contracts defined in Article 26, Turkish courts where the domicile or the habitual residence of the consumer, or where the place of business, domicile or habitual residence of the opposing party is situated, shall have jurisdiction, subject to the choice of the consumer” (para. 1). “The court of habitual residence of the consumer in Turkey shall have jurisdiction regarding actions filed against the consumer pertaining to consumer contracts concluded under the first paragraph” (para. 2).

¹²³ According to Article 46 CPIL-2007 “[t]he court of the principal place of business of the insurer or of the place where the branch concluding the insurance contract or its agency is situated in Turkey shall have jurisdiction in actions arising from insurance contracts. However, in actions filed against the policy owner, the insured and the beneficiary, the court having jurisdiction shall be the court of their domicile or habitual residence in Turkey”.

¹²⁴ For a comprehensive analysis of Articles 45 and 47/II CPIL-2007 see G. BAYRAKTAROĞLU ÖZÇELİK (note 18), at p. 833 *et seq.*

beneficiary as the weaker party in such relationships and not to deprive them of the jurisdiction of Turkish courts indicated in those provisions.¹²⁵

Conflicting views are present in literature as regards the meaning of Article 47/II and the nature of Articles 44, 45 and 46 CPIL-2007.

According to the view held by the majority, Articles 44, 45 and 46 should be characterized as provisions of exclusive jurisdiction, but limited with the aim of protection of the weaker party.¹²⁶ In this regard Article 47/II does not prohibit choice of court agreements and the parties are able to confer jurisdiction upon the courts of a foreign country, along with the Turkish courts provided between Articles 44 and 46.¹²⁷ Nevertheless, the party which is protected by the said provisions should benefit from that agreement, in other words, the choice of court agreement should be considered valid only if the protected party initiates proceedings before the designated court.¹²⁸ On the other hand, based on the characterization of those provisions as exclusive jurisdiction provisions limited with the aim of protection of the weaker party, decision of the designated foreign court can be recognised or enforced in Turkey on the conditions that it is in favour of the weaker party and its recognition or enforcement is sought by the weaker party.¹²⁹ On the contrary, if the action before the foreign court is instituted against the weaker party and that court has rendered a decision against that party, recognition or enforcement of that decision should be rejected by the Turkish court on the ground that it has exclusive jurisdiction.¹³⁰

According to another view, it is possible to consider choice of court agreements that do not rule out the jurisdiction of Turkish courts provided between Articles 44 and 46 and are in favour of the weaker party as valid.¹³¹ However, the said provisions cannot be interpreted as provisions establishing exclusive jurisdiction of Turkish courts.¹³² On the other hand, the Turkish court from which recognition or enforcement is sought cannot examine whether the decision of the foreign court is in favour of the weaker party since this would be against the

¹²⁵ See rationale of Article 47/II CPIL-2007: B. TIRYAKIOĞLU/ M. AYĞÜN/ E. KÜÇÜK (note 8), at p. 104.

¹²⁶ E. NÖMER (note 16), at p. 163; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 398; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 597; P. GÜVEN (note 75) at p. 105.

¹²⁷ C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 397.

¹²⁸ C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 398; C. ŞANLI (note 38), at p. 94.

¹²⁹ E. NÖMER (note 16), at p. 163-164; E. NÖMER (note 20), at p. 514; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FİGANMEŞE (note 16), at p. 505; A. ÇELİKEL/ B. B. ERDEM (note 20), at p. 597; P. GÜVEN (note 75), at p. 105.

¹³⁰ E. NÖMER (note 16), at p. 163; P. GÜVEN (note 75), at p. 105.

¹³¹ V. DOĞAN (note 38), at p. 75.

¹³² V. DOĞAN (note 38), at p. 75.

prohibition of *révision au fond*.¹³³ However, without such an examination, recognition or enforcement should be granted if it is sought by the protected party.¹³⁴

According to another view, due to its clear wording Article 47/II rules out the possibility of concluding choice of court agreements even if the agreement favours the interests of the weaker party.¹³⁵

In my view, by virtue of Article 47/II, Articles 44-46 cannot be characterized as provisions establishing exclusive jurisdiction of Turkish courts.¹³⁶ The mentioned provisions can only be accepted as rules of protective jurisdiction which aim to provide courts in Turkey in favour of the weaker party by considering the positions of the parties in the contract.¹³⁷ They cannot be interpreted as provisions conferring exclusive jurisdiction upon Turkish courts in all circumstances, since it is not possible to initiate proceedings in Turkey if any basis of jurisdiction provided in the said provisions does not point to Turkey.¹³⁸ Furthermore, the language used in two paragraphs of Article 47 is not identical: while under the first paragraph the parties are prevented from concluding a choice of court agreement if the dispute falls under the “*exclusive jurisdiction*” of Turkish courts, in the second paragraph it is stated that the jurisdiction of courts determined in Articles 44, 45 and 46 cannot be “*set aside by the agreement of parties*”.¹³⁹ Thus, Article 47/II should be interpreted as giving the parties the possibility of concluding a choice of court agreement without removing the international jurisdiction of Turkish courts under Articles 44-46.

In this respect, the conclusion regarding international *lis pendens* to be reached here will be different than the one regarding Article 47/I. In cases where there is a choice of court agreement in regard to the disputes arising from the contracts where the weaker party is protected and the first action is taken before the designated foreign court, one of the parties to the dispute before the Turkish court can raise an objection of international *lis pendens*, rather than an objection to international jurisdiction of Turkish courts. Thus, in this situation, both courts have jurisdiction to hear the dispute. In such a case international *lis pendens* should be accepted by the Turkish court if it concludes that the decision of the foreign court could be recognized or enforced in Turkey.¹⁴⁰

¹³³ V. DOĞAN (note 38), at p. 118.

¹³⁴ V. DOĞAN (note 38), at p. 118.

¹³⁵ R. AYBAY/E. DARDAĞAN (note 101), at p. 76.

¹³⁶ G. BAYRAKTAROĞLU ÖZÇELİK (note 18), at p. 866. Also see N. EKŞİ (note 75), at p. 207.

¹³⁷ G. BAYRAKTAROĞLU ÖZÇELİK, (note 18), at p. 866.

¹³⁸ N. EKŞİ (note 75), at p. 210, p. 214.

¹³⁹ N. EKŞİ (note 75), at p. 207.

¹⁴⁰ However, having said that, an urgent need is also obvious for an amendment of Article 47/II CPIL-2007 taking the divergence of views in doctrine. In this regard certain situations where a choice of court agreement is possible related with contracts where the weaker party is protected should expressly be provided in legislation, including for instance the possibility of concluding such agreements after the dispute has arisen or which allows only the protected party to institute proceedings in courts of foreign countries. For a proposal

IV. Conclusion

International *lis pendens* is one of the important topics that is not expressly provided for in Turkish CPIL-2007 and therefore has been subject to extensive comment in literature and to conflicting decisions when considered by Turkish courts. Absence of an express provision on the topic has divided the doctrine on the question of whether international *lis pendens* is rejected by the Turkish legislator. However, although not clearly provided in law, taking the undesirable consequences of international parallel proceedings, the frequency of international private law relationships as well as the necessary cooperation between the courts of different countries, the objection of international *lis pendens* should be accepted by the Turkish courts by analogy to Article 114 CCP-2011, providing for the objection of *lis pendens* in domestic cases. As such, the objection of international *lis pendens* should be subject to three conditions: identity of the actions, prior seizure of the foreign court and a positive prognosis to be made by the Turkish court that the foreign judgment could be recognized or enforced in Turkey. The primary effect of accepting such an objection should be a stay of the Turkish proceedings, rather than dismissal.

On the other hand, I am of the opinion that in two situations where the same action involving the same subject-matter and cause of action between the same parties is already pending before the courts of a foreign country, the defendant of the subsequent action before the Turkish courts should raise an objection as to the international jurisdiction of Turkish courts, rather than an objection of international *lis pendens*.

The first situation is as regards the application of Article 41 CPIL-2007 providing on the international jurisdiction of Turkish courts in disputes related to the personal status of Turkish nationals. The said provision clearly indicates as a condition that “*the action is not or cannot be instituted in the foreign courts*”. Therefore if such an action is already pending before a foreign court which has established its jurisdiction, the said condition is not fulfilled and the Turkish courts lack jurisdiction to hear the dispute. In such a situation, the objection to be made before the Turkish courts should be as to the international jurisdiction of Turkish courts.

Secondly, if there is a valid choice of court agreement between the parties under Article 47/I CPIL-2007 and the first action is taken before the designated foreign court which has established its jurisdiction pursuant to that agreement, the defendant in the second action should raise an objection to international jurisdiction of Turkish courts. In such a case the choice of court agreement being exclusive in character removes the international jurisdiction of Turkish courts, therefore international pendency cannot be said to exist technically since it requires seizure of courts of different countries having jurisdiction in relation to the same dispute. Nevertheless, if the defendant does not raise an objection to international jurisdiction

of the present author on the amendment of Article 47/II CPIL-2007 in the context of consumer contracts see G. BAYRAKTAROĞLU ÖZÇELİK (note 18), at p. 867 *et seq.*

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of Turkish courts within the time limit, or the objection is not accepted by the court, or if the parties have expressly concluded a non-exclusive choice of court agreement, it should be possible to raise an objection of international *lis pendens*.

Moreover, although from my point of view Article 47/II CPIL-2007 providing for a special rule on the choice of court agreements regarding employment, consumer and insurance contracts requires further amendment, as it stands today it cannot be interpreted as preventing the parties of such contracts from concluding choice of court agreements. The mentioned provision stating that the jurisdiction of the courts determined in Articles 44, 45 and 46 CPIL-2007 cannot be set aside by the agreement of parties can be interpreted to mean that the parties to such contracts can conclude foreign choice of court agreements without removing the international jurisdiction of Turkish courts in such disputes. Thus, if such an action is first taken before the foreign court, the defendant before the Turkish court should be able to raise an objection of international *lis pendens*.