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## Section 3
### Common provisions

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### Bibliography

- **Andrae**, Anerkennung und Vollstreckung von Entscheidungen sowie die Beachtung der früheren Rechtshängigkeit nach der EheVO (Brüssel II-Verordnung), ERA-Forum 1/2003, 28
- **Laura Brown/Nicole Fisher**, Sign here please ... Have prenups come of age?, (2008) 158 New L.J. 1548
- **Urs Peter Gruber**, Die “ausländische Rechtshängigkeit” bei Scheidungsverfahren, FamRZ 1999, 1563
- **id.**, Die neue “europäische Rechtshängigkeit bei Scheidungsverfahren”, FamRZ 2000, 1129
- **id.**, Zur Konkurrenz zwischen einem selbständigen Sorgerechtsverfahren und einem Verbundverfahren nach der EheVO, IPRax 2004, 507
- **Lübber**, Deutsch-französische Scheidung vor Gericht, ERA-Forum 1/2003, 18
- **Lupoi**, The New Lis Pendens Provisions in the Brussels I and II Regulations, ZZP Int. 8 (2002), 149
- **id.**, La “nuova” litispendenza comunitaria: aspetti procedurali, Riv. trim. dir. proc. civ. 2004, 1285
- **Vitellini**, European Private International Law and Parallel Proceedings in Third States in Family Matters, in: Malatesta/Bariatti/Pocar p. 221

### Introductory remarks

#### I. Legal history

The so-called common provisions mainly deal with two topics: firstly, with ascertaining jurisdiction, and, secondly, with *lis alibi pendens*. The ideas and concepts behind them are copied and imported from the Brussels I system: Arts. 17 and 18 are derived from, and some...
kind of offspring of, Arts. 19 and 20 Brussels Convention, now succeeded and supplanted by Arts. 25 and 26 Brussels I Regulation. Art. 19 heavily borrowed from Art. 21 Brussels Convention, now in an enhanced version implemented as Art. 27 Brussels I Regulation, the borrowing with some modification where seemingly appropriate and in particularly split into two paragraphs concerning the two grand topics of the Regulation, matrimonial affairs and parental responsibility. The case is a little different with Art. 16: Here the former Art. 11 (4) Brussels II Regulation was the frontrunner, and Art. 30 Brussels I Regulation is the copycat.

For the sake of continuity Arts. 16-19 remained generally unchanged as to substance (with the exception of Art. 11 (2) Brussels II Regulation being revised as Art. 19 (2), not extended in the proper sense of the word), but were rearranged as to their respective place within the overall system and to the structure of the former Art. 11 Brussels II Regulation: Art. 16 resembles the former Art. 11 (4) Brussels II Regulation with only a slight change of the wording as to the opening words. Arts. 17 and 18 are literally identical to the former Arts. 9 and 10 Brussels II Regulation. Finally, Art. 11 (1) and (3) Brussels II Regulation found refuge in Art. 19. Art. 19 (2) however pays due attention to the extension of the Brussels IIbis regime towards matters of parental responsibility whereas Art. 11 (2) Brussels Regulation features as some (unwanted?) victim of the revision.

II. Criticism as to the order implemented

The order of the Section is rather squarely than fairly and not quite intelligible: Art. 16 is related to Art. 19 whereas on the other hand Arts. 17 and 18 are pairing. In verse this would make a rhyme structure of ABBA. But legislation is prose not verse. Why the draftsmen did not adopt the same order as in the Brussels Convention or in the Brussels I Regulation, i.e. why they did not opt for the order (present numbers) 17, 18, 19, 16 lacks explanation. This is the more startling (if not irritating) since Arts. 16 and 19 both were derived from Art. 11 Brussels II Regulation and thus were most closely linked in the past when they were forming parts of a unitary article then. Formerly, Art. 16 was a fourth paragraph, and now it sprints to the first place in numerical order without any discernible purpose and for no easily detectable reason.

Equally questionable is why these four rules form part of a single Section whereas in the Brussels Convention or in the Brussels I Regulation the respective counterparts are rightly divided in two Sections. This is the more puzzling since in the Brussels II Regulation two Sections existed duly mirroring the same structure as it first was implemented in the Brussels

1 Biagioni, Riv. dir. int. 2004, 991, 1021.
3 Differing apparently Urs Peter Gruber, IPRax 2005, 293, 295.
4 Cf. only Biagioni, Riv. dir. int. 2004, 991, 1021; Strohal, juris-PraxisReport 2005, 85, 86.
8 Font i Segura, REDI 2004, 273, 294.
9 See in more detail infra Art. 19 notes 38-41 (Mankowski).
Convention. With all due respect, draftsmanship cannot be said to have been at its very top when the present Section was restructured. At least a convincing reasoning for such restructuring has not emerged yet and was not even attempted at.

III. Ius cogens

Arts. 16-19 are *ius cogens*. The parties are not entitled to derogate from them even by mutual understanding and expressed consensus. Party autonomy is not available in this area. Yet for instance, Art. 19 might in effect be flanked by if parties terminate the proceedings brought first and thus bring the conflict of two colliding and simultaneously pending actions to an end for practical purposes.

IV. Practical importance

Besides favouring *forum shopping* the large number of heads of jurisdiction as contained in Art. 3 in particular generates the possibility if not the probability of conflicting sets of proceedings. In turn a regime for regulating such conflict is necessary. This very necessity prompts Arts. 16-19 on *lis alibi pendens* and on establishing or cross-checking jurisdiction. Hence, these rules gain their weight and their importance from the great number of heads of jurisdiction available to applicants.

In the rather few years for which the Brussels II and now the Brussels IIbis systems have been effective Arts. 16-19 have already prompted many applications and have established themselves to be one of the central pieces and prominent focal points of the entire system. The applications in practice are numerous. As to practical importance – at least as evidenced by, and in terms of, published court decisions – their only serious rival is Art. 3. That the Regulation has attended to the vexing question of how to decide which of two Member State courts was seised first has obviously not erased chances that difficulties can arise.

In fact, the most wealthiest couples fought the fiercest battles for establishing jurisdiction in different Member States each spouse pursuing his or her personal interests most egoistically and most thoroughly. The divorcees embark upon a crude race, pitting one jurisdiction against the other and avoiding any judicial appraisal of where the balance of fairness and convenience lay. The couple that first litigates where to litigate might be said to be cursed.
Such curse might be mainly restricted to the rich, though, for “only they can afford such folly”\textsuperscript{19}. Only the rich fight to establish priority for there is no other incentive to fight but financial advantage.\textsuperscript{20}

Obtaining advice as to which is the best jurisdiction requires good lawyer contacts in other countries and an ability on the client’s side to pay for such advice (and to a certain extent upfront and quickly).\textsuperscript{21} This favours the wealthier spouse with easy access to specialist resources and lawyers with international experience (which both tend to turn out rather expensive in some jurisdictions) whereas the less wealthy spouse is likely to suffer badly.\textsuperscript{22} The spouse requiring public funding becomes very vulnerable.\textsuperscript{23}

V. Influence on advisors’ practice

Arts. 16-19 have undoubtedly and heavily affected family lawyers’ practice,\textsuperscript{24} the more so since case law tends to show that the successful party is usually the one whose proceedings have progressed further in their chosen court.\textsuperscript{25} It is said that woe betide the lawyer who does not advise his client of the race to court\textsuperscript{26} which to a certain extent is sanctioned by Arts. 16-19. These articles have inspired a whole charter of litigation tactics and might generate certain tendencies towards surprise attacks in order to obtain the upper hand. Who wants to secure jurisdiction must therefore aim to issue first.\textsuperscript{27} The first-mover (or better: first-striker) advantage must not be underestimated. The shift of emphasis on jurisdiction and coming to court first placed an absolute premium on seisin\textsuperscript{28} and snatching the jurisdictional advantage.\textsuperscript{29} The \textit{lis pendens} system rewards speed on litigants’ part and does not hasten to penalise self-serving tactics by parties.\textsuperscript{30}

Who strikes first might simply gain the jurisdictional and tactical edge. Such edge becomes the more important and the more crucial the more the chosen forum adheres to the principle of \textit{lex fori}. For instance, English courts apply English law as the \textit{lex fori} in matrimonial mat-

\textsuperscript{21} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.
\textsuperscript{22} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.
\textsuperscript{23} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.
\textsuperscript{24} Bradley, June (2008) IFL 85, 86.
\textsuperscript{26} Bradley, June (2008) IFL 85, 86.
\textsuperscript{28} Newton, The Uniform Interpretation of the Brussels and Lugano Conventions (2002) p. 166.
\textsuperscript{29} Briggs, (1994) LMCLQ 158.
\textsuperscript{30} Crawford, (2005) 54 ICLQ 829, 835.
ters\textsuperscript{31} and generally disregarded in the past\textsuperscript{32} any kind of pre-nuptial agreement\textsuperscript{33} on which parties from other jurisdictions might rely.\textsuperscript{34} This might lead to the implosion of any advance planning and gives even greater weight to the race to the courthouse.

The system of “first past the post” or “first to issue secures jurisdiction”\textsuperscript{35} leaves no room for delay.\textsuperscript{36} In the ultimate consequence, there should be no letters and no pre-trial correspondence before action in Brussels IIbis cases.\textsuperscript{37} Letters might be a forewarning and might entice the recipient to strike first with or without luring the sender in some kind of false security. It became truly inadvisable to send a polite (solicitors’) letter first because just this very letter might provide the other party with the incentive to lodge a pre-emptive strike.\textsuperscript{38} The kind attempt to settle matters amicably and consensually might badly turn against the one proposing it. Rather than encouraging clients to resolve marital disputes and differences in mediation or collaborative law, lawyers are advising clients to take advice in two or more jurisdictions with a view to issuing proceedings behind the other spouse’s back.\textsuperscript{39}

A lawyer’s advice to a client must be to secure jurisdiction first and only then to consider methods of ADR.\textsuperscript{40} Mediation or other ADR without securing jurisdiction has become unadvisable to a certain degree.\textsuperscript{41} This jeopardises the chances of successful ADR for ADR after one party unilaterally and tactically securing jurisdiction first has an ominous and acrimonious start, diminishing the prospects of a successful outcome.\textsuperscript{42} The tactical strike undermines the necessary trust. In turn, this might lead to preemptive strikes, encourages preci-

\textsuperscript{31} Cf. only McClean, in: Dicey/Morris, Conflict of Laws (16th ed. 2006) para. 18 R-027.
\textsuperscript{33} Post-nuptial agreements on the other hand have found legal recognition in MacLeod v. MacLeod (2008) UKPC 64, (2010) 1 AC 298 (P.C.).
\textsuperscript{37} Bradley, June (2008) IFL 85, 86.
\textsuperscript{38} Cf. the scenario in BGE 123 III 414.
\textsuperscript{39} Bradley, June (2008) IFL 85, 86.
\textsuperscript{40} Bradley, June (2008) IFL 85, 87; Wells-Greco, September (2011) IFL 207, 209.
\textsuperscript{41} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.
\textsuperscript{42} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.
piticate litigation\textsuperscript{43} and undermines negotiations which could be sensible. Reconciliation or the exploration of conciliated resolution would be prejudiced.\textsuperscript{44} Even worse, negotiations before commencing litigation could become treacherous efforts luring opponents in false security whilst one is preparing the own strike.\textsuperscript{45}

14 Even suggesting relationship counselling might be threatened and endangered since doing so and thus admitting that the marriage was in difficulties might prompt and precipitate the other spouse to issue first to the other spouse’s significant advantage.\textsuperscript{46} In the shadow of a pending application for divorce afterwards there appears to be little room for successful counselling.\textsuperscript{47} The ‘first past the post’ approach encourages and endorses the spouse who is making the break in the marriage, even without giving a full chance to overcome relationship difficulties and save saveable marriages.\textsuperscript{48}

15 Lawyers have to balance their clients’ concerns with the advantages of securing jurisdiction and to ensure that they, the lawyers, are not subject to a negligence claim against them in the future.\textsuperscript{49}

16 That the Brussels IIbis system does not contain the option of a discretionary transfer might exacerbate the bitterness of any party obliged to litigate in a court in which that party could have no confidence.\textsuperscript{50}

VI. Judicial co-operation and collaboration as a means of resolve

17 \textit{Lis pendens} strictly and rigidly applied to the letter will with high likelihood result in orders which at least one of the parties concerned will find harsh, and might impunge the perceived dignity of at least one of the courts seised with the matter. It is the very result of a rather confrontational process. Judicial co-operation and collaboration might mollify this and might employ co-operative means resulting in co-operative gains.

18 Judicial collaboration in cross-border family disputes within the EU is at a stage of advanced development.\textsuperscript{51} On a abstract, not directly case-related level there are regular meetings if the European Judicial Network devoted to family law and practice.\textsuperscript{52} Additionally, not EU


\textsuperscript{45} Bradley, (2008) IFL 85, 86.

\textsuperscript{46} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.

\textsuperscript{47} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.

\textsuperscript{48} The International Family Law Group, iGuides to family law and practice – Brussels II p. 3 (February 2009) http://www.davidhodson.com/aspects/documents/Brussels_II.pdf.

\textsuperscript{49} Bradley, June (2008) IFL 85, 87.


\textsuperscript{52} \textit{Mercredi v. Chaffe} (2011) EWCA Civ 272, (2011) 2 FLR 515, 530 (89) (C.A., per Thorpe L.J.).
Member States have nominated a judge apiece with responsibility for Brussels IIbis business.53

The European Judicial Network might also provide the proper basis for direct communication between the courts concerned. In practice, perhaps not an immediate need, but at least a desire for direct communication arises once the issue of *lis pendens* is squarely raised in two jurisdictions.54 Cases tend to illustrate the potential of direct judicial communication and cooperation.55 Judges plainly dealing with the same family dispute in two different jurisdictions should communicate and collaborate.56 They should not advance rival and competing claims for the responsibility to impose solutions on the warring parties.57 Wise and experienced judges might even reach, with amity, a shared view as to which court is better placed to hear the case58 (yet within the limits of their respective national rules of procedure).

## Article 16

### Seising of a court

A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

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### IV. Autonomous notion of *lis pendens*

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