EXCLUSIVELY YOURS

One of the most significant innovations in the recast Brussels I Regulation (Regulation (EU) 1215/2012 [2012] O.J. L351/1) was the adjustment of the *lis pendens* mechanism (art.29) so as to give priority in certain cases to a Member State court designated by an exclusive choice of court agreement between the parties. Art.29, which ordinarily gives priority to the court first seised of proceedings involving the same parties and the same cause of action, is expressed to be "without prejudice" to art.31(2), which provides as follows:

> "where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."

Under art.31(3), if the designated court has established jurisdiction in accordance with the agreement, any court of another Member State must decline jurisdiction. These provisions are to be read together with Recital (22), which emphasises among other points that their purpose is "to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics".

In *Ablynx NV v VHsquared Ltd* [2019] EWCA Civ 2192, the Court of Appeal (Lewison L.J., with whom Newey L.J. and Asplin L.J. agreed) applied art.31(2) of the Regulation to stay claims for infringement of the United Kingdom designation of a European patent on the ground that the English defendant had demonstrated a *prima facie* case that the claims fell within the scope of an exclusive choice of court agreement designating a Belgian court also seised of proceedings between the parties. The Court decided that it was appropriate to leave to the Belgian court as the putatively chosen court the question whether the proceedings had as their object the validity of the patent, which would give the English court exclusive jurisdiction under art.24(4) of the Regulation and would override the choice of court agreement to that extent. These conclusions, and the outcome, appear inconsistent with the scheme of the Regulation. Although the decision will have a limited shelf-life in the immediate post-Brexit era, it would have been preferable if the Court had made a preliminary reference to the European Court of Justice.

The claimant in the English proceedings, Ablynx, held an exclusive worldwide sub-licence to exploit the European patent (which related to antibodies derived from the biological family *camelidae*) for certain medical purposes. The licensed purposes excluded those reserved under an earlier licence granted by the patent holder to a member of the Unilever group, Unilever Nederland Holdings BV (UNH). The principal defendant in the English proceedings, VHsquared, was the holder of a sub-licence granted by UNH covering the reserved purposes.

A dispute had arisen between the parties as to whether packaged food products with a therapeutic or prophylactic effect fell within the scope of the purposes reserved to VHsquared under its sub-licence or within Ablynx's exclusive residual domain. In earlier litigation between the parties, a Dutch court had made certain findings in Ablynx's favour (see *Ablynx*, at [14]-[20]). Subsequently, in September 2018, Ablynx brought its English infringement proceedings against VHsquared and against various members of the Unilever group as alleged joint tortfeasors. Ablynx joined the patent holder, a Belgian university, as co-claimant. The English proceedings related to the defendants' research into the use of camelid derived proteins for the treatment of gastrointestinal conditions.

The defendants filed a Part 11 application challenging the English court's jurisdiction. The evidence filed in support of that application included a brief statement outlining the intended defences to Ablynx's claim, including "invalidity of the patents in suit". These five words – aptly described by

Lewison L.J. as a "whisper of invalidity" (*Ablynx*, at [75]) - brought art.24(4) of the Regulation into view (see *Gesellschaft für Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK)* (C-4/03) [2006] ECR I-6509, [2006] F.S.R. 967, at [25]; *Knorr-Bremse Systems for Commercial Vehicles Ltd v Haldex Brake Products GmbH* [2008] EWHC 156 (Pat), [2018] 2 All E.R. (Comm) 448, at [46] (Lewison J.)).

The defendants also sought to rely on the choice of court provision in the UNH licence. That provision designated the Court of Brussels as competent "in case of dispute between the Parties or one of their (sub)licensee(s)". In March 2019, the defendants in England sought to strengthen their position by bringing proceedings before the Belgian court. In that action, they raised issues as to Ablynx's standing to sue and sought a declaration that their research activities were within the scope of the UNH licence. This action, coupled with VHsquared's reliance on the choice of court provision in the UNH licence, brought art.31(2) of the Regulation potentially into play.

The defendants' Part 11 application was heard by Judge Hacon. Rejecting their challenge, he held that the English court had exclusive jurisdiction under art.24(4) of the Regulation because the validity of the patent was in issue. He further held that art.24(4) overrode the choice of court agreement, with the result that art.31(2) was not engaged (see [2019] EWHC 792 (Pat), at [121]).

The defendants appealed. The Court of Appeal's reasoning, upholding their jurisdiction challenge, rested on four propositions, as follows:

(1) As was common ground between the parties, the English court's role under art.31(2) as the non-chosen court was limited to deciding whether there was a *prima facie* case that the choice of court provision in the UNH licence met the requirements of art.25 and designated the Belgian court as exclusively competent, without reaching any conclusion on the points of dispute between the parties (*Ablynx* [2019] EWCA Civ 2192, at [53]-[55]).

(2) Putting the art.24(4) issue to one side, the defendants had met that threshold despite Ablynx's submissions regarding the scope and effect of the choice of court provision (ibid, at [53]-[65]).

(3) Art.31(2) of the Regulation also gave priority to the the Belgian court to decide whether, in light of the prospective issue of patent invalidity, the English proceedings fell within the scope of art.24(4) of the Regulation so as to confer exclusive jurisdiction on the English courts and override the choice of court provision. Accordingly, the Court ruled, the English court's role was limited to deciding whether there was a *prima facie* case that art.24(4) was not engaged (ibid, at [67]-[77]).

(4) There was at least a *prima facie* case that art.24(4) was not engaged, as invalidity was only one of the defences alluded to in the defendants' Part 11 application (ibid, at [78]-[111]).

Each of these steps is contentious. As to proposition (1), although the *prima facie* case approach has attracted support among commentators (see *Ablynx* [2019] EWCA Civ 2192, at [54]; also [2019] EWHC (Pat), at [46]-[52] (Pat)), it is not easily squared with the wording of either art.31(2) or Recital (22). The former makes the existence of "an agreement as referred to in Article 25" conferring "exclusive jurisdiction" a pre-condition to the court first seised's obligation to stay, and the latter in terms defines the scope of the designated court's priority as being concerned with "the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it". A more natural, and arguably more attractive, reading of the provisions involves (a) separating issues of (substantive) validity and scope from other art.25 issues (including consensus, formal validity and exclusivity), and (b) assigning priority to the designated court to determine issues within the former category, while leaving it open to the court first seised to determine issues within the latter category as a pre-condition to its art.31(2) obligation to stay. This alternative interpretation would have the benefit of distinguishing those issues under art.25 governed predominantly by national law, and which the chosen court (whose law would most likely apply) is best qualified to determine, from issues to which autonomous EU rules predominantly apply, and which the court first seised is just as well qualified to determine as the chosen court (see *Erich Gasser GmbH v MISAT Srl* (C-116/02) [2003] ECR I-14693, [2005] Q.B. 1, at [48]). Accordingly, counsel for Ablynx may too readily have conceded the point, which should be open to debate in a future case.

As to proposition (2), the Court of Appeal relied on evidence of Belgian law to conclude that Ablynx was bound by the choice of court provision in an agreement, the UNH licence, to which it was not party (*Ablynx*, at [58]-[59]). It does not appear, however, to have been argued that VHsquared (as sub-licensee) or the other defendants were not entitled to the benefit of the choice of court as third parties in accordance with the autonomous requirements of art.25 (see *Leventis v Malcon Navigation Co Ltd* (C-436/16) [2017] ECLI:EU:C:2017:497, [2018] 1 W.L.R. 80) or that the reference in the clause to the patent holder's "sub-licensees" could not apply to the defendants other than UNH and VHsquared who were not parties to a licence agreement.

Additionally, the English Courts appear to have assumed that the Belgian proceedings involved the "same cause of action" as the English proceedings", as Recital (22) requires. This, however, is not self-evident from the limited description given by the Court (see *Ablynx*, at [28]-[29]). The Court observed (at [29]) that "the validity of the patents is not in issue in Belgium". That feature would not be decisive on this point if the issue of invalidity of the UK designation of the patent had been sufficiently raised in the English proceedings and if the Belgian proceedings sought to establish whether the defendants were liable for infringement of that patent (see *Anan Kasei Co Ltd v Molycorp Chemicals & Oxides (Europe) Ltd* [2016] EWHC 1722 (Pat), [2017] F.S.R. 13, at [24] (Arnold J.); *Eli Lilly and Co v Genentech Inc* [2017] EWHC 3104 (Pat), [2018] 1 WL.R. 1755, at [73]-[74] (Birss J.)). It is, nevertheless, unclear from the Court of Appeal's summary in *Ablynx* (at [28]) whether the Belgian proceedings did squarely raise the issue of liability for infringement of the UK designation or were principally concerned with the scope of the UNH licence. If the latter, it would be strongly arguable that the Belgian proceedings had neither the same factual and legal basis (*cause*), nor the same end in view (*objet*), as the English proceedings and so could not involve the "same cause of action" under the Brussels I regime (see *Maersk Olie & Gas A/S v Firma M de Haan* (C-39/092) [2004] E.C.R. I-9657, [2005] 1 Lloyd's Rep. 210, at [33]-[39]; *The Alexandros T* [2013] UKSC 70, [2014] 1 All E.R. 590, esp. at [28]-[32], [40]-[54]). On that basis, art.31(2) would not apply to the case at all.

In relation to proposition (4), the Court of Appeal's reasoning unsatisfactorily sidesteps the decision of the Court of Justice in *GAT* (above) through the supposition that "[a]s far as one can tell from the report, the only defence to the infringement claim in *GAT* was the allegation of invalidity" (*Ablynx*, at [107]). That approach is not only speculative, but is hard to reconcile with the thrust of the European Court's reasoning in *GAT*, which emphasised the risk that a court other than that of the Member State of registration would rule indirectly on the validity of the patent and thereby undermine the purpose of giving exclusive jurisdiction to the courts of the Member State of registration (see [2006] ECR I-6509, esp. at [26]-[29]). This reasoning led Aikens L.J. in *Berliner Verkehrsbetriebe Anstalt des Offentlichen Rechts v JP Morgan Chase Bank NA* to conclude that *GAT* supported the proposition that "when an infringement case raises the issue of validity of the patent, they are really two aspects of one issue" ([2010] EWCA 390, [2012] QB 176, at [85]; see also *Anan Kasei v Molycorp* and *Eli Lilly v Genentech* (above)). Thus, once validity is in issue, the questions of infringement and validity are intertwined and cannot be pulled apart – resolving the question of (in)validity becomes a pre-condition to determining any other question raised in the course of the infringement proceedings.

The most troubling aspect of the Court Appeal's decision, however, is its reasoning in relation to the proposition (3) involving the relationship between art.24 and art.31(2). Several flaws appear in the reasoning.

First, the Court appears to have overlooked the significance of provisions within the Regulation (arts.27 and 31(1)) which define the procedural obligations of Member State courts seised of claims engaging another court's exclusive jurisdiction under art.24 of the Regulation. Art.27 requires a Member State court seised of a claim which is principally concerned with a matter over which the courts of another Member State have art.24 exclusive jurisdiction to decline jurisdiction of its own motion, regardless of whether it was seised first or had been designated in a choice of court agreement. Art.31(1) applies to the (relatively rare) case in which actions come within the exclusive jurisdiction of several courts, and requires any court other than the court first seised to decline jurisdiction. These rules are properly seen as exhaustive, with art.31(1) providing the sole basis for a court vested with art.24 exclusive jurisdiction to bring its proceedings to a halt. Thus, art.31(2) was not engaged.

Secondly, the Court also failed to appreciate that the decision of the Court of Justice in *Weber v Weber* (C-438/12) [2014] ECLI:EU:C:2014:214, [2015] Ch.140 points ineluctably to the conclusion that what are now arts.24 and 27 of the recast Regulation combine to disarm the *lis pendens* mechanisms of the Regulation in circumstances in which the court ostensibly having priority would, in giving judgment, trespass upon the art.24 exclusive jurisdiction of another Member State court.

Although *Weber* was concerned with what is now art.29 of the recast Regulation (art.27 of Regulation (EC) 44/2001), the reasoning applies with equal force to the *lis pendens* mechanism in art.31(2)-(3). The Court of Appeal's suggested ground of distinction between the two cases - that *Weber* (unlike *Ablynx*) "does not bear on a case in which both courts have exclusive jurisdiction, albeit by different routes" - improperly elides art.24 (in Section 6 of Chapter II of the Regulation, under the heading "Exclusive jurisdiction") with art.25 (in Section 7, under the heading "Prorogation of jurisdiction"). Jurisdiction under art.25 is "exclusive" only in the sense that the autonomy of the parties may displace jurisdiction founded on the defendant's domicile (Art 4) or rules of special jurisdiction (Section 2), whereas jurisdiction under art.24 prevails over all other grounds of jurisdiction within the Regulation. As Recital (19) makes clear, the parties' autonomy to choose the forum is "subject to the exclusive grounds of jurisdiction laid down in this Regulation" (cf. *Ablynx*, at [70], where Lewison L.J. refers inappropriately to "a clash between two exclusive jurisdictions"). This distinction was central to the Court's reasoning in *Weber* (above, at [51]-[53]).

Thirdly, the Court disregarded the statement in Recital (22) that art.31(2) has no role to play if the court designated in an exclusive choice of court provision is first seised. In that case, the general *lis pendens* mechanism in art.29 will apply, bringing with it the force of the decision in *Weber*. If, therefore, the Belgian court had been the court first seised in *Ablynx*, the scheme of the Regulation would have required the English court to determine whether it had exclusive jurisdiction under art.24 and, if so, to proceed irrespective of the prior Belgian proceedings. Counterintuitively, the Court of Appeal's analysis places the English court in a procedurally weaker position in the situation in which it is the court first seised, being required to defer to the Belgian court in that case but not otherwise.

Fourthly, contrary to the Court of Appeal's assumption that its decision to cede priority is consistent with the scheme of the Regulation, not only could a Belgian court not determine the validity of the UK designation of a European Patent without trespassing on the English court's exclusive jurisdiction under art.24(4), but it could not even rule upon the jurisdictional question as to whether art.24(4) was engaged in such a way as to bind the English court (see recast Regulation, art.45(1)(e)(ii)). Thus, the

English court's deference to the Belgian court is an empty gesture: the Belgian court could never, as the English court appears to have believed, "decide definitively" on the art.24 issue (cf. *Ablynx*, at [73]).

Finally on this aspect of the case, the Court gave insufficient weight to art.25(4) of the Regulation, which provides, in the strongest possible terms, that choice of court provisions "shall have no legal force … if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24". The act of staying proceedings under art.31(2) itself involves giving legal force to the choice of court agreement. Even if the rule is properly characterised as "a procedural rule about which court should take the lead in deciding the question of jurisdiction where there are parallel actions" (*Ablynx*, at [72]), to allow the choice of court agreement to fix the mechanism for addressing the jurisdictional issue is to give it legal significance.

All in all, the decision in Court of Appeal in *Ablynx* is highly unsatisfactory. As the Brussels I Regulation will cease to apply in the UK after the end of the Brexit implementation period (see S.I. 2019/479, regs.84 and 92), its immediate impact will likely be limited. Moreover, there is no equivalent to art.31(2) in the 2007 Lugano Convention ([2007] O.J. L339/3) to which the UK might seek to become a party in the future. Nevertheless, the jurisdictional issues raised in *Ablynx* were sufficiently novel and complex that the English Court would surely have benefited from the guidance of the European Court of Justice under the preliminary reference procedure. As the facility remains in place during the implementation period (see art.86(2) of the Withdrawal Agreement, agreed at European Council on 17 October 2019 [2019] O.J. C384I/1), it can only be hoped that the Supreme Court will have the opportunity to consider this case and will decide that a call to Luxembourg is appropriate.

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