LIS ALIBI PENDENS AND RELATED ACTIONS
IN CIVIL AND COMMERCIAL MATTERS
WITHIN THE EUROPEAN JUDICIAL AREA

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I. General Features of *Lis alibi pendens* and Related Actions as Instruments of Coordination among State Jurisdictions

The possibility of concurrent proceedings before the courts of different countries is a typical feature in the current practice of international civil and commercial litigation. In fact, concurrent proceedings are caused by the inherent differences among the State legal orders, both in procedure and substance, so that each litigant is naturally drawn to introduce an action before his or her domestic courts whenever the possibility of so doing arises, rather than submitting to the jurisdiction of a foreign court chosen by his or her opponent.1

Concurrent proceedings may take two forms, each of which is subject to different rules depending on whether they concern the same or different, but related, causes of actions. In the first case, a situation will arise that is currently known as *lis alibi pendens*, which, as will be seen in due course, presupposes identical proceedings, both as concerns the cause of action and the parties (even though the identical nature of the proceedings, particularly under the EC rules, may be appraised with a certain degree of flexibility). In the second case, a situation will arise known as related actions, which presupposes the existence of some form of relevant connection among the causes of action, so that, at least according to the definition contained in the EC rules, joinder of the two sets of proceedings may be advisable to prevent the risk of irreconcilable decisions that may arise if the two actions are tried separately.2

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2 See Article 28, par. 3, of EC Regulation No. 44/2001. The same definition of related actions, taken from Art. 22, par. 3, of the Brussels Convention of 27 September 1968 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, appears in Article 6, par. 1 of the Regulation, concerning jurisdiction based
The present study focuses mainly on *lis alibi pendens* because of its more significant effect on the practice of international civil and commercial litigation and of the wide array of complex legal issues it raises, as documented by the extensive body of case law both of the European Court of Justice – with respect to the rules contained formerly in the 1968 Brussels Convention and subsequently in the EC Regulations adopted in the field of judicial cooperation in civil matters – and of domestic courts. In particular, attention will be focused on some salient features presented by the uniform rules on *lis alibi pendens* and, more marginally, on related actions, applicable in cases involving the courts of two or more Member States of the European Union. For cases that are not covered by the said rules, the majority of European countries have embodied in their domestic legal systems autonomous rules concerning *lis pendens*, and, occasionally, related actions pending abroad. In some cases, these rules take the form of specific statutory provisions, in other cases of a consolidated judicial attitude developed on the basis of

on connection in respect of actions brought against a plurality of defendants. See *infra*, Part II, sub C.1.

2 Among these Regulations, adopted pursuant to Article 65 of the EC Treaty as introduced by the Treaty of Amsterdam (currently Article 81 TFEU), rules on *lis alibi pendens* are to be found notably in Regulation No. 44/2001 concerning jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters (s. c. ‘Brussels I’ Regulation), Arts. 27-30, and, currently, in Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (s. c. ‘Brussels II-bis’ Regulation), Art. 19, besides Regulation No. 4/2009 concerning maintenance obligations, Arts. 12-13, not yet in force. The majority of decisions so far rendered by the ECJ in this domain actually concerns the rules as previously contained in the 1968 Brussels Convention, Article 21. See *infra*, parts II et seq.

3 The relevant requirement for the application of the rules on *lis alibi pendens* contained either in Regulation No. 44/2001 (‘Brussels I’), Article 27, or in Regulation No. 2201/2003 (‘Brussels II-bis’), Article 19 – as formerly in the 1968 Brussels Convention, Article 21 – is in fact that the concurrent sets of proceedings, besides concerning a subject matter which falls within the scope of application *ratione materiae* of either instrument, must be pending before the courts of different Member States. See *infra*, Part II, sub A.1.

the rules applicable in respect of the same occurrences at a domestic level. Rules may be also found in a number of international conventions on jurisdiction and/or enforcement of judgments concerning specific matters.

Lis alibi pendens and related actions share a common feature: they achieve a preventive form of coordination among the jurisdictions of different countries, which aims to complement the more traditional form of coordination constituted by the recognition and enforcement of foreign judgments issued by the judges seized by the parties in different countries. In this respect, it can be seen that the application of rules concerning *lis alibi pendens* or related actions may foster the recognition and enforcement of foreign judgments, since they tend to prevent the occurrence of a frequent cause of refusal of recognition, given by the existence of a contrast among judgments.8

Nevertheless, the effects produced by instruments of coordination among jurisdictions, like *lis alibi pendens* and related actions, are not limited to the procedural sphere. In fact, the application of rules concerning either situation is likely to produce the effect that a cause of action will be treated by a judge in a legal order different than the one to which belongs the judge originally seized by one of the parties. This will in turn cause the action to be decided under a law that may be different from that which would have been applied by the judge originally seized, since every judge is, in principle, and – except in cases where uniform conflict of laws or substantive rules are applicable – subject to his or her own domestic conflict of laws rules. As a result, both *lis alibi pendens* and related actions contribute indirectly to achieving coordination among legal orders and, more specifically, among systems of private international law, which is pursued by the recognition and enforcement of foreign judgments. Under the recognition and enforcement of foreign judgments, the legal order of the State of recognition gives

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7 Among these, well-known examples are given by the Geneva Convention of 19 May 1956 on contracts for the carriage of goods by road (CMR), Article 31.2; the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations, Article 12; the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, Article 13. For an examination of the rules on *lis alibi pendens* contained in these conventions as well as in others, including bilateral conventions, and for further bibliographical references we refer to MARONGIU BUONAIUTI F. (note *), p. 89 et seq.

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effect to a legal situation created in the State of origin through a judgment issued under the law applied pursuant to the conflict of laws rules of the latter State. By preventing contrasting judgments, *lis alibi pendens* and related actions may also create material harmony among legal solutions, which is traditionally pursued by the recognition of foreign judgments, in that they both tend to create a legal framework that is favourable to the introduction of the effects of the foreign judgment within the legal order of the State of recognition.9

II. The EC Rules on *lis pendens* and Related Actions Contained in Regulation No. 44/2001 (‘Brussels I’)

The rules on *lis alibi pendens* and related actions, which were previously contained in the Brussels Convention of 27 September 1968,10 are as of 1 March 2002 found

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9 The attitude of the rules providing for the recognition and enforcement of foreign judgments to act as ‘disguised additional allocation rule(s)’ has been underlined by WENGLER W., *The General Principles of Private International Law*, in Recueil des Cours, vol. 104 (1961-III), p. 273 et seq., esp. p. 443 et seq. See, in this respect, also PICONI P., *Les méthodes de coordination entre ordres juridiques en droit international privé*, Cours général de droit international privé, ibidem, vol. 276 (1999), p. 9 et seq., esp. p. 259 et seq. The differences in the mode in which international uniformity of legal solutions is attained by means of the recognition of foreign judgments, which gives effect to the foreign rules as concretely applied by the foreign judge to the case at hand, and by means of the rules of conflict of laws, which provide for the application of foreign law in its general and abstract form by the domestic judge, have been underlined in particularly neat terms by CONDORELLI L., *La funzione del riconoscimento di sentenze straniere*, Milan 1967, p. 142 et seq. The close relationship existing between the rules on conflict of laws and the rules on the recognition of foreign judgments, including the fact that they both achieve, although through different means, a coordination among legal systems is underlined also by VISCHER F., ‘Introduzione alla legge’, in: *Il nuovo diritto internazionale privato in Svizzera*, Milan 1990, p. 3 et seq., esp. p. 11 et seq., with regard to the Swiss federal law on private international law (LDIP) of 1987. The point, which had to be summarized here in its most essential terms, is more extensively discussed in MARONGIU BUONAIUTI F. (note *), p. 44 et seq., to which we refer also for further bibliographical references.

in EC Regulation No. 44/2001 of 22 December 2000, concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is also known as the ‘Brussels I’ Regulation11 because it substantially replaces the Brussels Convention.12 Those rules on lis pendens are substantially replicated, though with some modifications reflecting the different subject-matter at issue, in EC Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, which is also known as ‘Brussels II-bis’ Regulation13


12 As clarified in the Preamble to Regulation No. 44/2001, pars. 5 and 19, a close link of continuity exists between the Regulation and the Brussels Convention, which has to be taken into account to interpret the two instruments. The ECJ has on some occasions pursued this aim by taking into account the amendments introduced by the Regulation in respect of the rules as contained in the Convention as ratio scripta in interpreting the provisions of the latter: see BONADUCE C., ‘L’interpretazione della convenzione di Bruxelles del 1968 alla luce del regolamento n. 44/2001 nelle pronunce della Corte di giustizia’, in: Riv. dir. int., 2003, p. 746 et seq.

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because it replaces the previous EC Regulation No. 1347/2000, known as ‘Brussels II,’ and, lastly, in Regulation No. 4/2009 concerning maintenance obligations.

A. Lis pendens in the Brussels I Regulation – General Framework

The rules on lis alibi pendens contained in ‘Brussels I,’ to which we shall mainly refer in this study, establish three essential requirements for a situation of lis pendens: (1) there must be two concurrent proceedings that share the same cause of action, (2) those proceedings must involve the same parties, and (3) one of the two actions must have been initiated before the other.


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1. **The Scope of Application ratione loci**

Apart from these requirements, which are intrinsic to *lis alibi pendens*, the rules contained in Regulation No. 44/2001 and in the other above-mentioned regulations only apply when the two sets of proceedings are pending before courts of different Member States, to the exclusion of Denmark. The difficulties posed by this exclusion have been overcome through the introduction of rules identical to those contained in Brussels I in an apposite convention concluded between Denmark and the EC, which became effective on 1 July 2007. The same rules on *lis pendens* as contained in the Regulation have also subsequently been introduced in the new Lugano Convention signed on 30 October 2007, which attempts to align the rules applicable in the relations with EFTA countries with those in force among EC Member States.

2. **The Irrelevance of the Domicile of the Defendants**

In contrast to the other provisions concerning jurisdiction contained in the Regulation, no relevance is given to the domicile of the defendants in either set of proceedings, which may be located in the same or in different Member States as well as in third countries. In fact, the irrelevance of the ground upon which the jurisdiction—

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16 Which must fall within the scope of application *ratione materiae* and *ratione temporis* of the relevant Regulation.

17 The Regulation – just as any other EC act adopted pursuant to Title IV EC Treaty – does not apply to Denmark, pursuant to the Protocol concerning the position of Denmark attached to the Treaty of Amsterdam of 2 October 1997, in OJ, C 340, 10 November 1997, p. 101 et seq.

18 See the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Brussels on 19 October 2005, in OJ, L 299, 16 November 2005, p. 62 et seq. The conclusion of the agreement has been approved by the Council on behalf of the Community by a decision of 27 April 2006, in OJ, L 120, 5 May 2006, p. 23, and the latter went into effect on 1st July 2007, as from notice in OJ, L 94, 4 April 2007, p. 70.

19 See the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, in OJ, L 339, 21 December 2007, p. 3 et seq. The conclusion of the convention has been approved by the Council on behalf of the Community by a decision of 27 November 2008, in OJ, L 147, 10 June 2009, p. 1 et seq. and has been ratified by the Community on 18 May 2009. The Convention is in force since 1 January 2010 between the EU, Denmark and Norway. Following a decision by the Swiss Federal Council of 31 March 2010, it will be ratified by Switzerland with effect from 1st January 2011. Generally, on some issues concerning the applicability of the provisions on *lis alibi pendens* and related actions contained in the new convention in Switzerland, KREN KOSTKIEWICZ J., “Rechtshängigkeit und Konnexität”, in: *La Convention de Lugano. Passé, présent et devenir*, ed. by A. Bonomi, E. Cashin-Ritaine, G. P. Romano, Zürich 2007, p. 109 et seq., esp., concerning the new rule for the determination of the temporal element under Article 30, p. 115 et seq.
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tion of either court is based is a cornerstone of the Regulation’s system for resolving concurrent proceedings, as previously affirmed by the ECJ in Overseas Union Insurance regarding the 1968 Brussels Convention. This is due to the close relationship, already stressed above, between the rules on lis alibi pendens and related actions and those on the recognition and enforcement of judgments contained in the Regulation, which apply to any judgment falling within the substantial scope of application of the latter and handed down by a judge of a different Member State, irrespective of the domicile of the defendant to the action and, in principle, of the ground on which the jurisdiction of the judge is based.20

B. The Principle of Reciprocal Faith among the Judicial Systems of EU Member States

1. The Exclusion of a Review of the Jurisdiction of the Judge First Seized

As a corollary to the said rule, it must be noted that the court first seized is, in principle, given total control over its jurisdiction. In fact, as clearly stressed by Article 27, par. 1 of the Regulation, the court second seized must suspend its proceedings until the court first seized has determined whether it has jurisdiction. Pursuant to par. 2, it is only after the court first seized has affirmed its jurisdiction that the court second seized must decline jurisdiction. This rule was modified by the 1989 Donostia-San Sebastian Convention for the accession of Spain and Portugal to the Brussels Convention to prevent the risk, which the original text left open, that the court first seized may determine that it had no jurisdiction after the court second seized had dismissed the action.21


21 The Convention for the accession of Spain and Portugal to the Brussels Convention, signed at Donostia-San Sebastian on 26 May 1989, has amended the text of Article 21
2. **The Exceptions in Cases of Exclusive Jurisdiction, Not Including Choice of Court Agreements**

As the ECJ stressed in *Overseas Union Insurance* in respect of the rules on *lis pendens* contained in the Brussels Convention, the only circumstance in which the court second seized may review the jurisdiction of the court first seized is when the former is vested with exclusive jurisdiction. The Court, however, recently clarified in *Gasser* that this option is limited to only those cases where the exclusive jurisdiction of the court second seized directly derives from the provisions of the Convention, i.e. the Regulation, and does not extend to cases where the court second seized has been designated in an agreement by the parties providing for exclusive jurisdiction. When an agreement between the parties is involved, it is up to the court first seized to assess the validity and enforceability of the agreement and, in such a case, to decline jurisdiction.

of the Convention in order to align it with the corresponding provision of the Lugano Convention concluded on 16 September 1988 with EFTA Member States, which provided for the duty of the judge second seized to merely suspend proceedings until the court first seized has ruled on its jurisdiction. The rule as originally formulated in the 1968 Brussels Convention required the judge second seized to decline its jurisdiction unless the jurisdiction of the court first seized had been challenged, in which case the judge second seized could merely suspend proceedings. See the Report on the Accession Convention by De Almeida Cruz, Desantes Real, Jenard, in OJ, No. C 189, 28 July 1990, p. 35 et seq., par. 28, at p. 48; also Trunk A., *Die Erweiterung des EuGVÜ-Systems am Vorabend des europäischen Binnenmarktes, Das Lugano-Übereinkommen und das EuGVÜ-Beitrittsübereinkommen von San-Sebastian*, München 1991, esp. p. 52 et seq.

22 ECJ, 27 June 1991, case C-351/89, *Overseas Union Insurance Ltd*. (note 20), point 26, at p. I-3351. The solution reached by the Court of Justice is consistent with the special treatment reserved to rules granting exclusive jurisdiction in the context of the recognition and enforcement of judgments; whereas as a general rule no control of the jurisdiction of the court of origin is allowed within the system of the Regulation. The violation of rules of exclusive jurisdiction contained in Article 22 of the Regulation, as well as of those concerning contracts of insurance and consumer contracts, is especially contemplated by Article 35, par. 1, of the Regulation as a ground for refusal of recognition. The solution adopted by the ECJ has been followed by English Court of Appeal in *Speed Investments Ltd. v. Formula One Holdings Ltd.* (No. 2), in *Weekly Law Reports*, 2005, vol. 1, p. 1936 et seq., esp. p. 1946 et seq.

The rule stressed by the ECJ in both the *Overseas Union Insurance* and the *Gasser* cases is inspired to the principle of reciprocal faith among the judicial systems of the Member States, according to which the judges of each Member State are expected to trust the others’ reliability in correctly applying the rules contained in the Regulation as well as any other rule instrumental to their implementation – including any rule which may be relevant regarding the validity and enforceability of a choice of *forum agreement* – and may not substitute themselves in this task.24

### 3. The Irrelevance of the Excessive Average Length of Court Proceedings in the Member State Concerned

The Court has derived other consequences from the said principle. First, as stressed in the *Gasser* case, there is no exception to the duty of the court second seized to suspend proceedings because the court first seized belongs to a judicial system known for excessively long court proceedings, since the judicial systems of the Member States are deemed equal with regard to the application of Community rules on jurisdiction.25

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The Exclusion of the Power to Issue Restraining Orders, Like Anti-Suit Injunctions

Second, as the ECJ affirmed in Turner, the duty to respect another court’s assessment of its own jurisdiction implies that Member States cannot use domestic law to give their courts the power to issue restraining orders like anti-suit injunctions, which, even though formally directed to the parties, may effectively preclude another Member States’ court from exercising the jurisdiction derived from a provision of the Convention or, currently, the Regulation.26

The ECJ has recently extended that rule in Allianz (formerly RAS) to cases where an anti-suit injunction is issued by a Member State court to protect the right of one of the parties to have its case submitted to arbitration, notwithstanding the fact that arbitration is excluded from the scope of application of the Regulation.27 In fact, the Court has considered the arbitration exclusion irrelevant in all cases where an injunction is aimed at deterring the defendant from entertaining an action before a court in another Member State, in a situation which falls within the scope of application of the Regulation, regardless of the fact that an issue of validity or enforceability of the arbitration clause may arise as a preliminary question before that court.28 According to the same principle of reciprocal faith, it will be for the

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court seized to determine the validity and enforceability of the arbitration clause within the assessment it is expected to make of its own jurisdiction pursuant to the Regulation.  

C. The Rules Concerning Related Actions under Article 28 of the Brussels I Regulation

The rules contained in Article 27 of the Brussels I Regulation concerning *lis alibi pendens* are completed by those formulated in Article 28 in respect of related actions.

I. The Definition of Related Actions

Article 28 substantially replicates Article 22 of the Brussels Convention, reproducing in paragraph 3 the same definition of related actions. Accordingly, two actions are deemed to be related when they present such a close connection that it is expedient to have them treated jointly in order to prevent the risk of irreconcilable judgments that may arise if they were treated separately. The ECJ interpreted points 23 et seq., esp. point 34 – the relevant criterion for establishing whether or not an action falls within the scope of application of the Convention – the same applying to the Regulation – is given by the main object of the plaintiff’s claim and not that of preliminary questions which may eventually arise.  


30 The same requirement has been introduced by the Brussels I Regulation in the provision of Article 6, par. 1, concerning jurisdiction based on connection with regard to actions against a plurality of defendants, after having been considered substantially inherent in the corresponding rule of Article 6, par. 1, of the Brussels Convention, which did not expressly provide a connection requirement: see ECJ, 27 September 1988, case 189/87, Kalfelis v. Banque Schröder, in *ECR*, 1988, p. 5579 et seq., esp. points 8 et seq., p. 5583. The Court has subsequently affirmed that the provision in Article 6, par. 1, is to be interpreted restrictively, since it implies a derogation from the general rule of the forum of the defendant’s domicile: see in particular ECJ, 27 October 1998, case C-51/97, Réunion européenne, in *ECR*, 1998, p. I-6511 et seq., esp. points 46 et seq., p. I-6548 et seq. See, with regard to the case law of the ECJ concerning Article 6.1 of the Convention, among others, DI BLASE A. (note 20), p. 39 et seq.; MARI L., *Il diritto processuale civile della*
this definition expansively in its well known Tatry decision,\textsuperscript{31} holding that the risk of irreconcilable judgments is not intended to mean only decisions that would produce mutually exclusive effects, as under Article 27, par. 3 of the Brussels Convention according to the interpretation the Court had given in its previous Hoffmann decision.\textsuperscript{32} The Court observed, in fact, that whereas Article 27, par. 3 – which is currently to be found in identical terms in Article 34, par. 3, Brussels I Regulation – provides for an exception to the general rule requiring automatic

\textsuperscript{31} ECJ, 6 December 1994, case C-406/02, Tatry (Owners of the cargo lately laden on board the ship) v. Maciej Rataj (Owners of the ship), in: ECR, 1994, p. 1-5439 et seq., at p. 1-5477 et seq. The diversity of the aim pursued by Article 22 of the Brussels Convention from that of Article 6, par. 1 of the Convention had been previously affirmed by the ECJ, 24 June 1981, case 150/80, Elefanfen Schuh v. Jacqmain, in: ECR, 1981, p. 1671 et seq., at p. 1686 et seq., pointing to the fact that Article 22 does not extend the jurisdiction derived from other rules in the Convention. In fact, Article 22, par. 2 of the Convention (just as Article 28, par. 2, Brussels I Regulation) provides that jurisdiction may be declined in favour of the judge first seized only if this has jurisdiction in respect of the two actions.

recognition of judgments given in other Member States and is therefore to be interpreted restrictively, the rule on related actions contained in Article 22 of the Convention – i.e., in Article 28 of the Regulation – tries to achieve an efficient coordination among proceedings pending in the Courts of different Member States, and a broad interpretation thereof is therefore necessary to ensure that purpose is achieved to the largest extent possible.33

2. The Procedural Modifications Introduced by the Regulation

Article 28 of the Regulation has introduced procedural improvements, while at the same time maintaining the definition of related actions previously contained in Article 22 of the Convention. Under the first modification, the requirement of concurrent actions pending at first instance, which the former provision contemplated for the mere suspension of proceedings by the judge second seized, is now foreseen only in respect of the decision to decline jurisdiction under paragraph 2 of the rule. This modification substantially extends the applicability of the rule so far as the mere suspension of proceedings is concerned. At the same time, the said requirement is maintained with regard to the more delicate decision to decline jurisdiction. Such a decision might in fact have caused the plaintiff in the action subsequently introduced the loss of an instance of judgment, in case that action was still pending at first instance whereas the concurrent action before the judge first seized was already pending in appeal. The second modification concerns the additional requirement posed by paragraph 2 of the rule regarding the decision of the judge subsequently seized to decline jurisdiction and the possibility to consolidate the actions in front of the judge first seized. Article 22, par. 2, of the Convention oddly required that consolidation of the actions had to be permitted according to the law of the judge second seized,34 an illogical requirement that has been recti-


fied. Pursuant to Article 28, the actions can be consolidated if allowed by the law of the judge first seized, a solution which appears more correct considering that it is in front of the latter that consolidation of the concurrent actions has to take place.35

III. In Particular, the Requirements for the Application of the Rules on lis pendens: the Identity of the Cause of Action

The requirements for the application of the rules concerning lis alibi pendens in ‘Brussels I’ and formerly in the Brussels Convention have frequently proven difficult to interpret due to the inherent difficulty of having them applied to two different sets of proceedings pending before courts of different Member States that frequently belong to distinct legal traditions. Probably the most significant problems of interpretation have concerned the requirement that the two claims present the same cause of action; this problem is caused by a broad variety of conceptions that can be met in the legal literature of the Member States on this issue. The ECJ was addressed with this question as early as 1987 in Gubisch Maschinenfabrik v. Palumbo.36 The Court began by observing that even though the said requirement was formulated in different terms in some of the linguistic versions of the Brussels Convention, as it is now in those of ‘Brussels I,’ a uniform meaning of the different terms adopted could be traced. In fact, the majority of linguistic versions distinguished within the unitary English notion of ‘cause of action,’ as within the German notion of ‘Anspruch’, the two elements of the object of the action and of the title on which it is based. This distinction was therefore to be taken into account for the purposes of the autonomous interpretation of the Convention, as it is currently in respect of the Regulation.37


37 See in this sense the reasoning of the Court, point 14, at p. 4875. Among the other linguistic versions of the Brussels Convention and of Regulation ‘Brussels I’, the French version bears: ‘le même objet et la même cause’, the Italian version: ‘il medesimo oggetto ed il medesimo titolo’; the Dutch version: ‘vorderingen (…), welke hetzelfde onderwerp
In determining the precise meaning of the two said elements of the action, the Court of justice stressed the need to pursue an autonomous and uniform interpretation, capable of transcending the peculiarities of domestic legal conceptions. In establishing such an interpretation, the Court referred to the essential aim of the rules on *lis alibi pendens*—at that time contained in the Brussels Convention—to prevent conflicting judgments, which would create an obstacle to the free circulation of judgments among the Member States. The latter constitutes, in fact, the main purpose of the Convention and now of the Regulation. Consequently, the autonomous interpretation of both notions of ‘object’ and ‘title’ of the two actions had to be conceived broadly, so as to ensure to the largest extent possible the attainment of that aim. Accordingly, the ‘object’ of the action is in principle

betreffen en op dezelfde oorzaak berusten; the same distinction appears in other versions successively drafted on the occasion of the accession of new Member States to the Brussels Convention, such as the Spanish version: ‘el mismo objeto y la misma causa’ and the Portuguese version: ‘o mesmo pedido e a mesma causa de pedir’. The difference in the linguistic versions of the Convention, which has remained substantially unaltered in the Regulation, is inevitably evidence of the divergences among domestic legal conceptions in the Member States.

In this respect, the Court, point 7, at p. 4873, recalled itself to its previous decision of 6 October 1976, case 12/76, *Industrie Tessili Italiana Como v. Dunlop A.G.*, in ECR, 1976, p. 1473 et seq., to underline that none of the two alternative solutions, given by an entirely autonomous interpretation and one which refers to the domestic conceptions of the specific Member States concerned, may be accepted as a general rule, since the more appropriate solution in respect of the interpretation of expressions used in the Convention has to be assessed on a case by case basis according to the specific purpose of the relevant provision. In the *Tessili* case, in fact, the Court held that the place of performance of the disputed obligation under Article 5.1 of the Convention had to be determined in accordance with the law applicable under the conflict of laws rules of the forum. See, in this respect, FRANZINA P., *La giurisdizione in materia contrattuale. L’art. 5 n. 1 del regolamento n. 44/2001/CE nella prospettiva dell’armonia delle decisioni*, Padua 2006, esp. p. 73 et seq.; p. 371 et seq.


The Court, points 8 et seq., at p. 4874, recalled the purposes contemplated by former Article 220 of the EEC Treaty –then Article 293 of the EC Treaty – on the basis of which the Convention had been concluded, as underlined in particular in its earlier decision of 30 November 1976, case 42/76, *de Wolf v. Cox B. V.*, in ECR, 1976, p. 1759 et seq., where the Court affirmed the relevance within the system of the Convention of the principle of *res indicata*, stressing that it would be incompatible with the purpose of Articles 26 et seq. of the Convention, relating to the recognition of judgments handed down in the other
identified with the substantial aim pursued by the plaintiff with his claim, rather than with the specific form of relief requested, which might vary according to the legal system concerned. ‘Title,’ instead, must be identified with the legal relationship giving rise to the action.

A. The Relationship between Actions for Performance and Actions for a Negative Declaration

*Gubisch Maschinenfabrik v. Palumbo* presented, on the one hand, an action for performance of a sales contract, whereby the seller sought payment of the price from the buyer. On the other hand, it presented an action for a negative declaration, whereby the buyer sought a declaration holding either that the contract was null and void or that the seller had committed a fundamental breach of the contract, discharging the buyer from his obligations. The ECJ held that because the enforceability of the same contract was at the heart of the two actions, which were in fact aimed either at affirming or at denying enforceability of the contract, the actions were to be assumed as having the same object and the same title for the purposes of the Convention, even though pursuant to the domestic legal conceptions of the Contracting States, to admit a new action, identical both as to the parties and in respect of the object, to another one which has already been decided by a judge in another Contracting State.

40 It is to be noted that with respect of the object of the action Italian procedural law distinguishes the two elements of ‘oggetto immediato,’ given by the specific form of relief requested, that is, in the case at hand, the condemnation of the other party to payment of the price under the contract on the one side and a negative declaration on the other, and of ‘oggetto mediato,’ given by the aim which is pursued by the plaintiff by means of the relief requested, that is, respectively, the performance of the contract and the discharge from the obligations deriving from it. See, among others, FRANCHI G., *La litispendenza*, Padua 1963, p. 88, 92 et seq.; MANDRIOLI C., *Corso di diritto processuale civile*, XIX ed., Turin 2007, vol. I, p. 158 et seq.; MARENGO R., *La litispendenza internazionale*, Turin 2000, p. 125 et seq.; RICCI G. F., ‘Litispendenza’, in: *Digesto*, IV ed., *Disc. priv., Sec. civ.*, Vol. IX, Turin 1994, p. 64 et seq., esp. p. 71 et seq., 74 et seq.

41 In fact, as observed by the Court, point 15, at p. 4875, being the identity of the contractual relationship which formed the basis of the two actions beyond dispute, the really controversial aspect in the case in question was constituted by the identity of the object, which could appear questionable, in consideration of the opposite pretentions of the parties.

42 See in these terms the fundamental assumption by the Court, point 16 of its reasons for decision, at p. 4876. The Court went on, points 17-18, *ibidem*, affirming that in front of this decisive consideration of no relevance could be considered the lack of formal identity of the two actions, since, had the issue been decided otherwise, the way would have been left open to potentially contradictory judgments. In fact, the recognition of a judgment condemning one of the parties to performance of his obligations under the contract could have been barred in the Contracting State of domicile of the said party pursuant to Art. 27, par. 3 – currently, Art. 34, par. 3, Brussels I Regulation – by a previous judgment by the courts of the latter country having declared the invalidity or the non-enforceability of the same contract. The decision of the ECJ has formed the subject of extensive legal literature:

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relevant Member States the identity of the object of the two actions could apparently not be affirmed. The Court further observed that the solution reached was justified because the object of the subsequent action for a negative declaration might well have been introduced as a defence to the previous action for the enforcement of the contract, since it did not extend the limits of the object of the dispute as set by the latter action.


Reflecting conceptions apparently derived from Italian law, Advocate General Mancini suggested in his conclusions concerning the case at hand, ibidem, p. 4867 et seq., esp. p. 4870, that the relationship between an action for performance and an action for a negative declaration in respect of the same legal relationship should be conceived in terms of ‘pregiudizialità,’ that is, of preliminary relevance with respect to the decision on the other action, rather than identity. This solution, however, is questionable, since for a relation of ‘pregiudizialità’ to properly arise, the preliminary question must pertain to a different legal relationship than that which forms the subject of the other action, which is not the case in the situation under consideration. See, for different propositions in respect of this issue, PROTO PISANI A., ‘Appunti sulla tutela di mero accertamento’, in: Riv. trim. dir. e proc. civ., 1979, p. 620 et seq., esp. p. 629 et seq.; MENCHINI S., I limiti oggettivi del giudicato civile, Milan 1987, p. 107 et seq.; ID., Il giudicato civile, Turin 1988, p. 59 et seq.; MERLIN E., ‘Azione di accertamento negativo di crediti ed oggetto del giudizio (casi e prospettive)’, in: Riv. dir. proc. 1997, p. 1064 et seq., esp. p. 1079 et seq.; ROMANO A. A., L’azione di accertamento negativo, Naples 2006, p. 265 et seq.; the point is specifically discussed with regard to the corresponding requirement for the application of the Italian rule on lis alibi pendens contained in Art. 7, par. 1, of Law No. 218/1995 in MARONGIU BUONAIUTI F. (note *), p. 336 et seq., to which we refer also for further references to Italian legal literature and case law.

This assumption, which figures in point 16, second paragraph, of the Court’s reasoning, reveals to a certain extent the influence of the German doctrine on Streitgegenstandsidentität, that is, on the identity of the object of the actions. The said doctrine tends to conceive the relationship between an action for performance and an action for a mere declaration regarding the same legal relationship in terms of a maiori ad minus. Accordingly, the object of the first action has to be considered as broader than that of the second, so that the latter could be introduced within the limits of the object of the contention as set by the former. See in this sense, in German case law, among others, Landgericht Hamburg, 24 March 1976, in: Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (IPRspr.), 1976, Nr. 160, p. 456 et seq., esp. p. 459; Oberlandesgericht Köln, 4 April 1973, in: Versicherungsrecht 1973, p. 1065 et seq.; Oberlandesgericht Hamm, 25 September 1985, in: IPRax 1986, p. 233 et seq. For a different interpretation that is more in line with the conception proposed by Advocate General Mancini in the conclusions mentioned above.

45 ECJ, 6 December 1994, case C-406/02, Tatry (Owners of the cargo lately laden on board the ship) v. Maciej Rataj (Owners of the ship), in: ECR, 1994, p. I-5439 et seq.

46 Concerning, among others, the presence of a plurality of parties, not entirely corresponding in the concurrent sets of proceedings (see, in this respect, infra, Part IV, sub A), and the in rem character of the action introduced in London by the owners of the cargo against the shippers, by means of arrest of a different ship owned by the same company. With regard to the latter issue, the Court held that since actions in rem appeared as a figure peculiar to common law jurisdictions and unfamiliar to the generality of the other contracting States, such an action was, for purposes of the Brussels Convention, equivalent to an ordinary action in personam brought against the owners of the ship. See point 46 et seq. of the Court’s decision, at p. I-5476 et seq. Such a solution had nonetheless been anticipated by English case law, in particular, The ‘Nordglimt’, in: Lloyd’s Law Reports, 1987, vol. 2, p. 470 et seq.; The ‘Linda’, in Lloyd’s Law Reports, 1988, vol. 1, p. 175 et seq.; The ‘Kherson’, in Lloyd’s Law Reports, 1992, vol. 2, p. 261 et seq. See, among others, BLACKBURN E., ‘Lis
Tatry’s facts are reversed from those in Gubisch; in Tatry the action for a negative declaration preceded that for performance, so that it could not be said that the object of the latter action could have been introduced as a defence in the first proceedings. In fact, in accordance with the domestic legal conceptions of various Member States, the object of the latter action appeared broader than that of the former.47

Nonetheless, the Court still held that the same question lied at the heart of the two actions (the shipowners’ liability for damage to the cargo). And, in this respect, the Court held that no relevance was to be given to when the action for a negative declaration was filed. In fact, the Court believed that the subsequent claim for damages might well be considered dependent on a ruling finding the shippers liable, as that was the main object of the action subsequently introduced by the owners of the cargo.48

47 The point had been stressed, in particular, by Advocate General Tesauro in his conclusions on the case at hand, ibidem, p. I-5442 et seq., points 17 et seq., at p. I-5450 et seq.. Advocate General Tesauro observed that since the object of the action for compensation subsequently introduced by the owners of the cargo could not fall, as far as the request of condemnation of the shippers to payment of the compensation is concerned, within the limits of the object of the action for a negative declaration previously introduced by the same shipowners – which was limited to the mere existence or non-existence of the latters’ liability for damage suffered by the cargo – the eventual decision by the judge second seized to decline his jurisdiction pursuant to the rule on lis alibi pendens contained in Article 21 of the Convention could have caused a denial of justice in respect of that part of the action. The Advocate general therefore proposed, point 18, at p. I-5451, to limit the application of the latter rule to that part of the action subsequently introduced which was common to the two actions, proposing instead the application of the more flexible solution contemplated by Article 22 of the Convention – corresponding, with some procedural differences, to Article 28 Brussels I Regulation (supra, Part II, sub C.1)– in respect of the remaining part.

The solution adopted by the ECJ has attracted much debate in the legal literature of various Member States. That debate has underlined the Court’s divergence from the traditional conceptions – especially in civil law countries – regarding the objective limits of res judicata and the risk that it may open the way to improper attempts at forum shopping. It has in fact been observed that the solution adopted by the Court has encouraged the use of actions for a negative declaration, triggering the rule on lis alibi pendens contained in the Brussels Convention and now in ‘Brussels I.’ Accordingly, such actions for a negative declaration may be used as a tactical instrument to prevent the introduction of an action for performance by the natural plaintiff, that is, in broad terms, the party claiming damages because of the other party’s conduct. As a result, anyone afraid of being sued for their actions may strike first by introducing an action for a negative declaration in a forum of their choice among those having jurisdiction, thereby depriving the substantial plaintiff of the right to choose the forum, which is, of course, one of the alternatives established by the Brussels Convention and the Regulation.

Some of the remarks raised by the Court of Justice’s solution can be countered. In particular, the ECJ has realized that, with regard to lis pendens, attributing relevance to actions for a negative declaration alongside actions for performance has re-established an equality between the litigants regarding choice of forum, which had been endangered by the creation of a system providing for a range of alternative fora among which the plaintiff might choose to introduce his or her action. In fact, by filing an action for a negative declaration, the substantial defendant can

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49 The risk of an exploitation of the rule on lis alibi pendens contained in the Convention and now in the Regulation as interpreted by the ECJ for purposes of forum shopping has been pointed out by numerous authors, in particular, Moissinac Massénat V. (note 1), p. 117 et seq.; for a consideration of the phenomenon in question as intrinsically related to the existence of a plurality of concurrent fora, rather than to the existence and mode of operation of the rules on lis alibi pendens, Nibolet-Hoegy M. L. (note 1), p. 79 et seq., who proposes that the exploitation of the existing plurality of fora for purposes of forum shopping might be curtailed by means of rules providing for exclusive jurisdiction. The relevance of the substantial aspects of forum shopping, pertaining to the consequences which the choice among concurrent jurisdictions may have on the applicable law, due, in particular, to the absence within the Brussels system of any control of the law applied by the foreign judge at the recognition and enforcement stage, is underlined by Vareilles-Sommières P. de (note 1), p. 56 et seq.; see also, in this respect, Bell A. S. (note 1), p. 38 et seq.; Kropholler J. (note 1), p. 171 et seq.
make himself a plaintiff, thereby exercising the right to select the forum, which would otherwise have been reserved only for the plaintiff.50

3. The Solutions to Prevent Abuse: A Discretionary Evaluation of the Circumstances of the Case

Nevertheless, the risk of an abuse of actions for a negative declaration as an instrument of forum shopping remains alive. The rigidity of the Regulation’s rules on lis alibi pendens prevents the judge second seized from performing a discretionary evaluation of the case’s circumstances in order to refuse to suspend proceedings in cases where the action previously introduced in another Member State for a negative declaration appears abusive.51 A discretionary evaluation of the like, which would be familiar to common law jurists as intrinsic to the doctrine of forum non conveniens,52 is totally unknown within the system of the Convention and now


51 The introduction of a form of discretionary evaluation of the circumstances of the case in order to establish whether the action in front of the judge first seized purported to an abuse aimed at precluding adjudication of the matter by a judge more closely connected to the case has been contemplated to temper the rigidity of the rules on lis alibi pendens contained in the Brussels Convention by Lagarde P., Le principe de proximité en droit international privé contemporain, in Recueil des Cours, vol. 196 (1986-1), p. 9 et seq., esp. p. 154 et seq.; ID., ‘Perpetuatio fori et litispendance en matière internationale’, in: Mélanges dédiés à Dominique Holleaux, Paris 1990, p. 237 et seq., esp. p. 246 et seq. See, with reference to some examples where a discretionary evaluation of the like has been contemplated, such as Articles 8 and 9 of the 1996 Hague Convention on the protection of minors, in particular, Guademet-Tallon H., Le pluralisme en droit international privé: richesses et faiblesses, in Recueil des Cours, t. 312, 2005, p. 9 et seq., esp. p. 361 et seq.; with reference to Belgian law, Fallon M., ‘L’appréciation, par le juge, de la compétence internationale en matière civile et commerciale’, in: Annales de droit de Louvain 1994, p. 373 et seq.

of the Regulation. This point was clearly emphasized as early as the Schlosser Report on the Accession Convention of the U.K., Ireland and Denmark to the Brussels Convention.53

Both Convention and Regulation are in fact clearly inspired to the opposite principle of certainty and predictability as to the existence of jurisdiction, on the assumption that the plaintiff should not waste time and money looking around for a court vested of jurisdiction only for the judge seized to find himself or herself less appropriate than some other court for entertaining the case.54 The compulsory character of jurisdiction conferred by the Convention and now the Regulation on the courts of the Member States has recently been confirmed by the ECJ in its well known Owusu decision.55 There the Court stressed that jurisdiction based on the defendant’s domicile in a Member State may not be declined in favour of the courts of a third country on the basis of the doctrine of forum non conveniens. This decision prevents recourse to the doctrine not only in the relationships among Member States – where it would have inevitably overlapped with the mechanisms of coordination among concurrent proceedings, namely lis alibi pendens and related actions, provided for under the Convention and now the Regulation56 – but also in relationships involving third countries.57
An Alternative Solution: A Control on the Admissibility of Actions for a Negative Declaration

A different solution to the problem posed by the abusive use of negative declaration actions may be a careful control of the admissibility of those actions performed directly by the judge seized. In this respect, it is observed that the admissibility of actions, an issue which remains distinct from that of jurisdiction, is left to the Member States’ domestic rules of procedure, which neither the Brussels Convention nor the Regulation purport to unify. Clearly, as the ECJ has stressed in its decision in Hagen, with respect to issues left for the Member States to regulate with their own domestic rules, these rules remain subject to the effet utile principle, whereby the application of domestic, non-harmonized rules of the Member States may not impair the aims pursued by EC law. Nonetheless, such control does not

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seem likely to cause any substantial interference with the effet utile of the Regulation, insofar as it does not go beyond an assessment of the existence of a real and genuine interest on the part of the plaintiff in obtaining a declaration on the non-existence of the rights claimed by his opponent.59

B. The Irrelevance of the Defendants' Submissions for Determining the Identity of a Cause of Action

Apart from this, which has long since appeared as the most troublesome aspect of the requirement that the identity of the causes of action be demonstrated, the ECJ has been seized with other questions concerning the said requirement, which deserve further discussion. First, in Gantner Electronic,60 the ECJ was asked to application of the domestic rules on admissibility of actions does not impair the effet utile of the Convention, insofar as it does not prejudice the correct and uniform application of its rules on jurisdiction. In particular, concerning an action against a third party on a guarantee pursuant to Article 6, par. 2, of the Convention, the application of domestic rules on admissibility would be incompatible with the effet utile if it caused the action to be declared inadmissible because the third party was domiciled in a different Contracting State, since this would have deprived the provision in question of its effects.

59 Such a solution has been proposed by Chalas Ch. (note 54), p. 494 ss., persuasively arguing that it would be more in line with the general framework of the Convention – the same being true presently with the Brussels I Regulation – to leave it to the court first seized to exercise this form of control on the propriety of the plaintiff’s initiative to seize it, rather than letting the judge subsequently seized review the grounds on which the other judge has been seized. A somewhat similar solution has been proposed by the International Law Association in its Leuven-London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters, published in International Law Association, Report of the Sixty-Ninth Conference, London, 2000, p. 137 et seq., which under Article 4.1 provide that the judge first seized, in order to decide whether to entertain the action, should first evaluate the existence of another judge that would be in a better position to adjudicate on the action pursuant to a series of criteria contemplated in the following Article 4.3. The option of having recourse to the rules on admissibility to curtail abusive procedural tactics by means of actions seeking negative declarations is further discussed, among others, by Cuniberti G., ‘Action déclaratoire et droit judiciaire européen’, in: Clunet, 2004, p. 77 et seq., esp. p. 79 et seq., 84 et seq.; Cornut E., ‘Forum shopping et abus du choix de for en droit international privé’, ibidem, 2007, p. 27 et seq., esp. p. 47 et seq.; Moissinac Massénat V. (note 1), p. 118 et seq.; Marongiu Buonaiuti F. (note *), p. 311 ss.; Romano G. P. (note 11), p. 129. Among the requirements for the admissibility of an action for a negative declaration Schlosser P. (note 11), p. 179 et seq., esp. p. 183 et seq., considers as decisive the possibility for the defendant to such an action to introduce a counterclaim for the enforcement of the disputed obligation, so as to prevent the relevant limitation periods from expiring. The importance of such a requirement to safeguard the rights of the defendant to an action for a negative declaration has been stressed already by Wolf Ch., ‘Rechthängigkeit und Verfahrenskonnexität nach EuGVÜ’, in: Eur. Zeitschrift für Wirtschaftsrecht 1995, p. 365 et seq., esp. p. 366.

decide whether the identity of the causes of action must be determined with regard to only the object of the originating claims introduced by the plaintiffs in the two concurrent actions, or whether the content of the defences submitted by the respective defendants must also be considered. In the circumstances of the case, the identity of the causes of action would have resulted from a comparison between the plaintiff’s claim in the first action and the defence of set off, which the same party had presented in the parallel set of proceedings where it appeared as a defendant.61

The Court pointed to the regular reference to the term ‘action’ in the rules on *lis alibi pendens* contained in Article 21 of the Brussels Convention – and currently in Article 27 of the Regulation – and considered also the provision contained in Article 30 of the Regulation, even though not applicable for temporal reasons to the case at hand. The latter provision makes reference, for the purposes of determining the moment when proceedings are commenced, to the moment when the document instituting the proceedings is lodged with the court or when it is received by the authority competent for service. From this, the Court drew further elements for concluding that the identity of the causes of action is to be determined from the plaintiffs’ claims in the two proceedings.62

The solution adopted by the Court appears correct from a strictly procedural point of view. Indeed, it is correct only insofar as the defendant’s request for set off is submitted by way of defence, that is, without extending the action’s object any further than was set by the plaintiff’s claim. A different solution ought to have been reached in those cases where the defendant’s request is presented in the form of a counterclaim. In such a case, the defendant’s counterclaim is likely to be considered as an autonomous action, which can give rise to a situation of *lis alibi pendens* in relation to the originating claim of the plaintiff in the concurrent set of proceedings.63


63 The autonomy of a counterclaim from the plaintiff’s claim, consisting in that, differently from a mere defence, it is aimed at obtaining a separate judgment against the other party, has been stressed by the ECJ in its decision of 13 July 1995, case C-341/93, *Danvuern Production v. Schuhfabriken Otterbeck*, in *ECR*, 1995, p. I-2053 ss., points 12 et seq., at p. I-2075 et seq., concerning the interpretation of Article 6, par. 3 of the Brussels Convention. The relevance for the same purposes of the distinction between the two different means through which a request for set off may be advanced by the defendant has been underlined by Advocate General Léger in his conclusions on the latter case, *ibidem*, p. 2055 et seq., points 17 et seq., at p. 2059 et seq., with reference also to the conclusions by Advocate General Capotorti concerning the case of *Meeth v. Glacetal* – decided by the ECJ on 9
Apart from these procedural aspects overlooked by the Court in its text based ruling, the solution reached raises more considerable doubts concerning its substantial effects. In fact, the Court, suddenly adopting a rather restrictive attitude with respect to the application of the rules on *lis pendens* contained in the Brussels Convention and departing from the previous more flexible attitude demonstrated in *Gubisch* and *Tatry*, reaches the undesirable result of allowing two concurrent actions to follow their course, notwithstanding the fact that the same issue forms the subject of both actions, be it as a consequence of the respective plaintiffs’ claims or of the defendants’ defences. Inevitably, such a solution is difficult to reconcile with the aim of preventing contradictory decisions by judges of different Member States, which, as the Court clearly stressed in previous decisions, is specifically pursued by the rules on *lis alibi pendens* contained in the Convention and, currently, in the Regulation.64

C. **The Identity of Cause of Action in Relation to Actions for Limitation of Liability**

In the later *Maersk* case,65 the ECJ addressed the identity of the causes of action in relation to an action for limitation of a vessel owner’s liability pursuant to the rules contained in the relevant Convention concluded in Brussels in 195766 and a concurrent action by a company owning a submarine pipeline that was seeking compensation for damages allegedly caused by the vessel. The Court stressed the peculiarities of the first action, which consisted of the vessel owners’ unilateral application for limitation of their liability deriving from a specific event, which, once granted by the court pursuant to the rules contained in the relevant Convention, is valid against any claimant seeking compensation for damages suffered in the same event. Therefore, no identity could be established with an ordinary action for non-contractual liability, both as regards the object of the two actions and as concerns

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64 The risk of contradictory decisions ensuing from the solution adopted by the ECJ is underlined by REISCHL K. (note 62), esp. p. 430 and by PATAUT E. (note 62), esp. p. 553, who nonetheless considers that the Court in this decision has more likely created a further rule concerning the regime of *lis pendens* within the Brussels system rather than touching upon the question of the object of the actions that had formed the subject of its previous decisions in *Gubisch* and *Tatry*.


their legal foundation. In reaching this conclusion, the Court relied in particular on the provision of Article 7 of the said 1957 Brussels Convention, which clarifies that the application for limitation of liability does not imply an admission of liability on the part of the owners of the vessel.67

If this appears a persuasive argument for denying an identity between the respective objects of the two actions, the decision needs to be considered more carefully regarding its refusal to find an identity of the causes of action on account of the difference between the rules of law on which the two actions were based.68 In this respect, it warrants clarifying that when concurrent proceedings are pending before courts of different countries, a difference in the rules to be applied by the relevant judges may in principle not cause a denial of the identity of the causes of action. In fact, due to the differences among private international law rules and to possible divergences in the interpretation of those rules when they are unified – as they are among Member States in relation to contractual and non-contractual obligations69 – it is a fairly common occurrence that two different laws may be applied

67 See, in particular, points 35 et seq. of the Court’s decision, at p. I-9698 et seq. The Court further observed, point 36, that no relevance could be attributed to the fact that the owners of the damaged pipeline had appeared in the proceedings for limitation of liability introduced by the owners of the vessel contesting the amount of the limitation granted, since, pursuant to its previous decision in Gantner Electronic, point 26, no relevance could be attributed to the defences raised by the defendant for the purposes of establishing the identity of cause of action. See, with regard to the solution reached by the Court of justice, Smeele F., ‘Recognition of foreign limitation proceedings under the European Jurisdiction and Judgments Convention’, in: IPRax, 2006, p. 229 et seq., esp. p. 231 et seq.

68 See point 38 of the Court’s decision, at p. I-9699.

by two judges in deciding an identical case.\textsuperscript{70} This of course might not result in a denial of the identity of the causes of action, based on the diversity of the actions’ legal foundation. In fact, identity is to be denied only in those cases where, as in the case at hand, the difference is not limited to the material content of the rules applied\textsuperscript{71} but, instead, concerns their structure, being the one action founded on the ordinary rules on non-contractual liability and the other on a specific regime providing only for its limitation.

IV. Some Problems Concerning Identity of the Parties

The requirement of the identity of the parties has less frequently given rise to questions of interpretation submitted to the ECJ.

A. Party Identity in Multi-Party Proceedings

The interpretation of the said requirement was first discussed in the \textit{Tatry} case, where the Court was faced with a multiplicity of proceedings wherein the parties only partially coincided. With regard to such a situation, the Court clearly stressed that the rules on \textit{litis alibi pendens} contained in the Brussels Convention – as presently in the ‘Brussels I’ Regulation – apply only to the parties that are common to the two sets of proceedings under consideration, with the action subsequently contained in the Rome Convention into a Regulation, with regard to the Italian system of private international law – which, under Article 57 of Law No. 218/1995, referred to the Convention in order to determine the law applicable also to contractual obligations not falling within the scope of application of the latter – \textsc{Marongiu Buonaiuti} F., ‘\textit{Note introduttive}’, \textit{ibidem}, p. 534 \textit{et seq}.; on the relationship between the Rome I Regulation and the Rome Convention, \textsc{Franzina} P., ‘Commento all’art. 24’, \textit{ibidem}, p. 931 \textit{et seq}.

\textsuperscript{70} As already observed above (Part I, note 1 and this Part, \textit{sub A.1}, note 49), the differences in respect of the law applicable by judges belonging to different countries is one of the main elements taken into account by the parties and their counsels in choosing among different alternative \textit{fora} (that is, in ‘\textit{forum shopping}’), particularly due to the fact that, at least under the EC rules as contained formerly in the Brussels Convention and currently in the Brussels I Regulation, such differences do not constitute an obstacle to the recognition and enforcement of judgments. See in this respect, in particular, \textsc{Vareilles-Sommières} P. \textsc{de} (note 1), p. 56 \textit{et seq}.

\textsuperscript{71} The point appears to be caught in its correct terms by the English High Court of Justice (Commercial Court), 5 April 2005, \textit{JP Morgan Europe Ltd. v. Primacom AG}, [2005] EWHC 508 (Comm), in \textit{Lloyd’s Law Reports}, 2005, vol. 2, p. 665 \textit{et seq}, esp. point 45, where the Commercial Court judge correctly held that in order to establish whether the legal foundations of the two actions are identical for the purposes of Article 27 Brussels I Regulation regard is to be had to the respective rights and obligations of the parties, ‘\textit{however those were classified and determined by the national courts of each country}’. 

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introduced having to follow its course regarding the other parties that do not appear in the concurrent proceedings.72

B. Cases of Procedural Substitution: Subrogation of the Insurer to the Rights of the Insured

The question posed to the ECJ in the subsequent *Druot assurances* case was more complex,73 concerning the influence of a subrogation on the identity of the parties of the two sets of proceedings. There, the insurers of a ship appeared in one action in the place of the shipowner and the captain, who were parties to the other action. In such a situation, which happens often in those countries where the insurer who has indemnified the insured can sue in the insured’s place, the Court held that no identity can be found between the parties of the two sets of proceedings unless it is proved that the insurer in the one action and the insured in the other were acting in the pursuit of the same indivisible legal interests, so that the judgment to be pronounced in respect of the former would be *res iudicata* on the latter.74 The solution adopted by the ECJ, which appears persuasive, shows how the requirement of a subjective identity of the two sets of proceedings also ultimately rests on the iden-

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72 ECJ, 6 December 1994, case C-406/02, *Tatry ( Owners of the cargo lately laden on board the ship) v. Maciej Rataj (Owners of the ship)* (note 45) (*supra*, Part III, sub A, note 45), point 34, at p. I-5474. The Court added, par. 35, that in the said case proceedings in respect of the other parties could be stayed under Article 22 of the Convention – currently Article 28 Brussels I Regulation – provided the relevant requirements are met, that is, the existence of such a connection among the actions as to render it expedient to have them treated jointly in order to prevent the risk of irreconcilable judgments (*supra*, Part II, sub C.1). See in respect of this point addressed in the *Tatry* decision, among others, QUÍONES ESCÁMEZ A. (note 30), p. 60 et seq.; ASPRELLA C., ‘I presupposti della litispendenza internazionale: rapporti tra l’art. 21 della convenzione di Bruxelles e l’art. 7 della legge italiana di riforma del diritto internazionale privato’, in: *Giust. civ* 1999, I, p. 6 et seq., esp. p. 9; PERSANO F., ‘Il rilievo della litispendenza internazionale nella convenzione di Bruxelles del 1968: la nozione di «stesse parti»’, in: *Riv. dir. int. priv. proc*. 2000, p. 713 et seq., esp. p. 721.


74 See the decision of the Court, points 18 et seq., at p. I-3097 et seq. The Court went on addressing the circumstances of the case, affirming that such an identity of the legal interests is probably to be affirmed in those cases where the insurer sues on behalf of the insured, without the latter being able to influence the course of the proceedings. To the contrary, the required identity appears not met when, as in the case at hand, the insurer is merely interested in recovering the cost of a salvage operation and not in ascertaining whether the captain of the ship, who is a party to the concurrent proceedings, is liable for the shipwreck. In a case like the latter, extending the application of the rules on *lis alibi pendens* would produce the undesirable result of depriving one of the parties of the right of autonomously invoking his own divergent legal interests.
tity of the substance of the two actions, or more specifically the identity of the legal interests pursued by the parties.\textsuperscript{75}

C. Other Cases of Procedural Substitution

A similar rule should in principle be used to solve other cases where the identity of the parties is doubtful due to some other form of substitution in the exercise of the rights in question or to other particular circumstances, such as where the same right may be invoked by or against different subjects possessing an identical title and with effect for the entire category of subjects who may be equally so legitimated.\textsuperscript{76} The first hypothesis may occur in an assignment of credit, where the assignor is a party to the action previously introduced and the assignee appears as a party to the action subsequently commenced. In such a situation, as persuasively affirmed in the German case law, identity of the parties is to be found when the legal position of the assignor in the former action and that of the assignee in the latter appear identical with respect to the exercise of the disputed rights.\textsuperscript{77}


\textsuperscript{76} A particularly interesting case in this respect has been decided by Tribunale di Torino, 27 March 2007, Rete Ferroviaria Italiana S.p.A. v. Gefco SA, in Riv. dir. int. priv. proc., 2008, p. 194 et seq., where two parallel actions had been brought in France and in Italy in relation to an accident survened in the performance of a contract for the international carriage of goods by rail, under the COTIF Convention of 1980. In this case, identity of the parties was affirmed even though the Italian railway company was a party to the one set of proceedings and the French railway company to the other, since under Article 55, par. 3, of the uniform rules attached to the said Convention such an action may be brought either against the railway company of departure or against that of destination, or against that on whose railways the accident survened. The Italian court considered that because par. 4 of the said rule provides that the plaintiff waives his right of choice once he has sued one of the said railway companies, the action against the one is to be considered as having the same effects as that against any of the others contemplated by the rule.

D. Actions for the Annulment of Decisions of Company Organs

The second situation, which presents an inevitable degree of complexity, appears frequently in company law matters, particularly in actions for the annulment of decisions adopted by company organs. Such actions, in fact, may be brought by any stakeholder in the company, and the ensuing judgment, particularly when the decision is annulled, produces its effects on the company itself and, thereby, on all stakeholders, as well as on the administrators and other company organs. Therefore, when a plurality of actions brought by different stakeholders concerning the validity of the same decision of a given company’s organ, identity of the parties should in principle be affirmed, so as to prevent the risk of contradictory decisions on the validity of the same decision by courts of different Contracting States. Due account is to be taken, nonetheless, that the said risk is reduced due to the presence of an exclusive head of jurisdiction in respect of the issues at hand under Article 22.2 of the Regulation.

E. The Solution Retained in Regulation No. 2201/2003 in Respect of Actions on Parental Responsibility

A somewhat similar situation arises with regard to concurrent proceedings on the exercise of parental responsibility under Regulation No. 2201/2003 (‘Brussels II-bis’). Not incorrectly, Article 19 of that regulation distinguishes for the purposes of lis pendens between concurrent proceedings concerning personal separation, divorce or annulment of the marriage, which are dealt with in par. 1, where identity of the parties – i.e. the spouses – is required, and actions concerning parental...
responsibility, which are dealt with in par. 2. In respect of the latter, identity of the parties is not required, because as concerns the subjective sphere it is only relevant that both proceedings concern the same minor. Also in the context of parental responsibility, in fact, relevance is given to the identity of the person on whose subjective sphere the measures requested to the judge are deemed to have effect, and not to that of the applicants, who are likely to be only indirectly affected by the measures to be adopted.81

V. The Rule Contained in the Regulation Concerning the Determination of Temporal Priority

Some further comments may be devoted to the rules concerning temporal priority between actions, as contained in Article 30 of ‘Brussels I’ and, in the same terms, in Article 16 of ‘Brussels II-bis.’ When the rules in question first appeared in Article 11, par. 4, of the then repealed Regulation No. 1347/2000 (‘Brussels II’) and shortly thereafter in Brussels I, they were welcomed in the legal literature as a new, uniform regulation of the moment when a court in a Member State is deemed seized for the purposes of the application of the rules on lis alibi pendens,82 filling a lacuna that had deliberately been left open by the Brussels Convention of 1968.83


83 As documented by the Jenard Report on the Brussels Convention, in OJ, C 59, 5 March 1979, p. 1 et seq., at p. 41 and further underlined in the subsequent Schlosser Report on the 1978 Accession Convention, ibidem, p. 71 et seq., at p. 97, the drafting committee
The absence of a specific rule in this respect within Article 21 of the Convention was remedied by the ECJ in the well-known Zelger decision, which, adopting a neutral solution, left the matter to be decided according to the domestic procedural rules of each judge seized.84

A. The Twofold Solution Contemplated by Article 30 Brussels I Regulation

In reality, the solution first introduced in ‘Brussels II’ and in turn mutated by ‘Brussels I’ and ‘Brussels II-his,’ wherein two alternative rules reflecting the different modes of introducing proceedings in the various Member States are included, cannot be considered entirely uniform and autonomous from the different national rules. In fact, the solution adopted leaves untouched the co-existence of two main modalities in which the introductory phase of the proceedings may be articulated: (1) that in which the document introducing proceedings is first lodged with the court – or, as it is England, issued by the court – and then served on the defendant, and (2) that – mostly used in continental-European countries – where the said document must be served on the defendant first and then lodged with the court. The only significant contribution the Regulation’s solution offers consists of providing that, whichever of the two modalities applies depending on the procedural rules of the judge seized, the relevant moment for establishing when the judge is considered seized is upon the first act performed by the plaintiff.85

considered it inappropriate to specify in the Convention the moment when proceedings are to be considered as pending and therefore preferred to leave the matter to be regulated according to the relevant domestic procedural laws.


85 A consequence of the rule in question is that when the relevant moment, under Article 30, par. 1 Brussels I Regulation, is the lodging of the document instituting proceedings with the court, subsequent formal shortcomings affecting service are irrelevant for the present purposes, provided the plaintiff has taken all necessary steps to cure them: see in this sense, in the Italian case law, Tribunale di Milano, 8 June 2004, in: Riv. dir. int. priv. proc.,
In this respect, the new rules depart somewhat from the solution adopted by the ECJ in Zelger, which took into account the moment when an action could be considered as definitively pending in front of the judge seized. \(^{86}\) It is in fact clear that at the moment when just one of the two acts necessary to introduce an action is performed proceedings cannot be considered definitively pending. The new rules contained in the Brussels I Regulation, as in the other aforementioned regulations, seem to take account of this fact. Accordingly, they subject the relevance of the date of the first act for \textit{lis pendens} purposes to the accomplishment by the plaintiff of all the subsequent procedural steps which are necessary to ensure that proceedings become definitively pending in front of the judge seized. \(^{87}\)

B. The Relationship with the Rules Contained in EC Regulation No. 1393/2007 on Service

Additional interesting questions arise from the latter rules as concerns their relationships with the EC rules on the service of judicial and extra-judicial documents in civil or commercial matters as currently contained in Regulation No. 1393/2007, \(^{88}\) which has replaced as of 13 November 2008 the rules previously contained in Regulation No. 1348/2000. \(^{89}\) In fact, the rules contained in Article 30

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\(^{86}\) ECJ, 7 June 1984, case 129/83, Zelger v. Salinitri (note 84), points 14 \textit{et seq.}, at p. 2408.

\(^{87}\) As stressed by the Italian Corte di cassazione, sez. un., 15 February 2007, n. 3364, in \textit{Riv. dir. int. priv. proc.}, 2008, p. 156 \textit{et seq.}, esp. p. 159, the provision has been drafted in these terms pursuing clearly the purpose of preventing the introduction of fictitious proceedings, which are served on the defendant or lodged with the court for the mere purpose of triggering the application of the rule on \textit{lis pendens} without a real intention to give course to the action.

\(^{88}\) Adopted on 13 November 2007, in \textit{OJ}, L 324, 10 December 2007, p. 79 \textit{et seq.}

\(^{89}\) Adopted on 29 May 2000, in \textit{OJ}, L 160, 30 June 2000, p. 37 \textit{et seq.}
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of ‘Brussels I’ and in Article 16 of ‘Brussels II-bis’ make reference, for those cases where the document introducing proceedings is served on the defendant first and then lodged with the court, to the moment when the authority competent for service receives the document. The rationale behind this rule is to avoid the unfair result of having the plaintiff suffer the consequences of a delay in service caused by events that are beyond his control. Yet, because in proceedings presenting an international character service often has to be performed on a defendant domiciled in a different country – e.g., pursuant to the alternative fora contemplated by Article 5 of ‘Brussels I’ – it seems reasonable to propose that with regard to the ‘authority competent for service’ the rule refers to the ‘sending authority’ in the forum, not the receiving authority in the Member State of the defendant’s domicile, as the plaintiff has no direct contacts with that state. Nevertheless, such a result does not occur if the plaintiff opts for direct service by the authorities of the Member State where service is to be performed pursuant to Article 15 of Regulation No. 1393/2007.90

I. The Problem of Language Requirements

As the ECJ has underlined in its case law concerning regulation No. 1348/2000, difficulties may arise regarding the linguistic regime of the document to be served, which, in the context of a document instituting proceedings, may also have some bearing on the moment the action is deemed to be commenced. In its decision in the Leffler case,91 the Court affirmed that the failure to include a translation of the document to be served into one of the languages contemplated by Article 8 creates an irregularity in service, which may be cured by subsequently providing the required translation as soon as possible. The ECJ has not clarified which of the two moments, handing over of the original document or supplying the required translation to the relevant authority, would be relevant for the purposes of lis alibi

90 So we have proposed in MARONGIU BUONAIUTI F. (note *), p. 246. The European Commission has underlined the uncertainty which surrounds this point in its Report concerning the application of the Regulation presented on 21 April 2009 to the European Parliament, the Council and the European Economic and Social Committee, doc. COM(2009) 174 final, point 3.5, at p. 8, suggesting the point might be clarified in the context of a revision of the Regulation.

pendens when the document instituting proceedings is served on the defendant before being filed with the court, since that question was not raised.92

It seems reasonable to argue that the relevant moment is when the translation is received by the authority competent for service, since initial service on the defendant of a document drafted in a language unknown to him would make it impossible to understand the content of the plaintiff’s claims.93 This solution now

92 See, in the sense that an assessment of the validity of service of the document instituting proceedings pursuant to the service regulation should be performed only by the judge first seized, as the latter is expected to do if the defendant does not appear before him – as formerly contemplated by Article 19 of Regulation No. 1348/2000 and currently by the same provision of Regulation No. 1393/2007 – whereas the judge second seized should limit himself to applying the rule under Article 30 of Brussels I Regulation, without being entitled to review the regularity of service of process in front of the judge first seized, FRIGO M., ‘Problemi applicativi’ (note 89), p. 16 et seq., esp. p. 18 et seq. The approach adopted by the author appears, however, not entirely persuasive, considering that, insofar as – in the case contemplated by Article 30, par. 2 Brussels I Regulation – the relevant moment is that of the handing over of the document instituting proceedings to the authority competent for service, the decision on which of the two moments – the delivery of the original document or that of the translation to the competent authority – is relevant for the purposes of the application of the rule on lis pendens appears to fall entirely within the limits of the assessment which the judge allegedly second seized is expected to make in order to apply the rule under Article 30, par. 2 Brussels I Regulation correctly. See, in the sense that the provisions contained in the service Regulation may be relevant also in respect of the application of Article 30 Brussels I Regulation, FRANZINA P. (note 88), p. 226, in note 33; the author subsequently returns on the point, ibidem, p. 254, in note 126, taking into account the presence of different opinions in this respect. Actually, the cases cited by the authors in respect of this issue appear not strictly relevant, since they concern either the previous rule under Article 21 Brussels Convention, which, as interpreted by the ECJ in Zelger (supra, note 84), posed the different requirement that the action should be definitively pending (see, among others, the English Court of Appeal decisions of 26 May 1995, Grupo Torras S.A. v. Al Sabah, in: Lloyd’s Law Reports 1996, 1, p. 7 et seq.; 16 March 2000, Molins Plc v. GD SpA, ibidem, 2000, 2, p. 234 et seq.; 5 February 2004, Tavoulareas v. Tsavliris [2004] EWCA Civ 48, ibidem, 2004, 1, p. 445 et seq., the latter applying the rules in Regulation No. 1348/2000, though, for temporal reasons, still in relation to Article 21 Brussels Convention) or the different situation contemplated by Article 30, par. 1 Brussels I Regulation, where, as pointed out above (note 85, with reference to Tribunale di Milano, 8 June 2004, cit.), lodging of the document instituting proceedings with the court, not handing it over for service, is the relevant moment.

93 This solution, which we have proposed in MARONGIU BUONAIUTI F. (note *), p. 245 et seq., appears supported by a passage in the ECJ decision in the Leffler case (note 91), point 68, at p. I-9662, where the Court refers to the duty of the judge under Article 26, par. 2, Brussels I Regulation to suspend proceedings where the defendant does not appear until it is proved that he has been in a position to receive the document introducing proceedings within a sufficient time to enable him to arrange for his defence. As provided by the subsequent par. 3, the rule in question is to be replaced by the requirements posed by Article 19 of the service Regulation, in all cases where the document instituting proceedings is to be transmitted from one Member State to another. A corresponding requirement, as observed by the Court, is also posed by Article 34, par. 2, of the Regulation for the recognition of judgments pronounced in other Member States, and it is to be considered as implying that the document introducing proceedings should also be served in an appropriate language as
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seems to be endorsed by Article 8, par. 3, of Regulation No. 1393/2007, which provides that, in such a case, the document is considered served on the date that service is made with the requested translation, except where the document has to be served within a certain time limit under the law of a Member State, in which case the date of the initial service applies. The latter exception, for the said reasons, appears inapplicable for the purposes of the application of the rules on lis alibi pendens.\footnote{Inevitably, the solution, contemplated already by Article 9 of Regulation No. 1348/2000 and confirmed by the corresponding provision of Regulation No. 1393/2007, of considering a separate date as relevant in respect of the plaintiff is inapplicable in the assessment of the moment when an action is to be considered as pending between the parties, since that moment is intrinsically the same for both parties. See, with regard to the solution contemplated under Article 8, par. 3, of Regulation No. 1393/2007, DANIELE L., MARINO S., (note 88), p. 990 et seq.; FRANZINA P. (note 88), p. 245 et seq.}

According to the subsequent ECJ decision in the \textit{Weiss und Partner} case,\footnote{ECJ, 8 May 2008, case C-14/07, \textit{Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin}, in ECR, 2008, p. I-3367 et seq.} a less restrictive attitude should be adopted where the failure to meet the linguistic requirements concerns materials attached to the document instituting proceedings, as opposed to the document itself. The Court stressed that when the materials attached to the document instituting proceedings are served on the defendant without a translation into one of the languages contemplated by Regulation No. 1348/2000 – applicable at the relevant time – the validity of the service is unaffected, provided the documents concerned are relevant mainly for evidentiary purposes and are not necessary to provide the defendant with adequate information on the content of the plaintiff’s claims. In this respect, the Court appears to implicitly refer to the duty of the parties to act in good faith, observing that where the party concerned has, during his contractual dealings with the other party, accepted relevant communications in the same language as that used in the documents in question, the judge is entitled to take that element into account to determine whether the said language can be considered as understandable by that party.\footnote{See, for a comment on the latter decision, FRANZINA P., ‘Translation Requirements under the EC Service Regulation: The \textit{Weiss und Partner} Decision of the ECJ’, in: this \textit{Yearbook} 2008, p. 565 et seq.}

2. \textit{The Implications of the Choice among Alternative Modes of Service}

A further issue concerning the relevance of the modalities of service on the defendant for determining the moment when a judge is considered seized is posed by the option formerly contained Regulation No. 1348/2000 and currently, in broader terms, contained Regulation No. 1393/2007 that gives the plaintiff a choice between different modes of service. As the ECJ has stressed in its decision in the
Plumex case,97 where one of the parties uses two different modes of service equally provided for in the Regulation and service is effected according to the two modalities at different dates, the document is considered served at the moment when the first service is effected, irrespective of whether the latter is the ordinary mode of service contemplated by Article 3 et seq. of the Regulation or a special mode, such as service by post under its Article 14.98 Applying this solution to the constellation contemplated by Article 30, par. 2 of ‘Brussels I’, in cases where a copy of the document introducing proceedings is sent to the defendant by means of the postal services before another copy is handed over to the sending authority for service through the ordinary procedure contemplated under Article 4 et seq. of Regulation No. 1393/2007, the first date should be considered relevant for the purposes of lis alibi pendens.99

VI. A Brief Discussion of Some Proposals for Reform of the Rules on lis alibi pendens and Related Actions Contained in the Brussels I Regulation

Legal literature in different Member States has generally acknowledged the advantages derived from applying the rules on lis alibi pendens and related actions contained in the ‘Brussels I’ Regulation.100 Nonetheless, the extensive judicial practice, both of the ECJ and of domestic courts, concerning the application of these rules has revealed a few problematic aspects, most of which have already been

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98 See, concerning the decision of the ECJ in this case, FRIGO M., ‘Cumulo e questioni di priorità dei mezzi di notificazione nella disciplina comunitaria’, in: Int’l Lís, 2006, p. 129 et seq.; also FRANZINA P. (note 88), p. 248. See, for a case where a different solution has been retained, Cour de cassation, Ch. Soc., 21 September 2005, in Rec. Dalloz, 2005, Inf. rapides, p. 2479; abstract in: Rev. crit. dr. int. pr. 2006, p. 978. The latter case, however, must be considered exceptional, since relevance was given to the date of the second service for the purpose of the time limit for appealing against a decision, on account of the fact that the first service had been performed by means of a signification au parquet, which, by itself, does not provide evidence that the defendant has actually received the document.


100 Which, as observed above (Part II), have substantially replicated, with the sole exception of some procedural modifications concerning the operation of the rules on related actions in Article 28 of the Regulation (see supra, Part II, sub C.2) and the new rule under Article 30 concerning the determination of the moment when a court is deemed to be seized (see supra, Part V, sub A), those previously contained in the Brussels Convention.
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pointed out above. Recently, the planned process for the Regulation’s revision which the European Commission has undertaken pursuant to its Article 73, has created the opportunity for a discussion of these aspects and for advancing some proposals for reform of those provisions whose application has proved more controversial. Among these discussions, the rules concerning lis alibi pendens and related actions have occupied a central place, particularly due to some recent controversial decisions by the ECJ that have attracted acute criticism, especially from jurists belonging to common law countries.

A. The Relationship between Exclusive Choice of forum Agreements and lis alibi pendens

The first controversial point signaled by the Commission in its Report on the application of the Regulation and in the attached Green Paper promoting a consultation of the interested parties is given by the relationship between the lis pendens rules and agreements providing for the exclusive jurisdiction of the courts of a Member State pursuant to Article 23 of the Regulation. The concern has specifically been raised that a strict application of the rules on lis pendens, as advocated by the Court of justice in the Gasser case discussed above, might encourage a party wishing to evade a valid jurisdiction agreement to seize a judge in a different Member State. The solution adopted by the ECJ – that the presence of an exclusive

101 With particular regard to the relationship between the rules on lis alibi pendens and those concerning choice of forum agreements, after the ECJ decision in Gasser (supra, Part II, sub B.2); the relationship between actions for the enforcement of an obligation and actions for a negative declaration, after the Gubisch and Tatry decisions (supra, Part III, sub A); the determination of party identity in cases of procedural substitution, such as in the Druot assurances case (supra, Part IV, sub B); and the determination of temporal priority among actions (supra, Part V). Concerning the rules on related actions, particular problems have arisen concerning their application in intellectual property matters (see infra, sub C).

102 In particular, the ECJ decisions of 9 December 2003, Gasser; 27 April 2004, Turner; 1 March 2005, Owusu, and, lastly, 10 February 2009, Allianz, briefly commented above (Part II, sub B.2-4 and Part III, sub A.3) have been seen by the English doctrine as systematically curtailing the space left to the traditional instruments of coordination among jurisdictions contemplated by the common law: see in particular, the remarks by HARTLEY T. C. (note 26), p. 813 et seq.


105 ECJ, 9 December 2003, case C-116/02, Gasser v. MISAT (note 23) (supra, Part II, sub B.2).
choice of court agreement pursuant to Article 23 of the Regulation creates no exception to the application of the rules on *lis alibi pendens* – was in fact held by many commentators as encouraging bad faith behavior and producing as a material effect a situation where the party interested in affirming the jurisdiction of the court designated in the agreement would have to sustain the inconvenience of defending the validity and enforceability of the agreement in front of the judge seized by the other party before being able to seize the designated court.\(^{106}\)

The Commission has taken these difficulties into account, as they had been made subject to an extensive examination in a preliminary study that it commissioned to a qualified team of German scholars,\(^ {107}\) and accordingly proposed a series of alternative solutions to the problem posed, some of which deserve a short commentary.

1. **First Solution: Allowing the Designated Court to Proceed with the Case Even if Subsequently Seized**

The first solution proposed is inspired to a somewhat unilateral approach, in that it consists of merely allowing the judge designated in the agreement providing for exclusive jurisdiction to proceed with the case without applying the *lis pendens* rules. Even though such a solution has received some support in a Report published in the UK by the House of Lords European Union Committee,\(^ {108}\) it appears somewhat simplistic and inevitably conducive to a situation of concurrent proceedings and prospective divergent decisions concerning the validity and enforceability of the jurisdiction agreement, thus contradicting the very purpose of the rules on *lis alibi pendens* contained in the Regulation.

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\(^{106}\) See the Commission’s Report (note 103), point 3, p. 6 *et seq*., and the Green Paper (note 104), point 3, p. 5 *et seq*. For some references to literature in respect of this issue, see supra, Part II, notes 23-24.


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2. **Second Solution: A Reversal of the Rule on Lis Alibi Pendens**

This shortcoming would be overcome at least in part by the second solution proposed by the Commission, which, nonetheless, appears probably too radical, in that it proposes a reversal of the rule of *lis alibi pendens* in favour of the judge designated in the agreement, so that it would be for the judge first seized in a different Member State to suspend proceedings until the judge designated in the agreement has decided whether it has jurisdiction. Such a solution, which would in substance take stock of the suggestions formulated by the English authors who critically commented on the ECJ decision in the *Gasser* case, would on the one side tend to align the rules contained in the Regulation to those introduced in an international perspective by the Hague Convention on choice of court agreements of 2005, while on the other side it would inevitably clash with the principle of reciprocal faith clearly and repeatedly stressed by the Court of Justice, whereby each court of

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110 Convention on choice of court agreements, adopted at the XXth Session of the Hague Conference on Private International Law on 30 June 2005, text available on <http://www.hcch.net>, not yet in force (at the moment of writing signed by the EU and the United States, and ratified by Mexico), Article 5, par. 2, which provides that the judge designated in an agreement pursuant to the Convention shall not decline jurisdiction on account of the fact that some other judge should decide the case. The rule suffers some exceptions, notably in relation to jurisdiction rules based on subject matter or value of the claim and to rules concerning the repartition of jurisdiction among different courts within the same country. Accordingly, the subsequent provision of Article 6 imposes on any other judge seized of an action falling within such an agreement the duty to suspend or dismiss proceedings, permitting nonetheless the latter judge to refuse to do so if he finds the jurisdiction agreement to be invalid or unenforceable. The rule contemplates in this respect different hypotheses, some of which appear to leave a certain space for a discretionary evaluation by the judge seized: that of the agreement being null and void under the law of the court chosen; that of incapacity of the parties to conclude it, pursuant, conversely, to the law of the judge seized; that of manifest injustice or a violation of public policy of the country of the judge seized and that of unenforceability due to *force majeure*, besides where the court chosen has declined jurisdiction. See with regard to the said rules, the *Report on the Meeting of the Drafting Committee of 18-20 April 2005 in preparation of the Twentieth Session of June 2005*, prepared by A. SCHULZ, Prel. Doc. No. 28 of April 2005, available on the above website, points 22 *et seq*., p. 9; for some comments, RÜHL G., ‘Das Haager Übereinkommen über die Vereinbarung gerichtlicher Zuständigkeiten: Rückschritt oder Fortschritt’, in: *IPRax*, 2005, p. 410 *et seq*., esp. p. 412 *et seq*.; BUCHER A., ‘La convention de la Haye sur les accords d’élection de for’, in: *RSDIE* 2006, p. 29 *et seq*., esp. p. 36 *et seq*.; KESSEDJIAN C., ‘La convention de la Haye du 30 juin 2005 sur l’élection de for’, in: *Clunet* 2006, p. 813 *et seq*., esp. p. 831 *et seq*.; also with regard to the question of the EC participation in the conventions adopted by the Hague Conference, KRÜGER TH., ‘The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership’, in: *I.C.L.Q*. 2006, p. 447 *et seq*. 

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a Member State has to be trusted to correctly deciding whether or not it has juris-
diction.\textsuperscript{111}

Furthermore, the proposed solution might be conducive to irrational results
where the judge designated in the agreement is not promptly seized by the other
party. Should this not happen within a short time, in fact, the judge first seized in a
different Member State would have to suspend proceedings at a more mature stage,
possibly even after having himself ruled on the validity and enforceability of the
agreement, with the ensuing risk of contradictory decisions in this respect.\textsuperscript{112}

3. Third Solution: A Time Limit for Deciding on the Validity of the
Jurisdiction Agreement

Probably most persuasive is the third solution proposed by the Commission Green
Paper, whereby the modification to the existing rules – besides establishing some
still relatively undefined forms of coordination and communication among the
judges concerned\textsuperscript{113} – would be limited to imposing on the judge first seized a time
limit for declaring the choice of court agreement to be invalid or unenforceable.\textsuperscript{114}

Such a solution would surely foster a prompt resolution of the issue
concerning the validity and enforceability of the choice of court agreement, thus
leaving this decision to the first judge seized pursuant to the principle of reciprocal
faith stressed above. Nonetheless, as properly pointed out in the Green Paper, such
a solution presents the disadvantage of exposing the plaintiff to the risk that, in
case the court seized does not reach a decision on the validity and enforceability of
the choice of forum agreement within the term fixed for reasons which are beyond
his control, he may be deprived of the right to sue in a forum that would appear
perfectly legitimate should the agreement be subsequently found to be invalid or
unenforceable. Therefore, provision should be made for an exception to the rule so
as to protect the plaintiff’s rights in the latter circumstances, provided the delay by
the court seized in reaching its decision on the matter is not imputable to his
conduct.\textsuperscript{115}

\textsuperscript{111} See \textit{supra}, Part II, sub B.1-2.

\textsuperscript{112} The inherent risk of an inefficient coordination between parallel proceedings in
different Member States raised by both the first and second solutions proposed in the
Commission’s Green Paper is acknowledged by the House of Lords Report (note 108), point
60, p. 19, assuming nonetheless, as suggested by Fentiman in his Oral Evidence (note 108),
questions 27 \textit{et seq}., p. 6 \textit{et seq}., that allowing the designated court to proceed would remove
the incentive for introducing parallel proceedings in another forum.

\textsuperscript{113} The Commission Green Paper (note 104), point 3, fourth indent, is rather vague in
this respect, since it abstains from formulating concrete proposals, as properly remarked in
the House of Lords Report (note 108), points 65, 70, p. 20 \textit{et seq}.

\textsuperscript{114} Commission Green Paper (note 104), point 3, fourth indent, p. 5.

\textsuperscript{115} \textit{Ibidem}. The Commission Green Paper has proposed some further solutions,
which, however seem scarcely persuasive: on the one side, the provision of a remedy in
damages in case of breach of a choice of forum agreement as a further disincentive against
B. The Requirement of Identity of the Cause of Action in Relation to Actions for a Negative Declaration

The other controversial aspect of the rules on *lis alibi pendens* contained in the Regulation consists of those rules’ applicability, clearly stressed by the ECJ in its decisions in *Gubisch* and *Tatry* discussed above, to cases where an action for introducing concurrent actions elsewhere (*ibidem*, fifth indent); on the other, the introduction of a standard form for choice of forum agreements pursuant to the Regulation, so as to reduce uncertainty concerning their validity (*ibidem*, seventh indent). Both proposals have been understandably criticized in the House of Lords Report (note 108), points 63-64, 69, 71, p. 20 et seq., observing, with respect to the former, that the Regulation is not the proper place, from a systematical perspective, for introducing a provision concerning substantial remedies, pointing also to the potential incompatibility of the action to be introduced for the enforcement of such a provision with the principle of reciprocal faith, which imposes on the courts of the Member States a duty not to interfere with the affairs of other Member States’ courts. Furthermore, doubts are advanced in the Report, points 63 and 69, concerning the effectiveness of such a remedy in the sense of discouraging tactical actions. In respect of the latter proposal, the House of Lords Report, points 64, 71, considers that imposing the use of a standard form for the drafting of choice of forum agreements would improperly restrict the parties’ freedom to draft such agreements in the mode more suitable to their specific needs. To this, may it be added that imposing the use of a standard form for drafting the agreement would not solve the other questions of validity relating to the capacity of the parties to conclude the agreement, to their legitimation to dispose of the disputed rights and to the validity of their consent, which, as is known, raise even more complex issues than those related to mere formal validity. See, concerning these aspects, and, in particular, the delicate issue of the law applicable thereto, among others, BRIGGS A., *Agreements on Jurisdiction and Choice of Law*, Oxford 2008, esp. p. 21 et seq.; COPEL-CORDONNIER N., *Les conventions d’arbitrage et d’élection de for en droit international privé*, Paris 1999, p. 7 et seq., esp. p. 85 et seq.; LINDENMAYR B., *Vereinbarung über die internationale Zuständigkeit und das darauf anwendbare Recht*, Berlin 2002, p. 71 et seq.; QUEIROLO I., *Gli accordi sulla competenza giurisdizionale – tra diritto comunitario e diritto interno*, Padua 2000, p. 203 et seq.; RIGHETTI E., *La deroga alla giurisdizione*, Milan 2002, p. 67 et seq.; The latter question has long since been debated in the Italian legal literature, also with regard to agreements for arbitration abroad, see, for some references, MORELLI G., *Diritto processuale civile internazionale*, II ed., Padua 1954, p. 182 et seq.; Id., ‘Legge regolatrice della clausola compromissoria per arbitrato estero’, in: *Giur. comp. di dir. int. priv.*, vol. X, 1943, p. 74 et seq., reproduced in Id., *Studi di diritto processuale civile internazionale*, Milan 1961, p. 149 et seq.; BARILE G., ‘Lex fori e deroga alla giurisdizione italiana’, in: *Riv. dir. int.*, 1960, p. 657 et seq.; DURANTE F., ‘Sulla legge regolatrice della forma del compromesso e della clausola compromissoria’, *ibidem*, p. 699 ss.; GAJA G., *La deroga alla giurisdizione italiana*, Milan 1971, p. 255 et seq. A particularly radical solution, consisting of substituting the control as to substantial validity of the agreement on choice of forum according to the law applicable to it by means of an all-encompassing reference to the principle of good faith in international trade is advocated, with regard to agreements under Article 23 Brussels I Regulation, by MERRETT L., ‘Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?’, in: *I.C.L.Q.* 2009, p. 545 et seq., esp. p. 559 et seq.

performance is confronted with an action for a negative declaration concerning the same legal relationship.

I. The Proposal by the Commission

In this respect, the Commission Green Paper proposes to modify the rule under Article 27 to exclude the application of the rules on *lis pendens* in the said situation. Concerning the proposed solution, the House of Lords Report is correct in stating that generally excluding the application of the rule on *lis alibi pendens* in all cases where a negative declaration is sought by one of the parties would probably be too hard and fast of a solution, since there might be cases in which the party has a perfectly legitimate interest in seeking such a declaration and is not merely forum shopping.

Furthermore, the solution appears too simplistic because it overlooks the inevitable risk of allowing parallel proceedings to follow their course with the inherent danger of creating contradictory decisions, which the rules on *lis alibi pendens* are specifically designed to prevent.

117 Commission Green Paper (note 104), point 3, sixth indent, p. 5, reflecting some considerations contained in the Commission Report on the application of the Regulation, (note 103), points 3.3, third indent, p. 6; 3.4, first indent, p. 6 et seq., and 3.5, second indent, p. 7, where particular reference is made to the widespread use of actions for a negative declaration with the tactical purpose of blocking the other party’s action in a more closely connected forum particularly in the field of intellectual property disputes (see also infra, sub C) and in that of corporate loans.

118 House of Lords Report (note 108), point 62, reporting an opinion by Fentiman, expressed in his Oral Evidence (note 108), questions 25 et seq., p. 6 et seq., in the sense that, even if the solution proposed in the Green Paper seemed surprising in consideration of the fairly wide degree of acceptance which the interpretation formulated by the ECJ in the recalled decisions had obtained in practice, such a solution might have the benefit of paving the way for the application of the more discretionary rule on related actions under Article 28 of the Regulation. Oral Evidence by Government experts Lord Bach and Mr. Oliver Parker (questions 90 et seq., p. 23 et seq.) was less favourable to such a solution, pointing out that, while accommodating the English tradition in the sense of a more discretionary evaluation of the circumstances of the case, it would have disturbed the need for legal certainty felt by continental-european Member States. Besides, from the consultation carried out, many opinions held that actions for negative declaratory relief are not by themselves to be considered negatively.

119 This point, raised in the House of Lords Report (note 108), point 60, appears somewhat overlooked, on the assumption, suggested by Fentiman, Oral Evidence (note 108), question 27 et seq., p. 6 et seq., that if the action for a negative declaration is proposed in a Member State having a slow-moving judiciary, such an action would unlikely come to a judgment before that in the concurrent forum. This explanation is clearly unsatisfactory, since an action for a negative declaration could well happen to be proposed in a Member State possessing a fast-moving judiciary system and the concurrent action in a slower one. The Commission Green Paper, loc. ult. cit., does not seem to take into account this risk inherent in its proposal, proposing nonetheless, as a more prudent solution, to simply
2. **The Solution Proposed in the Dropped Hague Draft on Jurisdiction and Enforcement of Judgments**

In this respect, the solution which had been proposed in the unsuccessful project of a Hague Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters appeared more articulated.\(^{120}\) In fact, the project provided in Article 21, par. 6, for a kind of reversal of the rule on *lis alibi pendens* in the case at hand, so that it would have been for the judge seized with an action for a negative declaration to suspend proceedings upon application by one of the parties, even if seized first, whereas the judge seized with an action for performance regarding the same legal relationship would have been authorized to proceed even if seized second.\(^{121}\) Obviously, as observed above in respect of the parallel proposal of reversing the *lis pendens* rule in presence of an exclusive choice of *forum* agreement, such a modification could operate satisfactorily provided the other judge is seized with the concurrent action within a short time. In fact, being hardly conceivable that any judge seized with an action for a negative declaration should have to suspend proceedings *sine die* waiting for another judge to be seized with an action for performance in respect of the disputed obligation, it would be inconvenient for the judge seized with the earlier action to suspend pro-

integrate the existing rule by providing for the suspension of the time bar for proposing an action for performance pending decision on the action for a negative declaration, so that, in case the latter is rejected, the substantial plaintiff is not deprived of his right to sue as a consequence of the *lis pendens* rule. A modification to the same effect, by means of admitting the introduction of an action for performance as a counterclaim to that for a negative declaration, had been advocated by Schlosser P. (note 11), p. 183 *et seq.*; both alternatives had been envisaged by Wolf Ch. (note 59), p. 366.


ceedings when they have reached a mature stage, with the risk of vanifying the
procedural activity performed up to that point.\textsuperscript{122}

C. Problems Posed by \textit{lis pendens}, Exclusive Jurisdiction and Related
Actions in Intellectual Property Matters

The Commission Green Paper subsequently analyses some of the practical difficulties
posed by the application of the rules on \textit{lis alibi pendens} and related actions
contained in the Regulation with regard to actions concerning the infringement of
intellectual property rights.\textsuperscript{123}

\textbf{1. The Problem of s.c. Torpedo Actions}

Insofar as the rules on \textit{lis alibi pendens} are concerned, intellectual property appears
to be the domain of s.c. torpedo actions, that is, actions for a negative declaration
filed by a party alleged of infringing an intellectual property right in a court of a
Member State known for its slow-moving judiciary system. The purpose of these
actions is to take advantage of the rules on \textit{lis pendens} contained in the Regulation
to block for an extended time proceedings by the owner of the disputed right in the
courts of another Member State that is possibly more closely connected with the
facts of the case.\textsuperscript{124} With regard to this problem, the Green Paper proposes the same

\textsuperscript{122} This potential disadvantage inherent in the reversal of the ordinary mode of
operation for the \textit{lis alibi pendens} rule had been taken into account in a parallel project,
aimed at the revision of the rules on \textit{lis pendens} and related actions contained in the Brussels
Convention, due to \textsc{Otte K., Prütting H., Dedek H.}, ‘The GROTIUS Program: Proposals
Law} 2000, p. 257 et seq., esp. p. 271 et seq. The proposed amendment to Article 21 of the
Brussels Convention, \textit{ibidem}, p. 278, accordingly provided that the rule on \textit{lis alibi pendens}
was to be reversed in the said case provided the action for performance was commenced
within six months after the introduction of the action for a negative declaration.

\textsuperscript{123} Commission Green Paper (note 104), point 4, p. 6 et seq.; see also the
Commission Report (note 103), point 3.4, p. 6 et seq.

\textsuperscript{124} The expression ‘Italian Torpedo’ has been used to designate a procedural tech-
nique consisting of preventing an action for the enforcement of an intellectual property right,
particularly in terms of compensation for the infringement, by means of an action for a
negative declaration, involving frequently issues of validity of the right, in the courts of a
Member State like Italy, known, among other European countries, for the excessive average
length of court proceedings, by \textsc{Franzosi M.}, ‘Worldwide Patent Litigation and the Italian
then been used also in other fields to identify the tactical use of actions for a negative decla-
ration: see, e. g., \textsc{Van Houtte H.}, ‘À propos des injonctions anti-suit et d’autres torpilles
pour couler des actions étrangères’, in : \textit{L’efficacité de la justice civile en Europe}, sous la
dir. de M.-T. Caupain et G. de Leval, Bruxelles 2000, p. 147 et seq.

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solution generally advanced in connection with actions for negative declarations, which has already been discussed above.125

2. The Problems Concerning Rules on Related Actions: Limits Due to Exclusive Jurisdiction Rules

The observations contained in the Commission Report on the application of the Brussels I Regulation and the proposals formulated in the Green Paper also concerned the application of the rules on related actions contained in the Regulation, which in the context of intellectual property litigation have proven particularly controversial. Much debate has been raised by the ECJ’s solution in some cases where the applicability of the latter rules came into question.126 The first problem is created by the rule under Article 22, par. 4 of the Regulation, which grants exclusive jurisdiction to the courts of the Member State of registration over claims concerning the validity of an intellectual property right. As the ECJ has affirmed in its decision in the GAT case – probably over-stretching the role of exclusive jurisdiction rules – the said rule – or, actually, the corresponding rule previously contained in Article 16, par. 4 of the Brussels Convention – prevents the judge in a different Member State who is seized with an action by the right’s owner for compensation for an infringement from determining the right’s validity, even when the issue has been raised by the defendant as a defence and appeared therefore as a preliminary question in the decision on the plaintiff’s claim. Such ques-

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125 See the Commission Green Paper (note 104), point 4, p. 6, second indent, where the Commission proposes either to exclude the application of the rules on lis pendens in presence of action for a negative declaration, or, as an alternative, to improve the cooperation and communication among the judges concurrently seized, as had been proposed, though in rather vague terms, in point 3 concerning issues related to the application of the rules on lis pendens generally (cf. supra, sub B.1).

tions, in fact, are generally considered to fall under the authority of the judge seized with the main action, who may decide on them incidentally, that is, with effects limited to the case at hand.127

3. The Limits Due to Territorial Scope of Rights

The ECJ demonstrated a rigorous attitude towards a joinder of parallel actions concerning intellectual property also in the Roche Nederland decision.128 There, the issue was the applicability of the rule under Article 6.1 of the Convention, which provided for jurisdiction based on connection regarding actions against a plurality of defendants in favour of the judge of the domicile of any of the defendants. The rule has been reproduced in the corresponding provision of the Regulation, which added the requirement that a close connection exist among the actions so as to give rise to a risk of irreconcilable judgments if they are treated separately, in terms which correspond to those adopted in Article 28, par. 3 of the Regulation as a general requirement for establishing whether two or more actions are to be deemed related for the purpose of the application of the latter provision.129 The Court held that the said rule could not apply to a plurality of actions against different defendants domiciled in various Member States based on the infringement of a European patent, considering that such a patent actually gives rise to a bundle of separate intellectual property rights, each having effect for the Member State where it is released. Hence, the various actions have different objects, which, according to the Court, excludes the need for the actions to be decided by the same judge.130

4. The Solution Proposed by the Commission

As it clearly appears, strict deference to the rules on exclusive jurisdiction on the one side and a restrictive interpretation of the rules providing for jurisdiction based on connection on the other produce the undesirable result of creating a situation which is unfavourable to the aim of realizing an effective coordination among parallel proceedings, which the Regulation should in principle pursue so as to prevent obstacles to the free circulation of judgments among Member States.131 A

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127 ECJ, 13 July 2006, case C-4/03, Gesellschaft für Antriebstechnik mbH (GAT) v. Lamellen und Kupplungsbau (LuK), cit. (supra, Part II, sub C.1, note 30), esp. points 25 et seq., at p. I-6532 et seq.


129 See supra, Part II, sub C.1.

130 See the decision by the ECJ in the latter case, esp. points 27 et seq., at p. I-6580 et seq.

131 We refer, for some critical comments concerning the attitude taken by the Court in the two decisions, to the Authors cited above, note 125. See also the Commission Report on the application of the Regulation (note 103), point 3.4, second and third indent, p. 7.

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solution to the latter problem might be found, as proposed in the Commission Green Paper, by introducing, for actions concerning the infringement of certain intellectual property rights committed by different subjects, a specific rule establishing jurisdiction in the courts of the Member State in which the defendant responsible for coordinating the activities constituting infringement is domiciled, or, in case no such coordination exists, of the Member State with which the infringement is most closely connected.132

Such a solution would certainly pursue the aim of avoiding a multiplicity of proceedings concerning the infringement of a given intellectual property right. In addition, it would limit the plaintiff’s choice among a plurality of alternative fora – which would have been granted by applying a rule such as that contained in Article 6, par. 1 of the Regulation – to the forum where the infringement action is coordinated or which otherwise presents the closest connections with the case. The justification for such a limitation, however, might appear questionable, since it would add a further constraint on the plaintiff’s choice among the alternative fora made available by the Regulation to that already posed by the rule contained in Article 22, par. 4, as interpreted by the ECJ. Such a constraint would probably result in an excessive divergence from the rules applicable under the Regulation in respect of actions concerning other matters, which might appear unwarranted by the peculiarities of intellectual property litigation.133 Furthermore, as acknowledged by the

132 See the Commission Green Paper (note 104), point 4, fourth indent, p. 6 et seq.

Commission Green Paper,\textsuperscript{134} the reference to elements of mere fact such as the place where the activity constituting infringement is being coordinated or, even more vaguely, the \textit{forum} presenting the closest connection to the infringing activity, carries with itself a broad scope for a discretionary evaluation by the judge seized. Such a broad scope of discretion could prove difficult to reconcile with the cornerstones of certainty and predictability in the determination of jurisdiction, which the ECJ has repeatedly identified as forming part of the inspiring principles of the system of distribution of jurisdiction among the courts of the Member States embodied in the Regulation.\textsuperscript{135}

\textsuperscript{134} Commission Green Paper (note 104), p. 7. The risk that the solution ventilated by the Commission might encourage \textit{forum shopping}, since it would allow consolidating all claims in the \textit{forum} which the plaintiff might choose among those having jurisdiction in respect of one of the occurred violations, is underlined also in the House of Lords Report (note 108), points 74 \textit{et seq.}, at p. 22, reflecting the opinion expressed by U.K. Government expert Oliver Parker, in the Oral Evidence attached to the Report, question 96, at p. 23 \textit{et seq.} Despite the support given to the solution advocated in the Green Paper by Fentiman, Oral Evidence (note 108), questions 36-38, at p. 9, who welcomed the flexibility of the approach taken by the Commission and the aim pursued of promoting a consolidation of different actions in one \textit{forum}, the European Union Committee of the House of Lords has considered the topic in need of further and more specific consideration (point 78, at p. 22).

\textsuperscript{135} See, concerning the role of certainty and predictability in the distribution of jurisdiction among the courts of different Member States under the Brussels I Regulation, \textit{supra}, Part II, \textit{sub B} and literature cited in note 24.