DEACTIVATING THE ITALIAN TORPEDO

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Abstract

Ensuring rapid recognition and enforcement of judgments within the European Space of Justice is a core goal of cooperation in civil and commercial matters. Parallel proceedings between the same parties in different Member States may undermine this aim, creating the risk of conflicting judgments. The threat of parallel proceedings has been faced at EU level by the adoption of first-to-file rule in case of *lis pendens*. However, it has been proved that the rigid and automatic mechanism of *lis pendens* adopted in the EU Space of Justice could be abused by the party who, wanting to delay the judgment by the competent court, seises first the court of a Member State, where civil proceedings take notoriously long time, just to wait for a declaration of lack of jurisdiction.

What are the most valuable solutions in order to avoid these "Torpedo" proceedings which, in many cases, are "launched" from Italian courts? The provision of a deadline for preliminary and fast examination of the jurisdictional issue together with strengthening the communication and cooperation between the two courts involved in parallel proceedings may be the right way to go even beyond to the recent but partial solutions elaborated in the "Recast" of Brussels I Regulation.

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I The Nightmare of parallel proceedings in the European space of justice

A. The Brussels / Lugano framework

A more integrated economy within the European Union can be achieved through the free circulation of judgments in the European Space of Justice.

In order to facilitate the reciprocal recognition and enforcement of judgments in civil and commercial matters by the Member States of the (former) Economic European Community, in 1968 the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter, the "**BrusselsConvention**")[1] was signed. In 2001, the Brussels Convention was replaced amongst European Union (hereinafter, "**EU**") Member States[2] by Council Regulation n 44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter, "**Brussels I**" or "**reg. 44/2001**")[3]. Brussels I was finally amended by the EU Regulation 1215/2012 (hereinafter, "**Brussels I bis**" or "**Recast**" or "**Regulation**") which came into force on 10th January 2015 and repealed reg. 44/2001. Rules almost identical to those of the Brussels Convention apply to defendants domiciled in Denmark, Iceland, Norway and Switzerland due to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988, (hereinafter, the "**Lugano Convention**")[4].

The aim of this "Brussels/Lugano system" is not to unify the rules of substantive law and of procedures of the different Contracting States, but to determine which Court has jurisdiction in disputes relating to civil and commercial matters, in order to facilitate the enforcement of judgments.

The very first rule of Brussels I on jurisdiction is found in art.2 (now art. 5 of the Recast). It consecrates the principle known as *actor sequitur forum rei*, which is recognised in all legal systems of EU and elsewhere. Specifically art. 2 states that "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*".

But art. 5 of Brussels I (see now art. 7.1 and 7.2 of the Recast) establishes several exceptions to the general principle *actor sequitur forum rei*. In particular, art.5 establishes alternative criteria of *jurisdiction* in cases of *contracts* (place of performance, or delivery of goods, or provision of services) and in cases of *tort* (place where the harmful event occurred or may occur). Alternative criteria of jurisdiction are inspired by the principles ofthe*sound administration of justice*[5] and efficacious conduct of proceedings, according to which disputes should be decided by the most appropriate court, that is the

[1] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels, 27 September 1968 in*Official Journal of the European Communities*, 1998, C 27, p. 3.
[2] Except for Denmark that still applies the Brussels Convention.
[3]*Official Journal of the European Communities*, 2001, L 12, p. 1.
[4]Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Lugano, 16 September 1988, between Iceland, Switzerland, Norway and Denmark, now replaced by Council Decision 2007/712/EC of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the new "Lugano Convention"). In *Official Journal of the European Communities*, 1988, L 319, p. 9.
[5] ECJ, 19 February 2002, case C-256/00, *Besix v. Ktretzschmar.*

court having practical advantage of first-hand knowledge of the facts, ease of taking evidence[6] and or knowledge of the applicable law[7].

Plus, the Brussels / Lugano system gives great relevance to the principle of party autonomy in allowing the parties to agree on forum choice clauses (art. 23 and 24 of Brussels I, former artt. 17 and 18 of Brussels Convention)[8]. This implies that a *forum* which both parties have agreed upon under their own free will, should be competent to hear the case. These *forum* choice clauses set aside both the rule of general jurisdiction (*actor sequitur forum rei*) as well as the rules of special jurisdiction contained in art.5 of Brussels I and art. 7 of the Recast, even if there is no objective connection between the legal relationship and the court designated. Also Brussels I bis insists on the party autonomy in *forum* choice clause, giving great relevance to those clauses in the modified artt.29 par. 1 and 31 par. 2.

Basically, according to the alternative *forum* criteria provided by the Brussel / Lugano system, the possibility of concurrent "parallel" proceedings before different courts of different Member States is a typical feature in the current practice of transnational civil and commercial litigation within the European Space of Justice.

Concurrent proceedings may be also 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.

B. Parallel proceedings' drawbacks

Parallel proceedings raise a host of problems and create potential legal obstacles to the recognition of judgments and therefore to their circulation in the EU Space of Justice. As one commentator explains: "*there is almost nothing in principle to support the maintenance of concurrent, parallel proceedings in the courts of different countries*"[9]. Duplicative litigation is patently wasteful: it imposes a heavy financial burden on the parties by forcing them to litigate the same case simultaneously in two places, and sometimes in piecemeal fashion. It also needlessly consumes scarce court resources, as two judges work on the same legal problem. The waste is magnified if the ultimate judgment in one action renders the other action meaningless. Issues of cost and efficiency are not the only concern.

[6] ECJ, 1 October 2002in case C-167/00, *Knosumenteninformation v. Henkel.*

[7] ECJ, *Besix v. Ktretzschmar*, see note 5.

[8] Art. 23 of Brussels I lists several formal requirements which must be fulfilled in order to establish the validity of such an agreement. Upon all, the clause of *forum* choice must be written.

[9] CALAMITA N. J., *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings,* in *27 U. Pa. Int'l Econ. L. 601*, 2006, at p. 609; see also WALKER J., *Parallel Proceedings - Converging Views: The Westec Appeal*, in *38 Can. Y.B. Int'l L. 155*, 2000. The author notes that "*in the jungles of transnational litigation, there is probably nothing quite as savage as parallel litigation. It is savage because the commencement of a second proceeding on the same matters in a different forum almost inevitably represents some form of abuse*"; RICHETER C., *The Nightmare of Litigating in Multiple Fora*, in *12 Rev. Quebecoise de Drois Int'l 9*, 1999, at p. 9, who describes parallel proceedings as a nightmare for litigants.

Concurrent proceedings can also lead to inconsistent judgments and subject the parties to incompatible obligations[10]. In fact, if a plaintiff may bring an action involving the same defendant and the same issue to different courts located in different states, there is no doubt that these actions may lead to conflicting judgments, because different states have different laws and procedures.

Parallel proceedings are also problematic because they "*smack of indefensible gamesmanship, jeopardizing public faith in the judicial system*"[11]. A litigant may file parallel proceedings solely as a means to vex or harass the opposing party. At the very least, the ability to file a concurrent, parallel proceeding invites tactics designed to delay the suit from proceeding in the forum proscribed by the Regulation or in that of the plaintiff's choice.

II The *lis pendens* rule: a formal criterion to solve parallel proceedings issue. The "Italian Torpedo" phenomenon

As already noted in paragraph I above, there is little doubt that one of the main challenge that EU Institutions have to face is how to effectively avoid the spread of parallel proceedings within the European space of justice.

The EU has tried to resolve this problem by simply adopting a traditional solution used in the civil law countries: the first-to-file rule, embodied in the *lis alibi pendens* doctrine (or, simply, *lis pendens*). The *lis pendens* represents a **formal criterion** based on an **automatic mechanism**: if another court is already seized of a matter, the second court seized must decline jurisdiction. The purpose of this jurisdictional criterion is to ensure predictable, certain and neutral litigation outcomes, which is one of the most urgent concern of the European Court of Justice (hereinafter, "**ECJ**" or simply the "**Court**")[12].

The rules on *lis pendens* contained in art.27 of Brussels I (now art. 29 of Brussels I bis) establishes that where proceedings involving **the same cause of action** and **the same parties** are brought in the **courts of different Member States**, then any court other than the court first seized shall stay its proceedings until the court first seized establishes whether it has jurisdiction. If the court first seized finds itself to have jurisdiction (which does not mean that the court must have made a formal ruling about its jurisdiction, as it suffices normally that nobody objected against it), then other courts must respect this and decline to deal with the dispute.

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[10] SAWAI T., *Battle of Lawsuit-Lis Pendens in International Relations,* in *23 Japanese Ann. Int'l L. 17*, 1980, at pp. 20; see also *EF Co Corp. v. Aluma Sys. USA, Inc.*, 983, in *F. Supp. 816,* S.D. Iowa 1997, at pp. 824-25: "*maintaining two concurrent and simultaneous proceedings would consume a great amount of judicial, administrative, and party resources for only speculative gain. Furthermore, simultaneous adjudications regarding identical facts and highly similar legal issues creates the risk of inconsistent judgments*".

[11] REHNQUIST J. C., *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, in *46 Stan. L. Rev. 1049*, 1994, at p. 1064.

[12] GARDELLA A., RADICATI DI BROZOLO L.G., *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM J. COMP. L. 611, 615 (2003).

So there are three essential requirements for a situation of *lis pendens*: (A) there must be two concurrent proceedings that share **the same cause of action**; (B) those proceedings must involve **the same parties**; and (C) one of the two actions **must have been initiated before the other**.

A.The notion of the identity of "*cause of action*"

The requirements for the application of the rules concerning *lis 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.

First of all, it has to be observed that the identity of the cause of action is to be determined with regard to only the object of the originating claims introduced by the plaintiffs in the two concurrent actions.

The notion at stake is problematic due to the 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*[13]. 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 bis, 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 purpose of the autonomous interpretation of the Convention, as it is currently in respect of the Regulation. In determining the precise meaning of the two said elements of the action, **the ECJ 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 ECJ referred to the essential aim of the rules on *lis pendens*, that is to prevent conflicting judgments, which would create an obstacle to the free circulation of judgments among the Member States. 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[14]. Therefore, **the 'object'** of the action is in principle 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**. As one of the main consequence of this

[13]ECJ, 8 December 1987, case 144/86, *Gubisch Maschinenfabrik v. Palumbo*, in ECR, 1987, p. 4861 et seq.

[14] The Court (points 8 et seq., at p. 4874) recalled the purposes contemplated by former art.220 of the EEC Treaty –then art. 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.. In this decision the Court affirmed the relevance within the system of the Convention of the principle of *res iudicata*, stressing that it would be incompatible with the purpose of artt. 26 et seq. of the Convention, relating to the recognition of judgments handed down in the other 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.

interpretation is that, as stated by the ECJ in *Gubish* case, an action for a negative declaration and an action for performance of the contract should be considered as having the same cause of action[15] and no relevance has to be given to what action has been filed before the other[16].

B. Some problems concerning the notion of"*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. Problems arise when the identity of the parties is doubtful due to some other form of subrogation or 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 legitimated[17]. According to the ECJ case law, no identity can be found between the parties of the two sets of proceedings unless it is proved that they are acting in the pursuit of the same indivisible legal interests, so that the judgment is to be pronounced in respect of the former would be *res iudicata* on the latter. 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 identity of the substance of the two actions, or more specifically the identity of the legal interests pursued by the parties.

C. The determination of temporal priority

Some further comments may be devoted to the rules concerning temporal priority between actions, as contained in art. 30 of Brussels I (now art. 32 of Brussels I bis). When these rules were established 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*

[15] *Gubisch* case 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 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 defense 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.

[16] 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. In *Tatry* case, an action for a negative declaration was instituted in the Netherlands by the owners of a ship, wherein they tried to exclude their liability for damages to the ship's cargo before the owners of the cargo sued them in England to recover their damages. *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 defense 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. 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 believed that the subsequent claim for damages might well be considered dependent on a ruling finding the shipowners liable, as that was the main object of the action subsequently introduced by the owners of the cargo.

[17] See, for example, ECJ, 19 May 1998, case C-351/96, *Druot assurances S.A. v. Consolidated Metallurgical Industries*, in *ECR*, 1998, I, p. 3075 et seq.. The Court addressed 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 pendens* would produce the undesirable result of depriving one of the parties of the right of autonomously invoking his own divergent legal interests.

pendens filling a gap that had deliberately been left open by the Brussels Convention of 1968[18]. 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[19].

D. The mechanism of *lis pendens*

The decision to stay the proceedings on the ground of *lis pendens* shall be made of the court's own motion, thus even if none of the parties requests it. This applies regardless of the domicile of the parties and of the legal basis of the jurisdiction of the court first seized; thus even in a case where the defendant is not domiciled in a Member State and the jurisdiction of the court first seized depends therefore on its own national jurisdictional rules pursuant to art.4 of Brussels I (now art. 6 of Brussels I bis).

In fact, the irrelevance of the ground upon which the jurisdiction 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 between the rules on *lis pendens* 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].

As a corollary to the said rule and of the principle of reciprocal faith among the judicial systems of EU Member States[21], it must be noted that the court first seized is, in principle, given total control over its

[18]See, among others, concerning the solution contemplated by art. 30 of Brussels I, CARBONE S. M., *Lo spazio giudiziario europeo in materia civile e commerciale. Da Bruxelles I al regolamento CE n. 805/2004,* 2006, p. 212 et seq.; GAUDEMET-TALLON H., *Compétence et exécution des jugementsen Europe. Règlement n° 44/2001. Conventions de Bruxelles et de Lugano,* 2002, p. 268 et seq.; SCHÜTZE R. A., *Europäisches Zivilverfahrensrecht, Kommentar,* 2004, p. 470 et seq.; LUPOI M. A., *La «nuova» litispendenza comunitaria: aspetti procedurali,* in *Riv. trim. dir. e proc. civ.*, 2004, p. 1285 et seq..

[19] Art.32 of Brussels Ibis also specifies that the authority responsible for service when the document has to be served before being lodged with the court "*shall be the first authority receiving the documents to be served*". Moreover, in the new par. 2, adds that: "*the court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served*".

[20] ECJ, 27 June 1991, case C-351/89, *Overseas Union Insurance Ltd. et al. v. New Hampshire Insurance Co.*, in *ECR*, 1991, p. I-3317 et seq., point 13 et seq., at p. I-3348 et seq.. With regard to this decision, see BRIGGS A., *The Brussels Convention, I. Overseas Union Insurance Ltd., Deutsche Ruck UK Insurance Ltd. and Pine Top Insurance Co. Ltd. v. New Hampshire Insurance Co.*, in *Yearbook Eur. Law*, 1991, p. 521 et seq.; DIBLASE A., *Connessione e litispendenza nella convenzione di Bruxelles*, 1993, p. 125 et seq. and HARTLEY T. C., *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Article 21: Defendant not Domiciled in a Contracting State,* in *Eur. Law Rev*., 1992, p. 75 et seq..

[21] 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

jurisdiction. In fact, as clearly stressed by art. 27.1 of Brussels I (now art. 29 of Brussels I bis), 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. 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[22]. The Court explained 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[23].

This solution has been now abandoned in the Recast, where in art. 31.2, it is provided that: "[…] *where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement*". This implies a reversal of the rule of *lis 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.

E. Some problems posed by *lis pendens* rule. In particular, the risk of *forum shopping* and *forumrunning*

Since the *lis pendens* rule represents an automatic criterion, this means that 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. The judicial systems of the Member States are deemed equal with regard to the application of Community rules on jurisdiction[24] and this

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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. See, for a discussion of the role of the principle of mutual trust among the judicial systems of the Member States within the framework of Brussels I and of the weight attached to it by the ECJ in its more recent case law, PONTIER J. A., BURG J.H.M., *E.U. Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, According to the Case Law of the European Court of Justice*, 2004, p. 69 et seq.

[22] ECJ, 27 June 1991, case C-351/89, *Overseas Union Insurance Ltd.* (note 26), point 26, at p. I-3351. It also held that "(…) *in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction*".

[23] ECJ, 9 December 2003, case C-116/02, *Eric Gasser GmbH. v. MISAT Srl*., in *ECR, 2003*, p. I-14693 et seq.. The ECJ stated that when an agreement between the parties is involved, it is always up to the court first seized to assess the validity and enforceability of the agreement and, in such a case, to decline jurisdiction: "*finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause, are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose*". According to Jonathan Harris "*the court first seised mechanism, the prevention of irreconcilable judgments and the doctrine of mutual trust were to be prized above the sanctity of commercial agreements. To the United Kingdom Government's arguments that this would provide a commercially undesirable solution, the ECJ's response was simply this: rules are rules, and this is the solution dictated by the Convention*" in HARRIS J., *The Brussels I Regulation and the Re-Emergence of the English Common Law*, in *The European Legal Forum (E) 4-2008*, 2008, p. 182.

[24] *Gasser* (see note 23), points 70 etseq (see note 28).

implies that the excessive average length of court first seized is not taken into any account according to *lis pendens* rule.

The latter courts are obliged to stay the proceedings and wait, without any time limit, until the court first seized has established whether it has jurisdiction or not. If the court first seized comes to the conclusion that it has jurisdiction, all the other courts must decline jurisdiction even if they are of the opinion that the conclusion of the court first seized was erroneous.

Moreover, it has been observed that the broad interpretation adopted by the Court with reference to the notion of same cause of action and, in particular, the fact that actions for performance and actions for a negative declaration might as well have the same cause of action (see par. A above), has encouraged the use of actions for a negative declaration, triggering the rule on *lis pendens* contained in the Brussels system. Such actions may be used as a tactical instrument to prevent the introduction of an enforcing contract action 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 his 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[25]. These attempts give rise to the so-called ***forum shopping***.

But *lis pendens* rule could have even more problematic effects.

Sometimes the main purpose of this negative action is not to obtain a favorable judgment there on the merits of the dispute. Instead, **the plaintiff** just wishes to **benefit** from the fact that **the courts in some Member States are notoriously slow** and it may take them years **to finally dismiss the case due to lack of jurisdiction**. In the meantime, while waiting for the declaration of incompetence, the *lis pendens* rule obliges the court second seized (*ex hypothesis*, the one who has jurisdiction in the case) to stay proceedings until the court first seized makes up its mind about its jurisdiction. The plaintiff hopes that the long delay, together with the potential costs and inconveniences taking part in court proceedings abroad, will make the other party to give up his claim or accept a settlement favorable to the former.

This, in the long run, could contribute to making Europe more "American" with regard to litigiousness, encouraging the so-called *forum running*. That is a speedy start of judicial proceedings, which might have previously been deemed premature (in the hope of reaching an amicable settlement of the dispute), in order to prevent the opposing party to start a proceeding in a Member State whose courts are particularly slow.

[25] The risk of an exploitation of the rule on *lis 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., *Les conflits de procédures et de décisionsen droit international privé*, Paris, 2007, 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*, NIBOYET-HOEGY M. L. *'Les conflits de procédures'*, in *Travaux du Comitéfrançais de droit international privé, année 1995-1996*, Paris, 1999, 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.

Such use (or rather abuse) of the *lis pendens* rule for the purpose of "sinking" proceedings in a competent court of a Member States having jurisdiction pursuant to the Brussels/Lugano rules has become known as the "Italian torpedo".

F. "Italian Torpedo"case-law.In particular, contractlaw: *Gasser* case

The "torpedo" is "Italian" because of the notorious slowness of some Italian courts, so that the alleged infringer will take advantage of that slowness of Italian proceeding[26] to decide on the jurisdiction.

In the Italian courts, a decision on the matter of jurisdiction can take up to two years, with a correspondent delay of the proceeding pending (and stopped) in the second seized court of a different Member State.

The situation described in the paragraph above is shownin the well know case *Gasser,* decided, as noted above, by the ECJ in 2003[27].

The *Gasser* case was referred to the ECJ by the *Oberlandesgericht* (Court of Appeals) of Innsbruck in a case of debt collection.

Mr. Erich Gasser, an Austrian manufacturer of clothes, had sold children's clothing to Misat, an Italian society established in Rome. After a dispute between the parties arose due to unpaid goods by Misat, Misat itself took the lead and started a proceeding in Italy on 19 April 2000 (a *forum* running situation?), in order to obtain a declaration that it had not failed to perform the contract and to pay for the received goods. Gasser sued Misat on 4December 2000 in front of the *Landesgericht* (District Court) of Feldkirch, Austria, relying on a contractual clause conferring jurisdiction on this court, in order to obtain payment of outstanding invoices for the sent (and yet unpaid) goods.

Misat appeared before the Austrian courts and requested a stay of the proceedings by virtue of art.21 of the Brussels Convention until such time as the Italian courts decided the question of jurisdiction. Gasser objected to the stay and submitted, *inter alia*, that the "*excessive and generalized slowness of legal proceedings in Italy*" should affect the application of art.21 of the Brussels Convention.

The Innsbruck Court of Appeals referred the case to the ECJ for a preliminary ruling.

The ECJ, inspiredby the principle of mutual trust between Member States stated that the rigid *lis pendens* rule "*cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seized is established is excessively long"*[28].

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[26] According to the Italian civil procedural code (art. 41), the decision on matter of jurisdiction, can straight be appealed in front of the Italian *Corte di Cassazione* (the last instance).

[27] See note 23.

[28] ECJ, *Gasser, points 70 et ss.* "*As has been observed by the Commission and by the Advocate General in points 88 and 89 of his Opinion, an interpretation of Article21 of the Brussels Convention whereby the application of that article should be set aside where the court first seized belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention.* [71] *First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.* [72] *Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which ail the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favor of a simplified mechanism for the*

By this ruling the ECJ clearly stated that the court second-seized cannot refuse to stay its proceedings for the mere reason that a previous action for declaration of non-infringement has been brought in a court established in a State in which the proceedings take usually very long. So, the Austrian Court had to stay waiting for the Italian Court to decide on its jurisdiction.

In this case, we can say that the "Italian torpedo" fully hit its target, sinking the Austrian second-seized suit, slowing down the procedure for the rescue of the credit.

G. The "Italian Torpedo" case-law. In particular, tort law: *Erika tank ship* case

In most cases, the "Italian torpedo" is structured as a defensive/negative action in front of a slow Italian court aimed at preventing the other party from starting the litigation on the merit of the case in front of the competent court of a different Member State.

This situation can occur not only in contract law but in tort law too, if the potential debtor starts a lawsuit in Italy asking the Italian court for a declaration of lack of liability in a tort case. The defensive / negative action falls within the scope of art. 5, par. 3 of Brussels I (now art. 7, par. 2 of Brussels I bis)[29], that refers to "*matters relating to tort, delict or quasi-delict*"[30]. According to settled case-law of ECJ, the rule establishing special jurisdiction laid down art5.3 of Brussels I is based on the existence of a very close connecting factor between the dispute and the court of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the principle of "*sound administration of justice***"**[31].

However, the mechanism of *lis pendens* described above can be abused by the infringer who starts the litigation in front of the "not competent" court, with the aim of delaying the proceeding in front of the competent court, and therefore of delaying the payment of the compensation of damages or of forcing the other party to accept a settlement of the case.

A clear example of abuse of "Italian torpedo" is the following *Erika tank ship case* concluded in 2002 in by the unified sections of the Italian *Corte di Cassazione*[32], which declared the lack of jurisdiction of the Italian courts.

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recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction. [73] *In view of the foregoing, the answer to the third question must be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seized is established is excessively long*".

[29] "*A person domiciled in a Member State may, in another Member State, be sued* […]*:* ***3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur****".*

[30] See ECJ, First Chamber, 25 October 2012, case C- 133/11, *Folier Fisher case*: "*point (3) of Article 5 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict falls within the scope of that provision*".

[31]The "*sound administration of justice*" principle states as follows: "*a court that has the practical advantage of first-hand knowledge of the facts, ease of taking evidence and or knowledge of the applicable law should be able to decide the case*". See ECJ, data Mines de Potasse d'Alsace case, par. 11; Case C-220/88 Dumez France and Tracoba case [1990] ECR I-49, par. 17; Case C-68/93 *Shevill* and Others case [1995] ECR I-415, par. 19; and Case C-364/93 *Marinari* case [1995] ECR I-2719, par. 10).

[32] Judgment of 17 October 2002, n. 14769.

Erika tank ship was built in Japan in 1975, following the technical standard of the time (10% steel less, no security tank, etc…). In the early afternoon of 11 December 1999, while on passage from Dunkerque (France) headed to Livorno (Italy), filled with a cargo of 30,884 tones heavy oil tanks, the Malta registered oil tanker "Erika" experienced a structural failure as she was crossing the Bay of Biscay (France) in heavy weather. The tankship first began to list heavily and then broke in two several hours later.

Following this major failure the vessel sank about 30 nautical miles south of the Pointe de Penmarc'h in Brittany (France – international water – pacific sea).

The entire crew was rescued without injury after a rescue operation carried out by the French navy after the mayday sent by the Erika crew but over 30.000 ton of oil were spilled in the pacific sea and soon brought to the coasts of France, Spain and Britain: it was very difficult to contain this pollution because of the type of cargo being carried and because of the severe weather conditions and it eventually soiled several hundred kilometers of coastline: the *Erika* case is considered the greatest environmental disaster that ever hit France.

The legal action started from this environmental disaster brought into play a large number of different entities[33]. This great number of entities involved (it was a suit with over 20 parties, everyone asking for a different jurisdiction) is usual when it comes to transporting bulk cargo by international waters, so it was highly complex even to determine the state of jurisdiction.

The first-in-time to start a legal action were the Italian society Rina S.p.A. (the ships' manager of security) and the *Registro Navale Italiano* (the classification society, controlled by Rina spa, that issued positive controls on tank ship Erika in August 1999): on 21 April 2000 this first legal action was brought in front of a tiny south Italy Court (Civil Court of Siracusa, detached unit of Augusta) for a declaration of non-liability.

On 25 April 2000 the *Conseil General de la Vandee* seized the Tribunal de Commerce of Nantes (France) asking for monetary compensation for the environmental disaster (same parties, same cause of action) but this second-seized French judge had to stay its proceeding and wait for Italian judge to decide upon its jurisdiction.It took two years for the Italian courts to decide on the matter of jurisdiction: the lawsuit started before the Tribunal of Siracusa on 21 April 2000 and on 17 October 2002 it was ended by the *Corte di Cassazione* that ruled the lack of jurisdiction of Italian courts and ascertained the jurisdiction of French courts[34].

[33]Erika owners (a Maltese company - Tevere Shipping Co. Ltd - under the control of two Liberian companies (Erika's flag was Malta); Erika security ship manager - Panship Management & Services S.r.l.- based in Italy; Erika classification society (Registro Italiano Navale - RINA), based in Italy; Erika's crewing agency, an Indian society commissioned to provide the master, officers and crew; Erika maritime agent located in Switzerland; Erika (and other parties') insurances companies, based in different states; Erika freight brokers, one based in Venice (Italy), the other in London (UK); Erika voyage charterer, namely a French oil group (Total).

[34] After a complex process, the French *Court de Cassation* rendered its final judgment on 25 September 2012, n. 3439. First of all, they decided that the French court had jurisdiction over the case even though the incident took place in France's exclusive economic zone and not within its territorial waters (according to Montego Bay convention, outside territorial waters, flag state

H. The "Italian Torpedo" and the general (critical) situation of the Italian civil justice.

According to the *EU Justice Scoreboard*[35]thatis a tool set up by the European Commission in 2012 with the aim of comparing timeliness, independence, affordability, and easy access of Justice of the EU Member States[36]:

- the Italian civil courts (in year 2012) had one of the highest rate among EU member States as regards the time needed to resolve litigious civil and commercial at first instance. This time was almost 500 days as an average in Italy, it was shortly below 300 days in France and Spain and below 200 days in Germany;
- the Italian civil courts had, by far, the highest rate of pending cases in civil and commercial matters among the UE Member States. The number of pending casesexpresses the number of cases that still have to be treated at the start of a period (e.g. a year). The number of pending cases influences the length of civil proceedings. The number of pending cases, per 100 inhabitants, was 7 in Italy, 3 in Spain, 2 in France and 1 in Germany;
- at the same time, Italian civil courts showed in 2012 the highest clearance rate (shortly after Luxembourg) among EU Member States. The clearance rate is the *ratio* of the number of resolved cases over the number of incoming cases. It measures whether a court is keeping up with its incoming caseload. When the clearance rate is low and the length of proceedings is high, backlog develops in the system.Clearance rate in civil and commercial litigious cases was around 120% in Italy, below 100% in France and Spain, and around 100% in Germany. In other terms, the Italian Courts, in one year, decided 20% of cases more than the total influx of new cases during the same year and therefore the backlog of total pending cases was correspondently reduced.

The general picture shows then a high length of proceedings, as a consequence of a huge backlog, in the Italian civil courts but also a very high productivity that is bringing the Italian judges to progressively reduce duration of trials and pending cases, dealing with a really complex situation.

III. A discussion of some proposal to deactivate the "Italian Torpedo"

As pointed out by the ECJ in case *Gasser*, the aim of the Regulation is "*to facilitate the reciprocal recognition and enforcement of judgments in accordance* and *to strengthen the legal protection of*

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jurisdiction - Malta - should be seized). The French Cassation Court finally condemned the Total company to 375,000 euros and 200 million euros in damages to be paid to the State, territorial communities and approved associations of protection environment. The defendants who started the "torpedo" in Italy were also concerned: shipowner, ship management company, ship's charterer (Total company) and certification company were also condemned to a 75.000 euros fine.

[35] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2013) 160 finalin*http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf.*

[36] The figures refer to year 2012 and are extracted from the *Study on the functioning of judicial systems and the functioning of the economy in the EU Member States*, prepared in 2012 by the CEPEJ for the European Commission. In http://ec.europa.eu/justice/index_en.htm.

persons established in the Community". To achieve this goal, the ECJ stressed 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[37].

With regard to the allocation of jurisdiction, the principle of legal certainty[38] implies that the rules of jurisdiction must be clear, as their interpretation must ensure a certain and reliable criterion of jurisdiction. A multiplicity of courts having jurisdiction as regards one and the same legal relationship might be avoided, including:

- the avoidance of *alternative* courts having jurisdiction as regards one and the same legal relationship;
- the avoidance of *different* courts having jurisdiction as regards various aspects of one and the same legal relationship;
- the avoidance of *fragmentation of proceedings, which requires:* (i) a not too broad or multifarious interpretation of concepts constituting the connecting link of jurisdictions and not too restrictive interpretation of concepts constituting the substantive scope of jurisdictions; (ii) national courts should be able readily to decide whether they are competent to hear a case.

The rules on *lis pendens* aim, for what said above, at avoiding a multiplicity of courts having jurisdiction the same legal relationship

Despite the illustrated legal background, the "Italian Torpedo" phenomenon shows how the achievement of the aim of the free movement of judgements in the EU still encounters some practical difficulties, because the rigid and automatic mechanism of *lis pendens* can be abused by the party who wants delay the judgment. Tis abuse is made possible by the different "effectiveness" of judicial systems in EU Member States, as regards the length of civil trials.

Indeed, the abuse of the *lis pendens* rule might even violate art.6 of the European Human Rights Convention (hereinafter, "**ECHR**"), which guarantees fair and public hearing "*within a reasonable time*"[39]. An additional factor complicating the issue is that the European Court of Human Rights could in some extreme cases hold that the *lis pendens* rule can force other member states to become accessories in the *déni de justice* committed by the Member State of the court first seized when that

[37] *Overseas Union Insurance* and *Gasser* cases (notes 22 and 23).

38 See cases: Besix, 19 febbraio 2001 in cause C-256/00; Effer, 4 marzo 1982 in causa 38/81; Handte, 17 giugno 1992 in causa C-26/91; Owen Tank, 20 gennaio 1994 in causa C-129/92; Custom Bade Commercial, 29 giugno 1994 in causa C-288/92; GIE Group Concorde e a., 28 settembre 1999 in causa C-440/97. As the Court stated in Besix v. Kretschmar, "*the court repeatedly held that the principle of legal certainty is one of the objectives of the Brussels Convention*", par. 24.

[39] *Gasser* case (see note 23).

court is excessively slow, so determining a double violation of the Convention[40].

Well, are such abuses of the Regulation and violations of the ECHR tolerable in the EU system?

This problem has been faced in **the Green Paper** which accompanies the Report from the Commission on the application of Brussels I, with the purpose to launch a broad consultation among interested parties on possible ways to improve the operation of the Regulation with respect to the points raised in the Report.

During the last years, different solutions have been elaborated to face the threat of the *Torpedo* proceedings and to prevent the abuses of the *lis pendens* rule.

A. First proposal was to punish the starting of parallel proceedings by granting **anti-suit injunctions** by the court. This type of remedy has been examined by the ECJ in the *Turner v. Grovit*[41]case, when the Court was asked to decide if the Convention (now the Regulation) is to be interpreted as precluding the grant of an injunction whereby a court of a Member State prohibits a party to proceedings pending before it from beginning or continuing legal proceedings before a court of another Member State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

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 State's court from exercising the jurisdiction derived from a provision of the Convention or, currently, the Regulation. The ECJ stated that the court did not have any legal grounds under Brussels I to do so.

Even though the Turner Case did not deal with a typical "Italian torpedo", this conclusion assuming that **anti-suit injunctions have to be considered incompatible** with the current European *lis pendens* provisions, will certainly make it impossible to use anti-suit injunctions in *torpedo cases* as well.

B. Another solution to temper the rigidity of the rules on *lis pendens* was inspired to the ***forum non conveniens*** **doctrine**: 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 purports to an abuse aimed at precluding adjudication of the matter by a judge more closely connected to the case. However such a discretionary evaluation is totally unknown within the system of the Convention and now of the Regulation. 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. The compulsory character of jurisdiction conferred by the Convention and now the Regulation on the courts

[40] The ECHR has held that the recognition of a judgment violating the European Human Rights Convention constituted also a violation of the Convention by the recognizing state, in the case of *Pellegrini v. Italy*, case n. 30882/96.

[41] ECJ, 27 April 2004, case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA.*

of the Member States was confirmed by the ECJ in its *Owusu* decision[42]. 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 that 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 pendens* and related actions – but also in relationships involving third countries. So, in the light of the general construction of Brussels I, the refusal of competence by the court first seized, a part from being a purely domestic remedy, could be considered a "*denì de justice*" and it would contradict the principle of mutual trust.

The problems pointed out in the ECJ ruling in *Owusu* have been addressed by art.33 of Brussels I bis[43],in relation to third Countries. This regulation now provides the Member States Courts with the option to stay ("*may stay*") proceedings where there is a *lis pendens* in a non-Member State court if the court of the Member State was seized on basis of art.4 (concerning general jurisdiction), 7, 8 or 9 (concerning special jurisdiction provisions). In these cases, art.33.3[44] is imposing a direct obligation to stay proceedings if the court of the third state concluded a judgment capable of recognition and enforcement in that Member State. However, this applies only if the court of the third state is first seized and the court of the Member State is second seized, and even so, only when the jurisdictional basis on which proceedings are commenced in the Member State fall within those expressly provided by art. 33.3. The one chosen in the Recast is, therefore, a much more restricted exception than the one hoped to be achieved in *Owusu* case-law. Thus said, *forum non conveniens* doctrine is still outside the scope of the Regulation.

C. 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**. This solution consists of a preliminary and fast examination of the jurisdictional issue by the concerned judge according to a summary proceeding. The proposal above could be connected with the idea to assign to national judges a **time limit** to finalize the decision on jurisdiction in transnational litigations.

It was objected that the above solutions could however run against the principle, according to which **the admissibility of actions and the procedural deadlines**, which remains distinct from the issue jurisdiction, **are left to the Member States' domestic rules of procedure,** which neither the Brussels Convention nor the Regulation purport to unify.

[42]ECJ, (Grand Chamber), 1 March 2005, case C- 281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*.

[43] European Parliament and the Council Regulation (EU) 1215/2012 of December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels I Regulation)**.**

[44] EU Reg. 1215/12, art. 33.3: "*The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State*".

D. Another proposal was **to exclude the application of the *lispendens*** rule in situations where the parallel proceedings are actionson the merits on the one hand and **actionsfor (negative) declaratory relief** on the other hand. However, this proposal had the clear drawback to encourage parallel proceedings leading to possible irreconcilable judgments and to erode the principle of mutual trust in EU Member States judicial System.

E. **The solution adopted by Brussels Ibis,** to face the threat of Italian Torpedo, relates to cases in which the parties agreed on a *forum choice clause*: the solution is to allow **the designated court to proceed with the case even if subsequently seized**. According to the Regulation, such agreements confers to the chosen court the exclusive power to decide the disputes. At the same time, the mentioned rule of *lis pendens*, aiming at precluding subsequent actions in other Member States if a court is already seized, allows the appearance 'on the legal scene' of a court other than the court chosen by the parties. And the *lis pendens* rule under Brussels I prescribed the latter court to stay proceedings until the court not chosen, but first seized, examined and declined its jurisdiction. In *Gasser* the Court did not consider the choice of court agreements to be an exception to the general *lis pendens*[45]rule and decided that the chosen court shall stay proceedings, as being second seized, until the court first seized determines its jurisdiction.[46] The Court considered that such an exception would have been "*manifestly contrary both to the letter and spirit and to the aim of the Convention*"[47], even in cases where the court first seized takes a very long time in dealing with cases. Interesting about this decision is that the court places the Regulation's procedural rules on a higher position than the principle of party autonomy.[48] It does so by assuming that the aim of the Regulation is to obtain certainty and 'procedural justice' for the parties, which would be served similar in any court within the EU jurisdictions and assuming that the principle of mutual trust prevails on the principle of party autonomy. Nevertheless, following Commission proposal, expressed in the *Green Paper*, to revise the relationship between art. 23 (regarding choice of court agreements) and art. 27 (providing the *lis pendens* provisions), according to which *"agreements on jurisdiction by the parties should be given the fullest effect, not the least because of their practical relevance in international commerce"*, the above exception was adopted in **art. 31.2 of the Recast.** Thenew provision makes clear that, once the chosen court is seized, this provides that "*any court of another Member State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement*". This provision reverses the *lis pendens* rule, because the designated court is the one to decide on the validity of the agreement. If the chosen court determines that it has jurisdiction, any other court seized on the same matter and between the same parties, has to decline its jurisdiction. This was therefore the answer given by the European

[45]*Gasser*, Opinion of AG Léger, para 83 (see note 23).
[46]*Gasser* para 54 (see note 23).
[47]*Gasser* paras 70 and 73 (see note 23).
[48] STEINLE J., VASILIADES E., *The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy*, 2010, in *6 Journal of Private International Law565*, p. 571-572.

legislator to the *Torpedo actions*, that cannot prevent the chosen court from continuing the proceeding anymore, regardless if the court first seized decided to stay proceedings or not.

IVCritics and perspectives

The new rules about *lis pendens* adopted in Brussels Ibis(in force since 10th Jan 2015) with the purpose to avoid parallel proceedings and irreconcilable judgments have to be analysed in connection with the provisions about exclusive jurisdiction[49] and the choice of court agreements[50].

New art.29 of the Recast has the same underlying principle as art. 27 of Brussels I, as it provides that "*where proceedings are pending in the courts of different Member States, involving the same parties and the same cause of actions any other court than the court first seized shall of its own motion stay proceedings until such time as the jurisdiction of the court first seized is established*". If the court first seized decides that it has jurisdiction, then any other court shall decline its jurisdiction.

However, section 9 of the Recast brings in art. 29 two important changes, one of them having an significant impact on the choice of court agreements, that is the addition in its second paragraph of the words "*without prejudice to Article 31(2)*". In the view of the reformers, this addition should be the key for solving the *Torpedo* issue arisen in the *Gasser* ruling.

By this change, the general first-come first-served rule of art.29 is not anymore applicable if the parties concluded an *exclusive jurisdiction agreement*grantingthe courts of another member State jurisdiction to settle the dispute[51].

It has to be remarked that the solution adopted in artt. 29 and 31.2 of Brussels Ibis has certain drawbacks and does not eliminate the risk of *Italiantorpedo.*

This solution is inspired by a somewhat unilateral approach, in that it consists of merely allowing the judge designated in the *exclusive jurisdiction agreement* to proceed with the case without applying the *lis pendens* rules.

However it seems that it inevitably conducts 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 pendens* contained in the Regulation.

Also, the party seeking to rely on art. 31.2 has to practically seize the chosen court, otherwise the judgment of the non-chosen court is perfectly valid. The main downside of this provision is that in cases

[49] Brussels I art. 22; Brussels Ibis art. 24.
[50] Brussels I art. 23; Brussels I bis art. 25.
[51] A second minor novelty can be found in paragraph 2 of art. 29 of the Recast: it requires, in cases of parallel proceedings, that any "court seized shall inform *without delay*", upon request by another court seized, the date when it was seized in accordance with art. 32 (which provides guidance in order to determine the moment when courts are seized).

of an invalid agreement parties have first to seize the chosen court as this is the only one able to rule upon its invalidity, before being able to seize another court[52].

The solution adopted inart. 29 and 31.2 of Brussels Ibis does not eliminate the risk of Italian torpedo,andconsequently of *forum running*, because it refers only to exclusive choice of court agreements, therefore:

- non-exclusive choice of court agreements are still subject to the previous regime;
- *Italian torpedo* is still possible in cases of contractual relations whereby the parties did not agree on a choice of court clause;
- *Italian torpedo* is still possible in cases of tort and in every case the Regulation allows alternative criteria of jurisdiction.

In brief, this solution could work when stronger parties are involved, meaning companies that have the power to impose to a weaker party (different from policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee[53]) the acceptance of clauses of court choice. Indeed, the solution adopted in the Recast would have helped in solving the *Gasser vs. Misat* case, but it might not work in further cases of parallel proceeding, like the case of *Erika tank ship*.

Furthermore,apart from its procedural limitations, the adopted solution must be considered**a surrender to** the very purpose of the rules on *lis pendens* contained in the Brussels I, **the principle of mutual trust**, on which the cooperation between member states is based.

The fundamental principle of mutual trust, emphasised by the ECJ in *Gasser* case, could have been better safeguarded by the adoption of a different solution, more simple and effective.It is the solution indicated sub letter C above, according to which the court first seized should perform a preliminary and fast examination of the jurisdictional issue according to a summary proceeding and within a pre-established deadline.

The legal objection, according to which the Regulation could not impinge on domestic rules of procedure**,** might be overcome by referring to *effet utile* doctrine[54], whereby the application of domestic non-harmonized rules of the Member States may not impair the aims pursued by EU law. Such preliminary and fast examination of the jurisdictional issue seem likely to comply with core principles 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. This solution would be more in line with the general framework of the Regulation to

[52] Commission Green Paper, (n 19) para 3; 'Report on the Application of Regulation Brussels I in the Member States' (Heidelberg Report), (Study JLS/C4/2005/03 Final Version September 2007), par. 494, <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>.

[53] Those categories of *weak parties* are exempted from the application of art. 31.2that is applicable *without prejudice to article 26.* Art. 26, in its second paragraph, says that: *in matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.*

[54] ECJ, 15 May 1990, C-365/88, *Hagen.*

leave it to the court first seized to exercise this form of control on 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.

However, even in the current legal framework, after the adoption of Brussels I bis, some "organisational" solution could be adopted by the Italian courts in order to deactivate the *Italian Torpedo*.

First of all, Italian Courts could embrace virtuous procedural mechanisms, making domestic judges **giving priority to in the examination of disputes that involve cases of international cooperation** in civil and commercial matters, especially when jurisdiction is disputed, in addition to cases involving the violation of fundamental rights.

Second, **direct communication and cooperation between the two courts** involved in parallel proceedings should be strengthened in a way that the court second seized is constantly informed about the development and the time needed for the finalisation of the first trial [55] .Cooperation and communication between the courts would help mutual understanding and mutual trust.

Third, in any case, art.6 of the ECHR, art.47 of the Charter of Fundamental Rights of the EU and art.111 of the Italian Constitution claim for the Italian Judicial System to be brought back to effectiveness.

As the *Justice Scoreboard* shows, Italian judges are fully committed in pursuing the aim to reduce the backlog of cases, to take back the length of proceeding to a fair level and to demonstrate that the Italian Judiciary system deserves trust.

[55]Council Regulation (EC) n. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters