The race to the court in the light of the Brussels I recast

– An improvement in preventing the *torpedo tactics*? –

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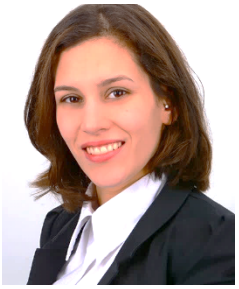

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Abstract

Before the Brussels I recast came into force, one of the problems in the European legal system was the abuse of the lis pendens rule. The abuse is enabled by so-called torpedo suits; a European phenomenon due to the European legal system. This torpedo problem is closely linked to European legal politics whereas in German law there is no room for a torpedo suit. Because of the European Single Market, more and more legal affairs are crossing the national line to be claimed in another European state. The European Union tries to emphasize the equality of all European legal systems by appropriate regulations. This also has the effect of avoiding parallel proceedings which would cause conflicting judgments[1] and furthermore a waste of resources. Therefore, the practice has to fight the issues caused by the actual differences between the Member States. One of these many differences is the court's effectivity. The State, which the proceeding takes place in, is important for the length of the trial.

Thus, the different standards in the European Member States lead to the well-known problem of the torpedo suits. Since this problem has grown and kept jurisdiction and legal writings occupied, the European Parliament and the European Council created a new regulation.

The Themis therefore deals with the torpedo practice, gives a review about the problem itself and in which way it is affected by Brussels I recast. It illuminates how much of an improvement the Brussels I recast is and draws a comparison between the current and the previous legal situation.

Moreover, the Themis will expose several solution approaches de lege lata. Since the Brussels I recast does not solve the torpedo problem in total, there is also a small part of approaches de lege ferenda.

1*Geimer* in: Coester, Martiny, von Sachsen Gessaphe , Privatrecht in Europa: Vielfalt, Kollision, Kooperation, Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag, 2004, p. 357 (358).

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A. Introduction

On 10th January 2015 the regulation (EU) No 1215/2012 (hereafter Brussels I recast) of the European Parliament and of the Council on jurisdiction and the recognition and enforcement in civil and commercial matters came into effect. Among others the objective of this regulation is to improve the existing provisions in regards of the prorogation of jurisdiction in order to prevent abusive litigation tactics, especially the *torpedo tactics*[2].[3] In accordance to the prior provisions of the regulation (EC) No 44/2001 (hereafter Brussels I) it was possible to block an imminent lawsuit by bringing an action for another negative declaratory judgment promptly in a Member State of the European Union (hereafter EU).[4] The court, which was called later had to interrupt the proceedings so long as the court first seised, had adjudicated about its jurisdiction, Article 27 (1) Brussels I. This blockade could last long if the first called court was a court of a Member State where proceedings usually take much time.[5] Especially Italy and Belgium were countries, which were pretty "suitable" for torpedo claims in the past.[6] The following paper illuminates how far the legislator was successful in reaching his objective to prevent *the race to the court* for future cases.

B. The torpedoed trader

The following example shall clarify the legal position in regards of the torpedo tactic. Afterwards the revision by the Brussels I recast is pictured and analysed.

> A Austrian trader (A) and a Belgium trader (B) concluded a purchase contract. Both parties agreed about a court in Hamburg, Germany to be the court-of-choice which has jurisdiction. A claims the purchase price after delivering the goods. B denies the payment. After repeated request for payment by A, B was bringing an action for a negative declaratory judgment with the objective to state that A is not entitled to any payment.

[2] Origin of the term: Franzosi, Worldwide Patent Litigation and the Italian Torpedo, (1997) 7 European Intellectual Property Review p. 382.
[3] Regulation (EC) No 1215/2012 Recital 22.
[4] Carl, Einstweiliger Rechtsschutz bei Torpedoklagen, 2007, p. 37; Schmehl, Parallelverfahren und Justizgewährung: Zur Verfahrenskoordination nach europäischem und deutschem Zivilprozessrecht am Beispiel taktischer „Torpedoklagen", 2011, p. 2.
[5] Herberger, ZJS 2015, 327; Sujecki, GRUR Int. 2012, p. 18.
[6] Sujecki, GRUR Int. 2012, 18; Meibom/Pitz, GRUR Int. 2004, 765, 769.

C. Prior Problem and legal position by the Brussels I

In the interest of the harmonious administration of justice it is necessary to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States.[7] Therefore, the *lis pendens rule*[8] applies within the EU[9], which is implemented in Article 27 (1) Brussels I. In accordance to this principle, any other court than the court first seised shall stay its proceedings of its own motion until the lack of jurisdiction of the court first seised is established. This way the mutual trust in the administration of justice within the Community shall get strengthened. The legislator assumed equality of remedy standards within the different Member States of the EU.[10] Unfortunately, certain differences exist which lead to specific problems when the lis pendens rule is not only used to avoid concurrent proceedings but also used to blockade.[11]

Such a blockade can be the result of a widespread practice known as a *torpedo*, which abuses the lis pendens rule. In the scope of application of the Brussels I recast *torpedo* means an action for a negative declaratory judgment in a jurisdiction with slow working courts which have no jurisdiction before the defendant can bring an action for injunction. The latter is now – caused by ulterior lis pendens – blocked respectively *torpedoed*.[12]

I. Requirements of the lis pendens rule pursuant the Article 27 (1) Brussels I: Identity of the parties and the cause of action

In pursuance of Article 27 (1) Brussels I the identity of the parties and the cause of action are the central requirements for the stay of proceedings.

In order to fulfill the criteria of identity of the parties it is not necessary that both parties arise in the same role, as complainer or defendant.[13] Regarding the initial example it is innocuous that the parties will have other roles in the action for negative declaratory judgment and the later submitted action for injunction. Furthermore the European Court of Justice (ECJ)

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[7] Regulation (EC) No 44/2001 Recital 26.

[8] Herberger ZJS 2015, 327; Gürtler, Der Jurist 2013, 1, 2; Hess, Europäisches Zivilprozessrecht, 2010, § 6 para. 161.

[9] Outside the EU there are substantially same provisions due the Lugano Convention which is a treaty signed by the European Community, Iceland, Switzerland, Norway and Denmark on jurisdiction and the enforcement of judgments in civil and commercial matters in 2007.

[10] ECJ NJOZ 2004, 3338, 3346; Regulation (EC) No 1215/2012 Recital 26.

[11] Carl (fn. 3), p. 55; Schmehl (fn. 3), p. 2; Herberger ZJS 2015, 327.

[12] Gürtler, Der Jurist 2013, 1, 2; Fentiman in: Magnus/Mankowski, The Brussels I-Regulation (2nd Edition 2012), Intro Arts. 27-30 para. 17; Schlosser in: Hess/Pfeiffer/Schlosser, The Heidelberg Report on the Application of Regulation Brussels I, 2008, para. 657.

[13] ECJ, judgement of 6th December 1994 – case 406/92 (Tatry ./. Maciej Rataj), ECR 1994, I 5439; Junker Internationales Zivilprozessrecht, 2012, § 23 para. 12.

asserted – after a submission by the Corte Suprema di Cassazione in Rom – that the identity is not restricted on the parties.[14]

In addition the actions must have the same cause of action which is fulfilled when they have the same *plea* and the same *matter in dispute*.[15] In the initial example both, the action for negative declaratory judgment and the action for injunction are based on the same circumstances namely the delivery of goods. The *plea* of both proceedings is identical. Further research is necessary to state if the *matter in dispute* is identical too. After all B pursues the declaratory of invalidity of his duty to pay whereas A pursues not only the validity of his entitlement to the payment but rather the adjudgment that B is ordered to pay the purchase price to A.

The ECJ pronounces a wide interpretation to avoid concurrent proceedings with irreconcilable judgments and bases its argumentation on "*the heart of the two actions*", hence the main issue of both proceedings.[16] Therefore, the aims of the legal actions are irrelevant and merely the identity of the main issues of both proceedings are to be taken into account. Conclusively the cause of actions are identical in the initial example because the main issue of both claims is the validity of the purchase contract.

To sum it up the requirements of the Article 27 (1) Brussels I are fulfilled in the given example. The court in Hamburg has to stay its proceedings till the court in Rom has established its lack of competence by reason of the valid choice-of-court agreement as it is the court which was secondly seised. The subsequent inversely action for injunction of A is blocked by the prior action for negative declaratory judgment of B on the court in Rom, consequently *torpedoed*.

II. Disadvantageous impacts for the putative defendant

It might be objected that A shall enter a defence without reprimanding the jurisdiction of the court in Rom referred to Article 24 Brussels I. Lastly he can trust – against the background of the legislative dogma mentioned above – an *equal permission to justice*[17]. In the outcome A just could obtain a declaratory judgment which only prejudices the validity of his claim because declaratory judgments are not enforceable.[18] Hence A has to bring an action for

[14] ECJ, judgement of 8th December 1987 – case 144/86 (Gubisch Maschinenfabrik ./. Palumbo), ECR. 1987, 4861 – 4876.
[15] Kropholler/v. Hein, Zivilprozessrecht, 2011, Art. 27 EuG-VO para. 6; Herberger ZJS 2015, 328; Thole, ZZP 2011, 403, 409.
[16] ECJ, judgement of 8th December 1987 – case 144/86 (Gubisch Maschinenfabrik ./. Palumbo), para. 16; Herberger ZJS 2015, 328.
[17] ECJ NJOZ 2004, 3338, 3346; Regulation (EC) No 1215/2012 Recital 26; Herberger ZJS 2015, 327.
[18] Musielak, Grundkurs ZPO (11th Edition 2012), para. 65.

injunction if B still declines to pay the purchase price. The defence without reprimanding the jurisdiction of the court is time-consuming and may cause financial losses without prospect to obtain an executory title.[19]

The reprimand of jurisdiction does not improve the situation of the claimholder as putative defendant because some courts already need much time to establish its lack of competence.[20] If the first claimer exhausts all various stages of appeal it is possible that many years will pass without any progress in the actual case. But the procrastination of the proceeding is not always the single aim of the claimer. In addition to this he earns a tactical advantage. The action for a negative declaratory judgment delays a judgement in favour of the putative defendant and in particular cases a judgement will be completely or at least partially blighted if the putative defendant gives up or the claimer becomes insolvent.[21] On top of this his offensive grants leverage against the actual claimholder to the hand of the torpedo-claimer. This promotes the possibility for a convenient settlement in a court of his choice. It can take years till the dispute can be adjudicated by the court with jurisdiction. As a consequence the actual claimholder can get motivated to arrange a settlement in court although his claim is completely justified.[22]

III. Conflict situation of the claimholder

The dilemma for the claimholder A which is a result of the aforementioned impacts is evident. If A sends a request for the payment to B the risk occurs that B brings an action for a negative declaratory judgment. If A brings an action for injunction immediately he has to carry the costs of the proceeding in the case of an instant acknowledgement by B, Article 307, 93 CCP[23].

Although A and B arranged a choice-of-court agreement, B is not inhibited to call a court without competence. Article 27 (1) Brussels I applies. As a consequence the court in Rom has to establish its lack of competence firstly before the court in Hamburg can continue its proceeding.

[19] Gürtler, Der Jurist 2013, 1, 3.
[20] As can be seen in Italy and Belgium: Sujecki, GRUR Int. 2012, 18; Meibom/Pitz, GRUR Int. 2004, 765, 769.
[21] Gürtler, Der Jurist 2013, 1, 3.
[22] Försterling in: Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen (44th EGL 2013), Volume I, Art. 27 EuGVO para. 39.
[23] On the example of the German civil procedure.

D. Legal position after the Brussels I recast

After the description of the valid legal position till 10th of January 2015 and the caused dilemma for the claimholder it is analysed if the recast of Brussels I leads to an improvement for the claimholder.

I. Implementation of the recast

Firstly, the lis pendens rule (of the Article 27 Brussels I) is implemented in Article 29 of the Brussels I recast. The new Article 29 of the recast is extended regarding its content and states an exception of the lis pendens rule for cases in which the parties arranged a choice-of-court agreement: In pursuance to Article 29 (1) in conjunction with Article 31 (2) Brussels I recast the court which an agreement – as referred to in Article 25 (choice-of-court agreement) – confers exclusive jurisdiction has to determine its jurisdiction immediately while the other court shall stay its proceeding until such time as the court which an agreement confers jurisdiction on the basis of the agreement declares that it has no jurisdiction under the agreement. Otherwise it has to establish its lack of competence.
Secondly, Article 29 (2) Brussels I recast states an obligation to notify between the courts. Accordingly, a court seised of the dispute shall inform upon request any other court seised about the date when it was seised without delay, in accordance with Article 32 Brussels I recast.
For the initial example the new legal position leads to another new judicial appreciation. In coherence with Article 29 (1) Brussels I recast in both proceedings appear identical parties which dispute about the validity of B´s obligation to pay the purchase price in the main issue. The requirements of Article 29 (1) Brussels I recast are fulfilled. Given that the parties concluded a choice-of-court agreement the court in Hamburg has to verify its jurisdiction on the basis of Article 29 (1) in conjunction with Article 31 (2) Brussels I recast. Until this happened the court in Rom has to stay its proceedings which were initialized by B as stated in Article 31 (2) Brussels I recast. Consequentially B cannot benefit from the mentioned tactical considerations, namely the usual long duration of proceedings in Italy anymore. The barrier effect of Article 27 (1) Brussels I recast caused by B's action in Rom will not come into effect. The torpedo-tactic in similar cases may be prevented for the future. The actual claimholders, who is A in the pictured example, dilemma does not occur no longer. Above all

there is no need to bring an action for injunction by A immediately with the risk to carry the costs caused by an instant acknowledgment of B.[24]

II. Critical acclaim of the recast

By reason of the exception of the lis pendens rule based on Article 29 (1) in conjunction with Article 31 (2) Brussels I recast the reform reached its objective, namely to break the possible blockades caused by actions for negative declaratory judgment without soften up the dogma of equality of the different European Union's jurisdictions at the first glance.[25] Finally it is irrelevant if the first court seised or the second court seised adjudicate about the validity of the choice-of-court agreement.[26]

Some sources notice the fact as a problem that – based on the exception – delays could occur which are caused by the claimholder. Because the claimholder could watch the course of the action for negative declaratory judgment and then, when the things did not work well in this trial, he is bringing an action for injunction before the *forum prorogatum*.[27] Apart from the fact that these theoretical possible cases will not occur often in practice[28] the abusive acting party which brings an action before a court which has evidently no jurisdiction according to the arranged choice-of-court agreement is not worthy of protection. So the potential for abuse may be acceptable.

Rather problematically seems the circumstance that in the cases of invalid choice-of-court agreements the party which benefits from the invalidity has to obtain a corresponding declaration of the court which has the jurisdiction upon the agreement.[29] Furthermore it would be desirable that the violation of the exception of the Article 29 (1) in conjunction with Article 31 (2) Brussels I recast would lead to the invalidity of the decision of the court without jurisdiction.[30] But the main weakness of the recast is the fact that the exception of the lis pendens rule is restricted to cases where the parties had arranged a choice-of-court agreement.[31] The containment of the risk of abuse is successfully carried out in these

[24] Gürtler, Der Jurist 2013, 1, 14.
[25] Hess, Stellungnahme zum Grünbuch KOM (2009) 175, endg., S. 7, available from: http://www.europarl.europa.eu/document/activities/cont/200910/20091009ATT62257/20091009ATT62257DE.pdf (17th April 2016).
[26] Weller GPR 2012, 34, 41.
[27] Herberger ZJS 2015, 329.
[28] Stellungnahme des Deutschen Anwaltsvereins zum Bericht und Grünbuch der Kommission vom 21. April 2009 (KOM [2009] 174 endg. und KOM [2009] 175 endg., Nr. 40/2009, S. 5), available from: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/deutsdeut_anvaltsverein_de.pdf [17th April.2016]).
[29] DAV Stellungnahme (fn. 27), p. 5.
[30] Tretthan/Hiersche, ÖJZ 2014, 57, 61.
[31] Herberger ZJS 2015, 329.

particular cases. But in addition to these cases, situations are also conceivable in which the parties did not arrange choice-of-court agreements, for instances issues in tort or cases where the choice-of-court agreement is invalid. The legislative measures turn out to be an insufficient, reserved and on top of this just a partial solution of the problem especially in regards of this issues.

The obligations to report provided by Article 29 (2) Brussels I recast just establish cooperation between the courts.[32] Additionally it assures that the later seised court can fulfill its obligation to stay its proceeding.[33] For this purpose, it is necessary that the courts clarify which court was the one that got seised later and has to stay its proceeding. The Brussels I recast didn't assign the competence-competence in determining the priority which court has jurisdiction. So any court has to determine its jurisdiction independently.[34] The reporting obligations just have an organizational character with the objective to prevent concurrent proceedings. Therefore, the obligations did not have the ability to eliminate the remaining risk of abuse.[35]

E. Solutions

As already examined, the Brussels I recast has modified the problem of torpedo actions only to the extent that the agreement of a jurisdiction has been significantly upgraded. Since the problem has not completely been solved, the question of possible alternatives arises. In the following, the main solutions will be presented.

I. De lege lata

1. Coordination of negative declaratory action and action for performance

a. Restrictive interpretation of Article 27 Brussels I recast

As discussed in section I, the Court does not interpret the term of the subject matter according to the national procedural law but according to the purpose of the provision, thus basing the provision on the French version instead of the quoted German wording.

Considering that the broad interpretation of the ECJ serves the coordination of the process in the European Area of Justice and that it avoids parallel proceedings and contradictory

[32] Herberger ZJS 2015, 330.
[33] Herberger ZJS 2015, 330.
[34] Herberger ZJS 2015, 330; Thode, BauR 2005, 1533, 1537.
[35] Herberger ZJS 2015, 330.

decisions, it becomes clear that a solution to the problem cannot be found at the level of the subject matter[36].

b. Article 6 (1) (1) of the ECHR

Article 6 (1) (1) ECHR could relativize the priority principle of Article 29 Brussels I recast, which includes the prohibition of an excessive length of proceedings. An argument supporting such a solution is the fact that Art. 6 Para. 1 sentence 1 ECHR establishes a normative basis for the exception.

However, the interpretation of Article 6 ECHR depends on the individual case: Set limits, whose transgression allows the conclusion of a violation, do not exist. Article 6 (1) ECHR further guarantees a human rights minimum standard whose application appears – questionable due to reasons of interpretation[37]. Many of the torpedo-tactics situations are likely to be located below the human rights fundamental guarantees. The existing jurisdiction seems to indicate that even a 6-year duration of proceeding does not automatically justify an excessive length within the meaning of Article (6) ECHR[38]. Before an individual complaint may be lodged, the victim of a torpedo action must first support the procedure in front of the Court of the torpedo state and have to fight delays with all possible legal means.

2. Performance counterclaim

The plaintiff could respond to the negative declaratory action with a performance counterclaim[39]. In contrast, it is argued that an effective legal protection cannot be obtained because the court lacks jurisdiction.

However, the jurisdiction of the first court can be justified in accordance with Article 8. No. 3 Brussels I recast. An argument against this is that it drops as soon as the court declares his lack of jurisdiction [40]. In addition, the torpedo plaintiff would still partly succeed because he could force his desired jurisdiction on the torpedo defendant.

Disadvantages for the torpedo defendant would then lie not only in practical inconvenience (like travel expenses, hiring a foreign lawyer etc.) but also in the fact that the selection of the jurisdiction may have consequences for the substantive outcome of the case [41].

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[36] *Wagner,* in: Stein/Jonas, Kommentar zur ZPO, volume 10, 22. edition 2011, Art. 27 EuGVVO para- 29.
[37] *Sander/Breßler,* ZZP 122 (2009), 157 (168).
[38] OLG München, RIW 1998, p. 631.
[39] *Huber,* JZ 1995, 603 (608).
[40] *Sander/Breßler,* ZZP 122 (2009), 157 (173).
[41] *Sander/Breßler,* ZZP 122 (2009), 157 (173).

3. Restrictive interpretation of Article 7 no. 2 Brussels I recast

For tortious acts, Article 7 (2) Brussels I recast applies. Here, the plaintiff can also sue at the place, which the harmful event occurred at or may occur (action for injunction). It would now be possible to interpret Article 7 (2) Brussels I recast in a restrictive way that prevents this standard from being applicable to negative declaratory actions.

In favour of this, it could be argued that the fundamental rule of jurisdiction, which provides for actions to be charged in front of the courts of the defendant's state of residence (actor sequitur forum rei), is contained in Art. 4 Brussels I recast and that, as an exception to this general principle[42], Article 7 no. 2 Brussels I recast has to be interpreted strictly.

Ultimately, the effectiveness of this solution approach is questionable because a decision of the improper court of its (lack of) jurisdiction would have to be awaited, which may take several years.

As a consequence, torpedo actions cannot be counteracted by a restrictive interpretation of Article 7 no. 2 Brussels I recast.

4. Arbitration

A preventive approach is to consider the extent to which the parties at the point of closing the contract can make arrangements based on a possible torpedo situation. Article 27 Brussels I recast is not anticipated[43]. But a recommendation could be to make more use of arbitration clauses in the future, because the pendency of the court of arbitration is not included in article 27 Brussels I recast. If an arbitration clause has been agreed in the contract, the contract is - due to the arbitration exclusion in Article (1) (2)(d) Brussels I recast - not subject to the regime of Brussels I recast[44]. This solution may seem quite attractive at first glance, but the torpedo problem can't be solved with this instrument outside of contractual relations.

Because in practice, there are numerous category groups that are not traditionally covered by arbitration, such as Disputes in international loan agreements that are typically subject to the ordinary courts at the place of syndication (mostly financial centres like New York and London). Should it really come to a greater devotion to arbitration, this would be an indication of the surrender of the practice before an indefensible condition in the European civil jurisdiction.

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[42] Högsta Domstolen GRUR Int 2001, 178.
[43] *Geimer/Schütze,* Europäisches Zivilverfahrensrecht, 2. edition 2004, Art. 27 EuGVVO, para 27.
[44] *Hess/Pfeiffer/Schlosser,* Report on the Application of the Regulation Brussels I in the Member States, 2007, para. 420.

5. Objection of abuse of rights

The Priority Principle of Article 29 (1) Brussels I recast could be countered by the objection of abuse of rights so that the court could may make an exception from the stay of proceedings[45]. The ECJ has not ruled explicitly that article 27 Brussels Ia regulation does not apply in cases of abuse of rights. However, the subsequent decisions indicate a corresponding trend.

a. The Turner Case

The Turner decision[46]denied the possibility of an anti-suit injunction against action for abuse of rights. Although this ruling was not about torpedo actions, it suggests that the ECJ would not soften the block of the pending suit in an abuse constellation. The House of Lords had limited its question on the compatibility of anti-suit injunctions due to abusive behaviour with the Brussels Convention. The ECJ has, however, postulated a general incompatibility of the anti-suit injunction[47]. This extension of inconsistency on all types of injunctions was not covered by the question of interpretation and thus cannot be part of the prejudicial bond according to the interpretation Protocol of 3 June 1971st.

b. The Gasser Case

In addition, in the Gasser case[48] the ECJ denied explicitly that the legal prescriptions even then couldn't be derogated when the length of the proceedings in the first court of the Contracting State of is excessively long. The United Kingdom had proposed to make an exception of the legal prescriptions, if the applicant had mala fide referred the case to a court without jurisdiction with intensions to block the action and if the court has not decided within a reasonable time of its jurisdiction first. However, the ECJ has not paid any attention to this argument. Such an – in European jurisdictions consistently known as - dolo agit objection or the restrictive interpretation of Article 27 Brussels I recast has also several disadvantages:

One the one hand there is a risk of abetting a misuse; because the intended clear rules by the Brussels I recasts are put in question. It is feared that the question whether a torpedo action is an abuse of rights, is loaded with a number of uncertainties and therefore ensures no consistent solution to the problem.

On the other hand, it is an open conflict with the established formal system of Article 27 Brussels I recast and is accompanied by a conceptual dilemma: The question whether the

[45] *Grabinski,* in: Festschrift für Winfried Tilmann zum 65. Geburtstag, 2003, p. 461 (466 ff.).
[46] EuGH, Rs. C-159/02, RIW 2004 – Turner v Grovit.
[47] EuGH, Rs. C-159/02, RIW 2004 – Turner v Grovit, para. 31.
[48] EuGH, Rs. 116/02.

(first) suit was improper would be decided by the second court, thus of a forum that is excluded from the referral by Article 27 (1) Brussels recast. The improper nature of the first suit should only be decided from the second court, if the jurisdiction of first court has been established. Otherwise would remain a - at least theoretical - risk that the second court decides that the first court was misused and establishes its jurisdiction, while the first court decides its competence.

The Brussels I recast precisely aims at such cases of conflicting lis pendens and it exists for the avoidance of such cases; Corrections of the current law, which would undermine this purpose of the Brussels I recast, are problematic in the light of the current law of the ECJ and are also connected with considerable legal uncertainty[49].

Finally, the idea of the objection of misuse of rights by resorting to the courts of a European Member State is in conflict with the principle of equality of every Member State. It can't be an abuse of rights, to call a European court.

6. Interlocutory injunctions

You may be able to react on a torpedo action with an interlocutory injunction. According to Article 35 Brussels I recast, the jurisdiction for interlocutory injunctions is not dependent on whether the seised court has jurisdiction in the main proceeding. From this follows that interlocutory injunctions can be requested before the second court is seised[50].

The background of this regulation is that otherwise the access to justice of the concerned party would be unreasonably restricted. It would be harmless if in another Member State a request for an interlocutory injunction is pending, because Article 29 Brussels I recast includes that parallel applications in other Member States are not sufficient. This follows from Article 35 Brussels I recast, which opens the closed system of jurisdiction to interlocutory injunction[51].

Also, the shift to interlocutory injunctions are - with regard to the premise of mutual recognition of the Member States' judicial systems – better for the sovereignty of each State: It does not require judicial dispute over the constitutional legality of the initial proceeding States which comes according to experience with considerable political discussions. Instead, the referral to the second court can be limited to the decision of the urgency of the interlocutory injunction.

The consequence of granting of interlocutory injunction does not necessarily mean that a solution of the torpedo problem is going to be available. The complainant must rather fulfil

[49] *Hess/Pfeiffer/Schlosser,* para. 459.
[50] EuGH EuZW 1999, 413 (415 para. 28 f.).
[51] *Wagner,* Art. 27 EuGVVO para 41.

the requirements of the national procedural law for the grant of interlocutory injunction. According to German procedural law an injunction requires proof of a right to claim and a ground for claiming, §§ 940, 936, 920, Para. 2 ZPO. The grounds for claiming can be seen in a special emergency/urgency of the interlocutory injunction [52]. In practice it could be difficult to make a disposal ground for claiming credible. An abstract reference to an excessive length of proceedings in the courts of the country was considered to be insufficient; the excessive length of proceedings must be made credible at the main court concerned. This will be difficult for the applicant as he can just declaim an uncertain prognosis for the course of the main proceeding.

7. Forum non-conveniens

On the objection of forum non-conveniens, a national court may decline his jurisdiction if a court of another State is objectively more appropriate to decide the matter.
However, the ECJ has ruled that such an objection is incompatible with the Brussels I recast[53]. The ECJ argues that the Brussels I recast is dealing with a binding system of jurisdiction. The ECJ also relies on the fact that this objection was not foreseen by the drafters of the Brussels I recast. The principle of legal certainty (here in the form of the predictability of the jurisdiction rules), which would no longer be fully guaranteed with regard to the objection, is considered to be of high importance. It would create hindrances of legal protection not only for the defendant who might not foresee the jurisdiction, but also for the applicant, who may have to justify why the other court is better suited[54].
Thus, the objection of forum non-conveniens can't be regarded as a solution for the torpedo actions.

8. Anti-suit injunction

While the objection of forum non-conveniens is limited to its own jurisdiction, the anti-suit injunction is directed to a party[55]. Thus, the applicant receives an instrument by which he can prevent the initiation or continuing of the proceeding in another court. Such an injunction could also be seeked by the surprised defendant of a torpedo action.
However, the ECJ has already decided that such an injunction could not be imposed within the scope of the Brussels I recast[56]. The regulation is based on the Principle of Mutual Trust,

[52] LG Düsseldorf GRUR Int. 2002, 157 (160).
[53] EuGH EuZW 2005, 345 (348).
[54] *Coester-Waltjen,* in: Annales Universitatis Scientiarium Budapestinensis de Rolando Eötvös Nominate. Secto Iuridicia, Tomus LII, 2011, p. 225 (236 f.).
[55] *Schroeder,* EuZW 2004, 468 (470).
[56] EuGH EuZW 2004, 468 (469 f.).

which the Member States bring to their legal systems and judicial institutions. This implies that the court of another Member State does not examine the jurisdiction of a court. If a court bans the conduct of a case, it would represent an interference with the jurisdiction of a foreign court[57].

This cannot be denied by claiming the misuse of the court, because the assessment of that behaviour is contrary to the Principle of Mutual Trust and based thereon no court should examine the jurisdiction of the court of another Member State.

Ultimately an anti-suit injunction would not reach the desired goals, because it cannot reduce the risk of irreconcilable judgments and process clusters. It rather threatens new situations involving conflicts for which there have been no rules.

Thus, even an "anti-suit injunction" cannot successfully respond to a torpedo action.

9. Liability for damages

Another idea to solve the problem of torpedo actions is that the victim of a torpedo action can make a claim for damages[58]. But this is also not a convincing solution to torpedo actions. It has not stopped torpedo claimants from their actions in the past. Such an action would be claimed in the first State by a counterclaim, which would be associated with the disadvantages shown in section IV. b). In the second state, such a dispute would likely be exposed, because there would be a risk of irreconcilable judgments if the first court decides its jurisdiction. The potential threat that would be associated with such an action would therefore be relatively low.

The question is also whether such a claim for damages is at all compatible with the Brussels I recast. If the second seised court imposes the obligation to pay compensation, then the same considerations as for the anti-suit injunction have to be consulted[59].

II. De lege ferenda

As already discussed the Brussels I recast does not solve the torpedo problem in total. Before the Brussels I recast was legislated there were a lot of suggestions in the legal writings how to handle torpedo suits. In the following there will be a few of them pictured as far as they still contain solution approaches de lege ferenda.

[57] *Wagner*, (Fn.1), Art. 27 EuGVVO para 53.
[58] *Rauscher/Leible* , Europäisches Zivilprozessrecht 2. edition 2006, Art. 27 EuGVVO, para. 18.
[59] *Balthasar/Richers*, RIW 2009, 351 (356).

1. The need of an interest in a declaratory judgment

Because of the popular problems with the torpedo suits it might be necessary to discuss the need of an interest in a declaratory judgment for declaratory actions, especially for negative declaratory actions. The German system requires the justification that the claimant has an interest in a declaratory judgment (§ 256 ZPO). The claimant has to have in interest to clear the legal situation as soon as possible.[60] Unlikely the declaratory judgment, the judgment of an action for performance is enforceable. So the interest in a declaratory judgment is mostly denied because it is not as effective as a suit for performance.[61] But the German system differentiates between the matter of dispute in a declaratory action and the matter of dispute in an action for performance.[62] In the Brussels regulations there is no difference in the matter of dispute in these two actions. According to the European Court of Justice's definition of the matter of dispute there is no reason to give the action for performance any precedence.[63] Though it might seem to be a good solution to avoid torpedo suits there is no room to interpret the Brussels I recast or the jurisdiction of the European Court of Justice in a way that a special interest in a declaratory judgment should be a condition for a declaratory action.

2. Forecasting the competence of the second court

According to Art. 28 Brussels I the second court is allowed to either suspense a procedure or to keep on proceeding if their procedure is connected to other trials in different Member States.

Even if Art. 28 Brussels I lost its validity after the Brussels I recast came into force, there are new articles that can be compared to it. Art. 33 and Art. 34 Brussels I recast determine that courts can suspense or keep on proceeding under specific conditions just like the former Art. 28 Brussels I. So the idea of Art 28 Brussels I,[64] respectively Art. 33, Art. 34 Brussels I recast, can be easily transferred to situations without a jurisdiction agreement to avoid the blocking effect and to prevent a torpedo suit. The second court would have to estimate how much time the first court will need until it denies its competence[65] and, of course, verify its own competence regarding the case. Until the first court comes to a decision the second court can continue proceeding at its own discretion.

This seems to be a possibility to avoid that the *lis pendens rule* will be abused for a torpedo

60 *Hartmann* in Baumbach/Lauterbach/Albers/Hartmann, ZPO (74th Edition 2016), § 256, para. 3; *Lüke*, Zivilprozessrecht (10th Edition 2011), § 11, para. 130.
61 *Jauernig/Hess*, Zivilprozessrecht (30th 2011), § 35, para. 19.
62 *Lüke*, Zivilprozessrecht, § 14, para. 162 ff..
63 *Gürtler*, Der Jurist, 2013, p. 1 (8).
64 *Sander/Breßler*, Das Dilemma mitgliedstaatlicher Rechtsgleicheit, ZZP 122 2009, p. 157 (178).
65 *Gürtler*, Der Jurist 2013, p. 1 (9).

suit but only if the place of jurisdiction is exclusive[66] or at least obvious. That is mostly the case if the parties have a jurisdiction agreement. Since the Art. 29 Brussels I recast already strengthened the jurisdiction agreements this solution would only be used for situations without jurisdiction agreements. In the following there would not be a big scope of application.

III. Different use of the blocking effect

The torpedo claimants use the blocking effect in an abusive way to avoid to be suited themselves. This effect is the necessary condition for a torpedo suit.[67] So if the blocking effect would not appear with the claims service on court but for example with the service on the defendant, a torpedo suit might seem less attractive. But any another temporal link, like the first courts decision about its competence, would work as well.[68] The second court would be able to proceed until the temporal factor triggers the blocking effect. The victim of the torpedo claimant would not have to start from the beginning, if the first court denies its competence.[69] Regarding the fact that some courts take even years to make a decision about their competence this seems to be in the interest of the torpedo victim.

The Brussels I and Brussels I recast are meant to prevent parallel proceedings, but a deferment of the blocking effect would lead to the opposite. At least for a while, there would be two claims in different Member States about the same matter in dispute, which would be contrary to the purpose of the Art. 29 Brussels I recast as well as to an overuse of resources.[70] Moreover there is also the possibility that two courts are competent and each of them comes to different judgments.[71]

Another solution might be to annul the blocking effect after a certain period.[72] In this case the second court could proceed without being blocked by the *lis pendens rule*, if the first court needs more than for instance six months[73] or for some legal affairs more than a year[74] to decide about its competence. This could have more than just one positive effect: first of all the defendants in a torpedo suit could start to proceed to enforce their rights and some Member

66 *Sander/Breßler*, ZZP 122 2009, p. 157 (178).
67 *Gürtler*, Der Jurist 2013, p. 1 (8); *Sander/Breßler*, ZZP 122 2009, p. 157 (176).
68 *Gürtler*, Der Jurist 2013, p. 1 (8).
69 *Sander/Breßler*, ZZP 122 2009, p. 157 (176).
70 *Sander/Breßler*, ZZP 122 2009, p. 157 (176).
71 *Gürtler*, Der Jurist 2013, p. 1 (9).
72 *McGuire*, Forum Shopping und Verweisung, ZfRV 2005, p. 83 (92); *Stürner*, Modellregeln für den internatinalen Zivilprozess, ZZP 112 1999, p. 185 (195); *Weller* in Hess/Pfeiffer/Schlosser, The Heidelberg Report on the Regulation Brussels I, 2008, para. 405.
73 *Weller* in Hess/Pfeiffer/Schlosser, The Heidelberg Report on the Regulation Brussels I, 2008, para. 405.
74 *McGuire*, ZfRV 2005, p. 83 (92)

States would be obliged to accelerate their legal system. An annul of the blocking system might even start a competition between the Member States that could lead to a general acceleration in the EU.[75] If a case gets withdrawn for working too slowly this could motivate courts and in the end the responsible Member State. On the other hand it might be difficult to come to a strict time limit. Every case has to be treated differently. In Germany a closing decision about the international competence could take years because it might go through all levels of jurisdiction.[76] And even if the time limit of for example six month would be restricted to the first instance, the following instances might still work slowly and keep the second court from proceeding.[77] The only way to get this solution approach to work, namely to limitate the stages of appeal to just one instance, would be a tremendous intervention in the national system of legal protection.[78] Given the fact that the speed of the court is beyond their influence, it is a disadvantage for the (torpedo) claimants, if the blocking effect fades after a time limit.[79] Even if claimants do not try to abuse a declaratory action as a „torpedo", they chose a slowly working court on their own decision.[80] Furthermore the torpedo claimants could still sue the Member State for losses if the necessary conditions are given.[81]
Another weak point of this approach is that after the blocking effect is annulled there could start another race to the court between the torpedo claimant and the torpedo victim. The torpedo claimants could easily claim declaratory action in another Member State.

F. Summary and conclusion

By reason of the fact that there were a lot of different solution approaches and that the torpedo suit is a real problem for the practice the ultimately decision is insufficient. The Brussels I recast would have been a chance to eliminate the torpedo problem for good. Instead, it just improves the situation if the parties agreed on a jurisdiction agreement. In any other constellation the torpedo problem continues to exist.
Furthermore the regulation of Art. 29 Brussels I recast suffers some logical weaknesses. Art. 29 refers to Art. 31 (2) Brussels I recast which determines, if a court of a Member State on which an agreement as referred to in Art. 25 Brussels I recast confers exclusive jurisdiction is seised, any court of another Member State will suspend the proceedings until the court of the

75 *Sander/Breßler*, ZZP 122 2009, p. 157 (182).
76 Zöller, ZPO (31th Edition 2016), § 513, para. 8.
77 *Sander/Breßler*, ZZP 122, 2009, p. 157 (183).
78 *Sander/Breßler*, ZZP 122 2009, p. 157 (183).
79 *Weller* in Hess/Pfeiffer/Schlosser, The Heidelberg Report on the Regulation Brussels I (2008), para. 405.
80 *Sander/Breßler*, ZZP 122 2009, p. 157 (183).
81 *Sander/Breßler*, ZZP 122 2009, p. 157 (183).

agreement comes to the conclusion that is has no jurisdiction under the agreement. According to Art. 25 (1) Brussels I recast, the court on which an agreement referred to has to decide about its own jurisdiction by the Member State's national law. This means that the validity of the jurisdiction agreement is a condition and at the same time matter of interest for the applicability of Art. 31 (2) Brussels I recast.[82] A reasonable interpretation of the regulations of the Art. 31, Art. 25 Brussels I recast would be that there is a jurisdiction agreement in terms of Art. 25 Brussels I recast. The first court has to suspend proceeding if one of the parties claims at the court of the jurisdiction agreement until this court decides about the validity of the agreement and simultaneously about its own competence.[83]

The validity of a jurisdiction agreement does not depend anymore on being entered by parties with their domesticile in one of the Member States. This is an improvement to the former Art. 23 Brussels I which required that at least one of the signing parties has their residence in one of the EU-States. The international market will benefit from the new strength of the jurisdiction agreement.

The other disadvantage of the Art. 29 Brussels I recast is that if the jurisdiction agreement is invalid the parties still have to bring the action to the court of the agreement. Until the court denies its competence any other proceeding even those at the competent courts will be blocked. This problem was already foreseen by the European Commission.[84]

It will be difficult to find a solution for the torpedo problem de lege lata. As shown above there is not much room left for the remaining problems to be solved without a regulation by another law. Like Art. 27 Brussels I, Art. 29 Brussels I recast does not leave any room for a parallel proceeding, which most of the solution approaches require.

A possibility for a solution de lege lata would be to find another interpretation of the matter in dispute. The European Court of Justice could change its definition, so the matter in dispute would not just involve the parties and the cause of the action but also the aim. Therefore a negative declaratory action and an action for performance would not have the same matter in dispute and both could be pending and be proceeded at the same time. Since the torpedo claimants choose slowly working courts, there is no risk of conflicting judgments.[85]

Because the EU tries to avoid parallel proceedings a change of the settled case law of the

82 *Gürtler*, Der Jurist 2013, p. 1 (15).
83 *Gürtler*, Der Jurist 2013, p. 1 (15).
84 *European Commission*, Green Paper 21th April 2009, KOM 2009 175, p. 5.
85 *Weller*, Der Kommissionsentwurf zur Reform der Brüssel I-VO, GPR 2012, p. 34, 40.

European Court of Justice[86] is not probable.

Keeping in mind that parallel proceedings should be avoided the most preferable solution de lege ferenda would be to give precedence to an action for performance. Since a judgment of action is enforceable an action for performance seems also to be much more effective than a declaratory one. Moreover a judgment of performance also deals with the aim of a declaratory action. To avoid that an action for performance is used to torpedo a declaratory action that is not used in an abusive way the annul of the blocking effect could depend on a few conditions. For example if the first court did not decide already about its competence and it needs more than a certain time period to do so.[87]

It seems that there are solutions for the torpedo problem. A torpedo suit is the result of the different standards of legal systems in all Member States. If every court would come to a decisions about its competence within a reasonable time period there would be no room left for an abuse of the *lis pendens rule* and therefore no torpedo suits. The idea of the equality of all European legal systems will only come true if the actual differences in effectivity can be eliminated. One possibility to adjust the effectivity might be the improvement of the exchange of information.[88] This could help to speed up the proceedings[89] and would also make it easier to detect parallel ones. An EU-wide register about pending claims naming the involved parties and the date of when the legal proceeding was instituted would be of good use.[90]

86 Settled case law of the ECJ, Judgement 06th December 1994 C-406/92 (Tatry./Maciej Rataj), Slg. 1994, I 5439; *Gürtler*, Der Jurist 2013, p. 1 (17).
87 *Gürtler*, Der Jurist 2013, p. 1 (17).
88 *Herberger*, ZjS 2015, p. 327 (335).
89 *Herberger*, ZjS 2015, p. 327 (335).
90 *Herberger*, ZjS 2015, p. 327 (335).