Lis Pendens and Related Actions

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Contradictory decisions are undesirable. Thus every legal system tries to avoid a duplication of legal proceedings by means of the plea of *lis alibi pendens*.[1] Both the Brussels Convention (on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) and the Lugano Convention, with identical wordings of their respective Article 21, have taken account of this and allow for the *lis alibi pendens* to be extended across borders if the same action is brought in the courts of different Contracting States.

It is, however, not only the irreconcilable rulings involving the same parties that are to be avoided; it is likewise problematic if the legal appreciation of the facts of the case that have given rise to a lawsuit differs where the litigants concerned are not the same. The Brussels Convention and the Lugano Convention have both considered this by providing for the consolidation of pending related actions (Article 22).

I. Problems of Application

The European Community has enacted rules providing for a uniform jurisdiction system and is on the way to a European civil procedure, although there remains a great deal of work. Until now, the national rules of procedure still determine the course of proceedings from the moment an action is brought to the conclusion of proceedings by a judgment being pronounced. These national rules of procedure differ widely. One must keep in mind that within the European Community (and within the scope of the Brussels Convention) two legal systems exist: the Civil Law system and the Common Law system. It is true that the Court of Justice of the European Communities seeks to further unification within the scope of its competence of interpretation, in particular by means of an autonomous interpretation of the Brussels Convention. In this endeavour it has not always proved much

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[1] For comparison with other legal systems see also Schütze, 'Die Wirkungen ausländischer Rechtshängigkeit in inländischen Verfahren' ZZP 104 (1991), 136 et seq.

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skill, which may be due to the fact that the body of judges concerned is formed of judges rooted in different legal systems.[2] The application of the Brussels Convention and the Lugano Convention has, in particular, brought to light the problems dealt with in the following, which are due in part to the wording of Articles 21 to 23, in part to precedents relating to these provisions.

1. The Beginning of Lis Pendens

In the matter of *Zelger v. Salinitri II*,[3] the European Court of Justice did not derive uniform conditions for 'final *lis alibi pendens*' from the Convention itself, interpreted to this effect, but has rather made reference to the respective laws of the countries whose courts are seized of a matter. This forcibly leads to unjust results and non-uniform application where one State prescribes as the beginning of pendency the moment the statement of claim has been served (as provided for by German law; § 261 of the Code of Civil Procedure), whereas the other State involved may consider that the beginning of pendency of proceedings depends on the filing of the action only.[4] Just as the hedgehog in the fairy-tale wins the race against the hare by means of a trick,[5] Article 21, as it stands today, makes it possible for the party bringing an action in the country where pendency is deemed to begin upon the filing of the action, undercut any previous action brought at a forum where pendency is made dependent on its service.[6]

2. Relationship between the Action for Performance and the Declaratory Action

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[2] Thus, the European Court of Justice has – apparently because to some of the judges concerned, the settlement in court was not known – failed to see in the matter of the Judgment of 2 June 1994 in Case C-414/92 *Solo Kleinmotoren v. Emilio Boch* [1994] ECR I–2237 = NJW 1995, 38 = JZ 1994, 1007 with comment Schlosser = IPRax 1995, 241 with commentary by Hoffmann/Hau, 217 et seq. = EuZW 1994, 760 = EWS 1994, 247 with review by Mankowski, 379, that the German settlement in court is identical in its function with the judgment by consent, and consequently has dealt with the two in different ways within the scope of Article 25.

[3] (1984) ECR 89 Case 56/79, 2397 NJW 1984, 2759 = IPRax 1984, 336 with comment by Rauscher, 317 et seq.

[4] *Dohm*, 'Die Einrede ausländischer Rechtshängigkeit im deutschen internationalen Zivilprozessrecht, 1996, page 116, with further annotations; Isenburg-Epple, 'Die Berücksichtigung ausländischer Rechtshängigkeit nach dem Europäischen Gerichtsstands- und Vollstreckungsübereinkommen vom 27.9.1968', 1992, page 124.

[5] Reference is made to Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 21, marginal note 9.

[6] *See Dohm*, loc. cit., page 135 for summary of criticism voiced; Isenburg-Epple, loc. cit., page 257; Koch, 'Unvereinbare Entscheidungen im Sinne der Artt. 27 Nr. 3 und 5 EuGVU und ihre Vermeidung', 1993, page 62.

[7] See: The owner of the cargo lately laden on board the ship Tatry v. the owners of the ship Maciej rataj, (1994) ECR I, 5439 = EuZW 1995, 309, with comment Wolf page 365 = EwiR 1995, 463 with comment Otte = JZ 1995, 616 with comment Huber = EWS 1995, 90 with comment Lenenbach page 361.

The conflict has intensified with the Tatry decision[7] delivered by the European Court of Justice, who found that the matter in dispute (Streitgegenstand) of the action for performance is identical with that of the declaratory action (with respect to the non-existence of even that obligation to perform) without, however, declining the plaintiff's legal interest in a declaratory judgment establishing the non-existence of the claim. The Italian defendant involved in German civil proceedings for payment can always (provided he or she learns about the action to be brought before it has actually been served[8] and insofar as an Italian forum exists) prevent German proceedings by means of a declaratory action to establish the non-existence of the claim, thus having the case dealt with in Italy. He will invariably be faster.

3. Pendency of Related Actions at First Instance

According to the wording of Article 22 paragraph 1 of the Brussels Convention, related proceedings may be stayed by the court only while both actions are pending at first instance. This means that - according to the tenor of this provision - either of the parties can avoid a stay of proceedings on account of their being connected, if the action is enlarged at the second instance or if the connected action is brought only after the other action is already pending at the second instance acting. The redaction of this provision is deemed to be 'unfortunate'[9] so that a rectifying interpretation even to the law in force is suggested to the effect that pendency at first instance is not made a precondition to proceedings being stayed.[10]

II. Reform Work

Reform work[11] regarding *lis pendens* and related actions has concentrated on the

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[8] Early knowledge of proceedings has in at least one case been due to a corrupt translator. In proceedings instituted before the Landgericht Stuttgart, the translator had informed the defendant bank of the action during the process of translation, whereupon the defendant – before the statement of claims was served upon it – closed down its German branch office.

[9] See Kohler, 'Die Revision des Brüsseler und Luganer Uebereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen – Generalia und Gerichtsproblematik' in: Gottwald (editor), Revision des EuGVÜ – Neues Schiedsverfahrensrecht, 2000, pages 1 et seq. (29).

[10] *See* Gaudemet-Tallon, 'Les Conventions de Bruxelles et de Lugano', 2nd edition, 1996 marginal note 300; Geimer/Schütze, 'Europäisches Zivilverfahrensrecht, loc. cit. Article 22 marginal note 11; Gothot/Holleaux, 'La Convention de Bruxelles du 27 septembre 1968' 1985 no. 225; Huet, Chronique de jurisprudence française, Journal Clunet 121 (1994), 167 et seq., 171. The French Cour de Cassation has rendered a decision to this effect; reference is made to Hackspiel, 'Berichtigende Auslegung von Article 22 EuGVÜ durch die französische Cour de Cassation – ein nachahmenswertes Beispiel?', IPRax 1994, 214 et seq.

[11] See also Kohler, loc. cit. pages 1 et seq.; Stadler, 'Die Revision des Brüsseler und Lugano-Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher

whole on the three problems considered above.[12] A scientific project that has found the support from the Grotius Programme has suggested the following wording for Articles 21 and 22 of the Brussels Convention:

Article 21

1. Where proceedings involving the same cause of action and between the same parties are brought before the court of different Contracting States, any court other then the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.
2. Where an action for a declaratory judgment is brought before a court and within six months after the pendency of this action for performance involving the same cause of action and between the same parties is brought before the court of a different Contracting State, the court seized first shall of its own motion stay its proceedings until such time as the jurisdiction of the court seized second is established. Where jurisdiction of the court seized second is established, the court seized first shall decline jurisdiction in favour of that court.
3. For the purpose of this Convention, a court shall be deemed to have been seized where an application has been made to it and the document instituting proceedings or equivalent document has been served on or notified to the defendant in accordance with the second or third indents of Article 20.

Article 22

1. Where related actions are brought in the courts of different Contracting States, any court other than the court first seized may stay its proceedings.
2. A court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over both actions.
3. (unchanged).

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cont.

Entscheidungen in Zivil- und Handelssachen – Vollstreckbarerklärung und internationale Vollstreckung' – in Gottwald (Herausg.), Revision des EuGVÜ – Neues Schiedsverfahrensrecht, 2000', pages 37 et seq.

[12] *See also* Otte/Prütting/Dedek, 'The Grotius Program: Proposals for Amending Articles 21 and 22 of the Brussels Convention', European Review of Private Law 2 (2000), 257 et seq.

III. Reform Implemented by Council Regulation (EC) No 44/2001

Council Regulation (EC) No 44/2001 of 22 December 2000,[13] which became effective on 1 March 2002, brings about a change, by its Articles 27 to 30, with regard to *lis pendens* and related actions. The amendment takes account of the problems that have been brought to light in the process of the application of the present provisions. However, it must be pointed out that, due to particularities arising from the Amsterdam Treaty, it will not apply to Denmark. The United Kingdom and Ireland on the other hand have both opted for the Regulation, so that it will apply in these countries in spite of their special status under the Amsterdam Treaty. Consequently, the result will be:

> For Belgium, Germany, France, Italy, Luxembourg, the Netherlands, the United Kingdom, Ireland, Greece, Portugal, Spain, Finland, Austria and Sweden, Articles 27 et seq. of Council Regulation (EC) 44/2001 shall apply;
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> For Denmark, Articles 21 et seq. of the Brussels Convention shall apply;
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> For Iceland, Norway and Switzerland, Articles 21 et seq. of the Lugano Convention shall apply.

As for the Brussels and Lugano Conventions, a working group has already completed preparatory work with a view to having them adapted.[14] Although the working party has since been dissolved, preparatory work is continued.[15] A revision of the Brussels Convention appears to be rather unlikely today. It now seems that a solution may be found that will provide for the application of Council Regulation (EC) No 44/2001 binding the above States, to Denmark also by means of a Treaty to be concluded with that country. The revised Lugano Convention (Lugano Convention II) is likely to adopt the contents of Council Regulation (EC) No 44/2001. Reform work in this field is making little progress at the moment: This is due probably to problems arising from the definition of preconditions for third countries to join the Contracting States as members.

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[13] Abl. L 12, 16 January 2001; unfortunately, Fausto Pocar's report on the new regulations has not been published. This is regrettable as the great use for the interpretation of the reports have been shown by the reports on the Brussels Convention and the treaties of accession.

[14] *See* Kohler, loc. cit., pages 1 et seq.

[15] With respect to reform work, reference is made also to Fricke, 'Europäisches Gerichtsstands-und Vollstreckungsübereinkommen revidiert', VersR 1999, 1055 et seq.; Hausmann, 'Die Revision des Brüsseler Übereinkommens von 1968' EuLF 2000/01 (D), 40 et seq.; Kerameus/Prütting, 'Die Revision des EuGVU – Bericht über ein Grotius Projekt', ZZPInt 3 (1998), 265 et seq.; Wagner, 'Die geplante Reform des Brüsseler und des Lugano-Übereinkommens', IPRax 1998, 241 et seq.

1. *Lis Pendens*

a. *Proceedings 'Brought' Instead of Lis Pendens*

Problems arising from qualification of *lis pendens* in accordance with national law and brought to light by the decision rendered by the European Court of Justice in the matter of *Zelger v. Salinitri II*, are solved by Article 27 of Council Regulation (EC) 44/2001, substituting the term '*lis pendens*' with 'proceedings brought'. This modification has already met with advance approval in literature, in particular, the Grotius Programme working group.[16] With a view to forestalling difficulties in its interpretation, Article 30 of the Regulation provides a definition of the term 'proceedings brought'.

Proceedings are deemed to have been brought, and the court seized, upon lodging the document instituting proceedings or equivalent document with the court. However, the effects of proceedings brought in this manner shall end if the plaintiff fails to comply in due course with his or her duty to arrange for the document to be served on the defendant. With regard to German law for instance, this means that:

> under the terms of the German Law on Court Fees (§ 65 GKG) the statement of claim is served on the defendant only after the advance towards the court costs has been paid. However, the plaintiff does not have to pay the advance when filing the claim. He or she may wait until the court requests him or her to do so.[17] Once the plaintiff has been summoned to pay, he must pay the amount required without delay. Time allowed for payment does not, as a rule, exceed two weeks, a period the German jurisdiction deems adequate insofar as the retroactive effect of the service of the complaint on the defendant refers – for the purpose of interrupting the period of limitation – to the day the complaint was filed with the court.[18] These principles apply also within the scope of Article 30 paragraph 1 of Council Regulation (EC) 44/2001 of 22 December 2000, with no modification being brought about by Council Regulation (EC) 1348/2000.[19] Paragraph 9 refers to the law of the state of the forum.

If the plaintiff brings an action against a defendant domiciled in Pisa on 1 June 2002, at the Landgericht (district court) Stuttgart, paying the advance toward court cost when filing the action, effects in accordance with Article 27 of the Council Regulation are produced on the same day. If the plaintiff waits for the court to summon him or her to pay the advance, whereupon he or she makes payment within two weeks, the

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[16] *See* Otte/Prütting/Dedek, European Review of Private Law 2 (2000), 257 et seq. (275 et seq.).

[17] See BGH NJW 1986, 1347; 1993, 2811.

[18] *See* BGH NJW 1986, 1347; KG VersR 1994, 922.

[19] With respect to the provisions on service as amended by the Council Regulation, see Geimer (G.), 'Neuordnung des internationalen Zustellungsrechtes', 1999.

effects produced are the same. If, however, the plaintiff fails to pay the advance within two weeks, effects in accordance Article 27 of the Council Regulation are produced only from the date the complaint is actually served in Pisa, which may take weeks. If, in the meantime, the defendant has brought an action with identical subject matter in Pisa, this action will precede. The plaintiff therefore is well-advised to make payment of the advance toward court cost when filing the action.

The second alternative under Article 30 of the Council Regulation concerns the action brought under French law and the law of other Latin countries. Here, service (l'assignation) - at least with respect to certain forms of filing an action - is effected before the document instituting the proceedings is lodged with the court.[20] In this case, the plaintiff must immediately take any necessary steps to cause the action to be filed.

b. International Lis Pendens – Legal Consequences

As for legal consequences of *lis pendens* there has been no change compared to Article 21 of the Brussels Convention. There are two stages to be distinguished:

aa) Proceedings Stayed

Where related actions are pending in the courts of different Member States, any court other than the first court seized, that is the court that is definitely seized of an action pursuant to Article 30 of Council Regulation (EC) 44/2001 at a later stage only, shall stay its proceedings until the court first seized has decided on its jurisdiction, which decision is binding on the court second seized. This applies even in the event of actions where the second court is not prevented from re-examining jurisdiction, in particular consumer actions or proceedings in accordance with Article 35 of the Council Regulation (former Article 28 of the Brussels Convention). A consumer sued abroad therefore cannot seek to have the jurisdiction of the court first seized re-examined by the domestic court applied to at a later stage and called upon to decide on pendency. He shall be in a position to plead incompetence only when recognition and the order of enforcement of the judgment are considered. This is consistent, as the court applied to later is no more entitled to make a prognosis with regard to recognition than it is under the terms of Article 21 of the Brussels Convention.[21] Even if the court applied to at a later stage

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[20] For details see Buschmann, 'Rechtshängigkeit im Ausland als Verfahrenshindernis unter besonderer Berücksichtigung der Klageerhebung im französischen Zivilprozess' 1996, pages 111 et seq.

[21] *See* European Court of Justice – Overseas Union Insurance Ltd. New Hampshire Insurance Co. – European Court of Justice, decision 1991, 3317 = IPRax 1993, 34 with review by Rauscher/Gutknecht, ibid., 21 et seq. = Rev. crit. 1991, 764 with annotations Gaudemet-Tallon = Journal Clunet 1992, 488 with annotations Huet; BGH RIW 1995, 413 = EuZW 1995, 378 with annotations: Geimer = IPRax 1996, 192 with review Hau, loc. cit. 177 et seq.; Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit. Article 21 marginal note 16 with further notes erlating to literature.

deems the court first seized to lack jurisdiction, it is not entitled to give a ruling on the matter.[22]

bb) Dismissal of the Action or Continuation of Proceedings

Where the court first seized has ruled on its jurisdiction, the court applied to later shall continue proceedings provided the court first seized has held that it lacked competence. Otherwise it holds that it lacks competence refusing – as under German law – to hear the action, dismissing it by a procedural decision on the grounds that it is inadmissible, thereby ending the effects of substantive law produced by *lis pendens*, which are determined by *lex causae*,[23] such as for example interruption of prescription or aggravation of liability with retroactive effect.

c. Proceedings Involving the Same Cause Brought With Several Different Courts Simultaneously

Neither Council Regulation (EC) 44/2001, nor the Brussels or the Lugano Convention deal with the problem of the same action being brought simultaneously before several courts. Under such circumstances, which are very rare, Article 27 of the Council Regulation does not apply. None of the courts seized is under the obligation to stay proceedings[24] so that it is possible that two irreconcilable judgments are given with the effect that the domestic judgment constitutes a bar to the recognition of effects produced by the foreign judgment, pursuant to Article 34, point 3 of Council Regulation (EC) 44/2001.

d. Disregard of Foreign Lis Pendens on Account of Excessive Length of Proceedings?

The objection of *lis pendens* raised in domestic proceedings do not raise any issues, as actions before national law courts are intended to be decided on in more or less the same period of time. This is not so where international law of civil procedure is concerned. Proceedings before Belgian or Italian law courts take more time than those instituted before German courts. The authors of the Brussels Convention have knowingly accepted this and, consequently, Council Regulation (EC) 44/2001 has likewise accepted this fact.

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[22] *See* Dohm, 'Die Einrede ausländischer Rechtshängigkeit im deutschen internationalen Zivilprozess', 1996, pages 162 et seq.; Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit. Article 21, marginal note 17; Isenburg-Epple, 'Die Berücksichtigung ausländischer Rechtshängigkeit nach dem europäischen Gerichtsstands- und Vollstreckungsübereinkommen' of 27 September 1968, thesis Heidelberg, 1991, pages 83 et seq.; Schack, 'Internationales Zivilverfahrensrecht', 3rd edition 2002, marginal note 761.

[23] *See* Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit., Article 21 marginal note 53.

[24] *See* Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit., Art. 21 marginal note 25.

This may under certain circumstances deprive the plaintiff to some extent of legal protection or even leave him without legal remedies altogether. Consequently, the German Federal Supreme Court (BGH) has ruled that excessively lengthy proceedings in Italy have set aside the impediment of *lis pendens* preventing proceedings involving the same cause to be brought in German courts.[25] In a judgment rendered later the Court left unanswered the question of whether these principles were to apply also within the scope of Article 21 of the Brussels Convention.[26] The matter is still controversial.[27] It is argued that the decisive criterion should be whether the litigant party concerned is responsible for the delay occurred in the other Member State. The party that has caused the delay shall not be entitled to avail itself of the excessive length of such proceedings. As for the rest, excessively long proceedings bring about the end of *lis pendens* as a bar to proceedings being brought before another court pursuant to Article 27 Council Regulation (EC) 44/2001.[28] Where the excessive length of proceedings is tantamount to a violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 27 of the Council Regulation must be interpreted in such a way that pendency produces its effects abroad only where the duration of proceedings is not unreasonably long.[29] As for determining the point beyond which a delay may no longer be tolerated, case law of the European Court of Human Rights on the excessive length of proceedings may be taken into consideration. The problem remains that in practice an excessive duration of proceedings becomes obvious only after years have elapsed. If, on account of excessively long proceedings abroad proceedings are instituted at home also, it remains quite possible that the foreign judgment be given before domestic proceedings have concluded, which could give rise to a plea of *res judicata*.

2. *Related Actions*

Article 28 of Council Regulation (EC) 44/2001 brings about a regulation that undeniably constitutes a decisive improvement in one respect as compared to Article

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[25] *See* BGH NJW1983, 1269.

[26] *See* BGH RIW 1986, 217 IPRax 1986, 293 with review by Rauscher, ibid., pages 274 et seq.

[27] In agreement Dohm, loc. cit., pages 178, 181; Geimer, NJW 1984, 527; MünchKomm ZPO/ Gottwald, Article 21 EuGVÜ, marginal note 12; Schlosser, EuGVÜ, 1996, Article 21 marginal note 11; Wittibschlager, 'Rechtshängigkeit in internationalen Verhältnissen', 1994, page 132; Isenburg-Epple, loc. cit. page 100, 255; Koch, 'Unvereinbare Entscheidungen i.S.d. Article 27 No. 3 und 5 EuGVÜ und ihre Vermeidung', 1993, page 85.

[28] This is also embodied in Article 9 para. 1 of the Swiss Private International Law Statute, which makes observance of lis pendens abroad dependent on the conclusion of foreign proceedings in due course. Volken, in Heini and others (editor), IPRG, 1993, Article 9 marginal note 23 wants this principle to be applied only to such cases of which it is well known by the court that they are dealt with in proceedings that 'make no headway'.

[29] *See* Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit., Article 21 marginal note 47.

22 of the Brussels Convention. According to the Regulation it is possible, henceforth, to assert that two actions are related even if the two are not pending at first instance.

a. Related Proceedings

Article 28 paragraph 3 of Council Regulation (EC) 44/2001 provides a definition of the term 'related actions', repeating word-for-word Article 22 paragraph 3 of the Brussels Convention. This definition is drawn from Belgian law and is modelled after Article 30 of the 'Code Judiciaire'.[30] The connection between the two actions must be such as to make it necessary – to avoid irreconcilable judgments given in separate proceedings – for the two to be dealt with in joint proceedings leading to one judgment only.

Whereas pursuant to Article 22 of the Brussels Convention related actions are to be considered such only if respective proceedings are pending at first instance, Article 28 of the Council Regulation has dropped the requirement of pendency at first instance, a requirement that has – both in France[31] and in Germany[32] – already been abolished[33] by way of court decisions. Article 28 of the Council Regulation does, however, distinguish between legal consequences in cases where both actions are pending at first instance and cases where this is not so.

b. Legal Consequences of Internationally Related Actions

If related actions are pending at first instance, the court second seized has two options:

First, it may stay proceedings, a decision that is at the court's discretion. It is, however, no more under an obligation to do so than under the provisions of Article 22 of the Brussels Convention.[34] This discretionary decision must take

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[30] *See also* Schütze, 'Die Berücksichtigung der Konnexität nach dem EWG-Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen' RIW/AWD 1975, 543 et seq.

[31] *See* Cour de cassation 27th October 1992, 'Bulletin des arrêts de la cour de cassation – chambres civiles' 1991 I No 263; see also Hackspiel, 'Berichtigende Auslegung von Article 22 EuGVÜ durch die französische Cour de Cassation – ein nachahmenswertes Beispiel?' IPRax 1996, 214 et seq.

[32] *See* OLG Stuttgart RIW 2000, 954

[33] *See also* Schütze/Kratzsch, 'Aussetzung des Verfahrens wegen konnexer Verfahren nach Article 22 EuGVÜ', RIW 2000, 939 et seq.

[34] For regulation pursuant to Article 22 EuGVÜ reference is made to Czernich/Tiefenthaler, 'Die Übereinkommen von Lugano und Brüssel', 1997, Article 22 marginal note 7; Donzallas, 'La Convention de Lugano', 1996 § 1562; Hartley, 'Civil Jurisdiction and Judgments', 1987, page 77; Kropholler, 'Europäisches Zivilprozessrecht', 6th edition 1998, Article 22 marginal note 10; Schütze/Kratzsch RIW 2000, 939 et seq.; (940 et seq.); Texeira de Souza/Moura Vincente, 'Comentario a Convencao de Bruxelas', 1994, page 134.

its bearings from all relevant circumstances of the case concerned. It shall in particular take account of the intensity of the factual relation, the risk of irreconcilable judgments being given, the actual state of the respective proceedings, the factual closeness of the courts applied to.[35] However, the court does not, when deciding whether or not to stay proceedings, weigh the probability of the recognition of the decision.[36]

The court second seized may also hold that it is not competent and dismiss the action under the following circumstances:

- a motion to this effect has been brought by one of the parties;
- the court first seized has jurisdiction for both actions, which, within the scope of the Council Regulation, is almost invariably the case, as in the event of related actions Article 6 No 1 provides for a place of jurisdiction;[37]
- admissibility of the joining of the two actions according to the *lex fori* of the court first seized, which is the case, for instance, under the laws of France, Belgium and Luxembourg.

If the actions are not both pending at first instance, the court applied to second must stay proceedings.

c. Forum Connexitatis

The regulation of internationally-related proceedings would not be complete if the Council Regulation did not provide for a place of jurisdiction for related actions, which is essential to the goal of achieving uniform judgments.

Article 6 point 1 of Council Regulation (EC) 44/2001 lays down rules for jurisdiction in the event of related actions just as Article 6 point 1 of the Brussels Convention.[38] The regulation of Article 6 point 1 of the Brussels Convention has been misused as a result of its broad wording to the effect that, by creating a local joined party. Consequently, a forum could be constructed for actions to be brought against a plaintiff domiciled in an other Contracting State. The European Court of

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[35] *See* Czernich/Tiefenthaler loc. cit., Article 22 marginal note 7; Donzallas, § 1567; Schütze/Kratzsch, RIW 2000, 939 et seq. (942).

[36] *See* Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit., Article 23 marginal note 12; Schütze/Kratzsch, RIW 2000, 939 et seq. (942).

[37] The decision rendered by the court applied to later is not binding on the court first seized; see also Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit., Article 23 marginal note 18.

[38] *See* Banniza von Bazan, 'Der Gerichtsstand des Sachzusammenhanges im EuGVÜ, im Lugano-Übereinkommen und im deutschen Recht', 1995; Geimer, 'FORA CONNEXITATIS – der Sachzusammenhang als Grundlage der internationalen Zuständigkeit', WM 1979, 350 et seq.; Gottwald, 'Europäische Gerichtspflichtigkeit kraft Sachzusammenhangs', IPRax 1989, 272; et seq.; Rohner, 'Die örtliche und internationale Zuständigkeit kraft Sachzusammenhangs' thesis Bonn 1991; Spellenberg, 'Örtliche Zuständigkeit kraft Sachzusammenhangs', ZvglRWiss. 79 (1980), 89 et seq.

Justice reacted to this in 1988, in the matter of *Kalfelis v. Bankhaus Schröder*[39] by restricting the scope of application of the provision to such actions as are linked by a factual relation. The wording of Article 6 point 1 of the Council Regulation takes account of the jurisdiction incorporating it in the tenor of the provision, without thereby bringing about a material change as compared to the legal situation prevailing previously.

According to Article 6 point 1 of Council Regulation (EC) 44/2001 there is a forum for related actions if:

- the defendant is domiciled in a State where the Council Regulation applies;
- the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments given in separate proceedings; and
- proceedings have not been brought solely with a view to depriving the defendant of the jurisdiction at his domicile, the *forum domicilii*. The latter condition is not explicitly referred to by the Council Regulation. It arises, however, from the general principle prohibiting malice and any behaviour contrary to loyalty and good faith in civil proceedings.[40]

It makes no difference whether or not the action brought against the domestic defendant is founded or admissible. The one exception to this rule is the inadmissibility of the action, because of non-existing international or local jurisdiction, brought against the domestic defendant.[41]

IV. Conclusion

The reform of the provisions on *lis pendens* and related actions of Council Regulation (EC) 44/2001, does not bring about any substantial innovations compared to the previous legal situation. It merely remedies, in accordance with jurisdiction and literature, such problems as have appeared in the application of the Brussels and Lugano Conventions. Therefore it may rightly be said: All Quiet on the Western Front.

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[39] European Court of Justice 5565 = NJW 1988, 3088 with annotations by Geimer = RIW 1988, 901 with annotations Schlosser, ibid., pages 987 et seq. = IPRax 1989, 288 with review by Gottwald ibid. pages 272 et seq.

[40] See Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit. Article 6 marginal note 23; Kropholler, 'Europäisches Zivilprozessrecht' loc. cit., Article 6 marginal note 12.

[41] *See* Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', loc. cit. Article 6 marginal note 26; Kropholler, 'Europäisches Zivilverfahrensrecht', loc. cit. Article 6 marginal note 13; Schlosser, EuGVÜ, 1996, Article 6 marginal note 3.