

## PART 5

### JURISDICTION AND COURT VENUE

#### CHAPTER 4

#### LIS PENDENS, RELATED ACTIONS AND PARALLEL LITIGATION

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## 1 Introduction

### 1.1 The Meaning and the Scope of the Subject; the Setting in which Parallel Litigation Occurs; the Varying Responses to and Remedies for Parallel Litigation

- 1 Different legal systems give different definitions and offer different procedural remedies to the existence of different court proceedings that somehow relate to the same factual dispute and share certain common features (such as the same parties, the same cause of action, or the same relief requested). Therefore, performing a comparative and concise analysis of *lis pendens*, related actions, and parallel litigations is not an easy task.
- 2 The concept of parallel litigation denotes the concurrence of multiple lawsuits through proceedings to resolve legal disputes, brought before different courts located in the same or different states. It covers various scenarios in the world of national and transnational litigation. It may involve identical lawsuits as well as related lawsuits. Depending on the approaches adopted, the identity of lawsuits may arise from a common set of facts or depend on common legal characteristics, such as the same parties, the same cause of action, and the same measures or remedies requested by different courts. Relatedness evokes a looser bond between claims which may arise from the facts linked together as predicates for the claims or from rights.
- 3 The term parallel litigation can also be used with a broader meaning to include claims in the sense of proceedings brought before a national court or another arbitral tribunal (national or international) in which the parties and one or more of the issues are the same or substantially the same as the one before the arbitral tribunal in the current

arbitration.<sup>1</sup> The term *lis pendens* or *lis alibi pendens* (literally 'a litigation is pending elsewhere') is often used in two different ways: it may be a Latin-sounding equivalent of *parallel proceedings*, and as such it is employed in a variety of legal systems; or it may identify a specific way of dealing with parallel proceedings, commonly found in legal systems belonging to the civil law tradition, namely that the proceedings first-filed are given priority over the others.

- 4 In recent years, discussions on conflicts of jurisdiction have increased. In this context, special attention has been paid to the issue of parallel proceedings in international disputes.<sup>2</sup> Additionally, the Permanent Bureau of the Hague Conference on Private International Law (HCCH) drafted a comparative note on *lis pendens* in the 'Recognition and enforcement of foreign judgments' in October 2015, which also focuses on this subject.<sup>3</sup> Furthermore, the Hague Conference is considering the preparation of a Convention that establishes rules to address questions of parallel proceedings when

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<sup>1</sup> For an overview see J P George, 'International Parallel Litigation – A Survey of Current Conventions and Model Laws' (2002) 37(3) Texas International Law Journal 499 <https://scholarship.law.tamu.edu/facscholar/263> accessed 28 August 2024. The Author defines repetitive actions as 'multiple suits on the same claim by the same plaintiff against the same defendant' (footnote n 1); related litigation 'separates cases involving similar parties or issues to which claim preclusion may not apply but which are eligible for issue preclusion and to some extent, subject to criticism as wasteful litigation' (footnote n 2), and derivative litigations 'a first suit for liability, with a second suit by the defendant's insurer seeking a declaration of nonliability on defendant's policy' (footnote n 3); J J Fawcett (ed), *Declining Jurisdiction in Private International Law* – Reports to the XVI Congress of the International Academy of Comparative Law, Athens August 1994 (Oxford University Press 1995) section 1.2. (Final Report on *Lis Pendens* and Arbitration); C McLachlan, *Lis Pendens in International Litigation* (Pocketbooks of the Hague Academy of International Law/ Martinus Nijhoff 2009); G A Bermann, 'Parallel Litigation: is Convergence Possible?' in A Bonomi and G P Romano (ed), *Yearbook of Private International Law, Vol. XIII (2011)* (Otto Schmidt/De Gruyter 2012) 21; R A Brand, 'Challenges to *Forum Non Conveniens*' (2013) 45 New York University Journal of International Law and Politics (JILP) 1003; A Briggs, *Civil Jurisdiction and Judgement* (Routledge 2021); for a discussion of the doctrine of *forum non conveniens* in common law system, and the doctrine of *lis pendens* in civil law system, R A Brand and S R Jablonsky, *Forum non conveniens, History, Global Practice, and the Future Under the Hague Convention of Choice of Civil Agreement* (Oxford University Press 2007); see also R A Brand, 'Forum Non Conveniens' and G A Bermann, 'Anti-Suit Injunctions: International Adjudication' in A Peters and R Wolfrum (ed), *The Max Planck Encyclopedia of International Law* (Oxford University Press 2008–) [www.mpepil.com](http://www.mpepil.com) accessed 25 November 2024; D Forstén, 'Parallel Proceedings and the Doctrine of *Lis Pendens* in International Commercial Arbitration' (2015) Master's Thesis, University of Uppsala <https://www.diva-portal.org/smash/get/diva2:813565/FULLTEXT01.pdf> accessed 24 July 2024.

<sup>2</sup> The strategic seminar 'Conflicts of Jurisdiction, Transfer of Proceedings and Ne Bis in Idem: Successes, Shortcomings and Solution', jointly organized by Eurojust and the Latvian EU Presidency, took place in The Hague on June 4, 2015, addressing this topic'.

<sup>3</sup> Hague Conference on Private International Law (HCCH), 'Comparative Note on *Lis Pendens* in the Recognition and Enforcement of Foreign Judgments' <https://assets.hcch.net/docs/0b10dd22-a15e-4b8a-b72b-2df1df712007.pdf> accessed 24 July 2024.

courts in more than one State are seized with the same or related claims under their respective jurisdictional rules.<sup>4</sup>

- 5 The increasing internationalization of business with unprecedented mobility of people, goods, and financial instruments has created social, cultural, and economic connections, as well as the inevitable attendant disputes. These disputes frequently fall into the adjudicatory jurisdiction of multiple States as a consequence of two concurrent factors. First, modern cross-border activities result in an increase in the number of states with significant legal or factual connection to a given transaction or relationship. In the case of the sale of goods, for example, many stages might justify a jurisdictional connection, from the contract offer to the contract acceptance to the payment and financing arrangements through banks. Each of these stages may be considered important to national rules determining judicial jurisdiction. Secondly, national sovereigns may have different views on the proper scope of personal jurisdiction and may value different interests in vesting their courts with the power over resulting disputes. Parallel proceedings in the courts of two or more states can and do result from jurisdictional rules that provide multiple judicial fora for the resolution of a single cross-border dispute. The fact that the relevant jurisdictional criteria in one state may differ from those adopted in another does not necessarily make litigation in one of these states better than the other. It is the differences in procedure and substantive law between available fora that give private parties strong incentives to litigate in one country rather than another. *Forum shopping* is often seen as a negative expression; but it is only a pejorative way of saying that if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be favourably presented. This should be a matter neither for surprise nor for indignation.
- 6 In some cases, the plaintiff in one litigation, after starting a lawsuit in country A, commences another lawsuit in a different jurisdiction against the same defendant(s) seeking the same kind of relief. This may be because the plaintiff realizes that the defendant's assets are in multiple jurisdictions and wants to eventually enforce the judgment in all jurisdictions. The plaintiff may also start a second proceeding to take advantage of litigation financing tools like contingent fees not available in country A or make use of more liberal rules of discovery available in country B. In other cases, parties to a civil dispute will find it advantageous to start litigation in the courts of more than one country, with each party seeking a resolution of the dispute in what is perceived to be the substantive choice of law more favourable to them. Strategies of this kind may assume a variety of forms. There are situations in which one party seeks declaratory relief in one forum, and the opponent asks for affirmative relief regarding the same legal

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<sup>4</sup> See P Herrup and R A Brand, 'A Hague Convention on Parallel Proceedings' (2022) 63 Harvard International Law Journal Online 1. The Authors also provide suggestions on the architecture and certain critical features of a convention in this area. P Herrup and R A Brand, 'A Hague Parallel Proceedings Convention: Architecture and Features' (2023) 2 Chicago Journal of International Law Online 1.

relationship in another forum. A party who expects to be sued in another forum may be motivated to rush into a court applying favourable tort law, asking for a declaration that he has no legal obligation to the other person or entity. Additionally, there are situations where the same parties, although in different positions, file the same suit in different forums. Parallel actions are being brought in an increasing number of civil disputes having an international or transnational nature in areas such as tort, international sale of goods, product liability, antitrust, family matters, etc.

- 7 The critical (worrying) aspect of this phenomenon is that parallel litigation, ie, the concurrence of lawsuits in the courts of two different legal systems over the same or closely related matters, may and frequently does represent some form of abuse. The abuse can lay in the way in which an action is framed, such as in the case of declaratory relief, or in the sequence in which the proceedings are started. A party by being the first to commence an action, may attempt to make the pre-emptive strike of preclude or delay an action of the party seeking to resolve the dispute in the proper forum. Conversely, it could result from the threat of litigation in an inappropriate forum, prompting an action in an appropriate forum for a declaration that the applicant is not liable. The challenges presented by parallel proceedings have also become more prevalent because litigants are taking advantage of the increased liberal regimes in forum selection that have been adopted under the law of most countries.
- 8 While it may be hard to know which party has acted opportunistically or abusively, parallel litigation has clearly undesirable effects: financial burden, waste of judicial resources, and contradictory judgments. Parties may be forced to bear the added cost of fighting multiple proceedings in different courts. Parallel litigation also consumes judicial resources in multiple jurisdictions, exacerbating docket congestion and resulting delays, which already represent a serious problem in many countries. Moreover, when both litigations reach final judgments, there is no assurance that such judgments will be consistent with each other.
- 9 Thus, there are good reasons to pay special attention to parallel litigation arising in both the transnational and the domestic context, to investigate the various possible strategies and devices that have been developed to deal with the phenomenon and mitigate its undesirable effects. It is crucial to consider the various approaches that have been taken, including the rules that have emerged to cope with the relevant issues and analyse the implications of the various responses to parallel litigation that have been established in the major legal systems.
- 10 As to the term *lis pendens*, already mentioned, it is commonly used in the tradition of the civil law systems both to describe the phenomenon of concurrent lawsuits in concurrent jurisdictions and to indicate the regulatory instrument devised to handle the arising implications. In other words, it refers to the mechanism established to prevent or stop duplication of legal proceedings and avoid the connected risk of conflicting

judgments, as well as to respond to the high costs and waste of time caused by multiple lawsuits for courts and parties.

- 11 *Lis pendens* was part of Roman Law transferred to the jurisprudence of continental Europe. The issue was also known in England and the United States, given that *lis pendens* and related actions are fundamental principles in any efficient judicial system, both domestic and international. Lord Bacon adopted the rule of *lis pendens* into chancery and 'gave it efficiency and precision, as a part of the body of the common law of England'.<sup>5</sup> James Fawcett has described the doctrine of *lis pendens* as applicable in a 'situation in which parallel proceedings involving the same parties and the exact cause of action are continuing in two different states at the same time',<sup>6</sup> thereby emphasizing that in contrast to the empirical approach that would look to see if the cases arise from a common set of relevant facts, civilians prefer the three customary elements of identifying claims: the parties, the *causa petendi* (subject matter) and the *petitum* (object). At the normative level, to cope with situations where proceedings over the same matter between the same parties are instituted or pending before different courts or jurisdictions, civilian legislators typically rely on clear and strict rules in line with their Code's remedies and private international law provisions.
- 12 A well-known example of an instrument adopting this approach was Art 21 of the Brussels Convention (now replaced in the wording but not in its basic thrust by Regulation 1215/2012).<sup>7</sup> Under such provisions, when dealing with matters of parallel proceedings, courts are required to carry out an investigation conceived as largely mechanical. In order to retain or decline jurisdiction, courts will only assess certain prerequisites which are defined in an objective manner and leave no space for a subjective appraisal. In principle, courts are not expected to go beyond this inquiry and evaluate factors different from those listed by the relevant provisions. In particular, they are not supposed to take into consideration whether or not the foreign forum appears to be in 'a better position' to decide the dispute, whether or not the foreign proceedings offer satisfactory guarantees of a fair trial, or whether or not the foreign action has been instituted simply with a view to preventing litigation in the domestic forum.

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<sup>5</sup> J I Bennett, *A Treatise on the Law of Lis Pendens: or the Effect of Jurisdiction upon Property Involved in Suit* (1st edn 1887, reprinted Beard Books Inc 2000) 64.

<sup>6</sup> J J Fawcett, 'Final Report on Lis Pendens and Arbitration' in J J Fawcett (ed), *Declining Jurisdiction in Private International Law – Reports to the XVI Congress of the International Academy of Comparative Law, Athens August 1994* (Oxford University Press 1995) section 1.2.

<sup>7</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (EU) Article 21 provided that: '1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.



- 13 The temporal criterion (first seized court), the typical response of the civilian tradition, is favoured for its objectivity, predetermination, and certainty. In principle, it is intended to minimize uncertainties resulting from the judge's handling of flexible standards and avoid wasteful duplicative litigation. On the other hand, the strict rule has its downsides and pitfalls in that it allows parties to strategically use litigation through a *race to the courthouse* undermining fairness and creating delays in the proceedings. A party foreseeing an action against it starts its action first in a court of its choice. The strict application of the *court first seized rule* results in the consequence that if one party starts proceedings first in a particular court, all other courts (including any court chosen by agreement between the parties) must stay or suspend any parallel proceedings on the same matter until the court seized first has rendered its decision or determine that it cannot adjudicate the matter.
- 14 Common law systems adopt different instruments to respond to the challenges of parallel proceedings. They rely on devices that favour a multi-factor test and measure detail and nuance but lack consistency and predictability.<sup>8</sup> The common feature of such instruments is to encourage reflection on how to manage concurrent lawsuits on identical or similar matters and to determine whether to let both cases unfold or stop one of the two. The *forum non conveniens* doctrine and anti-suit injunctions play a vital role. Choices are usually attributable to the need to ensure proper administration of justice, but they enclose different policies and different severity in terms of defining the *appropriateness* of the forum to entrust with the resolution of the dispute or to prevent from deciding the case. In a broader perspective, the *forum non conveniens* doctrine can be seen as a mechanism of self-restraint favouring cooperation among courts and jurisdictions, whereas (international) anti-suit injunctions operate as a device of restraint or defeat of the jurisdiction of a foreign court. At the same time, it is important to make clear that in many common law countries, the traditional solution is also well and alive to let litigation proceed in multiple countries, with the resolution of the matter coming at the stage of recognition and enforcement of the first judgment issued by the various courts considering the matter.
- 15 The different methodological attitudes and strategies displayed by the common law and civil law systems in coping with the relevant issues reflect their cultural backgrounds, legislative attitudes, and historical experiences. As Oscar Chase properly reminds us, the comparative perspective 'highlights the reality that procedural systems are the product of choice; there is no universal consensus on how best to serve the values of accuracy, fairness and efficiency, and even on whether these are values that a procedural system ought to serve'.<sup>9</sup>
- 16 This contribution will analyse the main features of the two macro areas of civil law and common law, with a specific *focus* on the solutions adopted by some countries operating

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<sup>8</sup> George (n 1) 501.

<sup>9</sup> O Chase, *Civil Litigation in Comparative Context* (West Academic Publishing 2017) 1.

within these areas, drawing comparative considerations with countries from different continents. Considering best law responses and supranational law attitudes, we will examine how the strict rules solution plays out a vis-à-vis multifactor test at an internal law level within a single jurisdiction and internationally. Specific attention will be drawn to the responses developed in the European Union, where lawmakers and case law have shaped solutions capable of harmonizing the different settings in the varying reactions to parallel litigations.

## 2 THE CIVIL LAW APPROACH: THE 'RULE' FORMAT. PARALLEL PROCEEDINGS IN CONTINENTAL EUROPEAN COUNTRIES

### 2.1 The Domestic Responses to Intra-Jurisdictional Parallel Proceedings. The *Lis Pendens* Doctrine and the Management of Identical Claims. The Triple Identity Test: A. The Parties; B. The Grounds (Subject Matters-*Causa Petendi*), and C. The Object (*Petitum*). The First-In-Time Rule

- 17 *Lis pendens* in the civil law tradition has standard features: the same method to handle parallel proceedings but with specific interpretative differences of the concepts involved. *Lis pendens* exists when two or more *identical* actions are pending before different courts. That is known as the *triple identity* test: same parties, *causa petendi* (same subject matter) and *petitum* (same object).
- 18 In principle, the triple identity test requires the following: (1) *same parties*, a condition that recurs when litigating parties, are the same in every pending cause. Establishing this can be complicated, such as when different persons have the same substantial position (eg, insurer and insured versus third party); (2) *same subject matter*, commonly called in civil law through the Latin expression *causa petendi*, refers to the same facts, rights, and (often but not always) the same rules of law as the basis of the action; (3) *same object*, also indicated as *petitum*, is the type of measure or result pursued by the various pending proceedings. National legislations usually require these elements, even if there are differences in their notions and recurrence. The first-in-time rule is generally applied. It means that the court first seized has jurisdiction over the litigation and continues to hear the proceeding. The court seized later must dismiss the action in favour of the court first seized.
- 19 In the following paragraphs, the Italian system will be described as a model of the civil law tradition, but reference will be made also to other countries that may provide similar solutions. Eventually, their peculiarities will be regarded. We may consider that essentially the same solutions are adopted in Spain, Portugal, Austria, Switzerland, and Latin America.

## 2.2 The Case of Italy

- 20 The Italian approach to parallel litigation implicates crucial issues of civil procedural theory. Firstly, the rules concerning *lis pendens* and related actions are part of the discipline of jurisdiction and must comply with the relevant legal system's principles. They are placed within the scope of Art 25 the first paragraph of the Italian Constitution, according to which 'no one can be diverted from the natural judge already established by law'. The guarantee implies that only the law may dictate the criteria to identify, prior to the trial, both the competent court and the mechanisms for designating the individual judge to decide the dispute. The same principle is applied in Art 6 of the ECHR and Art 47 of the Charter of Fundamental Rights of the European Union.
- 21 As mentioned above, certainty, predetermination and predictability are fundamental jurisdiction principles in civil law systems. Their fruition requires strict jurisdiction rules, parallel litigation remedies, and strict powers for the parties to oppose *lis pendens* (elect the forum or proceed with arbitration). *Lis pendens* and related actions are governed by Arts 39 and 40 of the Italian Code of Civil Procedure (ITCCP), but other provisions concern the consolidation of related actions (for instance, Art 31 ff, 103, 295 ITCCP). As previously mentioned, the 'objectives of these provisions are not dissimilar to those pursued by the *lis pendens* rule of Article 39: conservation of judicial resources, procedural economy, uniformity of judgements.'<sup>10</sup> There are characteristics of any civil law system; however, Italy adds a very formal character to the process. The law strictly governs what the parties can do in the process and how and when to do it under penalty of expiry.
- 22 The management of *lis pendens*, related actions, and parallel proceedings depends on the document's content instituting the lawsuit, known as *domanda giudiziale* (legal claim) in Italian. While there is agreement on recognizing *lis pendens* upon the occurrence of the three aforementioned identities (parties, subject matter, and object), the issue becomes very significant when verifying the role of the *petitum* and *causa petendi* in identifying the claim and the delimitation of the respective concepts.
- 23 At the abstract level, *causa petendi* is identified in the factual and legal aspects of the case from which the right asserted in court arises. On a concrete level, however, several aspects require further examination. The expression *domanda giudiziale* becomes more significant in a national civil procedural culture. In the document instituting the proceeding, the party asserts specific rights and requests particular measures from the court to obtain judicial enforcement of the aforementioned rights. The claim's structure determines the judgment's subject matter. Delicate questions also surround the power of the parties to amend and modify the initial claims. The expression 'domanda giudiziale' is linked to the concept of 'action', which constitutes the 'traditional hinge

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<sup>10</sup> N Trocker, 'Italy' in J J Fawcett (ed), *Declining Jurisdiction in Private International Law – Reports to the XVI Congress of the International Academy of Comparative Law, Athens August 1994* (Oxford University Press 1995) 283.

between substantive rights and the trial', as defined by Vittorio Denti to express its function.<sup>11</sup> Promptly, this is a non-trivial objective in light of the extensive and complex doctrinal elaboration of which the theory of action has been the subject, starting with the studies of the Master G Chiovenda.<sup>12</sup>

- 24 From another perspective, identifying the claim in court relies on the *fact*. It is essential to immediately clarify that the *fact*, of the sure naturalistic base, is regulated by the legislator in the categories denoted by Art 2697 of the Civil Code. This is a novelty introduced by the 1942 Civil Code, which accepted the most detailed doctrine analyses in reforming Art 1312 of the previous Civil Code (1865), clearly inspired by the Napoleonic Civil Code, limited to identifying the binomial constitutive fact-extinguishing fact.
- 25 These few lines already make it clear to the foreign observer how civil litigation of practical relevance and in need of simple and specific solutions, suffers greatly (and perhaps too much) from the theoretical elaboration that has developed around critical concepts of the process, creating uncertainties of a practical nature. The problem of parallel litigation is set in this rich and problematic context, in which the legislative datum is integrated with doctrinal and jurisprudential elaboration.

#### 2.2.1 *Lis Pendens ex Art 39 (1) CCP. The Triple Identity Test.*

- 26 The first paragraph of Art 39 ITCCP identifies *lis pendens* when 'the same proceeding' is brought before 'different judges'. In these circumstances, the court first seized has jurisdiction for the entire dispute.
- 27 The rule states:

If actions involving the same parties and having the same object are pending before different courts, the judge before whom the action was filed later, at any time and instance of the proceeding, also sua sponte, issues an order stating the *lis alibi pendens* and orders the striking of the case from the General Register of the proceedings.<sup>13</sup>

- 28 The notion of 'same proceeding' has no legislative definition and is drawn from doctrinal and jurisprudential considerations. The customary view recognizes this recurrence when the two cases are *identical*. The relevant identity must be whole; it occurs when the two proceedings have identical parties, identical measures requested of the court (customarily indicated as *petitum* or immediate), and when the identical grounds on

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<sup>11</sup> V Denti, *La giustizia civile* (Bologna, Il Mulino 1989) 115.

<sup>12</sup> G Chiovenda, *L'azione nel sistema dei diritti* (Ditta Nicola Zanichelli 1903).

<sup>13</sup> The translation is taken from S Grossi and M C Pagni, *Commentary on the Italian Code of Civil Procedure* (Oxford University Press 2010) 106.

which the claim is based (customarily marked as *causa petendi*). The case law of the Court of Cassation is constant in stating that:

Pursuant to Article 39 of the Code of Civil Procedure, a *lis pendens* exists when the claims are identical not only in terms of the parties but also in terms of the *petitum* [subject-matter] and *causa petendi* [cause of action], one being understood as the object whose protection is sought, the other as the fact constituting the claim, it being irrelevant in the recurrence of the identity of the two objective elements that a party formally assumes the position of the plaintiff in one case and the position of the defendant in the other case. Consequently, with regard to two proceedings concerning the refusal to renew a lease for non-housing purposes on its first expiry date, in respect of which, in the first, the tenant is acting to ascertain the invalidity of the reasoned notice of termination pursuant to Article 29 of Law no. 392 of 1978, while in the other it is the landlord who by virtue of the same notice requests the release of the property on the first contractual date, the identity of the causes of action must be recognised, the *thema decidendum* being the same between the same parties in the identity of the *causa petendi*.<sup>14</sup>

- 29 Just like the *petitum* and the *causa petendi*, the identity of the parties is also rigorously analysed. The only acknowledged diversity occurs when the party has an inverted procedural position (eg, the plaintiff in the first action is the defendant in the second action, for instance, *Corte di Cassazione* No 17443<sup>15</sup>). Such a rule is founded on the *ne bis in idem*, which precludes a new action on the same subject matter between the parties when a precedent action has begun in front of another court.<sup>16</sup> It answers the inalienable requirements of public procedural order and does not allow the same judge or different judges to rule twice on the same claim (ie, *Corte di Cassazione* No 15341<sup>17</sup>).

### 2.2.2 *The Remedy. Dismissal of the Second Lawsuit in the Event of Lis Pendens. Determination of the Court First Seized*

- 30 *Lis pendens* is strictly regulated by law, and the judge cannot choose which action to proceed with. As established by the first paragraph of Art 39 ITCCP, the first lawsuit filed precludes the second proceeding. The last paragraph of Art 39 states, ‘The prevention shall be determined by the service of the summons or the lodging of the application’.
- 31 The determination of the first proceedings depends on the document type instituting the lawsuit. The rule sets the so-called ‘prevention principle’, which implies that the only relevant criterion is chronological. According to the rule, if the document has to

<sup>14</sup> Case No 792 (Court of Cassation, Italy), Judgment 19 January 2001.

<sup>15</sup> Case No 17443 (Court of Cassation, Italy), Ordinance 31 July 2014.

<sup>16</sup> See G Chiovenda, ‘Rapporto giuridico processuale e litispendenza’ in G Chiovenda (ed), *Saggi di diritto processuale civile II* (Rome, Il Foro Italiano 1931) 376.

<sup>17</sup> Case No 15341 (Court of Cassation, Italy), Judgment 21 July 2005.

be served prior to being lodged with the court, the court is deemed seized at the time when the documentation is received by the recipient (defendant). If the document does not require service prior to being lodged with the court, the court is deemed seized at the time of its lodging. It is essential to underline this aspect, even though the Constitutional Court ruled<sup>18</sup> that service is complete (as regards the notifier) when the document instituting the proceedings is received by the authority responsible for the service.<sup>19</sup>

- 32 The are no exceptions to the rule. The second lawsuit must be dismissed, even if the forum is closer to the dispute, continuing the second dispute would be more convenient in terms of efficiency and/or economic reasons, investigative activities have been carried out in the second dispute, or the second court is not competent.<sup>20</sup> The same rule applies where a court not designated in an exclusive choice-of-court agreement has been seized. The Court of Cassation affirmed in judgment no 19056 of 31 July 2017 that *lis pendens* must be declared by the subsequent court seized, even if the dispute is pending on an appellate level.<sup>21</sup> However, case law concerning this specific issue appears to be uncertain.

### 2.2.3 'Continenza' and Related Action

- 33 The Italian procedural law recognizes, alongside the *lis pendens*, the concept of *continenza* (continence), governed by the second paragraph of Art 39 of the Italian Code of Civil Procedure<sup>22</sup>, and the idea of related actions governed by Art 40 ITCCP. The law

<sup>18</sup> Case No 477 (Constitutional Court, Italy), Judgment 20 November 2002.

<sup>19</sup> Case No 16446 (Supreme Court, Italy), Judgment 15 July 2009, held that 'For the purposes of the application of the criterion of prevention, in the matter of *lis pendens* and continuance of lawsuits, the time at which the notification of the summons was perfected, with the receipt of the document by the addressee or with the completion of the subrogation formalities, and not the time at which the notification was requested by the plaintiff to the judicial officer, must be taken into consideration'.

<sup>20</sup> Case No 17443 (Court of Cassation, Italy), Judgment 31 July 2014, held that 'For the purposes of the declaration of *lis pendens*, it is necessary to have regard exclusively to the criterion of prevention, while any investigation into the effective competence of the judge previously seized to hear the dispute is irrelevant even if the judge subsequently seized holds the competence to hear the case, answering that institution to the need to avoid the simultaneous pending of two judgments with the same procedural elements, and, therefore, an inadmissible duplicity of judicial actions in relation to the same subjective right, with the consequent danger of contradictory judgments'.

<sup>21</sup> Case No 19056 (Court of Cassation, Italy), Judgment 31 July 2017, in DeJure database: 'According to Art. 39(1) of the Code of Civil Procedure, where the same case is brought before different courts, the court subsequently seized is required to declare a *lis pendens*, even if the case brought earlier has already been decided in the first instance and is now pending before the appellate court, without it being possible to stay the proceedings brought later under Art. 295 or Art. 337(2) of the Code of Civil Procedure, which is precluded by the identity of the claims formulated in the two different proceedings'.

<sup>22</sup> Article 39 (2) ITCCP states the following: 'In the case of a continency of actions, if the court first seized has jurisdiction also over the case subsequently brought before it, that court shall declare by order the continency and prescribe a time limit within which the parties must resume the proceedings before the first court. If the court first seized does not have jurisdiction also over the case subsequently brought before it, the declaration of continuity and the setting of the time limit shall be made by that court'.



does not define the concept of continence, leaving it to doctrine and jurisprudence. The concept of *continenza* expresses a rigorous link with the pending claims. It lies between *lis pendens* and related actions and concerns disputes in which the claims overlap only partially. In other words, these actions contain other actions whose subject matter contained within the subject matter of another action. Due to this aspect, continence is considered a partial *lis pendens*.

- 34 In such a case, if the court before which the first action was brought also has jurisdiction for the subsequently brought action, the second court shall, by order, declare the existence of joined actions and prescribe a final time limit within which the parties must reinstate the action before the first court. Otherwise, if the first court is not the proper forum for the second action, it shall declare by order the existence of joined actions and prescribe a time limit within which the parties must reinstate the action before the second court. The existence of actions containing other actions may be declared by the judge *sua sponte*, but the parties may raise the objection of the existence of actions containing other actions at all stages and instances of the proceedings.<sup>23</sup>
- 35 The concept of *continenza* has expanded over time due to a growing favour for the simultaneous processus, ie, the joint handling of the proceedings. Cases involving parties with identities and quantitative variations in the *causa petendi* and the *petitum* (eg, claims concerning the same contract) are brought under continence. Cases with identical *causa petendi*, identical parties, but different *petitum* due to the inverted position of the parties in the two judgments, are also categorized as continence. Recently, in its ruling no 22830 of 21 July 2022, the Civil Cassation confirmed the existence of continence in two different lawsuits concerning the positive and negative ascertainment of the same shareholder status.<sup>24</sup>
- 36 In the case of *continenza*, the first court seized will oversee the proceedings if it has jurisdiction over both claims; if the first court does not have jurisdiction, the joinder will take place in the second court. The cases must be pending at the same level. If they are pending at different levels, the action to be absorbed is necessarily stayed.<sup>25</sup> The rule is strictly enforceable, and there is no room for *forum convenience* considerations.<sup>26</sup>
- 37 In the case of related actions, the triple identity test is not satisfied, but the connection between the proceedings exists, though it is not strong enough to determine the proceeding's stay or stop. Both causes may proceed separately, even if the legislator prefers the simultaneous processus for efficiency reasons or to avoid the risk of contradictory judgments. For the purposes of Art 40 first paragraph ITCCP, two actions are deemed to be seized, if they are so closely connected that it is expedient to deal

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<sup>23</sup> Grossi and Pagni (n 13) 107.

<sup>24</sup> Case No 2283 (Court of Cassation, Italy), Judgment 21 July 2022, in DeJure, database.

<sup>25</sup> Case No 14944 (Court of Cassation, Italy), Judgment 14 July 2020, in DeJure, database.

<sup>26</sup> Case No 18808 (Court of Cassation, Italy), Judgment 2 July 2021, in DeJure, database.

with them together to avoid the risk of irreconcilable judgments.<sup>27</sup> The court second seized or the court seized of the related action shall order the consolidation of the actions pending before it with those pending before the court first seized or before which the main action is pending. The first-in-time rule is mitigated and applied in the defect of any actions with exclusive jurisdiction.

### 2.3 The Case of France

- 38 In Fawcett's compendium, Professor Gaudemet-Tallon, describing the French system, explained:

[T]he French legal system determines whether the judge has jurisdiction or not. If he has jurisdiction, he must rule and cannot 'decline to exercise jurisdiction'. The expression *forum non conveniens* is extraneous to the French legal system; however, the latter knows about *exceptions de litispendance* (peas of *lis pendens*) and *connexité* (related actions), both of which provide almost the only bases whereby the court may decide not to proceed with the case.<sup>28</sup>

- 39 These few words are sufficient to present the French scenarios of parallel proceedings also today. They include actions in civil and commercial matters pending before two national courts, a national court and a foreign court within or outside the European Union. The same rules apply to parallel proceedings before State courts an arbitral tribunal.
- 40 Art 100 to 103 of the French Civil Procedure Code (FCCP) govern *lis pendens* and related actions; other Articles (104 through 107) concern the effectiveness of the decision on jurisdiction. The system presents all the grounds and all the purposes of the civil law tradition: the judge has no discretionary power about the convenience of the forum; jurisdiction is based on predictability and certainty; and the treatment of the related actions responds to the need of economy of the proceedings, that is, the proper administration of justice.

#### 2.3.1 French Domestic Law. *Lis Pendens* and Related Actions

- 41 Article 100 FCCP states:

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<sup>27</sup> Article 40 ITCCP provided that: 'If two or more related actions are pending before different courts, and it is proper for them to be disposed of in a single proceeding, the court before which the related action was brought shall order the parties to consolidate it with the main action or with the proceedings pending before the court first seized within a set time-limit'.

<sup>28</sup> H Gaudemet-Tallon, 'France' in J J Fawcett (ed), *Declining Jurisdiction in Private International Law – Reports to the XVI Congress of the International Academy of Comparative Law, Athens August 1994* (Oxford University Press 1995) 175.



When the same dispute is pending before two jurisdictions of equal authority, equally competent to rule on the matter, the court second seized must decline to rule in favour of the other court if one of the parties asked it. Otherwise, the court may do so *ex officio*.<sup>29</sup>

- 42 Considering this definition, the prerequisites of *lis pendens* are 'same proceedings' before two courts at the same level, and both competent. The Code does not specify when two causes may be considered 'the same'. According to the tradition, two proceedings are identical if the three customary identification elements are met: the parties, the subject matter, and the object.<sup>30</sup>
- 43 In France, there is no doctrinal elaboration of these elements as complex as in Italy. Much is left to case law. Moreover, there is no such concept as *continenza* in France. Two very similar cases are brought under the *lis pendens* rule, and the others under the heading of related actions. When the parties are not identical, there is no *lis pendens* but, eventually, related actions.<sup>31</sup> There is no *lis pendens* between an action for divorce and one of *separation de corps*<sup>32</sup>, or between an action seeking a provisional measure before the *référé* (referral) court and one seeking a decision on the merits.<sup>33</sup>
- 44 Art 101 FCCP accounts for related actions when two or more issues before different courts are so strictly connected that it is convenient for the proper administration of justice that they are heard together.<sup>34</sup> In this case, the judge has broad discretion to determine the relationship between the proceedings. Still, this cannot be assimilated to the discretion proper of the *forum non conveniens* doctrine.
- 45 When two courts are not of the same level, *lis pendens* or related actions may be heard only before the inferior court (ex Art 102 FCCP). The related actions plea may be rejected if proposed for a dilatory purpose (ex Art 103 FCCP).

## 2.4 The Case of Germany

- 46 In Germany, the *Rechtshängigkeit* (*lis pendens*) is governed by Sections 261 to 263 of the German Code of Civil Procedure (GCCP), establishing its conditions and effects. Pursuant to Section 261 (III) No 1 GCCP, the judge must dismiss *ex officio* a second action between

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<sup>29</sup> Article 101 FCCP states : 'Si le même litige est pendant devant deux juridictions de même degré également compétentes pour en connaître, la juridiction saisie en second lieu doit se dessaisir au profit de l'autre si l'une des parties le demande. A défaut, elle peut le faire d'office.'

<sup>30</sup> L Cadiet and E Jeuland, *Droit judiciaire privé* (11th edn, LexisNexis 2020) 266.

<sup>31</sup> *Cour d'appel de Rennes*, Decision 17 December 1980 (1980) *Gazette du Palais*, 400.

<sup>32</sup> Case (affaire) No 81-11700 (Court of Cassation, France), Judgment 23 June 1982.

<sup>33</sup> Case (affaire) No 81-10993 (Court of Cassation, France), Judgment 17 May 1982.

<sup>34</sup> Article 101 FCCP states : 'S'il existe entre des affaires portées devant deux juridictions distinctes un lien tel qu'il soit de l'intérêt d'une bonne justice de les faire instruire et juger ensemble, il peut être demandé à l'une de ces juridictions de se dessaisir et de renvoyer en l'état la connaissance de l'affaire à l'autre juridiction.'

the parties on the same cause of action. On the linguistic level, German law uses the sole expression *Streitsache* (cause of action). However, as in Italy, the determination of the 'subject matter' of the proceeding opens a very complex theme with diverging views.

- 47 In the case of related actions, the defendant may file a counterclaim for rights related to the *Widerklage* (counterclaim; plaintiff's motion). The governing provision is Section 33 GCCP, which requires a 'rechtlicher Zusammenhang' (a common legal context). None of the rules provides for an equivalent to *forum non conveniens*. Some decisions use arguments similar to common law to arrive at solutions that conjecture close results. However, whether such solutions are compatible with the 'Justizgewährungsanspruch' (right to judicial protection) as a fundamental principle of the 'Rechtsstaatsprinzip' (rule of law) is debatable.<sup>35</sup>

## 2.5 Domestic Responses to Parallel Proceedings in Foreign Jurisdictions (International *Lis Pendens*)

- 48 Domestic responses to parallel proceedings in a foreign jurisdiction differ depending on whether foreign *lis pendens* is considered relevant. Some legal systems view foreign proceedings as insignificant; others give deference to foreign litigation when certain requirements are fulfilled (such as the foreign court's jurisdiction to adjudicate or the possibility of recognizing of the foreign judgment in the forum); others apply to international *lis pendens* rules and principles developed for the domestic setting. In general, it can be said that the attitude of a legal system toward the effect of *lis alibi pendens* is strictly related to its attitude toward recognizing foreign judgments. Where foreign judgments are refused recognition in a country, the foreign *lis pendens* cannot be recognized either. Rules of *lis pendens* have a rational sense only in so far as the expected judgment is capable of acquiring legal force in the forum.
- 49 At the beginning of this century, when the issue of whether the instituting of an action in a foreign court could bar the exercise of national jurisdiction became the subject of elaborate discussions, different opinions were expressed. Some held that the pendency of an action abroad could not be used as an adequate defence to an action involving the same parties and subject matter in a domestic forum; others expressed some doubts on the appropriateness of this rule from the viewpoint of international co-operation and suggested the possibility of recognizing a *lis alibi pendens doctrine* in transnational cases under certain conditions.
- 50 The most restrictive of these views found its way into the Code of Civil Procedure which was enacted in 1940 and came into force in 1942. Included in the Code was an express provision on the subject (Article 3 ITCCP), reading that 'Italian jurisdiction is not excluded

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<sup>35</sup> H Schack, 'Germany' in J J Fawcett (ed), *Declining Jurisdiction in Private International Law – Reports to the XVI Congress of the International Academy of Comparative Law, Athens August 1994* (Oxford University Press 1995) 193.

by the pendency of the same case or another connected with it, before a foreign court'. The existence of foreign proceedings is therefore disregarded, both in cases where the actions are the same and where the actions are merely related. But similar rules are also found today in China, for example. Various reasons can be suggested to explain this approach. One point of view often underlined is the lack, at the international level, of clear limits on the exercise of adjudicatory jurisdiction. As scholars and court decisions put it, in an international community of sovereign states, each state, as *superiorem non recognoscens*, has the authority to decide for itself under which conditions jurisdiction to adjudicate will be granted. National jurisdiction cannot be barred by the assertion of jurisdiction of a foreign country.

- 51 A closely related explanation for the rule can be found in the desire of the sovereign to assert the jurisdictional power of the state in order to safeguard its nationals access to courts and to safeguard the state's legal order.<sup>36</sup> Over time, there has been a gradual opening up to foreign *lis pendens* and its implications regarding recognition of foreign judgments. We will see in Segment 4 Europe's uniform rules in commercial and civil matters (EU Regulation 1215/2012), which govern the *lis pendens* and related actions among the Member States. Still, we may already emphasize their importance in introducing a modern and more liberal approach to these issues in domestic and private international law.
- 52 Art 7 of Law No 218 of 1995 —the Italian Statute on Private International Law<sup>37</sup>— shares this modern attitude and states that if a plea of international *lis pendens* is raised before the Italian court, the judge shall stay the proceedings. It is necessary that the proceedings have the same parties, the same subject matter, the exact cause of action, and the foreign court was seized first. The Italian judge will accept the plea and stay the proceedings only if they consider the foreign judgment can be recognized.<sup>38</sup> This judge's provision is based on Article 64 of the same law, which lays down strict conditions for the recognition. Among other prerequisites, the foreign proceedings must have been carried out in accordance with the principle of a fair trial, and the judgment must be 'passato in giudicato', ie, final and binding. In applying that Article, courts do not investigate the purpose for which the action was started and whether it is vexatious or unjust.<sup>39</sup>

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<sup>36</sup> N Trocker remarks 'each State, as *superiorem non recognoscens*, has the authority to decide for itself under which conditions jurisdiction to adjudicate will be granted. National jurisdiction cannot be barred by the assertion of jurisdiction of a foreign country' Trocker (n 10).

<sup>37</sup> T Ballarino and A Bonomi, 'The Italian Statute of Private International Law of 1995' in P Sarcevic, P Volken and A Bonomi (ed), *Yearbooks of Private International Law* (vol II, Sellier European Law Publisher 2000) 99; A Giardina, 'Italy: Law Reforming the Italian System of Private International Law' (1996) 35(3) *International Legal Materials* 760.

<sup>38</sup> According to Article 7 ITCCP an Italian court shall stay its proceedings when a foreign court has first been seized with an action between the same parties involving the same issue and the same cause of action.

<sup>39</sup> Trocker (n 10) 287.

- 53 For several years, France did not consider international *lis pendens* and refused to stay the proceedings in favour of the foreign court, even though it was the first to be seized. In 1974, the country prudently admitted the plea of international *lis pendens* with the *Miniera di Fragne* case.<sup>40</sup> Subsequent case law has confirmed the principle.<sup>41</sup> Various pre-conditions must be met, such as the triple identity of the proceedings, the French court having jurisdiction under French law, and the French judge's determination to recognize the foreign judgment. It should be emphasized that, in the presence of such prerequisites, the French judge has considerable discretion in accepting the plea.<sup>42</sup>
- 54 Germany essentially applies the domestic rules to international *lis pendens*. If a parallel proceeding was first initiated in a foreign court, the German domestic case will be stayed when the preconditions found in Section 328 GCCP are met.<sup>43</sup>

## 2.6 Parallel Court and Arbitration Proceedings

- 55 The Italian rules concerning *lis pendens* and related actions do not apply to parallel court and arbitral proceedings. Parallel court and arbitral proceedings are governed by Articles 819-bis and 819-ter, first and third paragraphs of the Italian Code of Civil Procedure.<sup>44</sup> These rules apply both when the seat of the arbitration is in Italy and a parallel state court proceeding is pending in Italy, as well as when a foreign arbitration is pending at the same time as a proceeding before an Italian court.
- 56 Italy is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the 'New York Arbitration Convention'. The rules of the Convention and the Italian Arbitration Law provide a similar regime. For both, the defendant in the state court proceedings has the burden of challenging the state court's jurisdiction in favour of the arbitral tribunal in its first written submission (Article II.3 of the New York Convention); failure to raise this exception will be deemed to constitute consent to arbitrate. If the exception is upheld, the state court must decline jurisdiction, and the arbitral proceedings would continue. The Court of Cassation has recently confirmed that it may not apply the stop to one of the pending proceedings (ex Art 295 ITCCP).<sup>45</sup>

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<sup>40</sup> Case (affaire) No 73-12124 (Court of Cassation, France), Judgment 26 November 1974, in (1975) *Revue Critique Droit International privé* 491, Holleaux's observations.

<sup>41</sup> For instance, Court of Cassation, 17 June 1997 in (1998) *Revue Critique Droit International privé*, 452.

<sup>42</sup> Cadiet and Jeuland (n 30) 268 text and footnotes; Gaudemet-Tallon (n 28) 181.

<sup>43</sup> Schack (n 35) 196; Chase (n 9) 691.

<sup>44</sup> Article 819-ter ITCCP, first and third paragraphs, respectively, state: 'The jurisdiction of an arbitral tribunal is not affected by the institution of parallel state court proceedings concerning the same or related matters [...]'; 'Pending arbitral proceedings, a claim as to the non-existence or ineffectiveness of an arbitration agreement cannot be brought before a court'.

<sup>45</sup> Case No 2335 (Court of Cassation, Italy), Judgment 13 February 2020.

- 57 Like Italy, France does not recognize *lis pendens* between the state court and the arbitral tribunal. This does not mean that there is no procedural link. The question arises at the level of jurisdiction. Indeed, in Italy and France, in the presence of a valid arbitration agreement, the national courts have no jurisdiction, and any action brought before them cannot be pursued. In these systems, there are differences in the court's power to review the validity of the arbitration agreement. Still, in principle, it can be said that the civil court and the arbitral tribunal are independent, each deciding on its own jurisdiction.
- 58 In Germany, there is *lis pendens* between the state courts and the arbitral tribunal if the agreement is valid. Where one of the parties to an arbitration agreement brings a claim before a national court and the respondent relies on the arbitration agreement, the state court may review the validity of the arbitration agreement (Section 1032 (1) GCCP).<sup>46</sup>

### 3 THE COMMON LAW APPROACH

#### 3.1 Judicial Monitoring of Parallel Proceedings. The Overall Picture of the Available Instruments to Handle Parallel Proceedings

- 59 Common law courts faced with parallel proceedings usually perform a discretionary, case-by-case analysis to determine what is the more appropriate forum for the dispute.<sup>47</sup> The judge might also choose to let both actions proceed to the merits<sup>48</sup> until eventually one of the two reaches *res judicata*<sup>49</sup> and may be used to stop the other proceedings<sup>50</sup>.
- 60 As seen in Segment 2, in the civil law tradition, the existence of *lis pendens* requires a triple identity (same parties, same object, exact cause). In the common law world, for a *lis alibi pendens* situation, it is sufficient that similar parties and matters recur; thus, the

<sup>46</sup> R Kreindle, 'Lis pendens – Who Defers To Whom?' (November 2013) Cleary Gottlieb Steen & Hamilton LLP [https://uba.ua/documents/doc/richard\\_kreindler.pdf](https://uba.ua/documents/doc/richard_kreindler.pdf) accessed 24 July 2024.

<sup>47</sup> M Lupoi, *Conflitti transnazionali di giurisdizione* (Giuffrè 2002) 641–701. See also R Fentiman, 'Jurisdiction, Discretion and the Brussels Convention' (1993) 26(1) Cornell International Law Journal 59, 62–64, 72–75; P Schlosser, 'Report on the Convention on the Association of UK, Ireland and Denmark' (signed at Luxembourg, 9 October 1978) (1979) 22 (C 59) Official Journal of the European Communities, para 181.

<sup>48</sup> See, for instance, *Airbus Industrie GIE v Patel* (House of Lords, UK) [1998] 2 All ER 257, 264 (Lord Goff of Chieveley).

<sup>49</sup> Chase (n 9) 571, reminds us that 'the principles of *res judicata* as applied in England is similar to that of the United States, but the terminology and the scope are slightly different. What in the United States is known as "claim preclusion" is actually two separate doctrines in England. "Merger" of "former recovery" in English law prevents reassertion of the same claim [...]. "Cause of action estoppel" prevents assertion of a claim in contradiction of a prior judgment-similar to the concept of "bar" in the United States'.

<sup>50</sup> In England see *Golden Endurance Shipping SA v RMA Watanya SA and others* (High Court, UK) [2014] EWHC 3917 (comm), 47: 'This effectively means that, absent agreement between the parties, there will regrettably be three on-going sets of proceedings, the arbitration proceedings in relation to the Lomé Bill and the Moroccan and English proceedings in relation to the other two Bills. It plainly leaves open the possibility, subject to what may happen hereafter, of an application, if the Claimant were to obtain judgment in these proceedings, for a post-judgment injunction'. In the US, this principle is derived from the full faith and credit clause of Art IV Section 1 of the US Constitution.

concept includes the related actions. Being the first to sue is only one element, and perhaps not the most relevant, of the broader inquiry that the court makes.<sup>51</sup>

- 61 The *forum non conveniens* doctrine is traditionally considered a Scottish court elaboration of the eighteenth century<sup>52</sup>, from where it spread to the UK and other common law countries. In the US, however, it is the product of an original development by the courts. Its purpose is to base the proceedings in the most ‘appropriate’ court, more closely connected to the dispute and capable of getting valuable results. It responds historically to the need to temper the rigidity of the physical power criterion, also typical of common law jurisdiction systems based on the attributing jurisdiction solely by the defendant’s physical presence on the territory of a given state. Discretion always lies at the heart of the institution. The way is subject to continuous jurisprudential development aimed at identifying measures to guide the judge’s decision to not create unequal treatment between the parties or disadvantage one litigant. However, relevant differences exist between the concept developed in England and that accepted in the United States. In the latter, the constitutional principle of due process has led to developing the canon of *minimum contacts* to guarantee fairness in exercising the court’s power vis-à-vis the defendant. In England and other common law jurisdictions, such as Australia, international *lis pendens* is not a doctrine in its own right but is regarded as a facet, albeit an important one, of the doctrine of *forum non conveniens*.<sup>53</sup>
- 62 In exercising their discretion to stay the action or decline jurisdiction, courts can give the *lis pendens* factor considerable weight because of the recognized undesirability of allowing two parallel sets of proceedings to continue. Under English law, whether the action started first in the forum or abroad is immaterial. What’s relevant is the question of how far each set of proceedings has progressed or whether one is simply an attempt to obtain a negative declaration.<sup>54</sup> In addition, the *forum non conveniens* approach allows dealing with cases involving parallel proceedings, even where the parties or the causes of action are different. Thus, the focus is on avoiding multiple proceedings in the forum and abroad rather than on *lis pendens*, as strictly defined.

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<sup>51</sup> For the US, see eg, *E. & J. Gallo Winery v Andina Licores S.A.* (Court of Appeals, US) [446 F.3d 984, 994 (9th Cir. 2006)]: ‘That Andina filed first, however, makes no difference as to the propriety of an anti-suit injunction’. On the topic see Lupoi (n 47) 654–59, 662–63 and 676–683; C McLachlan (n 1) 184–185; L Collins (ed), *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 482.

<sup>52</sup> A Arzandeh, *Forum (Non) Conveniens in England: Past, Present and Future* (Hart Publishing 2019) 20; Fawcett (n 6) 10; Briggs (n 1); J G Starke, ‘The High Court and the doctrine of “forum non conveniens”’ (1988) 62(9) *Australian Law Journal* 671; W M Finch, ‘Forum conveniens e forum non conveniens: judicial discretion and appropriate forum’ (1990) 6 *Queensland University of Technology Law Journal* 67; Lupoi (n 47) 146.

<sup>53</sup> The *Spiliada* test has been applied in numerous countries, including Canada, Ireland, New Zealand and Singapore; R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths 2006) 92.

<sup>54</sup> See the view expressed by L J Bingham in *El Du Pont de Nemours & Company and Another v Agnew* (Court of Appeal, UK) [1987] EWCA Civ J0721-4, [1987] 2, Lloyd’s Report 585, 589.



- 63 Like in England, the United States has no autonomous international *lis pendens doctrine*. In the US, *lis alibi pendens* and *forum non conveniens* are distinct doctrines for handling jurisdiction. It is important to note that in US, concurrent litigation has different aspects because it involves parallel litigations in federal courts, federal-state courts, and federal-foreign courts. In federal cases, some statutory and other provisions may help prevent or regulate multiple actions. A federal court may consider another court a more appropriate forum and transfer its proceeding there.
- 64 In federal-state cases with concurrent jurisdiction, when an action is pending before the state court, a federal court may abstain or enjoin the state court from proceeding.<sup>55</sup> When parallel litigation involves a foreign court (the case examined here), a typical US Court reaction is to permit each sovereign to reach judgment and apply the findings of one to the other under the principles of *res iudicata*. However, US courts may still stay a domestic action when there is a parallel proceeding abroad, but rather that they adopt a relatively loose standard of *international comity*, instead of a first-filed rule.
- 65 ‘Comity’, in the legal sense, means ‘the recognition one nation allows within its territory to the legislative, executive, or judicial acts of another country, considering international duty, and convenience, and to the rights of its own citizens, or others under the law’.<sup>56</sup> Thus, ‘International Comity’ considerations permit a US court to refuse jurisdiction when parallel litigation is pending abroad. This principle applies in cases of legal reciprocity.
- 66 The ‘international abstention’ standard is discretionary.<sup>57</sup> Courts consider factors such as: (1) respect for foreign courts, (2) fairness to the litigants (which includes the order of filing relative convenience of the *forum*, and possible prejudice), and (3) efficient use of judicial resources. Often the decision with respect to staying or proceeding with an action may depend on the court’s view as to whether there is a substantial likelihood that foreign litigation will dispose of all claims present in the US case.<sup>58</sup>
- 67 While *forum non conveniens* doctrine is the main instrument for flexibility in jurisdictional system and dealing with parallel proceedings. Still, other specific instruments are typical of the common law system.

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<sup>55</sup> The abstention rule for the federal court is an exception and concerns three categories: cases presenting a federal constitutional issue, cases presenting policy problems of substantial public import, cases where federal jurisdiction has been invoked to restrain state criminal proceedings; Y Furuta, ‘International Parallel Litigation: Disposition of Duplicative civil proceedings in the United States and Japan’ (1995) 5(1) Pacific Rim Law & Policy Journal 1 <https://digitalcommons.law.uw.edu/wilj/vol5/iss1/2> accessed 24 July 2024. See R L Marcus and E F Sherman, *Complex Litigation: Cases and Materials on Advanced Civil Procedure* (2nd edn, West Publishing Company 1992) 147, 208.

<sup>56</sup> *Hilton v Guyot*, No 130,34 (Supreme Court, US) [159 US 113 (1895)] 163.

<sup>57</sup> On the role of comity and international abstention, L E Teitz, ‘Both sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation’ (2004) 10(1) Roger Williams University Law Review 1, 9.

<sup>58</sup> See the references in G A Bermann, *Transnational litigation* (West Academic Press 2003) 106 ff.

- 68 Transfers and consolidations are procedural features available in the *same judicial system*, to transfer a dispute from one court to another that is considered most appropriate, ie, between federal courts (including between federal courts in different states) or between courts of a single state, but not between federal and state courts (except in the case of removal and remand) or between state courts in different states; a stay is the temporary suspension of the action by a court; an anti-suit injunction is an order requesting a court, before which a case is pending, to prevent a party from pursuing another case. It is a discussion remedy because it interferes with the power of another court.<sup>59</sup>
- 69 It is a matter of enjoining the litigant from initiating or continuing parallel litigation in another jurisdiction. By this remedy, the judge may grant to enhance jurisdiction also in choice-of-court agreement case or *forum* arbitration clauses. A party may thus be obliged to abandon proceedings brought before a court that is not the one designated by the clause.

### 3.2 Meaning and Tradition of the *Forum Non Conveniens* Doctrine in the United Kingdom

- 70 The modern English rule of *forum non conveniens* was ‘beaten out of the anvil of experience’<sup>58</sup> to limit the territorial jurisdiction of English courts. If the foreign court appears more appropriate, an English court may declare England a *forum non conveniens* and stay proceedings and/or decline jurisdiction.<sup>60</sup> On the contrary, if it finds that the domestic court is the natural forum, it will exercise its jurisdiction over the case and, potentially, issue an anti-suit injunction against the foreign proceedings.
- 71 The leading authority is the 1987 House of Lords’ decision in *Spiliada Maritime v Cansulex*<sup>61</sup>, from which the English test arises. It requires ‘not only that England is not

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<sup>59</sup> George (n 1) 504. The practice of anti-suit injunctions originated in the fifteenth century in the English courts to prohibit parallel proceedings before the common law courts and the Court of Chancery, a parallel jurisdiction based on principles of equity, that makes up for the inadequacies and rigidities of the common law.

<sup>60</sup> Eg, A Reus, ‘Judicial Discretion: A Comparative View on the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany’ (1994) 16(2) Loyola of Los Angeles International and Comparative Law Review 455. The power is rooted in the inherent jurisdiction of the court, as well as on statutory grounds such as UKCPR 3.1(f) or Sec 9 of the Arbitration Act (1996). On inherent powers, see *China Export & Credit Insurance Corporation v Emerald Energy Resources Limited* (High Court, UK) [2018] EWHC 1503 (Comm), 61.

<sup>61</sup> *Spiliada Maritime v Cansulex* [1986] 3 WLR 972; [1986] 3 All ER 843; [1987] 1 AC 460. See also, R Abbot, ‘Note, The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish, English and United States Application’ (1985) 18(1) Vanderbilt Journal of Transnational Law 111, 125–135; Fentiman (n 47) 73. See *The Abidin Daver* (House of Lords, UK) [1984] 1 All ER 470, 412. See also, O Kahn-Freund, ‘Jurisdiction Agreements: Some Reflections’ (1977) 26(4) The International and Comparative Law Quarterly 825, 851.



the natural or appropriate forum for the trial, but that there is also another available forum which is clearly or distinctly more appropriate'.<sup>62</sup>

- 72 *Lis alibi pendens* is a factor to consider in the application of *forum non conveniens*. The discretionary power to decline jurisdiction seems to be traced back to the experience of Scottish courts,<sup>63</sup> which was gradually developed during the second half of the twentieth century.
- 73 The English courts' discretionary power to stay proceedings on judicial grounds was already provided for in the Judicature Acts of 1873. This is a faculty described as the *power to stay proceedings* in which the amendments introduced by the Judicature (Consolidation) Act of 1925 extend to cases where there is evidence of 'vexation or oppression' by the plaintiff.<sup>64</sup>
- 74 In *St Pierre v South American Stores*<sup>65</sup>, two conditions were set for ordering a stay. First, the defendant must prove that '[...] continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way'; second, that a stay would 'not cause an injustice to the plaintiff'. The words 'oppressive' and 'vexatious' imply that the court considers the plaintiff's morality and their desire to harass the defendant. This 1936 rule which makes it very difficult to obtain a transfer of the case; it is known as an *abuse of the process of the court* and includes cases of *lis pendens*, which is one of the aspects assessed in order to establish the existence of an abuse by the plaintiff in choosing to initiate litigation in England.<sup>66</sup> In light of this case, a mere balance of convenience would not suffice.

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<sup>62</sup> *Breams Trustees Ltd v Upstream Downstream Simulation Services Inc* (High Court, UK) [2004] EWHC 211 (Ch), 11.

<sup>63</sup> Abbot (n 61) 114–125; G Andrieux, 'Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non Conveniens and Lis Pendens?' (2005) 27(3) *Loyola of Los Angeles International and Comparative Law Review* 323, 336–348. The relevant Scottish decisions are *Clements v Macaulay* (Court of Session, Scotland) (1886) 4 M 583 and *Sim v Robinow* (Court of Session, Scotland) (1892) 19 R 655.

<sup>64</sup> A Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (consulted edition, Routledge 2009) 160 ff. The leading case is *McCurry v Lewis* (1882) 21 Ch D 202, followed by *Peruvian Guano v Bockwoldt and others* (1883) 23 Ch D 225; *Human v Helm* (1883) 24 Ch D 531; *Logan v Bank of Scotland* (Court of Appeal, UK) (1906) 1 Kb 141.

See Trocker (n 10) 209 ff; Mandaraka-Sheppard (n 64) 161 ff.

<sup>65</sup> *St. Pierre and others v South American Stores (Gath and Chaves), and others* (Court of Appeal, UK) [1936] 1 KB 382. See D McClean, 'Jurisdiction and judicial discretion' (1969) 18(4) *International Comparative Law Quarterly* 931, 939.

<sup>66</sup> J J Fawcett, 'General Report' in J J Fawcett (ed), *Declining Jurisdiction in Private International Law – Reports to the XVI Congress of the International Academy of Comparative Law, Athens August 1994* (Oxford University Press 1995) 3.

- 75 In *The Atlantic Star* of 1973<sup>67</sup>, the House of Lords set out the elements to be considered in ordering the stay: the progress and nature of the case, the advantages of the plaintiff of the English jurisdiction, and the possible *lis pendens*.
- 76 In the *MacShannon* case of 1978<sup>68</sup>, the discussion in the House of Lords around the concept of 'natural forum', indicates that there is no presumption in favour of the English jurisdiction. For cases where the *prima facie* natural *forum* of which is outside England, Lord Diplock devised a new two-tier test to decide on the stay: a) the defendant must indicate to the court the existence of another *forum* which is capable of providing justice to the parties with less inconvenience or expense; b) the stay must not deprive the plaintiff of any legitimate personal or legal advantages which led them to bring the case before the English court.
- 77 The comparative evaluation of the parties' position returns in *The Abidin Daver* of 1984<sup>69</sup>. Again, Lord Diplock proposes the restoration of the 'balancing of advantage and disadvantage to the plaintiff and defendant', ie, the canon already enunciated by the Scottish courts; he also emphasizes the need for advantages and disadvantages to be based on 'objective standards supported by evidence'.<sup>70</sup>
- 78 Faced with a *lis alibi pendens*, Lord Diplock formulates a test for deciding whether to order a stay in cases of parallel proceedings with a foreign court, according to which

Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign Court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter [...] then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries [...] can only be justified if the would-be plaintiff can establish objective by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of so much importance that it would cause injustice to him to deprive him of it.<sup>71</sup>

- 79 According to *Spiliada Maritime v Cansulex*, the judge must verify whether there is an *available forum that is clearly more appropriate* than the English one. The applicable test takes two steps: (1) The defendant must show that there is another natural forum that

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<sup>67</sup> *The Atlantic Star* (House of Lords, UK) [1974] AC 436, 454; [1973] 2 Lloyd's Report 197, criticized by Lord Reid, [1972] Lloyd's Report 146.

<sup>68</sup> *MacShannon v Rockware Glass Ltd* (House of Lords, UK) [1978] AC 795, 812 (Lord Diplock). R Schuz, 'Controlling Forum Shopping: The Impact of *MacShannon v Rockware Glass Ltd*' (1986) 35(2) The International and Comparative Law Quarterly 374, 383–384.

<sup>69</sup> *The Abidin Daver* (n 61) 343 and 344. Schuz (n 68). See, also, the earlier decisions *Logan v Bank of Scotland* (n 64) 150–151.

<sup>70</sup> *The Abidin Daver* (n 61) 476 ff.

<sup>71</sup> *Ibid*, Lord Diplock at 344.

is clearly more appropriate than the English one to which the dispute is more closely connected and where the dispute could be better decided.<sup>72</sup> This is usually the court where the defendant is domiciled, where the damage occurred, or where the evidence is located. (2) If the defendant satisfies the first stage, the plaintiff must prove that substantial justice will not be obtained in that 'natural' court.

- 80 If such a forum exists, the English court should stay its proceedings unless the plaintiff shows that, nonetheless, justice requires the court to exercise its jurisdiction.<sup>73</sup> It is, hence, a two-fold analysis, focusing first on the appropriateness of the forum,<sup>74</sup> then on the notion of justice. The court retains discretion whether or not to stay the action depending on the evidence presented by both parties. We will call this the *Spiliada* test. In the famous *Lubbe* case<sup>75</sup>, the English court decided to stay the proceedings in the English *forum*, considering that South Africa was the natural forum according to the first step of the *Spiliada* test.<sup>76</sup> In the similar case of *Connelly*<sup>77</sup>, English case law reaffirmed the need to apply the second step of the *Spiliada* test and to exercise the discretion to refuse a stay where justice so requires. The decisions in *Connelly* and *Lubbe* opened up possibilities for tort victims in similar circumstances to proceed in the courts of England.<sup>78</sup> For practical purposes, *Spiliada* is still the case to which attention needs to be directed. Recent case law, which also covers scenarios where proceedings have already

<sup>72</sup> *Spiliada Maritime Corp v Consulex Ltd* (n 61) [1986] 3 WLR 972, 856.

<sup>73</sup> *Ibid* 478 (per Lord Goff LJ).

<sup>74</sup> English courts only consider so-called 'private interests' elements.

<sup>75</sup> *Lubbe and Others and Cape Plc. and Related Appeals* (House of Lords, UK) [2000] UKHL 41.

Mrs Lubbe, the plaintiff, had worked for a South African subsidiary company of the UK parent company, Cape plc. He was exposed to asbestos and suffered from cancer; he initiated the lawsuit for damages before the High Court. The English Courts refused the plaintiff's arguments in favour of the English *forum* and ordered the stay; Lubbe's wife appealed to the House of Lords. The House of Lords held that South Africa was the more appropriate forum for hearing the claim on the base of the *Spiliada* test.

<sup>76</sup> Lord Bingham made the following remark about the tort issue (*Rachel Lubbe and Others v Cape Plc* (Court of Appeal, UK) [2000] 1 WLR 1545, 1556): '20. The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence. 21. The second segment of the cases involves the personal injury issues relevant to each individual: diagnosis, prognosis, causation (including the contribution made to a plaintiff's condition by any sources of contamination for which the defendant was not responsible) and special damage. Investigation of these issues would necessarily involve the evidence and medical examination of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived and the period for which he did so. Where the claim is made on behalf of a deceased person the inquiry would be essentially the same, although probably more difficult'.

<sup>77</sup> *Connelly v RTZ Corporation Plc* (House of Lords, UK) [1997] 3 WLR 373, 384.

<sup>78</sup> See A Tawanda Magaisa, 'Suing Multinational Corporate Group for Torts in the Wake of the Lubbe Case – A Comment' in F Macmillan (ed), *International Corporate Law Annual* (Vol II, Hart Publishing 2003) 316 ff.

been issued in the courts of the alternative forum, further confirms that many of the relevant factors in a *forum (non) conveniens* inquiry will be case specific and that one-size-fits-all guidance is impracticable.<sup>79</sup> When a contract specifies which country's laws govern the contract and any disputes arising from it, the issue is how to combine the *forum non conveniens* doctrine with exclusive foreign jurisdiction clauses. Lord Brandon, in *The El Amria* case, following the precedent of *The Eleftheria*, set out several principles for deciding a question of *forum non conveniens* in cases where the plaintiff sues in England in breach of an exclusive foreign jurisdiction clause.<sup>80</sup> His criteria have been taken as the definitive statement on the question and reiterated by the House of Lords in *Donohue v Armco*.<sup>81</sup>

### 3.3 Meaning and Tradition of the *Forum Non Conveniens* Doctrine in the United States

- 81 The US doctrine of *forum non conveniens* was first developed in *Gilbert*<sup>82</sup>, then refined in *Piper Aircraft Co v Reyno*<sup>83</sup>, and commented on by the Supreme Court in its decision *Sinochem International Co Ltd v Malaysia International Shipping Corp*<sup>84</sup>.

<sup>79</sup> *Traxys Europe SA v Sodexmines Nigeria Ltd* (High Court, UK) [2020] EWHC 2195 (Comm), the judgment contains a clarification of the burden of proof analysis in *Spiliada* and relates to scenarios where the foreign defendant seeks a stay of English proceedings to allow a parallel claim to be heard in an alternative forum.

<sup>80</sup> *The Eleftheria* (High Court, UK) [1969] 1 Lloyd's Report 237, 242; in *The El Amria* (Court of Appeal, UK) [1981] 2 Lloyd's Report 119 (CA), Lord Brandon set out the following principles: '(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion, the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial'.

<sup>81</sup> *Donohue v Armco Inc.* (House of Lords, UK) [2002] 1 Lloyd's Report 425, 432-433.

<sup>82</sup> *Gulf Oil Corp v Gilbert*, No 93 (Supreme Court, US) [330 US 501 (1947)].

<sup>83</sup> *Piper Aircraft Co. v Reyno*, No 8048 (Supreme Court, US) [454 US 235 (1981)] which removed, in the international context, the presumption laid down by *Gulf Oil Corp. v Gilbert* (n 82) that 'the plaintiff's choice of *forum* should rarely be disturbed' (*Gilbert* 508). *Gilbert* was a domestic intra-state case.

<sup>84</sup> *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.* (Supreme Court, US) [549 US 422 (2007)].

- 82 A key difference from the English version is that US courts add to the private factor<sup>85</sup> and also a public interest factor that considers the forum's interest in having (or not having) a specific case decided in US courts.<sup>86</sup>
- 83 In *Piper Aircraft*, which involved US and Scottish courts, the Supreme Court confirmed the legitimacy of balancing private and public interests. It also emphasized that a motion to dismiss jurisdiction cannot be based 'merely by showing that the substantive law that would be applied in the alternative forum is less favourable to the plaintiff'.<sup>87</sup> The US court was not faced with a case of *lis alibi pendens* but with a plea by *Piper Aircraft* to dismiss in favour of the Scottish courts on the ground of *forum non conveniens*. However, *Piper Aircraft* was applied in parallel international litigation. Subsequent case law has added further factors to be considered in deciding jurisdiction in foreign parallel proceedings.
- 84 The clear abuse of discretion test was elaborated in, among others, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*.<sup>88</sup> Referring to the inquiry set out in the *Gilbert* and the *Piper Aircraft* decisions, the court said that '[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction',<sup>89</sup> and added that 'Gilbert states that the doctrine of *forum non conveniens* presupposes at least two forums in which the defendant is amenable to process'. Moreover, it is

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<sup>85</sup> *Gulf Oil Corp. v Gilbert* (n 82) 508: 'An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy'.

<sup>86</sup> *Ibid* 508-09: 'Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centres instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself'.

<sup>87</sup> *Piper Aircraft v Reyno* (Supreme Court, US) [454 US 235 (1981)].

<sup>88</sup> *In re Union Carbide Corp. Gas Plant Disaster* (Court of Appeals, US) [809 F.2d 195 (2d Cir 1987)]. A chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India, released a lethal gas known as methyl isocyanate, resulting in the deaths of over 2,000 persons and injuries of over 200,000. The most tragic industrial disaster in history. Few days later, the first (of about 145) class action started in the United States. In the meantime, India granting to its government (Union of India) the exclusive right to represent the victims in India or elsewhere (with the Bhopal Gas Leak Disaster Act). Union of India brought suit in the US (because the Indian courts did not have jurisdiction over Union Carbide Corporation, UCC, the parent company) against UCC; the latter filed a motion to dismiss the actions for *non conveniens* reasons.

<sup>89</sup> *Piper Aircraft v Reyno* (n 87) 254; *Gulf Oil Corp. v Gilbert* (n 82) 506-507.

essential to bear in mind that in the *Piper*, the court listed numerous practical considerations which led it to conclude that an unfavourable change in law for the plaintiff was not a relevant factor in the forum analysis. In Bhopal, the *amicus curiae* argued that the Indian legal system was inadequate to handle litigation, but their observations were not accepted. The court modified the district court's order, affirming that there was no abuse of discretion in the district court's dismissal of the personal injury actions because all but a few of the 200,000 individual plaintiffs were Indian citizens located in India, and the defendant had consented to the jurisdiction of the Indian courts.<sup>90</sup>

- 85 In *Sinochem International Co Ltd v Malaysia International Shipping Corp*,<sup>91</sup> Justice Ginsberg's opinion emphasizes, that a federal court has the discretion to decline jurisdiction 'when considerations of convenience, fairness, and judicial economy so warrant'. This requires a balancing of considerations in order to identify the appropriate forum – an exercise that echoes the 'more appropriate' forum test in *Spiliada*. However, US courts tend to put a greater emphasis on public interest factors. Notably, they also distinguish between American plaintiffs and foreign plaintiffs. A local plaintiff's choice of a US forum is typically presumed valid and will often outweigh any inconvenience to the defendant. This presumption doesn't apply to foreign plaintiffs. The doctrine of *forum non conveniens* has frequently been used to dismiss suits brought by foreign plaintiffs against American corporate defendants, particularly in product liability and environmental claims. While the parties were invited to refile elsewhere, in practice, most cases did not relocate to the supposedly 'more appropriate' foreign courts. These dismissals often effectively determined the outcome of the case. More recently dismissals have started to trigger 'boomerang litigation' and parallel proceedings at the enforcement stage. Parties previously successful in their forum strategy now seek to avoid enforcement in the US and elsewhere of adverse judgments rendered by foreign ('appropriate') courts.<sup>92</sup> It is also worth noting that while in federal courts the doctrine of *forum non conveniens* exists entirely in federal common law, state principles of *forum non conveniens* may arise from state common law or statutes. Essentially, each state is free to decide whether to make *forum non conveniens* available and how to apply it

<sup>90</sup> However, the court held that the district court erred in imposing a condition that the defendant consent to the enforcement of a final Indian court judgment. The court also found an error in requiring the defendant to agree to grant the plaintiffs broad discovery rights under the Federal Rules of Civil Procedure when the defendant was confined to the more limited discovery authorized under Indian law.

<sup>91</sup> *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp* (Supreme Court, US) [549 US 422 (2007)].

<sup>92</sup> M R Casey and E Ristorph, 'Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation' (2007) 4(21) Brigham Young University Law Review; H Erichson, 'The Chevron – Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy, in Stanford Journal of Complex Litigation' (2013) 1(199) Stanford Journal of Complex Litigation 417 (Fordham Law Legal Studies Research Paper No 2245889) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2245889](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245889) accessed 24 July 2024; discussing dismissal of tort cases arising out of the Fukushima nuclear powers plant disaster, M Gardner, 'Deferring to Foreign Courts' (2021) 169 University of Pennsylvania Law Review 2291 (Cornell Legal Studies Research Paper No 21-34) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3934595](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934595) accessed 24 July 2024.



according to its own notions of justice and fair play. Some states still prohibit its use in cases involving in-state causes of action. Differences between federal and state approaches can lead to complex situations where courts must decide which version of the doctrine to apply. In some cases, even for international claims, absent a preclusive effect of an initial dismissal on *forum non conveniens* grounds, a suit may be brought in another United States forum where the defendant may choose to raise the *forum non conveniens* defence, with the effect of prolonging the duration of a single lawsuit and adding uncertainty to the proceedings.<sup>93</sup>

- 86 In the context of parallel proceedings, courts may consider the similarity between cases or the progress in a foreign forum when applying *forum non conveniens*. In *Landis v North American Co.*,<sup>94</sup> the Supreme Court held that federal courts have the authority to defer to parallel proceedings in other federal courts and that they should generally do so in order to avoid the wastefulness of duplicative litigation.<sup>95</sup> However, in *Colorado River Water Conservation District v United States*,<sup>96</sup> the Court affirmed that federal courts ‘should only defer to state courts in exceptional circumstances given the federal courts’ virtually unflagging obligation’ to exercise the diversity jurisdiction that Congress has assigned them’; the Court has given no guidance as to when federal courts should defer to parallel proceedings in other countries.<sup>97</sup>

### 3.4 The Standard Governing Anti-Suit Injunctions in the UK and in the US

- 87 When a domestic court is deemed the natural *forum*, common law courts may exercise their jurisdiction over the case and potentially issue an anti-suit injunction<sup>98</sup> against foreign proceedings.<sup>99</sup> Alternatively, the judge might allow both actions to proceed until

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<sup>93</sup> See D S Sternberg, ‘Res Judicata and Forum non Conveniens in Internationale Litigation’ (2013) 46(1) Cornell International Law Journal 191; W S Dodge, M Gardner and C A Whytock, ‘The Many State Doctrines of Forum Non Conveniens’ (2023) 72 Duke Law Journal 1163 (UC Irvine School of Law Research Paper No 2022-11, Cornell Legal Studies Research Paper No 22-17) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4060356](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4060356) accessed 24 July 2024.

<sup>94</sup> *Landis v North American Co.* (Supreme Court, US) [299 US 248, 254-55 (1936)].

<sup>95</sup> Gardner (n 92) 2331.

<sup>96</sup> *Colorado River Water Conserv. Dist. v United States*, No 74-940 (Supreme Court, US) [424 US 800 (1976)].

<sup>97</sup> Gardner (n 92) 2331.

<sup>98</sup> C McLachlan (n 1) 157–179; see generally T C Hartley, ‘Comity and the Use of Anti-suit Injunctions in International Litigation’ (1987) 35(3) American Journal of Comparative Law 487; for the US, G Berman, ‘The Use of Anti-Suit Injunctions in International Litigation’ (1990) 28 Columbia Journal of Transnational Law 589 <https://core.ac.uk/download/230166221.pdf> accessed 24 July 2024.

<sup>99</sup> Bermann (n 98).

one reaches *res iudicata*, which could then be used to stop the other proceedings.<sup>100</sup> If the court determines its 'more appropriate' forum is England and that the foreign proceedings (commenced or only threatened) are 'vexatious', it may decide to issue an anti-suit injunction restraining the party from continuing with the foreign action.<sup>101</sup> It is said that this equitable power is based 'not upon any pretension to the exercise of judicial [...] rights abroad',<sup>102</sup> but only because the party is subject to the *in personam* jurisdiction of English courts.<sup>103</sup>

- 88 In 1987, Lord Goff, sitting in the Privy Council, stated that *comity* mandates a cautious use of anti-suit injunctions, which should be employed only when England is the natural forum *and* the end of justice requires the court to do so.<sup>104</sup> In other words, an injunction should only be issued if the foreign proceedings are oppressive or vexatious, and the defendant fails to oppose its grant as 'unjust'.<sup>105</sup> While it's claimed that anti-suit injunctions don't interfere with foreign courts' authority, this is widely recognized as a legal fiction.<sup>106</sup>
- 89 In England the issue of restraining the commencements or prosecution of proceedings in foreign courts by means of an anti-suit injunction comes into play in two main categories of cases, dealing respectively with claims for the discontinuance of foreign proceedings in violation of an exclusive choice of forum clause, and claims based on abuse of process.

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<sup>100</sup> In England see *Golden Endurance Shipping SA v RMA Watanya SA and others* (n 50) 47: 'This effectively means that, absent agreement between the parties, there will regrettably be three on-going sets of proceedings, the arbitration proceedings in relation to the Lomé Bill and the Moroccan and English proceedings in relation to the other two Bills. It plainly leaves open the possibility, subject to what may happen hereafter, of an application, if the Claimant were to obtain judgment in these proceedings, for a post-judgment injunction.' In the US, this principle is derived from the full faith and credit clause of Art IV, section 1, of the US Constitution.

<sup>101</sup> Hartley (n 98) 489-90, quoting a number of early cases, such as *Hope v Carnegie* (1866) 1 Ch App 320; *Armstrong v Armstrong* [1892] P 98; *Moore v Moore* (1896) 12 TLR 221. A sort of restatement may be read in *Deutsche Bank AG v Highland Crusader Offshore Partners* (Court of Appeal, UK) [2009] EWCA Civ 725, 49-65. The historical precedents are *Castanho v Brown & Root (UK) Ltd* (House of Lords, UK) [1981] 1 All ER 143, [1981] AC 557; *British Airways Board v Laker Airways Ltd* (House of Lords, UK) 1 AC 58 (1984); *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provinciën' NV*; *South Carolina Insurance Co v Al Ahlia Insurance Co* (House of Lords, UK) [1986] 3 All ER 487; *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* (Judicial Committee of the Privy Council, UK) [1987] 3 All ER 510, [1987] AC 871; *Airbus Industrie GIE v Patel* (n 48).

<sup>102</sup> *Portarlington v Soulby* (High Court of Chancery, UK) (1834) 3 My & K 104, 108 (Lord Brougham LC); Collins (n 51) 500-1.

<sup>103</sup> A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2007) 196.

<sup>104</sup> *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* (Judicial Committee of the Privy Council, UK) [1987] 3 All ER 510, [1987] AC 871; confirmed by the House of Lords in *Airbus Industrie GIE v Patel* (n 48).

<sup>105</sup> Collins (n 51) 503-05.

<sup>106</sup> Lord Goff himself in *Airbus Industrie GIE v Patel* (n 48) 122 noted: 'although such injunctions operate only *in personam*, they indirectly interfere with the due process of the foreign court'.



- 90 In *British Airways Board v Laker Airways Ltd*<sup>107</sup>, *British Airways* (BA) sought an injunction in a UK court to prevent *Laker Airways Ltd* (defendant) from pursuing an antitrust lawsuit against BA in the United States. The lower court denied the injunction, and BA appealed. Lord Diplock said that ‘an injunction could be ordered if the applicant has an *equitable* right not to be sued in the foreign *forum*. This may be found generally in all conduct capable to be labelled as “unconscionable”’.<sup>108</sup>
- 91 In the *Patel* case,<sup>109</sup> Lord Goff observed that
- [t]he basic principle is that each jurisdiction is independent. There is therefore [...] no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons, a stay (or dismissal) of proceedings and an anti-suit injunction. Moreover, each of these has its limitations. The former depends on its voluntary adoption by the state in question, and the latter is inhibited by respect for comity. It follows that, although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible.<sup>110</sup>
- 92 In July 2022, English courts refused remedies in Standard Essential Patent (SEP) disputes, considering parallel litigations ‘unavoidable’. In *Philips*, the Patents Court declined to grant an anti-suit injunction to stop judgments from parallel proceedings in China. In *Nokia Technologies*, the Court of Appeal refused to stay English proceedings on *forum non conveniens* grounds or to manage parallel Chinese proceedings.<sup>111</sup> Justice Arnold emphasized that ‘the only sure way to avoid these problems is to use a supranational dispute resolution procedure [or] arbitration’ and that national courts cannot solve the problems inherent in parallel litigations in Fair, Reasonable, and Non-Discriminatory

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<sup>107</sup> *British Airways Board v Laker Airways Ltd* (House of Lords, UK) 1 AC 58 (1984); *Laker Airways v Sabena* (Court of Appeals, District of Columbia Circuit, US) [731 F.2d 909, 927 (DC Cir 1984)]. Freddie Laker claimed that his low-cost, no-frills transatlantic airline service was threatened by predatory pricing by the major airlines and their collusion with Laker’s creditors. Following his filing of a US action under the anti-trust laws claiming treble damages, British Airways obtained an injunction from an English court restraining it from proceeding with the suit, and the US court, at Laker’s request, issued its own injunction restraining the other antitrust defendants from seeking to obtain similar anti-trust injunctive relief in England. For an overview of the case D Tan, ‘Damages for Breach of Forum Selection Clauses, Principals Remedies, and control of International Civil Litigation’ (2005) 40 *Texas International Law Journal* 622, 629; A Lowenfeld, *International Litigation and Arbitration* (2nd edn, West Publishing 2002) 118.

<sup>108</sup> On the question of whether the refusal of the foreign forum to apply issuing forum’s law would provide the basis for the issuance of anti-suit injunctions see Hartley (n 98).

<sup>109</sup> See *Airbus Industrie GIE v Patel* (n 48).264.

<sup>110</sup> In the US similar considerations may be read in *Laker Airways, Ltd. v Sabena, Belgian World Airlines* (Court of Appeals, US) [731 F.2d 909, 926-27 (DC Cir 1984)].

<sup>111</sup> *Koninklijke Philips N.V. v Guandong Oppo Mobile Telecommunications Corp, Ltd and others*, No HP-2022-000010 (High Court, UK) [2022] EWHC 1703 (Pat).; *Nokia Technologies OY v Oneplus Technology (Shenzhen) Co Ltd* (Court of Appeal, UK) [2022] EWCA Civ 947 <https://www.bristows.com/app/uploads/2022/09/2022-EWHC-1703-Pat-Philips-v-Oppo.pdf> accessed 24 July 2024.

(FRAND) matter.<sup>112</sup> It remains to be seen whether *lis pendens* will lose its protective role against dilatory tactics, duplication of proceedings, and *res judicata* preclusion.

- 93 In the US, the question that more frequently arises is whether foreign proceedings should be restrained through anti-suit injunctions. This would permit a court to enjoin a litigant from commencing or continuing litigation in a foreign *forum*.
- 94 US courts have long asserted the power to issue anti-suit injunctions, regarding such orders as a corollary of a court's general equitable control over parties subject to its jurisdiction.<sup>113</sup> There is, however, disagreement as to the standards to be applied for the issuance of anti-suit injunctions. Some courts hold that 'a duplication of the parties and issues' alone is sufficient to justify the issuance of an anti-suit injunction.<sup>114</sup> Most courts, however, express a different view and hold that an anti-suit injunction generally may be issued only in order to: (a) protect a court's legitimate jurisdiction; or (b) prevent "litigants" evasion of the forum's important public policies'. This caution derives from the consideration that, while anti-suit injunctions are not issued directly against foreign tribunals, such orders 'effectively restrict the foreign court's ability to exercise its jurisdiction'.<sup>115</sup> Courts, however, do not hesitate to use the public policy exception for the issuance of anti-suit injunctions to assure the application to a dispute of US substantive law (for example, anti-trust law) that the foreign courts would not apply.<sup>116</sup>

### 3.5 Choice-of-Court Clause or Arbitration Clause

- 95 As mentioned at the beginning of this study (Segment 3 above), in parallel litigations involving a *forum* selection clause (exclusive or non-exclusive) or an arbitration clause, *forum non conveniens* tests are applied. Thereby, these clauses are not decisive.

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<sup>112</sup> Arbitration is considered 'the ordinary and normal method of settling disputes of international trade' from G Born, *International Commercial Arbitration: Volume I: International Arbitration Agreements* (Wolters Kluwer 2014) 97.

<sup>113</sup> *China Trade & Dev. Corp. v M.V. Choong Yong* (Court of Appeals, UK) [837 F.2d 33, 35-36 (2d Cir 1987)]: 'The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity, [...] because such an order effectively restricts the jurisdiction of the court of a foreign sovereign, [...]. Therefore, an anti-foreign-suit injunction should be "used sparingly" [...] and should be granted "only with care and great restraint"'. Similarly, *Paramedics Electromedicina Comercial, Ltda. v GE Medical Systems Information Technologies, Inc.* (Court of Appeals, US) [369 F.3d 645 (2d Cir 2004)]; *Karaha Bodas Co LLC v Perusahaan Pertamina* (Court of Appeals, US) [335 F.3d 357 (5th Cir 2003)].

<sup>114</sup> G B Born and P B Rutledge, *International Civil Litigation in United States Courts* (Aspeh Publishing 2022) 641.

<sup>115</sup> G A Bermann, 'The use of anti-suit injunction in International Litigation' (1990) 28 Columbia Journal of Transnational Law 589.

<sup>116</sup> S I Strong, 'Anti-suit Injunction in Judicial and Arbitral Procedures in the United States' (2018) 66(1) The American Journal of Comparative Law 153.

However, the arbitration clause is more powerful because it ‘does not merely choose a forum for adjunction, it chosen a non-curial form of adjudication’.<sup>117</sup>

- 96 In the case of international arbitration, if a plaintiff files a dispute before a court, the defendant may plead a breach of contract. He may ask for a stay or dismissal of proceedings, also on *forum non conveniens* grounds, claiming that such litigation is vexatious or oppressive, or there is an abuse of process. If a court is seized when a foreign arbitral award or a court judgment has been rendered, the court will generally decline jurisdiction to recognize and enforce the decision. Courts may also restrain proceedings from submitting disputes to arbitration or defend the choice of court. This regulation is common in England, the US and Australia.<sup>118</sup>

## 4 THE EUROPEAN UNION SYSTEM

### 4.1 The EU Regulation 1215/2012 in Civil and Commercial Matters. Scope of Application.

- 97 The Brussels Convention on civil jurisdiction and enforcement of judgments, signed in 1968 by European Economic Community members, pioneered the regulation of jurisdiction in civil and commercial matters across a broad group of countries. The Convention established a system for jurisdiction allocation and the reciprocal enforcement of judgments between contracting states based on the mutual trust among the Member States’ judicial systems.<sup>119</sup> According to its preamble, which partially incorporates the terms of Article 220 of the founding Treaty of Rome, the Convention seeks to facilitate the recognition and enforcement of court or tribunal judgments and to strengthen the legal protection of persons established in the Community.
- 98 Article 21 and Article 22, respectively, on *lis pendens* and on related actions, are part of Section 8 of Title II of the Brussel Convention. This section aims to prevent parallel proceedings before courts of different Contracting States and avoid conflicting decisions, prompting proper administration of justice within the Community.
- 99 On 22 December 2000, the Council adopted Regulation (EC) No 44/2001, replacing the 1968 Brussels Convention concerning the Member States’ territories. Then, on 6

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<sup>117</sup> P Gillies, ‘Forum Non Conveniens in the Context of International Commercial Arbitration’ (2008) Macquarie Law Working Paper No 2008-6, 2 <https://www.readcube.com/articles/10.2139%2Fsrn.1103344> accessed 24 July 2024.

<sup>118</sup> For an in-depth look also at English, American and Australian case law, Gillies (n 117).

<sup>119</sup> About the role of reciprocal faith in the Brussel-I, see J A Pontier and J H M Burg, *EU 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* (The Hague 2004) 69.

December 2012, the Council adopted Regulation (EC) No 1215/2012.<sup>120</sup> In line with the civil law tradition, this system does not include a doctrine of *forum conveniens*, although there are some limited openings for jurisdiction in other regulations, such as Regulation 650/2012 on succession and Regulation 2201/2003, to be found in Regulation 1111/2019. The system also excludes the anti-suit injunction, which involves an assessment of the jurisdiction of other courts and affects the exercise of their jurisdiction. Instead, it applies the *Kompetenz-Kompetenz* principle, allowing each court or arbitral tribunal to determine its own competence.

- 100 In addition to the uniform provided for the Member States of the European Union, the Lugano Convention of 16 September 1988 was adopted by the EFTA States (European Free Trade Association), followed by the Lugano Convention of 30 October 2007.<sup>121</sup> This parallel agreement essentially mirrors the provisions of the Brussels system in civil and commercial matters.

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<sup>120</sup> The Regulation, just like the Convention, does not extend ‘to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority’ (Art 1). As provided for in paragraph 2 of Article 1, it does not apply to ‘(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death’. Most of these areas are now covered by EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, No 1215/2012 of 12 December 2012 (EU), while arbitration still needs consistent rules. Recital No 12 of the Regulation No 1215/2012 provides that ‘This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.’; this, however, ‘without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation’. For the purposes of the Regulation, Member States courts or tribunals include courts or tribunals shared by several Member States, such as the Benelux Court of Justice, when it exercises jurisdiction on matters falling within the scope of this Regulation. Therefore, judgments given by such courts should be recognized and enforced under this Regulation.

<sup>121</sup> The signatories of the Lugano Convention 2007 are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland. While the Lugano Convention 2007 entered into force for the European Union, Denmark and Norway on 1 January 2010, it has only applied to Switzerland since 1 January 2011. For Iceland, it entered into force on 1 May 2011.

#### 4.2 *Lis Pendens* and Related Actions – Section 9

101 The Regulation No 1049/2012 (EU) main objectives are the forum's *predictability* and *certainty* and minimizes the possibility of irreconcilable judgments in different Member States. Article 45 provided that

the recognition of a judgment shall be refused [...] (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed; (d) if the judgment is irreconcilable with an earlier judgment given in another Member State or a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

102 Given the different national rules in the Member States, Article 32 defines when a court shall be deemed seized for the purpose of Section 9:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

103 Articles 29 through 34 of the Regulation, address parallel litigation dividing it into the following categories: (1) identical actions, (2) related actions, (3) actions having exclusive jurisdiction, such as actions *in rem* or an exclusive choice-of-court agreement, (4) *lis pendens* and related actions between a court of the member state and a court of a third state. These articles incorporate elements of discretion.

#### 4.2.1 Identical Actions. The Triple Identity – Stay of Second Proceeding. The Palumbo and Tatry Cases

- 104 Art 29 defines *lis pendens* in accordance with the civil law tradition, demanding the triple identity.<sup>122</sup> While the triple identity is required, the Court of Justice's case law has adopted a broad interpretation of the relevant elements, as evidenced in the *Palumbo* and *Tatry* cases.<sup>123</sup>
- 105 The rule also specifies how to handle parallelism. According to paragraph 3, the court first seized designates the action with priority for *lis pendens*; the court second seized must stay its proceedings until the court first seized has determined whether it has or not jurisdiction. Only after the court first seized has confirmed its jurisdiction the court second seized must decline jurisdiction. Pre-examination of these jurisdiction decisions is only possible according to the remedies available under the state's domestic law. Article 45(3) of the Regulation, in fact, provides that 'the jurisdiction of the court of origin may not be reviewed'. So, the court first seized has total control over its jurisdiction in this mechanism.<sup>124</sup>
- 106 Regarding the definition of *lis pendens*, different language versions use varied terminology to explain the concept of identity between lawsuits. The English version refers only to the 'same cause of action' (Art 29 Section 1), while other versions, such as Italian, French, and Spanish, use terms that distinguish between 'subject-matter' and 'cause of action'. However, in the Court of Justice's case law, the cause of action and the object are treated as two distinct concepts.
- 107 The Italian version, for instance, mentions 'il medesimo oggetto e il medesimo titolo' (ie, *petitum* and *causa petendi*); the French version uses 'le même objet et la même cause'; the Spanish version exploits 'il mismo objeto y la misma causa'. However, despite such

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<sup>122</sup> Art 29 provides that: '1. Without prejudice to Article 31, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32. 3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.

<sup>123</sup> *E Gubisch Maschinenfabrik KG v Giulio Palumbo*, Case 144/86 (CJEU), 8 December 1987 [ECLI:EU:C:1987:528] [https://curia.europa.eu/jcms/jcms/Jo1\\_6308/](https://curia.europa.eu/jcms/jcms/Jo1_6308/) accessed 24 July 2024; *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*, Case C-406/92 (CJEU) Judgment 6 December 1994 [ECLI:EU:C:1994:400] [https://curia.europa.eu/jcms/jcms/Jo1\\_6308/](https://curia.europa.eu/jcms/jcms/Jo1_6308/) accessed 24 July 2024.

<sup>124</sup> F M Bonaiuti, 'Lis Alibi Pendens and Related Actions in Civil and Commercial Matters within The European Judicial Area' in A Bonomi and P Volken, *Yearbook of Private International Law* (vol XI, Otto Schmidt/De Gruyter European Law Pub 2010) 511, 521.

divergences in the different language versions of Article 29, in the Court of Justice's case law, the cause of action and the object are two different concepts.

- 108 In the *Gubisch Maschinenfabrik*<sup>125</sup> and the *Tatry*<sup>126</sup> judgments, the Court of Justice addressed the interpretation of *lis pendens* as used in the different national legal systems of the contracting states. It laid several substantive conditions as components of a definition and the Court of Justice concluded that the terms used in Article 21 (today Art 29 Reg 1215/2012) must be interpreted independently from those laid down in the various national procedural rules. The 'cause of action' comprises the facts and the rule of law relied on as the basis of the action<sup>127</sup> and the 'object' consists of the action's purpose.<sup>128</sup>
- 109 In the *Gubish* case, attention is drawn to the fact that Article 21 does not refer to the term *lis pendens* as used in different national legal systems but instead lays down several *substantive conditions* as components of a definition (Section 11). In light of these considerations, the Court adds that the concept of 'object' could not be restricted to include in its meaning two claims which are formally identical.
- 110 The Court observes that an action to enforce a contract of sale and an action for its waiver or discharge have the same subject matter because the binding force of the contract is at the heart of the two actions; one action seeking to give effect to the contract and the other aimed at depriving it of any effect.<sup>129</sup> Interestingly, in this case, there is an Italian scenario: the Court of Rome has already rejected the lack of jurisdiction plea; Mr Mancini is the Advocate General and proposes a reconstruction of European *lis pendens* according to canons borrowed from the traditional Italian interpretation. However, in the absence of full identity between the parallel claims, he excludes the *lis pendens* between the two lawsuits.<sup>130</sup> Nevertheless, the Court does not accept such an opinion and affirms that 'in those procedural circumstances it must be held that the two actions have the same subject matter, for that concept cannot be restricted to mean two claims which are entirely identical' (point No 17). The overriding

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<sup>125</sup> *E Gubisch Maschinenfabrik KG v Giulio Palumbo* (n 123). The decision has formed the subject of extensive literature, for instance, H Gaudemet-Tallon, 'Observation' (1988) *Revue Critique de Droit International Privé* 374; A Huet, 'Chronique' (1988) *Clunet* 538; V Broggi, 'Sui rapporti tra litispendenza e connessione alla stregua della Convenzione giudiziaria di Bruxelles' (1988) 1 *Giustizia civile* 2166.

<sup>126</sup> *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* (n 123).

<sup>127</sup> *Ibid* para 39.

<sup>128</sup> *Ibid* para 41.

<sup>129</sup> See *Gubisch Maschinenfabrik KG v Giulio Palumbo* (n 123) para 16.

<sup>130</sup> The conclusions of Advocate General Mancini, presented on 11 June 1987, are available at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=94783&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=3774737> accessed 24 July 2024.



consideration is the need to avoid conflicting judgments for enforcement purposes, as explained in ground, point No 18.<sup>131</sup>

111 In *Tatry*, the Court extends this solution to actions on positive or negative ascertainment of liability. It holds that an action seeking a declaration that the plaintiff is not liable for the damage alleged by the defendants and an action brought by those defendants seeking to have the plaintiff in the first action held liable for causing the damage and ordered to pay damages, also have the same subject-matter.<sup>132</sup> The case is also very compelling on a linguistic level. The Court of Justice recognises that the English version of Article 21 does not expressly distinguish between the concepts of ‘object’ and ‘cause’ of action, however, affirms that that language version must be construed in the same manner as the majority of the other language versions in which that distinction is made (point No 38). So, for the purposes of EU concepts of *lis pendens*, ‘the “cause of action” comprises the facts and the rule of law relied on as the basis of the action’ (point No 39), and ‘the “object of the action” for the purposes of Article 21 means the end the action has in view’ (point No 41). The facts of the case are somewhat complex; it regards the liability for damages that occur during sea transport. The owners of the cargo reported to the ship owners that the cargo was contaminated with diesel or other hydrocarbons during the voyage. The parties are partially different, and the actions in question are *in rem* and *in personam*.

112 In line with the *Gubisch* case, the judgment states that ‘the issue of liability is central to both actions’. The court emphasizes that the object of the dispute remains the same, regardless of whether the plaintiff’s pleadings are couched in negative terms in the first action or in positive terms by the defendant in the second action (point No 43). As to damages, they are the natural consequence of those relating to the finding of liability and thus do not alter the main object of the action (point No 44). Based on these considerations, the court concludes (point No 47) that

the terms ‘same cause of action’ and ‘between the same parties’ have an independent meaning (see *Gubisch Maschinenfabrik v Palumbo*, cited above, paragraph 11). They must therefore be interpreted independently of the specific

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<sup>131</sup> Point No 18 explains that ‘If, in circumstances such as those of this case, the questions at issue concerning a single international sales contract were not decided solely by the court before which the action to enforce the contract is pending and which was seised first, there would be a danger for the party seeking enforcement that under Article 27 (3) a judgment given in his favour might not be recognized, even though any defence put forward by the defendant alleging that the contract was not binding had not been accepted. There can be no doubt that a judgment given in a contracting State requiring performance of the contract would not be recognized in the State in which recognition was sought if a court in that State had given a judgment rescinding or discharging the contract. Such a result, restricting the effects of each judgment to the territory of the State concerned, would run counter to the objectives of the Convention, which is intended to strengthen legal protection throughout the territory of the Community and to facilitate recognition in each Contracting State of judgments given in any other Contracting State.’

<sup>132</sup> *The owners of the cargo lately laden on board the ship ‘Tatry’ v the owners of the ship ‘Maciej Rataj’* (n 123) para 42.



features of the law in force in each Contracting State. It follows that the distinction drawn by the law of a Contracting State between an action in personam and an action in rem is not material for the interpretation of Article 21.

#### 4.2.1.1 The ‘Same Parties’

113 In the *Drouot Assurance* case<sup>133</sup>, the Court of Justice defines ‘same parties’ (insured and insurer) as those who have an identical interest. ‘That would be the case’, the Court clarifies,

where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings. In such a situation, insurer and insured must be considered to be one and the same party for the application of Article 21 of the Convention (point No 19).

114 The judgment concludes that this identification, and the application of *lis pendens* rules, however, ‘cannot have the effect of precluding the insurer and its insured, where their interests diverge, from asserting their respective interests before the courts as against the other parties concerned’ (point No 20). The issue is to grant the safeguards laid down in Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, which guarantee every person’s right to a fair hearing. This right, based on these fundamental rights, is a general principle of Community law which is upheld by Court.<sup>134</sup>

115 It is important to note that the objective of the free movement of judgments pursued by the Brussels system must not be attained to the detriment of the fundamental rights which form an integral part of Community law, such as the right to conduct one’s defence.<sup>135</sup>

#### 4.2.2 Related Actions. Notion

116 Article 30 No 3 states that ‘actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’. The primary objective,

<sup>133</sup> *Drouot assurances SA v Consolidated metallurgic*, Case C-351/96 (CJEU), Judgment 19 May 1998 [ECLI:EU:C:1998:242] [https://curia.europa.eu/jcms/jcms/Jo1\\_6308/](https://curia.europa.eu/jcms/jcms/Jo1_6308/) accessed 24 July 2024.

<sup>134</sup> See, for instance *Baustahlgewebe v Commission*, Case C-185/95 P (CJEU), Judgment 17 December 1997 [ECLI:EU:C:1998:608] [1998] ECR I-8417, para 20 and 21; and *Netherlands and Van der Wal v Commission*, Joined Cases C-174/98 P and C-189/98 P (CJEU), Judgment 11 January 2000 [ECLI:EU:C:2000:1] [2000] ECR I-1, para 17.

<sup>135</sup> *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, Case C-351/89 (CJEU), Judgment 27 June 1991 [ECLI:EU:C:1991:279]; *Skarb Państwa Rzeczypospolitej Polskiej – Generalny Dyrektor Dróg Krajowych i Autostrad v Stephan Riel, en qualité d’administrateur judiciaire de Alpine Bau GmbH*, Case C-47/18 (CJEU), Judgment 18 September 2019 [ECLI:EU:C:2019:754].

and the sole criterion, is to avoid conflicts of judgment that would prevent the recognition and enforcement of a judgment. The Court of Justice adopted a broad interpretation of this provision in the above-mentioned *Tatry* case. This definition aims to achieve an efficient coordination among proceedings pending in the courts of different Member States and thereby facilitating the proper administration of justice. In consideration of this purpose, 'that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive' (point No 52). Thus, the notion adopted is more extensive than in the *Hoffman* case<sup>136</sup>, where the Court considers a conflict between decisions (such as to prevent circulation) to exist only when decisions would produce mutually exclusive effects.

- 117 In cases of related action, Article 30 provides more options for the court second seized, which 'may' stay its proceedings.<sup>137</sup> The second court 'may' decline jurisdiction but only if it appears that the court first seized has jurisdiction over both actions; furthermore, the second court may decline jurisdiction only if the law of the court first seized permits the consolidation of related actions. These provisions are intended to avoid disclaimers of jurisdiction. To prevent one of the parties from being deprived of a step in the hierarchy of the court, the proceedings must be pending at the same level of adjudication.

#### 4.2.3 Actions Having Exclusive Jurisdiction. The Exclusive Choice-of-Court Agreement and the In Rem Actions

- 118 In the *Overseas Union Insurance* case, the Court of Justice held that the only case in which the court second seized might control the jurisdiction is when it is vested with exclusive jurisdiction; this was the sole exception to the general provision requiring the court second seized to stay the proceedings until the first court has ruled on its jurisdiction.<sup>138</sup>
- 119 However, the CJEU did not extend the same rule to cases where the second court seized is the one indicated in a choice of court clause. In the *Gasser* case, it was argued that

<sup>136</sup> *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, Case 145/864 (CJEU), Judgment 4 February 1988 [ECLI:EU:C:1988:61].

<sup>137</sup> The first and the second paragraph of Art 30 state: '1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. 2. Where the action in the court first seized is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof'.

<sup>138</sup> *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, C-351/89 (CJEU), Judgment 27 June 1991 [ECLI:EU:C:1991:279] ruled that 'Without prejudice to the case where the court second seized has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seized is contested, the court second seized may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seized'.

Article 21 of the Brussel Convention ‘must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction’.<sup>139</sup>

- 120 Rejecting the contrary opinion of Advocate General Léger, the Court added that such a rule ‘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 seised is established is excessively long’. The Court’s decision emphasizes that it is not in conformity with the letter and spirit of the Convention to interpret Article 21 as inapplicable where the court first seised takes a long time to deal with the case. The CJEU also remembers in point No 72 of the grounds, that

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 all 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 favour of a simplified mechanism for the 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.

- 121 In the light of these reasons at the time of the Brussel recast, the new Article 31 of the Regulation no 1215/2012 was amended, providing that in the case of an exclusive choice of court agreement, the other courts shall decline jurisdiction.<sup>140</sup> In essence, this amendment extends to exclusive choice of court agreements the discipline imposed on exclusive jurisdiction.<sup>141</sup>

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<sup>139</sup> *Eric Gasser GmbH. v MISAT Srl*, Case C-116/02 (CJEU), Judgment 9 December 2003 [ECLI:EU:C:2003:657]. T C Hartley, ‘Choice-of-court Agreements, lis pendens, Human Rights and the Realities of International Business: Reflections on the Gasser Case’ in *Mélanges en l’honneur de Paul Lagarde – Le droit international privé: esprit et méthodes*, *Mélanges en l’honneur de Paul Lagarde* (Dalloz 2005) 383 ff.

<sup>140</sup> Article 31 provides that: ‘1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court. 2. Without prejudice to Article 26, 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. 3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court. 4. Paragraphs 2 and 3 shall not apply to 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 claimant and the agreement is not valid under a provision contained within those Sections’.

<sup>141</sup> Exclusive jurisdiction is designated in Article 24 as including *in rem* actions, business entity dissolution, public register validity, intellectual property registration, and judgment enforcement.

- 122 The rule of ‘first court seized’ is, thus, mitigated and remains where both courts seized are vested with exclusive jurisdiction (Article 31 first paragraph). Recital 22 explains that

However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seized of proceedings and the designated court is seized subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seized should be required to stay its proceedings as soon as the designated court has been seized and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.

#### 4.2.4 *Lis Pendens and Related Actions between a Court of a Member State and a Court of a Third State. Elements of Discretion.*

- 123 Articles 33 and 34 address ‘foreign’ *lis pendens* and related action, specifically where different proceedings are pending before a court of a member State and a court of a non-Member State.<sup>142</sup>

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<sup>142</sup> Art 33 states: ‘1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if: (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice./ 2. The court of the Member State may continue the proceedings at any time if: (a) the proceedings in the court of the third State are themselves stayed or discontinued; (b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or (c) the continuation of the proceedings is required for the proper administration of justice./ 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. 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion’.

124 These rules were not included in the Brussel Convention or in the Regulation 44/2001. The European legislator deemed it appropriate to include them in Recital No 23 of Regulation 1215 of 2012 to the purpose of

provid[ing] for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.

125 The new rules establish the conditions under which the EU court may stay, continue or dismiss the case. The decision on which of these measures is more appropriate for the pending actions lies with the seized European court. This decision shall be subject to the remedies provided for in national law. Both rules share the scope of their application, which concerns actions only based on Articles 4 (persons domiciled in a Member State) or 7, 8 and 9 (alternative grounds of jurisdictions); they might not apply, for instance, in the case of exclusive jurisdiction or where the parties have chosen the forum. The EU court must always be the second court seized, and the judgment of the non-EU court seized may be recognized. Transfers and consolidations are not authorized, but the courts second seized may dismiss later-filed actions in the cases provided in Articles 33 and 34. The proper administration of justice and the risk of conflicting judgments form the general policy behind the EU courts' power to order one of the measures provided for in the rules (stay, dismissal or continuation of proceedings).

126 Article 33 requires the triple identity for *lis pendens*, namely the same parties and the same cause of action. In the case of related actions, the Member State's second seized court may or may not stay the domestic proceedings, subject to the conditions laid down

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Art 34 states: '1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seized of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if: (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings; (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. 2. The court of the Member State may continue the proceedings at any time if: (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments; (b) the proceedings in the court of the third State are themselves stayed or discontinued; (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or (d) the continuation of the proceedings is required for the proper administration of justice. 3. The court of the Member State may 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. 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.'

in Article 34, first and second paragraphs. One of the main conditions is the need to avoid the risk of irreconcilable judgments.

#### 4.3 Tensions Between Civil and Common Law Traditions. The Anti-Suit Injunction Ban. The *Turner* Case

127 Trevor Hartley argued that English conflict of laws was a creation of the common law, and that legislation played a limited role before Britain joined the European Union. He wrote that

[f]or this reason a common-law court will consider whether it, or the other court, is the more appropriate forum. If it considers that the other court is more appropriate, it will stay the proceedings before it. If it considers that it is the more appropriate forum, it may consider granting an anti-suit injunction (an injunction ordering the party who is claimant before the foreign court to discontinue the proceedings there), but it will not do so just because it has decided not to stay the proceedings before it.<sup>143</sup>

128 Regulation No 1215/2012 is inspired by civil law tradition and applies the doctrine of *lis pendens* whereby, with proceedings involving the same parties and the same cause of action, the court first seized has jurisdiction and there is not evaluation about the convenience of the *forum*. Furthermore, the anti-suit injunctions are not permitted by the Brussels-I *bis* system.

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<sup>143</sup> T C Hartley, 'The European Union and The Systematic Dismantling Of The Common Law Of Conflict Of Laws' (2005) 54(4) International and Comparative Law Quarterly 813-828 <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/european-union-and-the-systematic-dismantling-of-the-common-law-of-conflict-of-laws/59CFBC79BC8962BCBC034A17B72F7459> accessed 24 July 2024.

129 The CJEU affirmed this principle in the *Turner* case.<sup>144</sup> Mr *Turner* applied to the High Court of Justice of England and Wales for an injunction under Section 37(1) of the Supreme Court Act 1981, backed by a penalty, restraining Mr *Grovit*, *Harada* and *Changepoint* from pursuing the proceedings commenced in Spain. While the High Court refused to extend the injunction. However, the Court of Appeal granted the request and issued an injunction restraining the defendants from continuing the proceedings commenced in Spain and from commencing any further proceedings in Spain or elsewhere. In its judgment, the Court of Appeal stated, specifically, that the proceedings in Spain had been brought in bad faith in order to vex Mr *Turner* in the pursuit of his claim before the Employment Tribunal. Mr *Grovit*, *Harada* and *Changepoint* subsequently appealed to the House of Lords, arguing that the English courts had no power to grant an injunction preventing the continuation of proceedings in foreign jurisdictions covered by the Convention. The House of Lords stayed its proceedings and referred the matter to the Court of Justice. The latter considered that such an injunction amounts to an interference with the jurisdiction of the foreign court and provokes conflict between jurisdictions. In its judgment, the CJEU emphasized that the Convention's system

is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

130 The decision is based on the *Kompetenz-Kompetenz* principle, which excludes, as stated above, an anti-suit injunction order because it effectively confers exclusive jurisdiction on the issuing court and deprives the court of another Contracting State of any possibility of reviewing its own jurisdiction, thereby negating the principle of mutual cooperation

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<sup>144</sup> *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, Case C-159/02 (CJEU), Judgment 27 April 2004 [ECLI:EU:C:2004:228]. Mr *Turner*, a British citizen domiciled in the UK, was a solicitor who worked for the Chequepoint Group, under the direction of Mr *Grovit*. The group comprises several companies established in different countries, among others, *Harada*, established in the UK, and *Changepoint*, established in Spain. In 1997, he was moved to Madrid, where he worked at the office of a Spanish company called *Changepoint SA*. It was the Spanish member of the same group of companies as *Harada Ltd*. The move was intended to be merely temporary: he was still employed by *Harada Ltd*, which continued to pay his salary. A few months later, the whole group of companies was involved in a tax fraud. Money deducted for tax from the salaries of employees was being used to pay creditors. *Turner* was expected to justify and defend this. Since he could not do so, he resigned and returned home. He brought proceedings against *Harada Ltd* before an English employment tribunal. The tribunal held that it had jurisdiction under the Convention and found for *Turner* on the merits: it ruled that he had been unfairly and wrongfully dismissed. For critical remarks on this decision T C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54(4) *International and Comparative Law Quarterly* 813; A Briggs, 'Anti-suit Injunctions and Utopian Ideals' (2004) 120 *Law Quarterly Review* 529; among other, see M-L Niboyet, 'Le principe de confiance mutuelle et les injonctions anti-suit' in P de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Bloomsbury Publishing 2007) 77.



underlying the Convention.<sup>145</sup> The anti-suit injunction also conflicts with the trust which the Contracting States accord to one another's legal systems (point No 24 of the grounds) and the certainty of the rules establishing jurisdiction (point No 27).

#### 4.4 The *West Tankers* Case (Anti-Suit Injunctions Between Court of a Member State and Arbitration Clause)

131 The *Turner* solution was extended by the Court of Justice to the case in which parallel proceedings between a court and an arbitral tribunal.<sup>146</sup> This is the *West Tanker* case<sup>147</sup> where CJEU decided that it is

incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 [...] to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

132 The *Kompetenz-Kompetenz* principle is the base of the decision.

133 In its reasoning, the Court argued that a preliminary issue concerning the applicability of an arbitration agreement, including its validity, also comes within its scope of application. It follows:

first, that an anti-suit injunction is contrary to the general principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.; Secondly, [...] an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions.; Lastly, [...] a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court.

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<sup>145</sup> Point No 28 of the grounds: '28 [...] such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State'.

<sup>146</sup> *Marc Rich & Co. AG v Società Italiana Impianti PA*, Case C-190/89 (CJEU), Judgment 25 July 1991 [ECLI:EU:C:1991:319]. In this case, a dispute arose under a contract incorporating a London arbitration clause. The seller brought an action before the Italian courts seeking a declaration that it was not liable to the purchaser. The purchaser, however, and in accordance with the terms of the contract, initiated arbitration proceedings in London. The seller's refusal to participate or to appoint an arbitrator prevented the arbitration proceedings from continuing. The seller argued that the real dispute was linked to the question of whether the contract did or did not contain the arbitration clause and, as such, that dispute must fall within the scope of the Brussels I Regulation.

<sup>147</sup> *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, Case C-185/07 (CJEU), Judgment 10 February 2009 [ECLI:EU:C:2009:69]. R Fentiman, 'Arbitration and the Brussel Regulation' (2007) 66(3) Cambridge Law Journal 493.

134 In the post-Brexit landscape, with rules governing jurisdiction in proceedings commenced in the English courts after January 2021, the situation has changed. With the application of the common rules on parallel proceedings, anti-suit injunctions can now be deployed to ensure that the dispute is heard in only one jurisdiction. In two recent cases, the English courts have granted anti-suit injunctions in favour of English forum selection clauses. These cases clearly demonstrate the change in position from *Allianz v West Tankers* and *Turner v Grovit*.<sup>148</sup>

#### 4.5 The *Forum Non Conveniens* Ban. The *Owusu* Case

135 In the *Owusu* case,<sup>149</sup> the Court of Justice takes into account that the *forum non conveniens* doctrine,<sup>150</sup> which allows the court seized broad discretion to understand whether a foreign court would be a more appropriate forum for trailing an action, can undermine the predictability of jurisdiction rules laid down by the Brussels Convention and also the principle of legal certainty, which is the foundation of the Convention<sup>151</sup> (please see bullet 41).

136 The judgment also recalls that

<sup>148</sup> In *QBE Europe SA/NV and QBE (UK) Ltd v Generali Espaa de Seguros y Reaseguros* (High Court, UK) [2022] EWHC 2062 (Comm) found that it was appropriate to grant the claimant an anti-suit injunction restraining Spanish proceedings brought by the defendants in breach of an English arbitration agreement. In *Ebury Partners Belgium SA/NV v Technical Touch BV* (High Court, UK) [2022] FWHC 2927 (Comm) the defendants brought proceedings in Belgium seeking negative declarations and challenging the validity of agreements under Belgian law. The claimant responded by commencing proceedings in England and seeking an anti-suit injunction in respect of the Belgian proceedings brought by the defendants. The claimant submitted that the Belgian proceedings were in breach of the exclusive jurisdiction agreement in favour of the English court. The court found that there was a high degree of probability that the jurisdiction clause was incorporated into the parties' relationship agreement and that it was therefore appropriate to grant the plaintiff an anti-suit injunction restraining the Belgian proceedings.

<sup>149</sup> *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, Case C-281/02 (CJEU), Judgment 1 March 2005 [ECLI:EU:C:2005:120] <https://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-281%252F02&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=it&avg=&cid=966252> accessed 24 July 2024.

See T Ballarino, 'I limiti territoriali della Convenzione di Bruxelles secondo la sentenza Owusu' (2006) 2 Il Corriere giuridico 93; M De Cristofaro, 'L'incompatibilità del forum non conveniens con il sistema comunitario della giurisdizione: davvero l'ultima parola?' (2006) 61(4) Rivista di diritto processuale 1381; M Lupoi, 'L'ultima spiaggia del forum non conveniens in Europa?' (2006) 1 Corr giur 15.

<sup>150</sup> J J A Burke, 'Foreclosure of the Doctrine of Forum non Conveniens under the Brussels I Regulation: Advantages and Disadvantages' (2008) 3 The European Legal Forum 121 <http://simons-law.com/library/pdf/e/886.pdf> accessed 24 July 2024.

<sup>151</sup> Critical A Briggs, 'The impact of recent judgements of the European court on English procedural law and practice' (2005) *Int'l Lis* 3; A Briggs, 'The Death of Harrods: Forum non conveniens and the European Court' (2005) *The Law Quarterly Review* 535 ff; A Briggs, 'Forum non conveniens and ideal Europeans' (2005) *Lloyd's Maritime and Commercial Law Quarterly* 378 ff; R Fentiman, 'English domicile and the staying of actions' (2005) 64(2) *Cambridge Law Journal* 303 ff.

It is common ground that no exception on the basis of the *forum non conveniens* doctrine was provided for by the authors of the Convention, although the question was discussed when the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom was drawn up, as evident from the report on that Convention by Professor Schlosser (OJ 1979 C 59, p 71, para 77 and 78) (please see bullet 37).

- 137 The grounds also underline the importance of certainty and predictability of the jurisdiction rules to grant the protection of the parties. In particular, the Court affirms that the *forum non conveniens* doctrine would be affected the legal protection of persons established in the European Community. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able reasonably to foresee before which other court he may be sued. Second, when a plea is raised suggesting that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or that the foreign court has in fact no jurisdiction or even that the claimant does not, in practice, have access to effective justice before that court (bullet 42).
- 138 The conclusion is that the *forum non conveniens* doctrine within the context of the Brussels system would be likely to affect the uniform application of the rules of jurisdiction contained therein, in so far it is recognized only in a limited number of Contracting States. Furthermore, it is not compatible with the purpose of the Brussels system, which is to lay down common rules to the exclusion of derogating national laws.<sup>152</sup>

## 5 THE ASIAN EXPERIENCE: CHINA, JAPAN, KOREA

### 5.1 China. In Search of an 'Abstention Doctrine'. Reforms and Proposals

- 139 In the jurisdictional sphere, China may be defined as a developing country. Officially, its legal system is defined as 'socialist with Chinese characteristics', but, in fact, it is primarily based on the civil law traditions.<sup>153</sup> The court system is articulated in different levels and has specialized courts in various areas (eg, intellectual property, maritime, military courts), but an important role is still played by the People's Mediation

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<sup>152</sup> On 1 January 2021, the European Union's uniform rules on jurisdiction in cross-border disputes will cease to have effect in the United Kingdom. With the common law rules on jurisdiction also comes a return to the doctrine of *forum non conveniens* in deciding *Owusu*-type cases. In *Al Assam & others v Tsouvelekakis* (High Court, UK) [2022] EWHC 451 (Ch) considered an application to decline jurisdiction in favour of the courts in Cyprus on the basis that it was not an appropriate forum to hear the dispute against a defendant domiciled in England. The application was decided on the basis of the common law principles set out in *Spiliada Maritime Corp v Cansulex Ltd* (n 72). The decision is a reminder that, post-Brexit, these applications will continue to be made in the future.

<sup>153</sup> H Wu, 'People's Republic of China: National Report' Global Access to Justice Project, 3 <https://globalaccesstojustice.com/global-overview-china/> accessed 24 July 2024.

Committee, which is not a judicial structure.<sup>154</sup> Over time, especially since 1990, the Chinese law system has started important renewals, also thanks to the development of the Chinese Legal academy. Notable developments include the Supreme People's Court promotion judicial disclosure since 2013<sup>155</sup>, and the reform of the case registration system in 2015, which has ensured access to justice.<sup>156</sup> This movement also includes an extensive discussion about China's private international law system and the People's Republic of China (PRC) Private International Law draft, which has not been approved since 2000.<sup>157</sup>

140 Article 35 of the Chinese Civil Procedure Law governs the *lis pendens* between domestic parallel proceedings. It provides that:

Where an action comes under the jurisdiction of two or more people's courts, the plaintiff may file a suit at any of them; where the plaintiff brings an action with two or more people's courts which are competent, the case shall be handled by the people's court that is the first to place the case on file.<sup>158</sup>

141 The second part of the rule, 'the plaintiff brings an action with two or more people's courts which are competent' does not expressly require the *triple identity* between the pending litigations. Its rather general tenor, referring to the court's jurisdiction, suggests that the rule may also be applied in the case of related action.

142 Part four of the Code of Civil Procedure is entitled *Special Provisions for Procedure of Civil Actions Involving Foreigners* and consists of Articles 237 to 270. The rules concern jurisdiction (Articles 243-246), arbitration (Articles 257-261) and judicial assistance (Articles 262-270), but none govern international parallel proceedings or foreign judgments.

143 Art 533 of Civil Procedural Law Judicial Interpretation by the Supreme Court (2015), provides that

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<sup>154</sup> For an overview of the Chinese system see I Castellucci, *Rule of Law and Legal Complexity in the People's Republic of China* (Università degli Studi di Trento 2012).

<sup>155</sup> 'Opinions of the Supreme People's Court on disclosing the Construction of the three platforms for Judicial publicity' (2013) 13 SPC's Report.

<sup>156</sup> 'Provisions of the Supreme People's Court on several issues concerning the Registration of case of the people's Court' (2015) 8 SPC's legal interpretation.

<sup>157</sup> W Hui, 'A Review of China's Private International Law During the 30-year period of reform and opening-up' (2009) Asian Law Institute, Working paper series No 002 <https://law1a.nus.edu.sg/asli/pdf/WPS002.pdf> accessed 24 July 2024.

<sup>158</sup> Chinese Civil Procedure Law (English version) is available at <http://www.asianlii.org/cn/legis/cen/laws/cpl179/> accessed 24 July 2024. The Civil Procedure Law was adopted by the Fourth Session of the Seventh National People's Congress on 9 April 1991 and has been amended on several occasions since then (most recently in 2017). The interpretation of the civil procedure law by the Supreme People's Court is considered to be an integral part of the rules.

for the case over which both the People's Court of the People Republic of China and the foreign court have the jurisdiction, if one party files a lawsuit with the foreign court while the other party files a lawsuit with the People's Court of the People's Republic of China, the People's Court may accept the case. If, after judgment was rendered, the foreign court or one-party requests the People's Court to recognize and enforce the judgment or ruling rendered by the foreign court concerning this case, the People's Court shall not consent to the request, unless it is otherwise prescribed by an international treaty concluded or accepted to by both countries. The People's Court will not hear an action if there has already been a foreign judgment based on the same parties and the same dispute, and the foreign judgment recognized by the People's Court.<sup>159</sup>

144 China's position is, therefore, to protect its own jurisdiction, with modest openness to foreign countries.

145 A similar provision to Art 533 is also contained in Paragraph No 10 of the Notice of the Supreme People's Court (2005), which provides that

in cases of foreign-related commercial disputes, if a Chinese court and a foreign court both have jurisdiction, and one of the parties files a lawsuit in a foreign court which is accepted and then a lawsuit with the same dispute is file by either party in the Chinese court, whether the foreign court accepts the case or makes a judgment does not affect the jurisdiction of Chinese courts, Chinese court will decide whether accept the case or not according to circumstance of the case. If the judgment of the foreign court has been recognized and enforced in Chinese court, the Chinese court shall not accept jurisdiction. If the international treaties concluded or participated in by China have other provisions, they shall be handled in accordance with the provisions.

146 Regarding choice-of-court agreements, Chinese judicial practice may consider them null and void because of the lack of actual connection between the agreed foreign jurisdictions and the foreign-related disputes. Party autonomy is limited by the Chinese Civil Procedure Law; Chinese courts often exercise jurisdiction through the *forum non conveniens* doctrine, if the Chinese forum is not chosen by the parties.<sup>160</sup> While the country has no relevant legislation on anti-suit injunction, the discussion on whether or not to introduce this device has been going on among scholars for several years. Proponents believe that anti-suit injunction can play a positive role in resolving jurisdictional conflicts and that with limited use of injunction, China can combat

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<sup>159</sup> See HCCH (n 3) 18.

<sup>160</sup> L Zhao, 'Party autonomy in choice of court and jurisdiction over foreign-related commercial and maritime disputes in China' (2019) 15(3) Journal of Private International Law 541 ff.

excessive jurisdiction of other countries and judicial acts that undermine China's jurisdiction.<sup>161</sup>

- 147 Recently, Chinese courts have issued two anti-suit injunctions in cross-border patent cases. The first is *Huawei v Conversant* case (2019), involving China and Germany, in which China's Supreme People's Court issued an anti-suit injunction against the German party to prevent it from applying to the German court to enforce a German judgment.<sup>162</sup> The second case is *Xiaomi v Intel Digital* (2020), involving a Chinese company and a US company. The Chinese company brought the case before the Wuhan Intermediate Court to determine the global FRAND rate for SEPs held by the US company *Inter Digital*. *Inter Digital* sued *Xiaomi* in the Delhi High Court in India for infringement of Indian patents in the same patent family and sought an injunction. The Wuhan Intermediate Court ordered *Inter Digital* to stop seeking injunctions in India.<sup>163</sup> These two cases are noteworthy in that they open the door for the courts to 'make law' by an innovative interpretation of Article 100 of the Civil Procedure Law, which provides courts to order

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<sup>161</sup> J He, 'On the Anti-suit Injunction System in International Commercial Arbitration: An Overview of the Injunction System in International Commercial Arbitration (III)' (2021) [https://mp.weixin.qq.com/s/augah4CTlsRzvpYSN\\_\\_B9g](https://mp.weixin.qq.com/s/augah4CTlsRzvpYSN__B9g) accessed 24 July 2024; F Panfeng, 'The Anti-suit Injunction in International Commercial Arbitration: Particularities and Countermeasures' (2021) 8 Hebei Law, from Guangzhou Arbitration Commission, 'An Overview of the Injunction System in International Commercial Arbitration (II)' (2021) [https://mp.weixin.qq.com/s/augah4CTlsRzvpYSN\\_\\_B9g](https://mp.weixin.qq.com/s/augah4CTlsRzvpYSN__B9g) accessed 24 July 2024.

<sup>162</sup> Huawei, the famous telecom company, brought an action on 25 Jan 2018 in Jiangsu Nanjing Intermediate Court requiring a determination of FRAND royalty for all Chinese patents held by Conversant that is essential to 2G, 3G and 4G standard (Standard Essential Patent or SEP). Conversant brought another action in Düsseldorf, Germany (20 April 2018) claiming Huawei infringed its German patents of the same patent family. On 16 Sept 2019, the Chinese court ordered a relatively low rate pursuant to Chinese standards; on 27 August 2020, the German Court held Huawei liable and approved the FRAND fee proposed by Conversant, which is 18.3 times of the rate determined by the Chinese court. Pursuant to Huawei's application, the Chinese Supreme Court restrained Conversant from applying the German court to enforce the German judgment. The reasons include: the enforcement of the Düsseldorf judgment would have a negative impact on the case pending in Chinese court; an injunction is necessary to prevent irreparable harm to Huawei; the damage to Conversant by granting the injunction is significantly smaller than the damage to Huawei if not granting injunction; injunction will not harm public interest or international comity. See S Tang, 'Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law' (2020) Conflict of Laws.net <https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/> accessed 24 July 2024; A White and S Gao, 'Anti-suit' injunctions in China and further updates on the Huawei and Conversant SEP royalty dispute in China' (2020) Mathys & Squire <https://www.mathys-squire.com/insights-and-events/news/anti-suit-injunctions-in-china-and-further-updates-on-the-huawei-and-conversant-sep-royalty-dispute-in-china/> accessed 24 July 2024.

<sup>163</sup> In its grounds, the Supreme Court provides as follows: *Inter Digital* intentionally brought a conflicting action in India to hamper the Chinese proceedings; the Indian proceedings may lead to judgments irreconcilable to the Chinese one; an anti-suit injunction is necessary to prevent irreparable harm to Xiaomi's interests; an anti-suit injunction will not harm *Intel Digital*'s legitimate interests or public interests. See Tang (n 162).



or prohibit the respondent to do certain actions, albeit not through a proper anti-suit injunction.<sup>164</sup>

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<sup>164</sup> On 30 December 2022, China's Standing Committee of the National People's Congress issued the 'Civil Procedure Law of the People's Republic of China (amendment draft)'. Amendments are proposed for 29 articles, 17 of which relate to special provisions on foreign-related civil procedures, including rules on the jurisdiction, service abroad, taking of evidence abroad and recognition and enforcement of judgements. With regard to parallel proceedings and exclusive jurisdiction, the proposed amendment provided in Article 282 that: 'If one party sues before a foreign court and the other party sues before the Chinese court, or if one party sues before a foreign court as well as the Chinese court, for the same dispute, the Chinese court having jurisdiction under this law may exercise jurisdiction. If the parties have agreed in writing on choosing a foreign court to exercise jurisdiction exclusively, and that choice does not violate the provisions on exclusive jurisdiction of this law or involve the sovereignty, security or social public interests of China, the Chinese court may dismiss the action.' The first part of this article deals with parallel litigation. It allows the Chinese court to exercise jurisdiction over the same dispute pending in a foreign court. The second part of this article provides exceptions to exclusive jurisdiction agreements. Although Chinese courts are not obliged to stay jurisdiction in parallel proceedings, they should stay jurisdiction in favour of a chosen foreign court in an exclusive jurisdiction clause, subject to normal public policy defence'. The approach of the court first seized shall apply if the same action is already pending before a foreign court; the amendment to Article 283 states: 'Where a foreign court has accepted a lawsuit and the judgment of the foreign court may be recognised by the Chinese court, the Chinese court may suspend the lawsuit upon the written application of the party, unless: (1) there is a jurisdiction agreement between the parties designating the Chinese court, or the dispute is covered by exclusive jurisdiction; (2) it is obviously more convenient for the Chinese court to hear the case. If the foreign court fails to take the necessary measures to hear the case or fails to conclude the case in time, the Chinese court may lift the stay upon the written request of the party'. This provision introduces the first-in-time or *lis pendens* rule for the first time in China. However, the doctrine is introduced with many limitations. First, the foreign judgment may be recognized in China. Second, the Chinese court is not the chosen court. Third, the Chinese court is not the natural forum. Thus, the *lis pendens* rule is fundamentally different from the strict *lis pendens* rule adopted in the EU jurisdictional regime, in particular, it incorporates the consideration of *forum conveniens*. In addition, the first-in-time rule needs to be reconciled with the article on parallel proceedings, which states that Chinese courts can in principle 'exercise jurisdiction even if the dispute is pending before the foreign court'. Paragraph 3 of Article 283, in adopting the rule of *res iudicata*, provides that 'Once the foreign judgement has been fully or partially recognized by Chinese court, and the parties institute an action over issues of the recognized content of the judgement, Chinese court shall not accept the action. If the action has been accepted, Chinese court shall dismiss the action'. Article 284 provides for the application of a rule similar to that of *forum non conveniens*: '(1) Since major facts of disputes in a case do not occur within the territory of China, Chinese court has difficulties hearing the case and it is obviously inconvenient for the parties to participate in the proceedings. (2) The parties do not have any agreement for choosing Chinese court to exercise jurisdiction (3) The case does not involve the sovereignty, security or social public interests of China. (4) It is more convenient for foreign courts to hear the case'.

See N I E Yuxin, L I U Chang, 'A Major Amendment to Provisions on Foreign-Related Civil Procedures Is Planned in China' (2023) Conflict of Laws.net <https://conflictoflaws.net/2023/a-major-amendment-to-provisions-on-foreign-related-civil-procedures-is-planned-in-china/> accessed 24 July 2024.



## 5.2 Japan's Mixed System: Combining the Rule Format with Common Law Remedies

148 From a scholarly point of view, Japan presents a fascinating mix of traditions and models. Modern commercial litigation coexists with a traditional emphasis on conciliation.<sup>165</sup> The legal system is based on a written constitution and various codes, including the Code of Civil Procedure (JCCP) and the Civil Code; the court system is structured at several levels: the Supreme Court, High Courts and District Courts; judicial precedents are increasingly used and traditional common law remedies in jurisdictional matters are provided for by the Code of Civil Procedure, reminiscent of the doctrine of *forum non conveniens*, although they have their own original and significant characteristics, as well as devices for domestic litigation.

149 Article 18 JCCP, states that 'even if the litigation is subject to its jurisdiction, a summary court, upon petition or sua sponte, may transfer the whole or part of litigation to the district court of jurisdiction in that locality, if it finds this to be appropriate', and Article 3 – 9 provides the judge may dismiss a cause in special circumstances as

if the Japanese courts were to conduct a trial and reach a judicial decision in the action, it would be inequitable to either party or prevent a fair and speedy trial, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances.<sup>166</sup>

150 Scholars consider the latter provision different from the *forum conveniens* doctrine because the Japanese judge has the duty to dismiss the proceedings where the conditions of Article 3 – 9 are fulfilled.<sup>167</sup> Modern international law was first introduced to Japan in the mid-nineteenth century. International lawyers and scholars in Japan have played an important role in international law policy-making, and legal studies have interacted with Japanese foreign policy. Over the past 60 years, Japan has assumed a central role in the world economy. The expansion of transnational relations has increased the number of international business disputes. However, the country has not yet adopted rules of private international law. The 2009 Interim Draft proposed to adopt

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<sup>165</sup> Thus observes B G Garth, 'Book Review. Civil Procedure in Japan by Takaaki Hattori and Dan Fenno Henderson' (1984) *Articles by Maurer Faculty* 1107 <https://www.repository.law.indiana.edu/facpub/1107/> accessed 24 July 2024.

<sup>166</sup> Article 3-9, provides that: 'Even when the Japanese courts have jurisdiction over an action (except when an action is filed based on an agreement that only permits an action to be filed with the Japanese courts), the court may dismiss the whole or part of an action without prejudice if it finds that there are special circumstances because of which, if the Japanese courts were to conduct a trial and reach a judicial decision in the action, it would be inequitable to either party or prevent a fair and speedy trial, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances'.

<sup>167</sup> Y Nishitani, 'International Jurisdiction of Japanese Courts in a comparative perspective' (2013) 60(2) *Netherlands International Law Review* 251, 271.

the *lis pendens* doctrine and allow the judge to stay proceedings involving the same cause of action and between the same parties in favour of the court first seized. However, the draft was not adopted. Furthermore, the country does not have an articulated discipline of *lis pendens*, neither in domestic litigation nor in international litigation.

- 151 Article 142 of the Japanese Code of Civil Procedure contains a concise provision which, under the title *Prohibition Against the Filing of Duplicate Actions*, provides that 'It is not permitted for a party to a case pending before the court to file another action in the case'.<sup>168</sup> This rule is based on the consideration that parallel litigation wastes the time and resources of the parties and the court, may give rise to conflicting judgments, does not facilitate the protection of rights nor the resolution of disputes, and harms the authority of the court.<sup>169</sup> The term 'court' has traditionally been interpreted as referring to domestic courts<sup>170</sup>, but the case law began in the 1980s to recognize *lis pendens* also in international litigation under 'certain circumstances'.
- 152 Based on the Supreme Court Judgment of 16 October 1981 in the *Malaysian Airlines System* case and the Supreme Court Judgment of 11 November 1997 in the *Family Company* case, the general rules of international jurisdiction in civil and commercial matters are founded on considerations reminiscent of the multi-factor test of the common law.<sup>171</sup> Among the 'certain circumstances' mentioned previously are parallel proceedings having the same cause of action. The principle of the first court seized is not applied: the Japanese court declines jurisdiction when a foreign parallel proceeding is pending, and the judgment is expected to be recognized. In such cases, the court may consider it more convenient to proceed with the foreign action, as provided for in Articles 18 and 3-9 for domestic litigation. This implies the power of the court to transfer the cause to another forum that it deems more 'appropriate'.<sup>172</sup> However, for foreign *lis*

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<sup>168</sup> The translation of Civil Procedure Code (Japan) is available at [https://www.japaneselawtranslation.go.jp/en/laws/view/2834/en#je\\_pt2ch1at10](https://www.japaneselawtranslation.go.jp/en/laws/view/2834/en#je_pt2ch1at10) accessed 24 July 2024.

<sup>169</sup> Furuta (n 55) 25.

<sup>170</sup> *Shinagawa Hakurenga v Houston Technical Ceramics, Inc.* (District Court of Tokyo, Japan) Interlocutory Judgment of 19 June 1989, in Furuta (n 55) 27.

<sup>171</sup> M Dogauchi, 'New Japanese Rules on International Jurisdiction: General Observation' (2011) 54 Japanese Yearbook of International Law 260, 262 [http://www.pilaj.jp/yearbook/YB\\_DATA/YB012/Y012A09.pdf](http://www.pilaj.jp/yearbook/YB_DATA/YB012/Y012A09.pdf) (page 212) accessed 24 July 2024; Japanese test, formulated by the *Malaysian Airlines* case and the *Family Company* case, provides as follows: '(1) If there are any applicable rules regarding jurisdiction in a treaty to which Japan is a party, such rules shall apply; (2) If no applicable treaty exists, the determination of international jurisdiction should be made in accordance with the principle of justice which requires that fairness be maintained as between the parties, and a proper and prompt trial be secured; (3) Although the provisions in the Civil Procedure Code addressing the venue of local courts do not provide for rules regarding international jurisdiction they reflect, in principle, the above principle of justice. Thus, a defendant should be, in principle, subject to the jurisdiction of a Japanese court when any one of Japan's courts would have jurisdiction in accordance with provisions of the Civil Procedure Code. (4) However, a determination that international jurisdiction is to be admitted over a case simply in accordance with (3) should be reversed if it is found to be contrary to the principle of justice, as mentioned in (2), in consideration of the special circumstances of such case'.

<sup>172</sup> Nishitani (n 167).

*pendens*, the application of the *Malaysian Airlines System* and the *Family Company* test may be regarded as something other than a general provision.

### 5.3 The Republic of Korea

153 The Republic of Korea is currently organized similarly to the Japanese system. The country's legal system is based on a civil law tradition with certain common law influences.<sup>173</sup> In domestic parallel proceedings, Art 259 of the Civil Procedure Code, entitled *Prohibition of Double Lawsuits*, states that 'For the case pending before a court, neither party shall institute any lawsuit again'. The court may, *ex officio* or at the parties' request, transfer the case to another court for lack of jurisdiction or at its own discretion. For reasons of fairness, these provisions, such as Art 36, give the judge the power to transfer the case to avoid considerable damage.<sup>174</sup>

154 For a long time, the legal system had no specific rules for foreign parallel litigations and the internal system was *sometimes* applied. As an example of this application, the decision of the Korean Supreme Court No 86 (MEU57, 58), issued on 14 April 1987 in a divorce case, was recalled. The reasoning states that

where a party files a suit regarding the same cause of action before a court of Korea, where a final and conclusive foreign judgment has already been rendered, the court of Korea can recognise and enforce the foreign judgment and dismiss the proceedings before the Korean court.

155 The rationale for this provision is the anticipation of the foreign judgment and the expectation that, if it is recognized as valid, the judgment will be *res iudicata*. For this reason, the court dismissed the pending domestic proceedings if they were commenced after the foreign proceedings.<sup>175</sup>

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<sup>173</sup> The main sources of law are the Constitution of the Republic of Korea and, among the statutes, the Civil Procedure Act (enacted in 1960) and the Civil Code (enacted in 1960). The court system is articulated on different levels and the Constitutional Court was founded in 2017.

<sup>174</sup> Article 36 Civil Procedure Act (Korea) states: 'A court may, if deemed necessary to avoid any significant damage or delay even where a lawsuit falls under its jurisdiction, transfer the whole or part of such lawsuit to another competent court either *ex officio* or by its ruling upon request of the concerned parties: Provided, That the same shall not apply to cases of a lawsuit for which an exclusive jurisdiction has been determined'.

<sup>175</sup> See HCCH (n 3) 22.

156 On 9 December 2021, the Private International Law Act of Korea (the PILA) was amended.<sup>176</sup> The first version of the Pila, introduced in 2001, included only three articles on international jurisdiction, among which were general provisions to protect consumers and employees. The effort to change and integrate the KPILA over 20 years has finally been completed.<sup>177</sup> The new PILA enhances predictability for courts and parties by introducing detailed rules on international jurisdiction. In the case of parallel litigation before national and foreign courts, the revised Act expressly provides that the Korean courts may decide that they do not have international jurisdiction over the dispute at hand and may stay or even dismiss the Korean court proceedings (Article 11).

157 The *forum non conveniens* doctrine has also been adopted. Article 12 empowers the judge to stay or dismiss a case brought before them if a foreign court is considered a more appropriate *forum*. If the domestic court has international jurisdiction, it is allowed to reject it in limited circumstances fixed by the law, ie, where there are exceptional cases in which a Korean court is inappropriate to exercise its international jurisdiction and a foreign court with international jurisdiction is more suited to resolve the dispute at issue.

## 6 BRIEF OVERVIEW OF OTHER COUNTRIES. ON PARALLEL PROCEEDINGS BETWEEN DOMESTIC AND FOREIGN COURTS

### 6.1 Canada and Québec

158 The Canadian justice system is unique worldwide because, for historical reasons, two legal traditions cohabit—civil law in Québec and common law in all other provinces and territories. The co-existence of these two systems has important implications for federal law-making and statutory interpretation.<sup>178</sup> Two principles are at the heart of the country: the rule of law and the independence of the judiciary.<sup>179</sup> Traditional remedies inform common law jurisdiction.

159 *Forum non conveniens* doctrine has governed jurisdiction since the *Breeden v Black* case in 2012.<sup>180</sup> Courts consider many factors, some of which are codified in various Canadian provinces. The *forum non conveniens* is assessed considering the fairness to the parties,

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<sup>176</sup> About the draft, see K H Suk, 'Introduction to Detailed Rules of International Adjudicatory Jurisdiction in the Republic of Korea: Proposed Amendments of the Private International Law Acts' (Nagoya, June 2016) [http://www.pilaj.jp/data/conference/SUK-Presentation\\_Text\\_129th.pdf](http://www.pilaj.jp/data/conference/SUK-Presentation_Text_129th.pdf) accessed 24 July 2024.

<sup>177</sup> The amended PILA provides for (i) general and special jurisdiction (Articles 3-5), (ii) contingent jurisdiction (Article 6), (iii) counterclaim jurisdiction (Article 7), (iv) jurisdiction by agreement (Article 8), (v) jurisdiction by pleading (Article 9), (vi) exclusive jurisdiction (Article 10), (vii) international *lis pendens* (Article 11), (viii) *forum non conveniens* (Article 12), and (ix) jurisdiction for preservation and nonlitigation matters (Articles 14, 15).

<sup>178</sup> For an overall picture of Canadian system, see Wu (n 153).

<sup>179</sup> C Abela, K Chaytor and M-A Vermette, 'Canada' in M Madden (ed), *Global Legal Insights – Litigation & Dispute Resolution* (2nd edn, Global Legal Group Ltd 2013) 35.

<sup>180</sup> *Breeden v Black*, Case 33900 (Supreme Court, Canada), Judgment 18 April 2012 [2012 SCC 19] <https://cyrrila.org/en/entity/2mpx72bb65k?page=1> accessed 24 July 2024.

the costs for the parties and witnesses, the applicable law; the existence of parallel proceedings to avoid conflicts of judgments, along with the forecast of the future recognition of the foreign judgment.

- 160 Jurisdiction may be granted by an anti-suit injunction. However, this measure is used cautiously. The Supreme Court of Canada set out in the *Amchem* case<sup>181</sup> a two-part test to determine whether a Canadian court should issue an anti-suit injunction.
- 161 First, the court should determine whether the domestic forum is the natural forum or whether there is another forum that is ‘clearly more appropriate’. If the foreign court has already made this determination, the so-called, ‘deference principle’ dictates that the Canadian court should show deference and refuse the request for an antisuit injunction. However, if a foreign court has taken jurisdiction over a matter contrary to the principles of *forum non conveniens* and, thus, has not respected the rules of comity, the Canadian judicial system need not respect the foreign court’s assumption of jurisdiction, and it may order an anti-suit injunction.
- 162 Québec presents a very interesting example of a mixed legal system; the coexistence of common law and civil law remedies warrants in-depth study. Article 3137 of the Civil Code, under the title *International Jurisdiction of Québec Authorities*, regulates the international *lis pendens* as a typical civil law system, ie, the ‘triple identity’ is demanded.<sup>182</sup> In that case, the court may order the stay and dismiss the domestic proceedings if it considers that the authorities of another state are better placed to decide the dispute. The *forum non conveniens* is applied ‘exceptionally’ under Article 3135.<sup>183</sup> A foreign judgment is recognized and, where applicable, declared enforceable by the Québec authority, according to Article 3155. If it’s contrary to public order, this prevents its recognition. The legal system does not expressly provide for an anti-suit injunction to enforce jurisdiction.

## 6.2 South Africa

- 163 The Republic of South Africa has a mixed legal system formed by Roman-Dutch civil law, English common law and African Customary Law. Religious personal and family laws are

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<sup>181</sup> *Amchem Products Inc. v British Columbia (Workers’ Compensation Board)* (Supreme Court, Canada), Judgment 24 March 1993 [1993] 1 SCR 897.

<sup>182</sup> Article 3137 Civil Code of Quebec states: ‘On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority’.

<sup>183</sup> Article 3135 Civil Code of Quebec provides that: ‘Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute’.

also part of this hybrid legal system.<sup>184</sup> Since 1996, the country has adopted the Constitution of the Republic of South Africa and the Bill of Rights.

164 There is a complex relationship between these different traditions. In principle, the Roman-Dutch influence is considered most evident in the substantive private law, while the English tradition influences the procedural law and its means of adjudication, adversarial trials, detailed reporting of cases and adherence to precedent; customary law operates in parallel with the official legal system.<sup>185</sup>

165 In the area of jurisdiction, South African law has no proper *forum non conveniens* doctrine, although it appeared for the first time in the *Estate Agents Board v Lek* case.<sup>186</sup> However, the Supreme Court Act (Definition No 59)<sup>187</sup>, provides that the court has the power to evaluate if a lawsuit brought before it may be more conveniently heard in another division; the court may, after hearing all parties, dismiss the case. The Supreme Court may order a stay of proceedings in certain circumstances recognized by the case law. *Lis alibi pendens* exists in South Africa to prevent abuse of process as established in *Western Assurance Co v Caldwell's Trustee*.<sup>188</sup>

### 6.3 Brazil

166 Brazil is a federal state within the civil law tradition;<sup>189</sup> it is based on a written constitution enacted in 1988 and includes, among others, the Civile Code and the Civil Procedure Code (2015). Traditionally, Brazilian law does not recognize international *lis pendens* even if the lawsuits before the Brazilian and foreign courts are identical.

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<sup>184</sup> For detailed commentary, see the following open-access article on SSRN: R Christa, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 Journal of Legal Pluralism and Unofficial Law 143 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1783574](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783574) accessed 24 July 2024.

<sup>185</sup> For more information on the history of South Africa's legal system, see A Barratt and P Snyman, update by S Lutchman, 'Researching South African Law' (2018) GlobaLex [https://www.nyulawglobal.org/globalex/South\\_Africa.html](https://www.nyulawglobal.org/globalex/South_Africa.html) accessed 24 July 2024; C Maimela, 'The Role and Importance of African Customary Law in the 21st Century South Africa' (2019) University of Milano-Bicocca School of Law Research Paper No 19-02 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3409065](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3409065) and also <https://globalaccesstojustice.com/global-overview-south-africa/?lang=it> accessed 24 July 2024.

<sup>186</sup> *Estate Agents Board v Lek*, Case 149/78 (Supreme Court of Appeal, South Africa) Judgment 28 May 1979 [1979] ZASCA 65; see E Spiro, 'Forum non conveniens' (1980) 13(3) Comparative and International Law Journal of Southern Africa 333-339 [https://journals.co.za/doi/abs/10.10520/AJA00104051\\_940](https://journals.co.za/doi/abs/10.10520/AJA00104051_940) accessed 24 July 2024.

<sup>187</sup> Supreme Court Act 59 of 1959, available at <https://www.justice.gov.za/legislation/acts/1959-059.pdf> accessed 24 July 2024.

<sup>188</sup> *Western Assurance Co v Caldwell's Trustee* (High Court, South Africa) 1918 AD 262 at 272 and 274; about the abuse of the process, see Case No 7595/2017 (Constitutional Court, South Africa), available at <https://cer.org.za/wp-content/uploads/2022/01/MRC-et-al-Notice-of-Application-for-Leave-to-Appeal-to-the-Constitutional-Court-0103213717471.1.pdf> accessed 24 July 2024.

<sup>189</sup> However, there are some common law suggestions, such as the binding precedent of the Federal Supreme Court's cases (Art 927 of the Civil Procedural Code).



- 167 The former Brazilian Civil Procedure Code (BRCCP) provided in Section 90 that ‘the lawsuit brought before a foreign court does not imply *lis pendens* and does not prevent the Brazilian Judiciary Authority from processing the same lawsuit and [about the] ones related to it’.
- 168 The new Code of Civil Procedure (introduced in 2015) has maintained this position. Article 963, provides that a foreign judgment may be ratified if certain conditions are met, including that ‘it does not violate a Brazilian *res judicata* decision’. Thus, the domestic judgment (and domestic jurisdiction) prevails on the foreign one, and the parallel proceedings before a foreign court do not result in a stay for the Brazilian court if it has jurisdiction.
- 169 The case-law of the Supreme Court of Justice confirms the *Kompetenz-Kompetenz* principle as a general rule of jurisdiction.<sup>190</sup> Consequently, Brazil has not adopted the doctrine of *forum non conveniens* or the remedy of anti-suit injunction. There is no *lis pendens* between a state court and an arbitral tribunal.

#### 6.4 Russia

- 170 The Russian Code of Civil Procedure includes Chapter No 44 ‘Cognisance of Cases Involving Foreigners in the Russian Federation’.<sup>191</sup> The consequences of identical disputes pending before a domestic court and a foreign court are governed by Article 406 of the Code of Civil Procedure, titled ‘Procedural consequences of the examination of a case in a foreign court’, provides as follows:

1. The court in the Russian Federation shall refuse to accept a statement of an action for its proceedings or shall terminate the proceedings on the case, if there is a court decision on the dispute between the same parties, for the same object and on the same grounds adopted by a foreign court with which the Russian Federation has signed an international agreement envisaging the mutual recognition and execution of the court decisions.

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<sup>190</sup> Recently, *SPE Orla 1 LTDA v Maria Vilma Rodrigues de Lima*, Special Appeal No 1.854.483-RJ (Superior Court of Justice, Brazil), Judgment 9 September 2020 [https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num\\_registro=201901822409&dt\\_publicacao%E2%80%8E=16/09/2020%E2%80%8E](https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201901822409&dt_publicacao%E2%80%8E=16/09/2020%E2%80%8E) accessed 24 July 2024. Specific Appeal in Motion for Clarification in Appeal in Special Appeal, *Missoni SPA v MMR Investimentos e Participações S.A* (Superior Court of Justice, Brazil), Judgment 14 March 2022 [https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num\\_registro=201902344047&dt\\_publicacao%E2%80%8E=18/03/2022%E2%80%8E](https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201902344047&dt_publicacao%E2%80%8E=18/03/2022%E2%80%8E) accessed 24 July 2024.

<sup>191</sup> Code of Civil Procedure (Russia) available at [https://www.wto.org/english/thewto\\_e/acc\\_e/rus\\_e/wtaccrus58\\_leg\\_62.pdf](https://www.wto.org/english/thewto_e/acc_e/rus_e/wtaccrus58_leg_62.pdf) accessed 24 July 2024.



2. The court in the Russian Federation shall return the statement of an action or shall leave this statement without consideration, if in the foreign court whose decision is subject to recognition or execution on the territory of the Russian Federation was earlier instituted a case on the dispute between the same parties, for the same object and on the same grounds.

171 When a foreign court has already ruled on the dispute between the same parties, with the same object and the same grounds, the principle of *res iudicata* applies; the conditions for the recognition of the foreign judgment are established in Article 412 of Chapter No 45 of the C.P.C.

172 Under the same conditions, *lis pendens* occurs when the case is still pending before a foreign court, and a domestic proceeding may be stayed. Chapter No 45 provides, in principle for the same treatment of the foreign state court or arbitral awards.<sup>192</sup>

## 7 CONCLUSION. IS CONVERGENCE POSSIBLE?

173 The rise of parallel litigation in this specific scenario is complex and fascinating. As the English courts have recently emphasized, business internationalization, world trade, and the mobility of people require an equally global management of litigation. Legislators, judges and academics should be encouraged to think in new ways about the jurisdictional remedies' role in handling conflicts. The aims are common and may be attributed to the broad concept of *proper administration of justice*. This concept includes the assessment of various aspects, such as whether the foreign court has exclusive jurisdiction; the connections between the facts of the case, the parties and the forum; in the case of parallel proceedings, the status of the cases at the time of the commencement of the proceedings, whether the foreign court can be expected to render a judgment within a reasonable time or not; and of course, the existence of a choice of court agreement or arbitration agreement.

174 The EU uniform rules in civil jurisdiction matters show that a transnational approach also demands the possibility of direct communication between different countries' courts. Countries have developed diverse remedies for these common purposes depending on their tradition. Regarding the parallel proceedings issue, the common law world, consistent with its historical formation, has issued remedies characterized by court discretion and special attention to the usefulness of specific cases. The multi-factor test, devised by case law, establishes the circumstances that the court must verify in assessing the convenience of the forum. *Lis pendens* is one of these factors, especially in England compared to the US. In the latter, the solution to the problem of parallel proceedings is

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<sup>192</sup> See V Rekhtina Irina, 'Lis Pendens and Legal Certainty of Civil Proceedings in the Russian Federation' in *Российский Судья* (Russian Judge, 2020) 3 ff; M Karayanidi, 'Adjudicative Jurisdiction in Civil and Commercial Matters in Russia: Analysis and Commentary' (2016) 64(4) *The American Journal of Comparative Law* 981 ff.

frequently seen in terms of restraining the foreign proceedings by anti-suit injunction.<sup>193</sup> The *forum non conveniens* doctrine also appears as a means to choose which causes to retain in the US jurisdiction and which dismiss. An anti-suit injunction is also an important procedural resource to improve the effectivity of a choice-of-court agreement or an arbitral clause.

- 175 On the other hand, the increase in the use of this device<sup>194</sup> shows the willingness of common law courts to deploy their enforcement jurisdiction in transnational situations. Flexibility and fairness are the advantages of the common law approach; ‘delay, expense, uncertainty, and a substantial loss of judicial accountability’<sup>195</sup> are the disadvantages. Predictability is the main objective in the civil law system both in matters of jurisdiction and in parallel proceedings issues. According to the historical tradition that places codes at the heart of the legal system, the rules concerning jurisdiction are fixed by the legislation. Moreover, a general attitude widely shared by other civil law countries is the adoption of uniform rules without inquiry into the specific circumstances of a particular case through criteria pre-established by law, such as the defendant’s domicile, the contract’s performance, and the place of wrongful conduct<sup>196</sup> that link territory and forum.
- 176 The same approach works to handle parallel proceedings, an issue in which the court-first-seized (unless there is an exclusive jurisdiction) and ‘the triple identity’ are general, pre-fixed by law provisions. However, the civil law judge also exercises a certain freedom evaluating the circumstances fixed by law. This cannot be compared to the *forum non conveniens* doctrine, which is alien to civil law. It is a matter of the court’s power to interpret the law, which involves some adaptation of the rule to the particularities of the case, a power that has strengthened over time in the civil law system.
- 177 The civil law tradition does not recognize a device similar to the anti-suit injunction, which is also valuable for increasing the effectiveness of the forum or arbitration clause.<sup>197</sup> The main obstacle to the acceptance of the anti-suit injunction is the *Kompetenz-Kompetenz* principle, which requires each court to be the judge of its jurisdiction and does not allow interference with the jurisdiction of another court.
- 178 Currently, the civil law approach remains close to the anti-suit injunction. This attitude is expressed by the European Union by Regulation No 1215 of 2012 and confirmed by the Court of Justice’s case law. Some countries recognize, in their domestic law, the anti-

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<sup>193</sup> See Fawcett (n 6) 68.

<sup>194</sup> See C McLachlan, ‘Transnational Applications of Mareva Injunctions and Anton Piller Orders’ (1987) 36(3) *International & Comparative Law Quarterly* 669 ff.

<sup>195</sup> Trocker (n 10) 300.

<sup>196</sup> *Ibid* 299.

<sup>197</sup> However, it leaves open the possibility that breach of the clauses may give rise to damages. See P Hay, ‘Forum selection clause – procedural tools or contractual obligations? Conceptualization and Remedies in American and German Law’ (2021) 35(1) *Emory International Law Review* 1.

suit injunction<sup>198</sup> worth for FRAND litigation, and some European Countries have begun to use the cross-border contest.

- 179 The Court of Justice affirmed that a court of a Member State from recognizing and enforcing, or from refusing to acknowledge and implement, an arbitral award prohibiting a party from bringing specific claims before a court of that Member State.<sup>199</sup> In the same direction move the European Rules of Civil Procedure (ERCP), or *Model European Rules of Civil Procedure*. This soft law is presented as a model for a shared standard, whose rules on *lis pendens* and related actions (Articles 142-146) are essentially based on the Brussels I Regulation. The rules are an expression of the civil law tradition. They adopt the 'triple identity' principle to identify *lis pendens* and the power of the first-court-seized to handle parallel proceedings.
- 180 The mixed legal systems are particularly relevant in the world scene, where, for historical and political reasons, the rapprochement and coexistence of the two systems has been more rapid and natural. It remains to be seen whether convergence on a broader scale can be achieved through the proposed architecture currently under discussion at the Hague Conference on Private International Law and the signed Convention on Parallel Proceedings.

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<sup>198</sup> For instance, French; see F Ferrand, 'The French Approach to the Globalisation and Harmonisation of Civil Procedure' in X E Kramer and C H van Ree (ed), *Civil Litigation in a Globalising World* (Springer 2012) 335 ff.

<sup>199</sup> "*Gazprom*" OAO v *Lietuvos Respublika*, Case C-536/13 (CJEU), Judgment 13 May 2015 [ECLI:EU:C:2015:316].

**ABBREVIATIONS AND ACRONYMS**

ACHPR	African Court on Human and Peoples' Rights
ALI	American Law Institute
Art	Article/Articles
BA	British Airways
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) (Germany)
BRCCP	Code of Civil Procedure (Brazil)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
Ch	chapter
CJEU	Court of Justice of the European Union
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
EFTA	European Free Trade Association
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
ERCP	European Rules of Civil Procedure
etc	<i>et cetera</i>
EU	European Union
EUR	Euro
FCCP	Code of Civil Procedure (France)
ff	following
fn	footnote (external, ie, in other chapters or in citations)
FRAND	Fair, Reasonable, and Non-Discriminatory
GCCP	Code of Civil Procedure (Germany)
HCCH	Hague Conference on Private International Law
Ibid	<i>ibidem</i> (in the same place)
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
ITCCP	Code of Civil Procedure (Italy)
JCCP	Code of Civil Procedure (Japan)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs

PILA	Private International Law Act (Korea)
PRC	People's Republic of China
Pt	part
SCC	Supreme Court Canada
Sec	Section/Sections
SEP	Standard Essential Patent
Supp	supplement/supplements
trans/tr	translated, translation/translator
UCIL	Union Carbide India Limited
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America
v	versus
vol	volume/volumes

## LEGISLATION

### International/Supranational

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

### National

*Code de procedure civile* (France).

*Codice di procedura civile* (Italian).

Civil Procedure Law (China) (English version).

Civil Code (Québec).

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### International/Supranational

*"Gazprom" OAO v Lietuvos Respublika*, Case C-536/13 (CJEU) Judgment 13 May 2015 [ECLI:EU:C:2015:316].

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*Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, C-351/89 (CJEU) Judgment 27 June 1991 [ECLI:EU:C:1991:279].

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*Amchem Products Inc. v British Columbia (Workers' Compensation Board)* (Supreme Court, Canada), Judgment 24 March 1993 [1993] 1 SCR 897.

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