Lis Alibi Pendens and *Forum Non Conveniens*: From Confrontation via Co-ordination to Collaboration

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A. Introduction

Until 31 August 1995, Article 3 of the Italian civil procedure code (CPC) read as follows: 'La giurisdizione italiana non e esclusa della pendenza davanti a un giudice straniero della medesima causa o di altra con questa connessa.' In English: 'The competence of the Italian courts is not excluded by the fact that the same case or a connected claim is pending elsewhere before a foreign judge.'[1]

While other legal systems have long taken account of *lis pendens*, either explicitly (e.g. Article 9 of the Swiss Private International Law, IPRG) or customarily (e.g. in Germany), Article 3 of the Italian CPC was steadfast on collision course: We are not interested in whatever happens elsewhere ...

This attitude was given up with the adoption of law no. 218 of 31 May 1995 on the Italian International Private Law (LDIP);[2] Article 7 LDIP introduced a more moderate approach by stipulating – following the inspiration of Article 21 of the Brussels Convention – that proceedings in Italy are suspended if the case is already pending elsewhere and the expected foreign decision should generally be recognizable.

Article 3 CPC is used here as an example for a situation which can be widely observed: While many legal systems were until recently hermetically sealed against foreign decisions and proceedings[3] – confrontation – the Brussels Convention of

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1 The English versions of Italian and Swiss statutory provisions constitute an unofficial translation by the author.

2 *See also* Walter, Reform des internationalen Zivilprozessrechts in Italien, ZZP 109 (1996), 3 = AJP 1996, 423–436.

3 For recognition of foreign judgments see Walter/Baumgartner, Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions, in Walter/Baumgartner (eds.), Civil Procedure in Europe 3, Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions, The Hague/London/Boston 2000, pp. 1 et seq.

European Journal of Law Reform, Vol. 4, No. 1

1968 and its geographic enlargement in the Lugano Convention of 1989, in particular their Articles 21 and 22, introduced a system of co-ordination between the courts of different countries, at least in Europe. According to its draft, the global Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters[4] aims at yet another step in this direction: By means of its Article 22, it seeks to establish a system of collaboration between courts in international cases. This development shall be elaborated in some detail in the present article.

B. The Current System of Co-ordination: *Lis Alibi Pendens*

I. National Law

The examples of national law are taken from Switzerland (IPRG of 18 December 1987) and Italy (LDIP of 31 May 1995) because these two countries have the most modern laws on private international law in Europe.

1. Switzerland

Article 9 paragraph (1) of the IPRG[5] stipulates as follows: 'If a lawsuit about the same subject matter between the same parties has first been introduced abroad, the Swiss court shall stay its proceedings, if it is to be expected that the foreign court will adopt a decision within reasonable time which can be recognized in Switzerland.'

Hence, Swiss law establishes the following conditions for the recognition of a prior *lis pendens* in a foreign court:[6]

- *eadem res inter easdem partes*
- initiation of court proceedings abroad prior to initiation in Switzerland
- a positive prognosis for the possibility of recognition
- a positive prognosis for a timely judgment

If these conditions are met, the Swiss proceedings regarding the matter concerned will be stayed. Depending on how the foreign proceedings develop, this can later lead to the following decisions in Switzerland:

- If indeed a recognizable decision is adopted abroad, the 'Swiss' claim will be

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[4] Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters and Report by Peter Nygh and Fausto Pocar, Preliminary Documents No. 11 (both at http://www.hcch.net/e/workprog/jdgm.html).

[5] Reproduced as No. 1 in Walter/Jametti-Greiner/Schwander, *Internationales Privat- und Verfahrensrecht, Texte und Erläuterungen*, Bern 2002 (with 9 addenda).

[6] For details, see Walter, *Internationales Zivilprozessrecht der Schweiz*, 3rd ed., Berne/Stuttgart/Vienna 2002, § 11, pp. 466 et seq., and BGE 188 II 188 et seq., and BGE 126 II 118 et seq.

rejected pursuant to Article 9(3) IPRG, which reads as follows: 'The Swiss court rejects the claim, as soon as a foreign judgment is presented to it which can be recognized in Switzerland.'

– However, if the foreign judgment cannot be recognized, that is, the positive prognosis for the recognizability turns out to be false, or if the foreign court refuses to render judgment for lack of jurisdiction or any other reason, or if the foreign court does not render a judgment within a reasonable time, the Swiss proceedings will be resumed.

A problem unique to Switzerland exists with respect to the precise time of commencement of proceedings in Switzerland. This question is governed differently in different Swiss cantons.[7] Thus, for the purpose of private international law,[8] a common definition must be found. This is why Article 9 (2) IPRG states as follows: 'For the determination when a lawsuit has become pending in a Swiss court, recourse shall be taken to the first procedural step necessary for the commencement of court proceedings. Where applicable, this can be the initiation of conciliatory proceedings [Sühneverfahren].'

2. *Italy*

Article 7 LDIP reads as follows:

1. If, in the course of court proceedings, prior *lis pendens* of a lawsuit about the same subject matter and right between the same parties before a foreign courts is raised, the Italian courts shall stay the proceedings, provided they consider that the foreign decision can have an impact in the Italian legal order. Upon application by the interested party, the Italian proceedings shall be resumed if the foreign judge has rejected the case for lack of jurisdiction or if the foreign decision cannot be recognized in Italy.
2. *Lis pendens* before the foreign court is determined according to the law of the country where the proceedings are taking place.
3. If there is a foreign precedent, the Italian court may suspend the proceedings if it holds that the foreign decision can have an impact in the Italian legal order.

As can be seen, the conditions for the recognition of a prior *lis pendens* in a foreign court differ from those in Switzerland only in so far as there is no need for a positive

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[7] The cantonal procedure laws and their rules on *lis pendens* continue to be applicable even after the entry into force on 1 January 2001 of the new Federal Law on Jurisdiction in Civil Matters (Bundesgesetz über den Gerichtsstand in Zivilsachen) SR 272.

[8] However, the Swiss Federal Court (Bundesgericht) has decided that Article 9(2) IPRG shall not be applied for the purpose of determining *lis pendens* within the scope of application of Article 21 of the Lugano Convention (BGE 123 III 414 E. 6d p. 427). For comments see Jegher, IPRax 2000, 143 et seq. and Spühler, in FS Zäch (Forstmoser et al. (ed.), Zurich 1999), pp. 847 et seq.

prognosis for a timely judgment. Furthermore, the consequences of Article 7 LDIP are similar to those of Article 9 IPRG.

The clarification in paragraph (2) as to the applicable law for the determination of the time of lis pendens is quite natural and in line with common practice.

However, in paragraph (3) the Italian law goes beyond what is nowadays required by international law and comity. A foreign precedent can be taken into account by the Italian judge even if the claims and parties are not identical, provided he or she considers it relevant to the proceedings before the Italian court. This point will be further elaborated below under C.

II. The Brussels and Lugano Conventions

1. Differences When Compared to National Law

These two conventions have created a European Legal Area ('éspace judiciare européen') for the areas of international jurisdiction, recognition of prior foreign *lis pendens*, and recognition and enforcement of foreign judgments. A requirement that a foreign procedure can only be considered relevant if there is a positive prognosis for its recognizability (as in Switzerland and Italy), let alone if there is also a positive prognosis for a timely judgment[9] (as in Switzerland), would be incompatible with the very purpose and nature of these conventions. These kind of requirements would have to be seen as expressions of mistrust between the closely linked parties of the conventions and would be quite unacceptable.[10] As for the other requirements, however, the conventions contain quite the same rules as the two abovementioned national legal orders for the recognition of foreign lis pendens and for the consequences of such a recognition.

2. Problems of the Two Conventions

Nevertheless, there are certain problems in other areas:

(A) EADEM RES

A comparison of the language used in the different rules about the term *eadem res* reveals the following:

Article 9 IPRG Switzerland: 'a lawsuit about the same subject matter';[11]

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[9] On this issue, see also the decision of OLG München of 2 June 1998, published in RIW 1998, pp. 631 et seq., according to which the jurisdictional bar imposed by *lis pendens* pursuant to Article 21 of the Brussels Convention applies even if the foreign case is deliberately delayed.

[10] In addition, all Contracting States of the two Conventions are also bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its provisions on reasonably speedy trials.

[11] Our translation of 'Klage über denselben Gegenstand'.

Article 7 LDIP Italy: 'a lawsuit about the same subject matter and title';[12]
Article 21 of the Brussels and Lugano Conventions: 'proceedings involving the same cause of action'.

All three rules mean to say the same, namely *eadem res*. However, while it is not a problem for national courts in the context of purely national proceedings to develop their own notion of the matter in dispute, there cannot be any nationally determined differences in the interpretation of such an important term, when it comes to the coordination and cooperation between courts of the Contracting States of the conventions. This is why the European Court of Justice, in its leading case Gubisch v. Palumbo,[13] has attempted to create an autonomous 'European' interpretation for the subject matter of an action.

The European Court summarized the facts of that case as follows:

> '[The question of interpretation of Article 21 of the Brussels Convention] arose in a dispute between Gubisch Maschinenfabrik KG [...], whose registered office is in Flensburg (Federal Republic of Germany), and Mr Palumbo, resident in Rome, relating to the validity of a contract of sale. Mr Palumbo brought proceedings against Gubisch before the tribunale di Roma (District Court, Rome) for a declaration that the contract was inoperative on the ground that his order had been revoked before it reached Gubisch for acceptance. [...] Gubisch objected that the tribunale di Roma lacked jurisdiction, in accordance with Article 21 of the Convention, on the ground that [Gubisch] had already brought an action before the Landgericht (Regional Court), Flensburg, to enforce performance by Mr Palumbo of his obligations under the contract, namely payment for the machine he had purchased.'[14]

The issue for the European Court was whether both proceedings concerned the same subject matter. According to the European Court, the specific procedural situation of the case before it was one where the same parties were 'engaged in two legal proceedings in different Contracting States which are based on the same 'cause of action', that is to say the same contractual relationship'.[15] However, the question of identity of the subject matter arose because the one proceeding was for performance while the other was for a declaration that the contract was inoperative.

The Court held that even though an action for enforcement of a contract and an action for recission or discharge are formally not identical, the core of both proceedings concerned the validity and enforceability of the contract and, therefore,

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[12] Our translation of 'domanda avente il medesimo oggetto e il medesimo titolo'.
[13] Judgment of 8 December 1987 in Case 144/86, 1987 ECR 4861. The interpretation was later confirmed in the European Court's judgment of 6 December 1994 in Case 406/92, *Tatry v Maciej Rataj*, 1994 ECR I–5439; cf. also commentary by Lenenbach in EWS 1995, 361.
[14] Cf. rec. 2 and 3 of the judgment of 8 December 1987, op. cit.
[15] Ibid., rec. 15 of the judgment.

the same subject matter. The term 'cause of action' in Article 21 'cannot be restricted so as to mean two claims which are entirely identical'.[16]

As a consequence of this judgment, the 'European' and autonomous interpretation of the notion of subject matter of a dispute must be used whenever Article 21 is applicable. This is the case even if according to national law there would be two different subject matters and even if the European Court's ruling has met with some criticism.[17]

It was correct, therefore, for the Munich Appellate Court[18] not to entertain a claim for damages brought by a German party before it, since the Italian party had already introduced a lawsuit for a (negative) declaratory judgment concerning the same claim before an Italian court. The German court referred to the European Court's interpretation and affirmed that the claim was barred due to prior *lis pendens* in Italy.[19]

In a more recent decision, and in consistent extension of the European Court's jurisprudence, the German Federal Court[20] held that introduction of a lawsuit for payment in a foreign jurisdiction could not retroactively affect standing of the applicant in a domestic lawsuit for a (negative) declaratory judgment. The Federal Court correctly held that the foreign case should not be decided, since there was prior *lis pendens* of the German case.[21] In another judgment, the German Federal Court had already decided that *lis pendens* according to Article 21 applied to a case where the one party was suing in one court for a declaration that a contract was inoperative, while the other party was suing in another court for restitution of performance rendered under the contract.[22]

(B) DETERMINING THE COURT 'FIRST SEIZED'

The same problem encountered when determining *eadem res* presents itself when determining the precise time when a lawsuit was introduced. Within the scope of application of autonomous law it is possible and legitimate to refer to the respective national rules applicable in the forum States. By contrast, within the scope of application of the two Conventions, it would be desirable to have uniform rules about the beginning of *lis pendens* for all Contracting States, in order to prevent the proverbial 'race to the courthouse'[23] or 'forum shopping'. Nevertheless, the text of

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[16] Ibid., rec. 17 of the judgment. *See also* Schack, IPRax 1989, 139.

[17] See, for example, Geimer/Schütze, Kommentar EuGVÜ, Article 21 rec. 29–30 (with further references).

[18] Oberlandesgericht (OLG) München.

[19] Order of 22 December 1993, published in RIW 1994, 511.

[20] Bundesgerichtshof (BGH).

[21] Judgment of 11 December 1996, published in NJW 1997, 870 and in RIW 1997, 421 and in IPRax 1997, 348.

[22] Judgment of 8 February 1995, published in NJW 1995, 1758 and in RIW 1995, 413.

[23] See, for example, Geimer, Das europäische "Windhundprinzip" – Einige Bemerkungen zu Art. 21 EuGVÜ/LugÜ', FS Schweizer (Heldrich (ed.), Baden-Baden 1999), 175, and Pitz, Torpedos unter Beschuss, GRUR Int. 2001, 32.

Article 21 of the Brussels and Lugano Conventions does not provide such uniform rules and the European Court has so far abstained from determining an autonomous European rule for the relevant moment for the beginning of *lis pendens*: in view of the numerous rules applicable in the Contracting States, the Court found it impossible to identify a common approach to *lis pendens*.

Nevertheless, the European Court has made certain attempts to achieve a degree harmonization via partially autonomous interpretation. While the moment when *lis pendens* begins must be determined according to the respective national rules, that is, the *lex fori*, reference must be made to the moment when 'proceedings [have] become definitively pending'.[24] This determination, however, must be made by each court according to its national law.

A lawsuit is definitively pending when the applicant has become bound to the proceedings. As long as he or she can withdraw an application lodged in court without further consequences, the lawsuit has not become definitively pending.[25]

3. *The Revision of the Conventions of Brussels and Lugano*

Pursuant to the introduction of a new legal basis into primary European Community law – Article 65(c) of the consolidated version according to the Amsterdam Treaty – the legal nature of the Brussels Convention of 27 September 1968 has changed. It has mutated from an international agreement between sovereign States into a regulation of the European Community, which will enter into force on 1 March 2002.[26] The change in legal nature was used for the revision of certain weaknesses and provisions which had been found wanting. Since the Lugano Convention continues to exist as an international agreement, it should now be modified accordingly, in order to maintain the parallelism with 'Brussels'.[27]

To recapitulate: The system of coordination of proceedings pending in courts of different Contracting States, as provided by Article 21 of the two Conventions, has suffered from two main weaknesses. The two important elements of coordination, *eadem res* and the moment when *lis pendens* begins, were poorly defined or not defined at all. Has the revision of Brussels/Lugano changed this?

(A) EADEM RES

In this respect, the provisions have not changed. Hence, the solution provided in the case-law of the European Court, even if much criticized, continues to be applicable.

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[24] Judgment of 7 June 1984 in Case 129/83, Zelger v. Salinitri, 1984 ECR 2397.
[25] See, inter alia, Walter, note above, at p. 478, and BGE 123 III 414 et seq.
[26] Council Regulation 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1 of 16 January 2001.
[27] *See* A. Markus, Revidierte Übereinkommen von Brüssel und Lugano: Zu den Hauptpunkten, SZW 1999, 205.

(B) THE BEGINNING OF *LIS PENDENS*

While Article 21, which will now be Article 27, only provided that 'any court other than the court first seized shall of its own motion decline jurisdiction', Article 30 of the new regulation now provides a statutory definition:

> Article 30
> For the purposes of this Section, a court shall be deemed to be seized:
> 1. at the time when the document initiating the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he or she was required to take to have service effected on the defendant, or
> 2. 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 plaintiff has not subsequently failed to take the steps he or she was required to take to have the document lodged with the court.

This means that national rules about the moment when *lis pendens* begins remain applicable in principle.[28] However, where two acts are required in order to effect *lis pendens* (concretely the lodging of the lawsuit with the court and the subsequent service upon the defendant), the first of these acts will be decisive, provided the plaintiff does whatever is necessary on his or her part in order also to effect the second step.

In conclusion, this revision can be said to improve the conditions for effective coordination between the courts. In future, the different national rules will invite less 'forum shopping'.

III. The Worldwide Hague Convention

The proposed worldwide Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters principally follows the structure of the Brussels and Lugano Conventions:

Article 1 defines the substantive scope as 'civil and commercial matters' and – just as in the Brussels and Lugano Conventions – contains, in paragraph (2), a catalogue of areas not covered by the Convention.

Article 2 defines the territorial scope. For the present purposes, paragraph (1)(c) is particularly relevant, since it refers to Article 21 about lis pendens and Article 22 about exceptional cases for declining jurisdiction, which shall apply whenever proceedings are pending in courts of different Contracting States.

Chapter 2 contains the rules regarding jurisdiction (Arts. 3–18), and Chapter 3 contains the rules governing recognition and enforcement (Arts. 23–36).

It is worthwhile to take a closer look at the rules about *lis alibi pendens*. Article 21 provides as follows:

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[28] This fact is neither affected by Council Regulation 1348/2000 (EC) of 29 May 2000 on the service in the Member States of judicial and extra judicial documents in civil or commercial matters, OJ 2000 L 160/37, which already entered into force on 31 May 2000.

'1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seized shall suspend the proceedings if the court first seized has jurisdiction and is expected to render a judgment capable of being recognized under the Convention in the State of the court second seized, unless the latter has exclusive jurisdiction under Article 4 or 12.
2. The court second seized shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seized that complies with the requirements for recognition or enforcement under the Convention.
3. Upon application of a party, the court second seized may proceed with the case if the plaintiff in the court first seized has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.
4. The provisions of the preceding paragraphs apply to the court second seized even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.
5. For the purpose of this Article, a court shall be deemed to be seized -
   a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
   b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.
6. If in the action before the court first seized the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seized -
   a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seized, and
   b) the court first seized shall suspend the proceedings at the request of a party if the court second seized is expected to render a decision capable of being recognized under the Convention.
7. This Article shall not apply if the court first seized, on application by a party, determines that the court second seized is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.'

This means:

1. As precondition for the recognition of *lis pendens* 'The Hague' requires *eadem res* ('the same cause of action'), *inter eadem partes* and prior *lis pendens* abroad ('court first seized – court second seized') and, just like Italian law, a positive prognosis for recognizability (para. (1)). The positive prognosis for a timely judgment that was found in Swiss law does not figure in paragraph (1) among the elements of fact required for a decision to suspend the proceedings. However, it reappears in substance in

paragraph (3), according to which the court seized later can resume its proceedings if the plaintiff abroad fails to take the necessary steps to bring the proceedings to a decision on the merits or if the foreign court, irrespective of any fault of the plaintiff, does not render a decision within reasonable time. It may thus be concluded that the preconditions for the suspension of proceedings according to Article 21 of the Hague Draft Convention are the same as those under Article 9 of the Swiss IPRG.

2. The ultimate consequences of the suspension are also the same as those provided by Article 9(3) IPRG. As soon as the court second seized is presented with a judgment of the court first seized which meets with the requirements for recognition under the Convention, the former shall reject the claim.

3. Weaknesses of the Draft Convention as It Stands

At II.2. above, the failure of the Brussels and Lugano Conventions to define *eadem res* and their failure to provide for a uniform approach to the question when *lis pendens* begins, were pointed out. What does the Hague Draft Convention provide regarding these issues?

a) One of the most pertinent points of criticism against the jurisprudence of the European Court in matters of *eadem res* has been that the Court itself fired the starting gun for the race to the courthouse by stipulating that a lawsuit for performance and a lawsuit for a (negative) declaratory judgment, which attacks the very basis of performance, should be seen as *eadem res*.

In an obvious response to this criticism, the Hague Draft Convention provides as follows in Article 21(6): If the lawsuit before the court first seized is – only – for a (negative) declaratory judgment, while the lawsuit before the court second seized is for 'an action seeking substantive relief', paragraphs (1) to (5) shall not apply, that is, there is no duty on the court second seized under the Convention to suspend its proceedings. Instead, the Convention reverses the rule by stipulating that the court first seized should suspend its proceedings if so requested by a party and if it is to be expected that the second court seized is likely to render a recognizable judgment, that is, if there is a positive prognosis for the possibility of recognition under the Convention.

b) When it comes to the moment from which lis pendens begins, Article 21(5) follows entirely the model of the revised Article 30 of the Brussels and Lugano Conventions.[29]

c) In conclusion, it can be said that the Draft Convention seeks to avoid both weaknesses of the existing Brussels and Lugano Conventions and thus goes further in respect of coordination of proceedings than even the revision of the Brussels Convention, which addresses only one of them.

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[29] *See* above, II 3 b.

C. The First Step Towards Real Cooperation: Connected Cases

Taking into account that another lawsuit may be pending between the same parties regarding the same subject matter in another (foreign) court is certainly some progress. However, the progress would be greater if consideration for the foreign lawsuit were not limited to cases of *eadem res*. Rather, such a situation should already be taken into consideration if it seemed 'expedient to hear and determine [both proceedings] together to avoid the risk of irreconcilable judgments resulting from separate proceedings', as provided by Article 22(3) of the Brussels and Lugano Conventions.

1. Connected Cases According to Article 22 of the Brussels and Lugano Conventions

Some legal orders, for example the French, Belgian, and Italian, provide for the possibility of joining proceedings if the cases are connected or to suspend the proceedings before the court later seized. In this sense, Article 40 paragraph (1) and (2) of the Italian law on civil procedure provide as follows:

> 'If different proceedings have been brought before different courts, and these proceedings are connected and, therefore, could be decided in one proceeding, the court shall stay the proceedings by judgment, giving the parties a deadline for the continuation of the ancillary proceedings before the court of the main proceedings, respectively for the continuation of the proceedings before the court first seized.
>
> After the first hearing, the fact that the proceedings are connected can neither be claimed by the parties nor be found *ex officio*.
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> Moreover, the transfer of the proceedings cannot be ordered if the state of the proceedings in the main case or before the court first seized would not allow an exhaustive examination of and decision in the connected case.'

Article 22 of the Brussels and Lugano Conventions refers to the same background, when it stipulates the following:

> 'Where related actions are brought in the courts of different Contracting States, any court other than the court first seized may, while the actions are pending at first instance, stay its proceedings.
>
> A court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seized has jurisdiction over both actions.
>
> For the purposes of this Article, 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.'

In this way, Article 22 goes beyond the provisions on lis pendens of Article 21 and seeks to prevent, even in matters which are not identical but otherwise connected, contradictory decisions from being adopted by courts in different Contracting States.

2. *The Weaknesses of the Current Rules Contained in Article 22*

A) IF THERE IS A CONNECTED CASE ACCORDING TO ARTICLE 22, THE COURT LATER SEIZED CAN STAY ITS PROCEEDINGS (PARA. (1)).

However, this is permitted only as long as both actions 'are pending at first instance'.[30] The reason for this is, supposedly, that otherwise one party would lose an instance.[31] This, however, is nonsense. The proceedings, introduced later, are suspended in order to wait for the result in a connected case introduced earlier. The result of the connected case can then be taken into account if and when the suspended proceedings are resumed. For such a suspension to make sense, whether or not the proceedings introduced earlier are already before the second instance is irrelevant. Moreover, it would be equally irrelevant should the proceedings, introduced later, have already progressed before the second instance while the proceedings, introduced earlier, are still pending in first instance (a scenario which is perfectly possible, given the rather remarkable differences in the length of proceedings in Italy and Germany, for example).[32]

B) ACCORDING TO ARTICLE 22(2), THE COURT LATER SEIZED CAN ALSO DECLINE ITS JURISDICTION ALTOGETHER, IN ORDER TO PERMIT A CONSOLIDATION OF THE CONNECTED CASES INTO ONE PROCEEDING.

This is done by rejecting the claim by judgment – rather than a mere stay of the proceedings. However, such a judgment requires an application by at least one of the parties.

The other precondition for the rejection of the claim is that the court first seized

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[30] Article 22(1) does not provide for any further prerequisites. However, it has been suggested that the respective court, as part of its discretion under Article 22 para. (1), has the right to make a prognosis about the recognizability of the expected judgment of the other court, see the decision of the OLG Frankfurt/Main of 9 June 2000, published in RIW 2001, pp. 65 et seq. The German court explicitly referred to Kropholler, Kommentar EuGVÜ, Article 22 rec. 7 and 10.

[31] *See* Report Jenard, OJ 1979 C 59 of 5 March 1979, p. 41.

[32] In this context, see the decision of the OLG Stuttgart of 24 November 1999, published in RIW 2000, 954 et seq., and the comments by Schütze/Kratzsch on 939et seq., according to which Article 22 para. (1) should be interpreted as not requiring that both connected cases really still pending at first instance.

has jurisdiction over both actions. Otherwise the desired consolidation would not be possible. However, Article 21 of the Convention does not contain a ground for jurisdiction based on connection of the cases.[33] Thus, the question whether or not the court first seized has jurisdiction over both actions must be answered on the basis of the procedural rules applicable to it. Nevertheless, it has been claimed that this kind of transfer of proceedings should only be possible if it is (also) permitted according to the procedural rules applicable for the court later seized. That, again, makes little sense. The decisive question must be whether the consolidation of the actions is permitted under the law applicable to the court first seized. Any reference to the law of the court last seized is unreasonable. It would mean in practice that the kind of consolidation intended by Article 22 paragraph (2) could never happen when the court later seized is located in a Contracting State that allows only the joining of cases pending before the same court and does not allow the joining of cases pending before different courts, even if the law applicable to the court first seized would accept the transfer of the action.

3. *Correcting the Weaknesses of Article 22*

Both weaknesses of the present Article 22 of the Brussels and Lugano Conventions were eliminated by the revision of the Brussels Convention and its recasting into the form of an EU regulation.

(A) THE NEW TEXT OF ARTICLE 28(1) PROVIDES AS FOLLOWS:

'Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.'

With otherwise unchanged requirements, the provision that both proceedings must be pending at first instance has been deleted without substitute.

(B) THE NEW PARAGRAPH (2) READS AS FOLLOWS:

'Where these actions are pending at first instance, any court other than the court first seized 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.'

As is easily apparent, the consolidation of the two lawsuits now only depends on the law applicable to the court first seized. The requirement that both lawsuits must be pending at first instance, which was sensibly deleted in paragraph (1), is reintroduced here as a precondition for the denial of jurisdiction by the court last seized. This makes sense because – and not where proceedings are merely stayed according to paragraph (1) – there would otherwise be a danger for one party to lose an instance.

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[33] *See* Geimer/Schütze, above, note 17, Article 22 rec. 4 (with further references).

D. The Second Step Towards Real Cooperation: Article 22 of the Hague Draft Convention

Article 28 of the revised Brussels Convention means some important progress for the suspension or rejection of proceedings which are connected to another existing pending lawsuit. This should considerably increase the practical meaning of these provisions. Nevertheless, the truly revolutionary provisions are contained in Article 22 of the Hague Draft Convention. In order to appreciate their significance, it is useful to first discuss their background.

1. The ILA Principles on Declining and Referring Jurisdiction

The International Law Association (ILA) has created a number of committees, inter alia a Committee on International Civil and Commercial Litigation. This Committee, in its session of 16 October 1999 in Milano, adopted the so-called 'Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters'. These Principles were subsequently adopted by the ILA Conference in London in the year 2000.[34]

In section 4, these Principles deal with 'declining jurisdiction': 'The originating Court shall decline jurisdiction in the following exceptional circumstances ...'. As the reasons for declining jurisdiction, the Principles list the following:

- *lis pendens* (4.1)
- related actions (4.2)
- other grounds for refusal (4.3)

In order to demonstrate the relationship between 4.2 and 4.3, it is useful to consider the relevant passages of the Principles in full text:

> 4.2 Where related actions are pending in the courts of more than one State either court may suspend or terminate its proceedings and refer the matter to the alternative court in accordance with the procedures in Principle 5, provided that the actions can be consolidated in the alternative court.
>
> 4.3 An originating court shall decline jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on grounds of nationality. In making this decision, the court shall have regard in particular to the following factors:
>
> (a) the location and language of the parties, witnesses and evidence;
>
> (b) the balance of advantages of each party afforded by the law, procedure and practice of the respective jurisdictions;

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[34] The International Law Association, Report of the sixty-ninth Conference, London 2000, pp. 137 et seq., 171.

(c) the law applicable to the merits;
(d) in cases under Principle 4.1, the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court's jurisdiction and the substantive progress of the respective actions;
(e) the enforceability of any resulting judgment;
(f) the efficient operation of the judicial system of the respective jurisdictions;
(g) any terms of referral under Principle 5.3.

As can be seen, the point of departure is the so-called 'related action', corresponding to Article 22 of the Brussels and Lugano Conventions, and Article 28 of the revised Brussels Convention. Under both systems the court has a choice between suspending its proceedings and terminating them. In contrast with Articles 22 and 28, however, not only the court last or later seized can proceed in this manner but 'either court' – including the court first seized – which can sometimes be a very sensible solution.

Furthermore, the provisions provide clearly that there shall not only be a termination of proceedings but that the respective court shall 'terminate its proceedings and refer the matter to the alternative court'. This calls for true cooperation between the two courts, in spite of the fact that they are located in different Contracting States. The procedural provisions are contained in Principle 5.2:

> 'The originating court may communicate directly with the alternative court on any application for referral in order to obtain information relevant to its determination under Principle 4, where such communication is permitted in the respective states. States are encouraged to permit their courts to make, and to respond to, such communications.
>
> Any such communication shall be either on the application of one of the parties or on its own motion. Where the court acts on its own motion it shall give reasonable notice to the parties of its intention to do so, and hear the parties on the information to be sought.
>
> The originating court shall either communicate in writing or otherwise on the record. It shall communicate in a language acceptable to the alternative court.'

As is most obvious, these Principles are promoting direct communication between the courts, who, by this cooperation, should determine which one of several possible fora is the most appropriate to deal with a complex dispute.

2. *Article 22 of the Hague Draft Convention*

When comparing Article 22 of the Hague Draft Convention to the ILA Principles, their similarities are immediately apparent. This is not surprising, since both rapporteurs of the Hague Convention, Peter Nygh and Fausto Pocar, are also respectively president and member of the ILA Committee – 'network synergies', one might say.[35]

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[35] For reasons of fairness, it shall not remain undisclosed that the present author is also a member of this ILA Committee.

Article 22 of the Hague Draft Convention stipulates as follows:

1. In exceptional circumstances, when the jurisdiction of the court seized is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.
2. The court shall take into account, in particular,
   a) any inconvenience to the parties in view of their habitual residence;
   b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
   c) applicable limitation or prescription periods;
   d) the possibility of obtaining recognition and enforcement of any decision on the merits.
3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.
4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.
5. When the court has suspended its proceedings under paragraph 1,
   a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
   b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

At first glance, one might think that Article 22 introduces the so-called *forum non conveniens* rule of common law into the global convention: A court can choose to suspend its proceedings, if it feels it is 'clearly inappropriate' to deal with the dispute and if there is another court with jurisdiction, that is 'clearly more appropriate' to deal with it. In order to determine appropriateness, the court must take a number of factors into consideration. These are listed in paragraph (2) and include habitual residence of the parties, nature and location of evidence, applicable limitation and prescription periods, and enforcement opportunities.

Nevertheless, the Article differs significantly from traditional *forum non conveniens* rules, which ultimately make it inappropriate to talk about introduction of *forum non conveniens* into the Hague Draft Convention. First, as demonstrated, the rules require that a court, which is called upon, is 'clearly inappropriate' for

dealing with the case and that suspension shall be limited to 'exceptional circumstances'. This provides greater assurance that the court in question should not freely decide which of several possible fora is the most suitable for dealing with a dispute, as it is the case in England under classical *forum non conveniens* rules.[36] By contrast, under the Hague Draft Convention, jurisdiction should only be declined in very clear and exceptional cases.[37] Secondly, the references to Articles 4, 7, and 12 make it clear that a court can never decline its jurisdiction if it has exclusive jurisdiction, if it has been appropriately chosen by the parties, or if its jurisdiction concerns a consumer or labour law dispute. Thirdly, paragraph (3) blocks the discriminatory *forum non conveniens* practice in the USA, namely, the presumption that an American plaintiff has brought the claim in an appropriate forum, while the same presumption is not applied for foreign plaintiffs.[38] Article 22 must be applied equally (seldom) for all plaintiffs.

The last and maybe most important difference from *forum non conveniens*, however, is the fact that the court cannot simply decline jurisdiction when the requirements of Article 22 are fulfilled. Rather, as with Article 9 Swiss IPRG, it only suspends the proceedings at first and only later, after the more appropriate court has accepted its jurisdiction, the first court can definitively decline jurisdiction according to Article 22(5).[39] In this way, the constitutional guarantee to an effective legal remedy, which is given by several European States, is safeguarded.

E. Conclusion

Analysis of the development over the last decades of the rules on international cooperation of courts (outside of the context of requests for judicial assistance in the broadest sense), in particular the rules about taking into consideration foreign *lis pendens* and connected foreign cases, leads to the conclusion that there is a trend from confrontation to coordination. If the Hague Draft Convention becomes law, this trend will continue towards direct cooperation between the courts. This development is only logical, in a day and age where politics, business life and culture are subject to globalization. However, this development is to be welcomed regardless of these factors, since it will contribute to a better administration of justice in general.

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[36] See, for example, Beaumont, Great Britain, in Fawcett (ed.), *Declining Jurisdiction in Private International Law*, Oxford 1995, pp. 207 et seq., pp. 209–220.
[37] *See* Nygh/Pocar, above note 4, p. 89.
[38] See, for example, *Piper Aircraft Co. v Reyno*, 454 U.S. 235 (1981).
[39] *See* Nygh/Pocar, above note 4, pp. 90–91.