

Private International Law of Contractual and Non-Contractual Obligations

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 Ferrara 2015

Part III: Parallel Proceedings

§ 12 Risk of parallel proceedings and the need for coordination

§ 13 First in time principle and negative declaratory actions

§ 14 Particular issues

Art. 29 Brussels I *bis* Regulation

(1) Without prejudice to Article 31(2), 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.

§ 12 Risk of parallel proceedings and the need for coordination

- Lis pendens pursuant to Article 29 “covers a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State.” (Gubisch v. Palumbo, ECJ, case 144/86 (1987), Mn. 19)

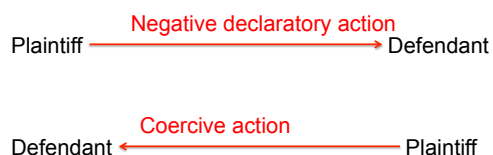
§ 12 Risk of parallel proceedings and the need for coordination

- Lis pendens and other means of coordination
- Gubisch v. Palumbo: coercive action first, negative declaratory action second

§ 13 First in time principle and negative declaratory actions

- Tatry, ECJ, C-406/92 (1994): “an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss.”
- European autonomous interpretation of “same cause of action”

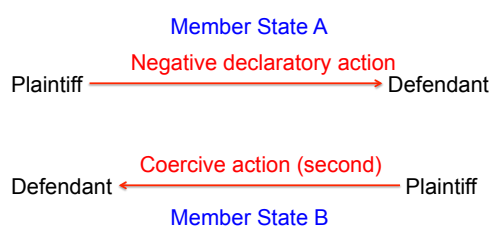
§ 13 First in time principle and negative declaratory actions



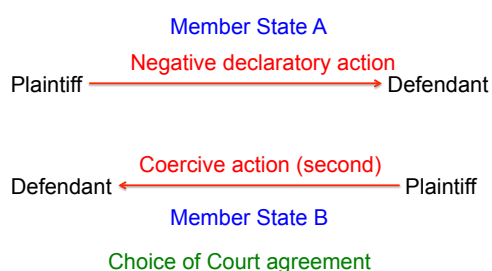
§ 13 First in time principle and negative declaratory actions

- Negative declaratory action first in time
- European autonomous interpretation of "same cause of action"
- The problem of the so-called torpedo actions

§ 13 First in time principle and negative declaratory actions



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§ 13 First in time principle and negative declaratory actions

Gasser, ECJ, C-116/02 (2004), MN. 54:
 "Article 21 of the Brussels 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"

§ 13 First in time principle and negative declaratory actions

Gasser, ECJ, C-116/02 (2004), MN. 70: "an interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention."

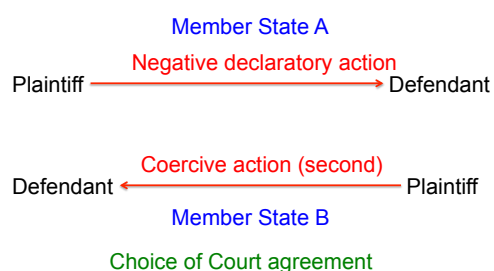
§ 13 First in time principle and negative declaratory actions

Turner v. Grovit, ECJ, C-159/02 (2004), MN. 31:
 “the Convention 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.”

Art. 31 Brussels I *bis* Regulation

- (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.

§ 13 First in time principle and negative declaratory actions



§ 13 First in time principle and negative declaratory actions

- First-in-time principle and choice of court agreements, Art. 31 (2) and (3)
- Protective contracts and *lis pendens* in case of a choice of court agreement, Art. 31 (4)

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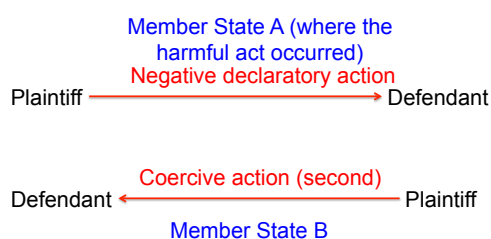
§ 14 Particular issues

- Same cause of action (Article 29) and “related actions” according to Article 30
- The time when a court shall be deemed to be seised, Article 32
- Proceedings pending before a court of a third State, Artt. 33-34

§ 14 Particular issues

- Negative declaratory action and special grounds of jurisdiction
 - May a negative declaratory action be brought before the courts of the state where the harmful act occurred?
- Folien Fischer, ECJ, C-133/11 (2012)

§ 14 Particular issues



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Folien Fischer, ECJ, C-133/11 (2012), question to the Court for a preliminary ruling, MN. 21: “Is point (3) of Article 5 of ... Regulation No 44/2001 ... to be interpreted as meaning that jurisdiction in matters relating to tort or delict also exists in respect of an action for a negative declaration in which a potential injuring party asserts that the party potentially injured by a particular situation has no claim in tort or delict (in this case, infringement of the provisions of competition law)?”

§ 14 Particular issues

Folien Fischer, ECJ, C-133/11 (2012), MN. 38: “In matters of tort or delict, the courts of the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence”

§ 14 Particular issues

Folien Fischer, ECJ, C-133/11 (2012), MN. 43: “an action for a negative declaration entails a reversal of the normal roles in matters relating to tort or delict, since, in such an action, the claimant is the party against whom a claim based on a tort or delict might be made, while the defendant is the party whom that tort or delict may have adversely affected.”

§ 14 Particular issues

Folien Fischer, ECJ, C-133/11 (2012), MN. 45: “The objectives, pursued by that provision and repeatedly stressed in case-law (...), of ensuring that the court with jurisdiction is foreseeable and of preserving legal certainty are not connected either to the allocation of the respective roles of claimant and defendant or to the protection of either.”