

## ACCUMULATION OF CONTRACTUAL AND TORTIOUS CAUSES OF ACTION UNDER THE JUDGMENTS REGULATION

SAMUEL ZOGG\*

### A. INTRODUCTION

Under many legal systems, several causes of action may arise from one and the same set of facts. This article focuses on situations where, between two parties,<sup>1</sup> a single incident (allegedly) gives rise to a contractual and a tortious cause of action.<sup>2</sup> Under many laws such claims are cumulative in nature and the claimant may pursue one or the other, or both, in order to recoup his losses. Examples may be the liability of a doctor in relation to a patient for negligent medical treatment, product liability of a manufacturer against his buyer, or liability under a contract of carriage for personal injury or cargo damage.

In such cases, difficult questions of private international law arise. This article is confined to jurisdictional and jurisdiction-related issues under the Judgments Regulation;<sup>3</sup> choice-of-law problems<sup>4</sup> as well as national jurisdictional law will not be considered. However, as far as the Regulation leaves questions to national law, English law will be considered primarily. The focus will lie on elaborating the applicable legal principles *de lege lata* (under the current version of the Regulation), rather than on developing new proposals *de lege ferenda*.

In this context, several questions arise. Firstly, concerning jurisdiction, it ought to be examined if and to what extent the claimant may, apart from Article 2, bring his claims under Article 5(1) and/or 5(3)<sup>5</sup> and particularly whether and to what extent he has a free choice as to how to frame his claim for these purposes. This involves analysing whether these provisions are mutually exclu-

\* MLaw (University of Zurich), LLM (King's College London); Research Associate, University of Zurich.

<sup>1</sup> Multi-party situations are not considered; however, similar problems may arise in cases of joint liability for one and the same damage.

<sup>2</sup> Other areas of law potentially giving rise to cumulative causes of action are not considered.

<sup>3</sup> Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Judgments Regulation).

<sup>4</sup> See J Fawcett, J Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford University Press, 2005), ch 20.

<sup>5</sup> Regarding Art 5, it will be supposed that the defendant is domiciled in *another* Member State.

sive. Even if they are, however, it would not automatically follow that they cannot simultaneously apply; this clearly emerges from the *Kalfelis* case.<sup>6</sup>

Secondly, if the claimant may, indeed, pursue his claims in different fora, questions of parallel litigation (Articles 27, 28) must be examined – in particular, whether in such cases the contractual proceedings involve the same cause of action as the tortious proceedings. On the other hand, delicate questions of *res judicata* will arise,<sup>7</sup> namely whether judgment on one claim precludes the other and, if not, how double satisfaction can be prevented.

### B. CONCURRENT LIABILITY: JURISDICTION UNDER ARTICLE 5(1) AND 5(3)

If the claimant alleges to have, according to the (allegedly) applicable law, cumulatively a claim in contract and in tort, both providing for compensation of the same damage out of the same incident, the question arises whether he can pursue these claims under Article 5(1) and/or 5(3) and whether this is subject to his free choice. At the jurisdictional stage, the applicable law is yet to be determined and it is unknown whether the substantive law (or even the choice-of-law rules) will allow cumulative pursuance and obtaining multiple judgments (cumulative remedies), require election of either cause of action (alternative remedies),<sup>8</sup> or will provide for the French principle of *non-cumul* (one remedy being subsidiary).<sup>9</sup> However, relying on the hypothetically applicable law is unfavourable and inconsistent with the independent interpretation of matters relating to contract/tort by the European Court of Justice (ECJ).<sup>10</sup>

This section does not intend to give a comprehensive overview of Article 5(1) and 5(3). In the context of concurrent liability, the following issues are of particular interest. Firstly, the relationship between those provisions – in particular, whether they are mutually exclusive<sup>11</sup> and require a “channelling” of all claims to one head or whether they allow a “splitting” of the dispute into

<sup>6</sup> *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst*, Case 189/87 [1988] ECR 5565.

<sup>7</sup> As long as the first proceedings are pending, *res judicata* issues may arise only if Arts 27 and 28 do not apply; however, after termination they arise in any case.

<sup>8</sup> See *Personal Representatives of Tang Man Sit v Capacious Investments* [1996] AC 514 (PC) [521]–[523] (Lord Nicholls).

<sup>9</sup> See Cour de Cassation 11.1.1922 D 1922 1 16.

<sup>10</sup> *Handte v Traitements Mécano-chimiques des Surfaces*, Case C-26/91 [1992] ECR I-3967; *Kalfelis*, *supra* n 6.

<sup>11</sup> The question whether these provisions are “all-embracing” (as one might infer from the *Kalfelis* definition for matters in tort) is beyond the scope of this article as it is not of particular importance for present purposes. It suffices to say that the ECJ accepted in *Reichert v Dresdner Bank* (No 2), Case C-261/90 [1992] ECR I-2149 that there are cases falling within neither Article 5(1) nor 5(3), there being some additional requirements derived from the words “liability” or “harmful event”; see also *Kleinwort Benson v Glasgow City Council* (No 2) [1999] 1 AC 153 (HL) [172] (Lord Goff), [196] (Lord Hutton).

different fora. Secondly, whether the claimant can “choose” the jurisdictional head by skilful drafting of his claim; this involves analysis of whose allegations (the claimant’s and/or the defendant’s) are relevant as well as of the required standard of proof to bring a claim under either head. Thirdly, whether there is “accessory jurisdiction” for related claims in the respective forum.

### 1. Relationship between Article 5(1) and 5(3): Mutual Exclusivity for the “Entire Dispute” or for Each “Single Cause of Action”?

It is well established that these provisions are “mutually exclusive”.<sup>12</sup> This follows from the *Kalfelis* definition for “matters relating to tort”,<sup>13</sup> and seems not to have been questioned so far. However, there is little clarity as to what it exactly means. As will become clear, there is an apparent (but so far unexpressed) dissent in the literature and jurisprudence among different Member States; this might be traced back to a confusing use of terminology and a widespread misunderstanding of *Kalfelis*.<sup>14</sup>

#### (a) Confusing Use of Terminology

The terminology used in this context, as to the “object of mutual exclusivity”, differs considerably.<sup>15</sup> This might not surprise as the Judgments Regulation itself does not provide for a consistent use of terminology either.<sup>16</sup> Two concepts may be distinguished: the first can be described as the “action as a whole” or the

<sup>12</sup> A Briggs and P Rees, *Civil Jurisdiction and Judgments* (Informa, 5th edn, 2009), 253; J Fawcett and J Carruthers (eds), *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 14th edn, 2008), 251; J Hill and A Chong, *International Commercial Disputes* (Hart Publishing, 4th edn, 2010), 133–34; Fawcett *et al*, *supra* n 4, 57–59.

<sup>13</sup> *Supra* n 6, [18].

<sup>14</sup> *Supra* n 6.

<sup>15</sup> Describing the “action as a whole”: *Kalfelis*, *supra* n 6, [19]–[20] (“action”, “action/case in its entirety”, “same dispute”); describing a “single cause of action”: *Kalfelis*, *supra* n 6, [19]–[20] (“in so far as it is based”, “different aspects”); P Mankowski, “Art 5” in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Sellier European Law, 2nd edn, 2012), 231–32 (“with regard to the single claim”, “issue”); in the German literature/language (see references, *infra* n 24) terms like “Rechtssache/-streit”, “Klage” or “Streitgegenstand” are used for the former, “Anspruch/-sgrundlage”, “Klage”, “Fragen”, “Gesichtspunkte”, “Aspekte”, “Haftung/-san-spruch” for the latter; see in England for the latter, eg: *Agnew v Länsförsäkringsbolagens AB* [2001] 1 AC 223 (HL) [244]–[245] (Lord Woolf: “case”, “same issue”, “proceedings”), [267] (Lord Millett: “matter”); *Source*, *infra* n 26, [63]–[64] (Staughton LJ: “claim”, “causes of action”); *RZB v NBG*, *infra* n 27 [411] (Tuckey J: “claim”); *Rayner v Davies*, *infra* n 27, [256]–[257] (QB; Morison J: “claim”, “cause of action”).

<sup>16</sup> Describing a “single cause of action”: “matter(s)” (eg Arts 1(1), 5(1/3), 15(1), 18(1), 25), “claim” (Arts 5(4), 6(1/3), 25), “dispute” (Arts 5(5/7), 15(2), 23(1/3)), “proceedings” (Arts 22(1)–(5), 23(4)), “action” (Arts 6(2), 7, 28/29), “cause of action” (Art 27); in the German version: “Gegenstand des Verfahrens” (eg Arts 5(1/3), 15(1), 18(1)), “Verfahren ... zum Gegenstand” (Art 22(5)) “sache” (Arts 1(1), 5(2)), “Klage” (Arts 5(4), 6(1)–(3), 22(1)–(4), 23(4), 27, 28, 29), “Streitigkeit” (Arts 5(5/7), 15(2), 25), “Rechtsstreitigkeit” (Art 23(1)), “Anspruch” (Art 27).

“entire dispute” which comprises so to speak “all causes of action contained in the proceedings/dispute”. The second can be described as the “respective single cause of action/claim” which is a “part of the action as a whole/entire dispute”.

This terminological confusion might have been one of the reasons which led to an apparent consensus that Article 5(1) and 5(3) are “mutually exclusive”; however, that confusion in fact conceals two fundamentally different positions:<sup>17</sup> one view assumes “mutual exclusivity” in relation to the “entire dispute”; this leads to an exclusion of tort claims from Article 5(3) as soon as there is a contract (however closely related) in the parties’ relationship. The “opposing” view conceives “mutual exclusivity” only with regard to each “single cause of action”; this allows tort claims to be pursued under Article 5(3) notwithstanding the fact that collateral contractual claims fall under Article 5(1). It will be argued that this second approach is, apart from the fact that it accords with the ECJ’s view in *Kalfelis*,<sup>18</sup> the better view – at least *de lege lata*.<sup>19</sup>

*(b) The Kalfelis Decision: No Accessory Jurisdiction and No Exclusive Effects of a Contract under Article 5(3)*

In that case, the claimant based his claim (seeking remedy for a certain sum of money as a result of negligent advice by a bank in financial transactions) on contract, tort and unjust enrichment. Firstly, the ECJ established an autonomous interpretation of the concept “matters relating to tort” as covering “all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1)”.<sup>20</sup> This part of the decision is usually referred to as establishing the “mutual exclusivity” between Article 5(1) and 5(3). However, the ECJ held, secondly, that “a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based”;<sup>21</sup> in other words, the claimant may pursue his “action” under Article 5(3) only (but at least!) in so far as it is based on tort. On the one hand, this part of the decision denies accessory jurisdiction under Article 5(3).<sup>22</sup> On the other hand, however, the judgment clearly establishes that the mere existence of a related contract in the set of facts (as there was!) cannot suffice to exclude the claim from Article 5(3). Accordingly, the ECJ acknowledged the

<sup>17</sup> As far as apparent, this dissent has never been properly identified.

<sup>18</sup> *Supra* n 6.

<sup>19</sup> See *infra*, Section B.1(d).

<sup>20</sup> *Kalfelis*, *supra* n 6, [17]–[18]; see for an interpretation of that term *infra*, Section B.1(d)(iii) – *Kalfelis* formula.

<sup>21</sup> *Kalfelis*, *supra* n 6, [19]–[21].

<sup>22</sup> See *infra*, section B.3.

possibility of a fragmentation of a “single dispute” into different fora<sup>23</sup> and, without saying so explicitly, qualified each cause of action separately. Consequently, only each such “single cause of action” is the object of the “mutual exclusivity” dictum.

(c) *Conflicting Views in Literature and Case Law*

(i) *Prevailing View in Germany: Separate Analysis of Each “Single Cause of Action” and No Exclusive Effects of a Contract*

The prevailing view<sup>24</sup> in many European civil law countries (particularly in Germany) appears to be that the existence of a contract in the parties’ relationship does *not* as such exclude tort claims from Article 5(3) and does not make them “matters relating to a contract” at the characterisation stage. Article 5(3) is not considered subsidiary to Article 5(1) and the availability of the latter does not exclude tort claims from the former; this is sometimes based on a correct understanding of *Kalfelis*.<sup>25</sup> A separate pursuance of cumulative causes of action under both Article 5(1) and 5(3) is recognised. Although it is accepted that Article 5(1) and 5(3) are “mutually exclusive”, they are regarded so only in relation to each “single cause of action”; only in so far the claimant has no choice whether to frame his claim in contract or tort. Contractual and tortious claims are regarded as separate causes of action, capable of being qualified independently for jurisdictional purposes. Interestingly, this is not usually considered as problematic but impliedly assumed as a given.

(ii) *English Case Law: Separate Analysis of Each “Single Cause of Action”*

It is appropriate to consider next how the English courts dealt with the question of accumulation of causes of action and mutual exclusivity. In *Source v TUV Rheinland Holding*<sup>26</sup> the claimant alleged two causes of action. Firstly, he based his claim on a breach of a contractual obligation to exercise reasonable skill and care in the preparation of quality control inspection reports; secondly,

<sup>23</sup> Cf *Kalfelis*, *supra* n 6, [20] where the ECJ noted that resulting disadvantages can be mitigated by Arts 2 and 28.

<sup>24</sup> BGH 27.5.2008 [2009] *IPRax* 150–51 (a claim framed solely in tort for negligent medical treatment against a doctor was subsumed under Art 5(3)); BGH 11.2.1988 [1989] *IPRax* 99; OLG Köln 5.4.2005 [2006] WM 124–25; CU Wolf, “Feststellungsklage und Anspruchsgrundlagenkonkurrenz im Rahmen von Art 5 Nr 1 und Nr 3 LugÜ” [1999] *IPRax* 85–86; Mankowski, *supra* n 15, 117–19, 231–32; J Kropholler and J von Hein, *Europäisches Zivilprozessrecht* (Verlag Recht und Wirtschaft, 9th edn, 2011), 212; R Geimer, “Art 5” in R Geimer and R Schütze (eds), *Europäisches Zivilverfahrensrecht* (Beck, 3rd edn, 2010), 233–34; A Spickhoff, “Anspruchskonkurrenzen, Internationale Zuständigkeit und Internationales Privatrecht” [2009] *IPRax* 129; HP Mansel, “Gerichtliche Prüfungsbefugnis im forum delicti” [1989] *IPRax* 85; see also BGH 16.10.1984 [1984] WM 1564 (left it open); *contra*: OLG München 8.3.1989 [1989] RIW 903; OLG Koblenz 23.2.1990 [1990] RIW 319 (but differently on similar facts: OLG Koblenz 25.6.2007 [2009] *IPRax* 153).

<sup>25</sup> *Supra* n 6; see *supra* Section B.1(b).

<sup>26</sup> *Source v TUV Rheinland Holding* [1998] QB 54.

he based it on a tortious breach of duty for the same reason. The Court of Appeal held that “[b]oth the causes of action” are excluded from Article 5(3) “because they *are both* related to a contract” and that “*a claim* which may be brought under a contract or independently of a contract on the same facts, save that the contract does not need to be established, *is* [excluded from Article 5(3)]”.<sup>27</sup> At first sight, one might infer from this judgment that whenever there is a contract between the relevant parties (related to the relevant facts), that contract necessarily excludes related tort claims from Article 5(3).<sup>28</sup> However, that conclusion does not necessarily follow from that case. It must be noted that the Court of Appeal, though using the singular and the plural interchangeably, effectively qualified both causes of action separately and held that *both* are (by themselves) related to a contract. The reason for qualifying the tort claim under Article 5(1) was not the mere fact that there was a contract between the parties but rather the fact that the tortious liability in question (namely the duty of care to draw up proper reports) necessarily presupposed such a contract without which this tort could never have existed.<sup>29</sup> This is reinforced by the words “save that the contract does not need to be established” which seem to indicate that a claim for tortious liability nonetheless falls under Article 5(3) if that liability does not depend on a contract. Consequently, the mere existence of a contract as such does not exclude tort claims from Article 5(3). Examples may be claims for product liability by a buyer against his seller/manufacturer<sup>30</sup> or claims by a patient against his doctor for negligent medical treatment.<sup>31</sup> Both of these liabilities, if framed in tort, do not, under many laws, require the proof of a contract. The tortious duty (not to cause damage by a product and not to injure someone physically) exists *irrespective* of any contract.

This is in line with the reasoning (*obiter*) of Morison J in *Rayner v Davies*<sup>32</sup> who was also concerned with a claim for breach of contract and a claim for breach of a tortious duty of care to carry out a survey and draw up reports carefully. He qualified both causes of action separately and held that “it is sensible to regard both claims as relating to a contract” since “[t]he relationship between

<sup>27</sup> *Ibid*, [63] (Staughton LJ; emphasis added); in *Raiffeisen Zentralbank Österreich v National Bank of Greece* [1999] 1 Lloyd’s Rep 408 (Comm) [411], Tuckey J considered *Source* to have been overruled implicitly by *Kleinwort Benson*, *supra* n 11; however, it was approved by Morison J in *Rayner v Davies* [2003] ILPr 14 (QB) [18]–[19]; affirmed without discussion by the CA, [2002] EWCA Civ 1880, [2003] ILPr 15.

<sup>28</sup> See *Cheshire*, *supra* n 12, 251–52; Fawcett et al, *supra* n 4, 60–61, 374.

<sup>29</sup> Equally: Briggs and Rees, *supra* n 12, 224, 262.

<sup>30</sup> *Contra: Ibid*, 265, citing *Handte*, *supra* n 10, which, however, is far from denying this.

<sup>31</sup> BGH 27.5.2008, *supra* n 24, 150–51; arguably, the physical injury gives prima facie rise to a tortious claim. Whether a valid contract or consent by the patient justifies the injury is a preliminary question (contractual defence to the tort claim) which should not govern the jurisdictional qualification: Kropholler and von Hein, *supra* n 24, 212; S Leible, in T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht* (vol 1, Sellier European Law, 2011), 264–65; *contra*: Briggs and Rees, *supra* n 12, 263.

<sup>32</sup> *Supra* n 27, [19].



the parties which gives rise to the duty in tort is founded upon the contract”. As in the *Source* case, the tort claim “arose precisely because there was a contractual relationship which gave rise to the duty of care”.

*RZB v NBG*<sup>33</sup> concerned a claim for breach of contract (an undertaking to pay on completion of certain events and a warranty of non-default under a related loan agreement at that time) and/or negligent misrepresentation. Concerning the latter, Tuckey J essentially left open whether it falls under Article 5(1) (on the basis that *Source*<sup>34</sup> is still good law) or 5(3) (on the basis that it has been overruled by *Kleinwort Benson*<sup>35</sup>). The question whether a claim for misrepresentation as such falls within Article 5(1) or 5(3) is beyond the scope of this article. However, it is apparent that Tuckey J “split” the action and – just as Staughton LJ did in *Source*<sup>36</sup> – qualified the two claims separately.<sup>37</sup> Although this case can, admittedly, also be resolved by a different route of reasoning, namely that these were “separate claims” concerning different facts,<sup>38</sup> Tuckey J nonetheless implied – by indicating his opinion that the tort claim falls rather under Article 5(3) – that the existence of a contract as such does not exclude related tort claims from that provision.

The alternative way of reasoning was taken in *Domicrest v Swiss Bank*<sup>39</sup> which concerned a contractual claim under an alleged payment order/guarantee and (eventualiter) a tortious claim for misrepresentation that such a payment order is as good as cash. Rix J held, distinguishing the *Source* case, that these claims are “not parallel” and based on opposite lines of arguments and therefore the latter claim plainly falls within Article 5(3). It suffices to say here that even if such claims can be said to concern different facts and, accordingly, no (proper) accumulation of causes of action, the result would be the same *a fortiori*.

Although there are indications to the contrary,<sup>40</sup> it can be concluded that the English case law generally favours a separate qualification of contractual and tortious claims, subsuming the latter under Article 5(1) *only* if and because it is founded upon and necessarily presupposes a contract, but *not* otherwise, even if a related contract exists between the parties. This approach appears to be consistent with the *Kalfelis* decision.<sup>41</sup>

<sup>33</sup> *Supra* n 27, [413]–[414].

<sup>34</sup> *Supra* n 26.

<sup>35</sup> *Supra* n 11.

<sup>36</sup> *Supra* n 26.

<sup>37</sup> Similarly: Chadwick LJ (*obiter*) in *Viskase v Paul Kiefel* [1999] 1 WLR 1305 (CA) [1320].

<sup>38</sup> See Fawcett *et al*, *supra* n 4, 59.

<sup>39</sup> [1999] QB 548 (QB) [561].

<sup>40</sup> A *uniform qualification* appears to have been adopted in (both *obiter*) *Barry v Bradshaw* [2000] CLC 455 (CA) [460] (Aldous LJ) and *Mazur Media v Mazur Media* [2004] EWHC 1566 (Ch), [2004] 1 WLR 2966 [2974] (Lawrence Collins J).

<sup>41</sup> *Supra* n 6 and Section B.1(b).

(iii) *Different View: Uniform Qualification and A Priori Exclusive Effects of a Contract on Tort Claims under Article 5(3)*

On the other hand, many authors as well as the Irish High Court<sup>42</sup> counsel a view of uniform qualification of the entire dispute as well as exclusive effects of a contract on tort claims under Article 5(3). Although it is surprisingly obvious that the ECJ in fact ruled precisely the opposite,<sup>43</sup> *Kalfelis*<sup>44</sup> is often cited as an authority supporting such a position.

*Burke v Uvex*<sup>45</sup> involved a claim by a buyer against his seller (not being the manufacturer) for damages for personal injuries allegedly caused by a defective product. He based his claim solely on tort of negligence and breach of duty at common law. The Irish High Court held, (wrongfully) relying on the autonomous definition in *Kalfelis*,<sup>46</sup> that, although the claim was based solely on tort, the “court cannot overlook the existence of the contractual relationship, however basic, between the plaintiff and the ... defendant” and that the “plaintiff cannot avoid the consequences of the existence of that contract by seeking his remedy solely in tort”. Therefore, the claimant was prevented from bringing his claim under Article 5(3).<sup>47</sup> At least the reasoning seems unsound and framed in too general terms; the court regarded the mere fact of a contract’s existence between the parties as decisive for the qualification of the tort claim. It did not analyse this claim separately and ask whether the alleged liability is the result of an obligation freely assumed<sup>48</sup> (the alleged tort necessarily presupposing a contract) or if the tortious duty exists independently of any contract. In the light of the reasoning, the court’s answer would probably have been the same had the seller also been the manufacturer and had the claim been based solely on product liability (which does not presuppose but might still exist alongside a contract). It is argued here that it would be wrong to desperately “press” an action, which is based on breach of contract and on product liability, into a single category, both claims necessarily being the same, namely contractual, merely because the manufacturer happens to be the seller.

However, such a broad reading of *Burke v Uvex*<sup>49</sup> seems to be supported by Briggs and Rees,<sup>50</sup> who suggest that Article 5(1) and 5(3) were inspired by the

<sup>42</sup> *Burke v Uvex Sports* [2005] ILPr 348.

<sup>43</sup> See *supra*, Section B.1(b); accurately: BGH 27.5.2008, *supra* n 31, 151; Spickhoff, *supra* n 24, 129; Wolf, *supra* n 24, 85–86.

<sup>44</sup> *Supra* n 6.

<sup>45</sup> *Supra* n 42, [354]–[355].

<sup>46</sup> *Supra* n 6.

<sup>47</sup> It appears, although this was not necessary to decide, that the court regarded the tort claim as contractual, falling under Art 5(1).

<sup>48</sup> *Handte*, *supra* n 10.

<sup>49</sup> *Supra* n 42.

<sup>50</sup> *Supra* n 12, 253, 263, 265; see also A Briggs, “Choice of Choice of Law?” [2003] *Lloyds Maritime and Commercial Law Quarterly* 25, 30, basically stating that if a claim “arises between contracting parties”, any such claim can only be contractual for jurisdictional purposes even if it is alleged that the cause of action does not presuppose a contract.



French principle of *non-cumul*: “[I]f two parties are bound by a contract and a claim falls within the area regulated by that contract, there is no legal possibility of a parallel or concurrent remedy in delict.” Similarly, Fawcett *et al*<sup>51</sup> categorically state that “claims” cannot be split “because this would breach the basic principle [of mutual exclusivity]”. In *Cheshire*,<sup>52</sup> the view appears to be taken (in a hardly understandable analysis) that a contract as such excludes a tort claim from Article 5(3) but it does also not fall under Article 5(1) (due to the implications in *Kleinwort Benson*<sup>53</sup>); it is then concluded “that the tort claim disappears altogether [from Article 5]” since accessory jurisdiction under Article 5(1) is rejected.

Notably, this view is slightly broader than the one expressed by the English courts.<sup>54</sup> It implies, allegedly following from the *Kalfelis* definition, that if there is a related contract in the set of facts, this excludes any tort claim from Article 5(3) *a priori*.<sup>55</sup> Apparently, this conclusion mainly results from the fact that the “action (or the underlying dispute) as a whole” is qualified *uniformly*, presupposing that all alleged claims necessarily need to fall under one and the same head. A “split of the action” is, for some unexpressed reason, categorically rejected; this results in some sort of “supremacy of the contractual forum”. In contrast, the English case law suggests a *separate* qualification and relevance of the question whether each separate cause of action necessarily presupposes a contract or whether such liability exists independently of any contract. Regarding these opposing positions, differences in outcome particularly result in cases of claims based on product liability against the seller/manufacturer or claims based on personal injury for negligent medical treatment against a doctor.

*(iv) Two Possible Approaches Following a View of “A Priori Exclusive Effects of a Contract”*

If it were correct that the mere existence of a contract as such excludes tort claims from Article 5(3), the question arises whether such tort claims can be brought under Article 5(1). Two answers are conceivable:

(a) On the one hand, it could be followed that any tort claim which arises between contractual parties must actually be qualified as a “matter relating to contract”; after all, the argument to exclude the tort claim from Article 5(3) was because it was said to relate to a contract (not satisfying the *Kalfelis* definition). Nonetheless, this is usually made subject to the additional requirement that the claim must be based upon a “particular contractual obligation” as laid down in

<sup>51</sup> *Supra* n 4, 58–59, 374; similarly Briggs and Rees, *supra* n 12, 220 [1].

<sup>52</sup> *Supra* n 12, 251–52.

<sup>53</sup> *Supra* n 11.

<sup>54</sup> See *supra*, Section B.1(c)(ii).

<sup>55</sup> At least as far as the claims are not considered “separate claims” (being based on different facts); cf Fawcett *et al*, *supra* n 4, 57–61, 374; *Cheshire*, *supra* n 12, 252.

the controversial decision of *Kleinwort Benson*.<sup>56</sup> However, it is difficult to see how a tort claim may ever be based on such a contractual obligation being regarded as the “obligation in question”. The result would be that the tort claim is excluded from Article 5(1) because it is not based on a contract and from Article 5(3) because it relates to a contract.<sup>57</sup> This reasoning is unsound in principle and contains inherent contradictions.

If it were correct that the tort claim “disappears from Article 5”, a further argument may be invoked: if the claimant pursues the contract claim under Article 5(1), this would effectively amount to a substantive waiver of the tort claim,<sup>58</sup> unless it would still be possible for him to bring the latter under Article 2. Such a waiver was certainly not intended by the framers by providing for special jurisdiction.<sup>59</sup> It follows that it would still be possible to pursue the tort claim under Article 2 (to the exclusion of the already pending contract claim; Article 27). Evidently, such a solution would nonetheless involve a splitting of the action which was categorically rejected by Fawcett *et al.*<sup>60</sup> For that reason, nothing would be gained in terms of “procedural economy” compared with splitting the causes of action in Article 5(1) and 5(3).

(b) On the other hand, it could be argued that, notwithstanding *Kleinwort Benson*,<sup>61</sup> the exclusion of a tort claim from Article 5(3) as a result of a contract’s existence automatically means that the tort claim is contractual (for jurisdictional purposes) and thus “channelled to Article 5(1) by way of characterization”.<sup>62</sup> This type of channelling is to be distinguished from and logically excludes any accessory jurisdiction.<sup>63</sup> It would have, in terms of procedural economy, the advantage that one and the same dispute would be tried in one single forum only. However, there are arguments against such an approach which are considered next.

<sup>56</sup> *Supra* n 11.

<sup>57</sup> Essentially to that effect: Fawcett *et al.*, *supra* n 4, 58; Cheshire, *supra* n 12, 251–52; technically, this view still leaves open the question of accessory jurisdiction under Art 5(1); however, this would effectively lead to the same result as to accept that the claim is “contractual” at the outset.

<sup>58</sup> At least if cause of action preclusion extends to both claims; see *infra* n 236.

<sup>59</sup> See also *infra*, Section D.4 for the proposition that a judgment on a contractual claim may not have *res judicata* effects on a tort claim if and because the latter was not and could not be heard by the adjudicating court; this would infringe the right to be heard; see also *infra*, Section C.1(b).

<sup>60</sup> *Supra* n 4, 58–59.

<sup>61</sup> *Supra* n 11.

<sup>62</sup> Essentially proposed by AG Darmon [1988] ECR 5565 [29]–[30] (rejected in *Kalfelis*, *supra* n 6); Briggs, “choice”, *supra* n 50, 30; see also OLG Koblenz 23.2.1990, *supra* n 24, 319; OLG München 8.3.1989, *supra* n 24, 903; OLG Stuttgart 7.8.1998 [1999] *IPRax* 104.

<sup>63</sup> Accessory jurisdiction presupposes that the “accessory claim” does not originally (on its own merits) fall under the provision it is “pulled” to; if a claim is already contractual, there can *a priori* be no question of accessory jurisdiction under Art 5(1); AG Darmon, *supra* n 62, [24]; in so far inconsistent (or uncritical): L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (vol 1, Sweet & Maxwell, 14th edn, 2006), 416; Hill and Chong, *supra* n 12, 133–34.

*(d) Arguments against Exclusive Effects of a Contract and for a Separate Qualification of Each “Single Cause of Action”*

In the first place, the ECJ rather clearly rejected any exclusion of tort claims from Article 5(3) by the mere reason of a contract’s existence; in so far, it provided for a separate analysis of each “single cause of action” under Article 5.<sup>64</sup> On the other hand, there are (at least *de lege lata*) good arguments for such an approach.

*(i) Contrary to the Scheme and Objectives of Article 5(1) and 5(3)*

Excluding tort claims from Article 5(3) by reason of the mere fact that contractual claims exist contradicts the scheme and objectives of Article 5(1) and 5(3) which provide for a “friendly coexistence on eye level” rather than for “supremacy” of one or the other provision. Although there is mutual exclusivity between these provisions, this exists only with regard to each single cause of action. There is no reason why tort claims should be excluded from Article 5(3) merely because there are contractual claims too. Such an approach would unduly – and clearly beyond the text – restrict Article 5(3).<sup>65</sup> Regarding the tort claim, there is still (and just as much as for the contract claim at the place of performance) a “particularly close connecting factor” at the place(s) where the harmful event occurred which still “justifies the attribution of jurisdiction”.<sup>66</sup>

Taking the example of product liability, it is clear that such a claim falls plainly within Article 5(3) as between the manufacturer and an end-user. It would seem arbitrary and fortuitous if the latter loses this jurisdictional basis against the former if that happens to be the seller. Since he might not have known that the seller is also the manufacturer, this might create unforeseeable results and is contrary to the object of the Regulation to strengthen legal certainty “by enabling the claimant to identify easily the court in which he may sue”.<sup>67</sup> If the Regulation attaches value to the place where the harmful event occurred in cases of product liability, there is absolutely no reason why these values should vary only because there is a contract between the parties.

*(ii) Uncertain “Scope” of a Contract’s Exclusive Effects*

Another factor creating significant uncertainty and unforeseeability is the fact that it is far from clear under which circumstances and conditions a contract should exclude tort claims from Article 5(3). In other words, when is the contract “closely enough related to the tort” and when does it “merely exist somewhere in the facts with an irrelevant remoteness”? A distinction between “parallel

<sup>64</sup> *Kalfelis*, *supra* n 6; see *supra*, Section B.1(b).

<sup>65</sup> Wolf, *supra* n 24, 85–86.

<sup>66</sup> See *Dumez France v Hessische Landesbank*, Case 220/88 [1990] ECR I-49 [17].

<sup>67</sup> *Fonderie Officine Meccaniche Tacconi v Heinrich Wagner Sinto Maschinenfabrik*, Case C-334/00 [2002] ECR I-7357 [20]; see also Wolf, *supra* n 24, 86.

claims” and “separate claims” (being based on “different facts”) appears to lack the desired clarity too.<sup>68</sup>

(iii) *Relevance of the Defendant’s Invocation/Proof of a Contract?*

If the claimant bases his claim on tort, without mentioning or pleading any contract in the delictual forum, the question arises whether the defendant can avoid Article 5(3) jurisdiction by invoking (and possibly proving) a contract. The ECJ case law appears to suggest that, as a matter of principle, any defences by the defendant are irrelevant for the qualification under Article 5(1) or 5(3).<sup>69</sup>

**(a) *Gantner* principle.** For the purposes of *lis pendens*, the ECJ held in *Gantner Electronic v Basch Exploitatie Maatschappij*<sup>70</sup> that account can be taken only of the claimant’s claim and not of the defendant’s defences. This follows particularly from the fact that *lis pendens* already exists at a time before the defendant has had an opportunity to submit his defences. If the “content and nature of the claims could be modified by arguments necessarily submitted ... by the defendant”, the “purpose of [Article 27] would be frustrated”; in particular, because it may have the result that a “court initially designated as having jurisdiction ... would subsequently have to decline to hear the case”. It follows that a defendant’s invocation (and proof) of a contract cannot not make the cause of action a different one.

Although this judgment was only concerned with *lis pendens*, it can be argued that similar considerations should apply regarding the jurisdictional qualification; at least in relation to Article 5(1) and 5(3): contractual and tortious claims are different causes of action under Article 27.<sup>71</sup> Certainly, as long as no contract is mentioned, a court may impossibly treat the claim as a contractual one. Consequently, it appears to follow from *Gantner*<sup>72</sup> that the defendant’s invocation of a contract cannot make a claim originally pleaded solely in tort a contractual and thus a different one. The defendant’s defences must be irrelevant also for the jurisdiction-allocation between Article 5(1) and 5(3).

**(b) *Effer* line of case law.** A similar argument might be derived from *Effer v Kantner*<sup>73</sup> where the ECJ held that Article 5(1) jurisdiction includes the power to consider the existence of the contract itself and that the claimant may invoke

<sup>68</sup> Cf Fawcett *et al*, *supra* n 4, 59–60, 322, 374; Cheshire, *supra* n 12, 252.

<sup>69</sup> A different question is, however, whether the mere allegation of a tort/contract claim by the claimant suffices to establish jurisdiction under Art 5; see for the relevant standard of proof *infra*, Section B.2(b).

<sup>70</sup> *Gantner Electronic v Basch Exploitatie Maatschappij* Case C-111/01 [2003] ECR I-4207 [26]–[32].

<sup>71</sup> This follows rather clearly from *Owners of the cargo lately laden on board the ship Tatry v Owners of the ship Maciej Rataj*, Case C-406/92 [1994] ECR I-5439 [38] and *Maersk Olie & Gas v Firma M de Haan en W de Boer*, Case C-39/02 [2004] ECR I-9657 [37]–[39]; see *infra*, Section C.1.

<sup>72</sup> *Supra* n 70.

<sup>73</sup> *Effer v Kantner* Case 38/81 [1982] ECR 825 [7]–[8].

that provision even if the defendant disputes the existence of a contract. It can be argued that this effectively means that the *defendant's denial* of a contract (even if he proves the non-existence) cannot alter the qualification under Article 5(1).<sup>74</sup> This is reinforced by *Boss Group v Boss France*<sup>75</sup> where Saville LJ held that even the *claimant's denial* of a contract cannot alter that qualification. These principles have been extended to Article 5(3) in *Equitas v Wave City Shipping*<sup>76</sup> and recently by the ECJ in *Folien Fischer v Ritrama*.<sup>77</sup>

Likewise, it is arguable that in the delictual forum the *defendant's allegation* of a contract (even if he proves its existence) cannot alter the qualification under Article 5(3). It appears from this line of case law, just as it does from *Gantner*<sup>78</sup> in relation to Article 27, that it is the claimant who exclusively defines the jurisdictional basis as regards Article 5(1) and 5(3).

**(c) *Kalfelis* formula.** The *Kalfelis* definition<sup>79</sup> itself requires (apart from possible further requirements<sup>80</sup>) an action which (i) seeks<sup>81</sup> to establish the liability of the defendant and (ii) is not related to a contract within the meaning of Article 5(1) (wherever the dividing line may be). It seems that no harm is done to that definition if it is reformulated as requiring an “action which is based on non-contractual liability” or an “action based on a rule of law which provides for liability irrespective of and not requiring proof of a contract”. If this reading is correct, it suggests that the relevant criterion is in particular the rule of law the action is based upon; this must be one which does not presuppose an obligation freely assumed. Apparently, it is the *claimant* who bases his claim on a certain rule of law; defences by the defendant can only convince the court that that rule of law does not apply on the facts.

*(iv) Separate Qualification: Several and Different Causes of Action under Article 27*

It is concluded that the “mutual exclusivity *dictum*” should be interpreted narrowly as referring only to each “single cause of action” in the dispute, each of which must be qualified separately (whether each on its own relates to a contract). It remains to be discussed what “single cause of action” means. The Judgments Regulation uses many different terms in this context.<sup>82</sup> However, no clear logic behind the use of these and no distinct meaning can be identified;

<sup>74</sup> See *infra*, Section B.2(b)(i); alternatively, it could also be argued that *Effer*, *supra* n 73, means that the defendant's denial at least requires the claimant to establish a good arguable case that a contract exists at the jurisdictional stage (still leaving open a negative finding on the merits).

<sup>75</sup> *Boss Group v Boss France* [1997] 1 WLR 351 (CA).

<sup>76</sup> *Equitas v Wave City Shipping* [2005] EWHC 923 (Comm).

<sup>77</sup> *Folien Fischer v Ritrama* Case C-133/11 [2012] ECR I-0000; see *infra*, Section B.2(b)(iii).

<sup>78</sup> *Supra* n 70.

<sup>79</sup> *Supra* n 6, [17].

<sup>80</sup> See *supra* n 11.

<sup>81</sup> It can be said that it is the *claimant* who seeks (by bringing such an action) to establish the liability of the defendant.

<sup>82</sup> See *supra* n 16.

this becomes particularly evident on a closer comparison of the different language versions. It rather seems that all of these terms are (and should be) used as synonyms, namely describing a “single cause of action”.

In *The Tatry*<sup>83</sup> the ECJ interpreted the term “cause of action” in Article 27 as “compris[ing] the facts and the rule of law relied on as the basis of the action”. Furthermore, it added the concept of the “same object” which is not contained in the English language version.<sup>84</sup> It could be argued that, in order to create a “consistent jurisdictional system” within the Judgments Regulation, the same definition should be adopted for qualification purposes. Whether this is correct in general, cannot be answered conclusively in this article. However, it might be said that *at least* if different “causes of action” for the purposes of *lis pendens* are at issue, it is possible and necessary to qualify them separately for jurisdictional purposes as, for example, one falling under Article 5(1) and the other under Article 5(3) or both falling under the same head. It is rather clear that two claims based on different facts must be qualified separately. If these claims are, however, based on the same facts but on different rules of law, it seems logical that they are to be qualified separately as well.<sup>85</sup> Otherwise, if they are to be qualified uniformly (as both together being necessarily either contractual or tortious), this would indeed lead to an exclusion of tort claims from Article 5(3). However, it is difficult to see how Article 27 might treat as two distinct and different things<sup>86</sup> what has been considered as one composite unit one logical step before.

#### (e) Conclusion

There is, probably enhanced by an unsophisticated use of terminology, considerable uncertainty as to the “object of qualification” under Article 5. It is submitted that each “single cause of action” (particularly contractual and tortious claims) ought to be qualified separately, the relevant question being whether each on its own merits relates to a contract within the meaning of Article 5(1) or is based on non-contractual liability. Accordingly, Article 5(1) and 5(3) are “mutually exclusive” only with regard to each such single cause of action. Furthermore, it is concluded that the mere existence of a contract in the set of facts does not, as such, exclude tort claims from Article 5(3) *a priori*.

<sup>83</sup> *Supra* n 71, [38].

<sup>84</sup> *Gubisch Maschinenfabrik v Palumbo*, Case 144/86 [1987] ECR 4861 [14]; *The Tatry*, *supra* n 71, [37], [40].

<sup>85</sup> Whether the concept of the “same object” is relevant as well can be left open for present purposes as contractual and tortious claims are already based on different rules of law; see *infra*, Section C.1.

<sup>86</sup> See for a discussion whether a contractual and a tortious claim constitute one or several causes of action for purposes of Art 27 *infra*, Section C.1(c).



## 2. Claimant's Free Choice of the Jurisdictional Rule?<sup>87</sup>

### (a) Overview

The purpose of this article is not to draw the demarcation between Article 5(1) and 5(3) in detail; however, the question shall be examined whether and to what extent the claimant is free to “choose”, by skilful drafting of his claim, the jurisdictional rule.<sup>88</sup>

It is submitted that the defendant's invocation of a contract in the delictual forum has no effects as to the qualification under Article 5(3).<sup>89</sup> In so far, it is the *claimant* who exclusively defines the dispute and, accordingly, allocates the applicable jurisdictional rule. However, this does not answer the question whether it is sufficient for the claimant to simply *allege* a “contract-independent liability” in the delictual forum (or a “contract-dependent liability” in the contractual forum), being entirely free to choose the jurisdictional rule, or if and to what extent he has to *prove* the jurisdictional requirements. Delicate questions as to the appropriate standard of proof arise. Since this issue is inextricably linked with the subject matter of this article, it will be considered to some extent.

### (b) Standard of Proof: Necessity to Prove the Existence of a Contract/Tort?

#### (i) Dispute about a Contract's Existence

It seems well established that the relevant standard of proof under the Judgments Regulation is a question of national law.<sup>90</sup> As far as English law is concerned, the claimant is required, as a general rule, to show a “good arguable case” that all jurisdictional requirements are met.<sup>91</sup> As regards Article 5(1), it is usually supposed that a claimant is required to establish a good arguable case as to the *existence* of a contract.<sup>92</sup> However, this is doubtful. On the one hand, Article 5(1) actually requires “matters *relating* to a contract” but not nec-

<sup>87</sup> See comprehensively as regards choice of law: Briggs, “choice”, *supra* n 50.

<sup>88</sup> Generally, such possibility is denied: Briggs and Rees, *supra* n 12, 261–62; Briggs, “choice”, *supra* n 50, 25; *Cheshire*, *supra* n 12, 251; Hill and Chong, *supra* n 12, 133.

<sup>89</sup> See *supra*, Section B.1(d)(iii).

<sup>90</sup> *Shevill v Presse Alliance*, Case C-68/93 [1995] ECR I-415 [35]–[38]; Briggs and Rees, *supra* n 12, 249–50, 345–46; the *Schlosser Report*, [1979] OJ C59/82 [22] is rather ambiguous.

<sup>91</sup> *Canada Trust v Stolzenberg (No 2)* [2002] 1 AC 1 (HL) [13] (Lord Steyn, applying the standard as established in *Seaconsar Far East v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) for permission to serve process out of jurisdiction under the traditional rules, CPR 6.36); Hill and Chong, *supra* n 12, 88; *contra*: Briggs and Rees, *supra* n 12, 344–48, favouring a “better of the argument-test”; similarly *RZB v NBG*, *supra* n 27, [411].

<sup>92</sup> Briggs and Rees, *supra* n 12, 249–50; *Cheshire*, *supra* n 12, 234; *RZB v NBG*, *supra* n 27, [411]–[412]; see also Dicey, *supra* n 63, 410 still proposing a test for a “serious question which calls for a trial”, based on *Tesam Distribution v Schuh Mode Team* [1990] ILPr 149 (CA) [21]–[24] (Nicholls LJ), [44]–[45] (Stocker LJ), decided prior to *Canada Trust*, *supra* n 91; *differently*: *Kleinwort Benson*, *supra* n 11, [182]–[184] (Lord Clyde); T Hartley, “Article 5(1): ‘Place of Performance of the Obligation in Question’” [1982] *European Law Review* 236.

essarily “a contract”; on the other hand, the case law points in a different direction.

**(a) The *Effer* and *Boss* decisions.** It emerges from *Effer*<sup>93</sup> that the mere allegation by the defendant that no contract exists does not as such deprive the court of Article 5(1) jurisdiction; the claimant may invoke that provision notwithstanding such denial. This principle has been extended in *Boss v Boss*;<sup>94</sup> Saville LJ held that there is Article 5(1) jurisdiction even in the opposite case, where it is the *claimant* who denies the contract (in an application for negative declaration to that effect),<sup>95</sup> and that there are nonetheless “matters relating to a contract” in such a case because there is a “lively dispute between the parties as to whether there is a contract between them”. In particular, the claimant may “establish a good arguable case that there is a matter relating to a contract by relying on the fact that this is what the [defendant is] contending against [him]” – unless the defendant withdraws his contentions. If that case has been decided correctly,<sup>96</sup> it establishes that the claimant, at least in an application for negative declaration, does *not* have to establish a good arguable case that a contract exists but it is sufficient merely to point to the fact that the defendant asserts a contract. In other words, a good arguable case for a “matter relating to a contract” is shown if a “lively dispute” concerning the existence of a contract is established.

**(b) Mere allegation or good arguable case for a contract’s existence?**

Regarding the *Effer*-type of case, where it is the defendant who denies the contract, the general view<sup>97</sup> is that the claimant’s mere allegation of a contract as such is not sufficient but he still has to show a good arguable case for its existence. Only if the court finds in the affirmative at the jurisdictional stage does

<sup>93</sup> *Supra* n 73; similar principles apply as regards the existence of a tenancy under Art 22(1) (*Sanders v Van der Putte*, Case 73/77 [1977] ECR 2383) and the existence/validity of a jurisdiction agreement (*Benincasa v Dentalkit*, Case C-269/95 [1997] ECR I-3767).

<sup>94</sup> *Supra* n 75, [356]–[357].

<sup>95</sup> This extension of the *Effer* doctrine to negative declarations appears to have been confirmed by the ECJ in the recent decision of *Folien Fischer*, *supra* n 77, where it held that (even) an action for negative declaration seeking to establish the absence of liability in tort falls within Art 5(3); the same must apply to Art 5(1) *a fortiori*.

<sup>96</sup> Affirmed in *Yeuell v La Réunion Aérienne* [2009] EWCA Civ 175, [2009] 1 CLC 336 [37]–[38] (Collins LJ); mentioned with approval in *Kleinwort Benson*, *supra* n 11, [182] (Lord Clyde); *Agnew*, *supra* n 15, [258] (Lord Hope); favouring such a view: Hill and Chong, *supra* n 12, 138 (only for that part of the decision); C Forsyth, “Brussels Convention Jurisdiction ‘In Matters Relating to a Contract’ when the Plaintiff Denies the Existence of a Contract” [1996] *Lloyds Maritime and Commercial Law Quarterly* 330–32; E Peel, “Jurisdiction over Non-existent Contracts” (1996) 112 *Law Quarterly Review* 542; I Turkki, “Taking Jurisdiction where the Existence of a Contract is Contested” [1996] *European Law Review* 420–21; doubt has been expressed in *Agnew*, *supra* n 15, [264] (Lord Millett); Dicey, *supra* n 63, 409–10; *Cheshire*, *supra* n 12, 234–35; however, these doubts should now have been removed by the ECJ in *Folien Fischer*, *supra* n 77.

<sup>97</sup> See *supra* n 92.

*Effer*<sup>98</sup> apply and its jurisdiction “includes the power to consider the existence of the ... contract itself”, a binding judgment being issued even if it will be found on the merits that there was no contract after all. However, if it decides that there is not even a good arguable case for its *existence*, it has to decline jurisdiction and cannot issue a binding judgment on the merits to that effect.

However, that latter inference needs not necessarily to be drawn from *Effer*.<sup>99</sup> There are good arguments that the contractual forum has jurisdiction to decide upon a mere *allegation* of a contract (and render a binding judgment on the merits) since that is still a “matter relating to a contract”: Firstly, it follows from *Boss v Boss*<sup>100</sup> that in a case where the defendant alleges a contract but the claimant denies it (in an application for negative declaration), no good arguable case that a contract exists must be shown but it is sufficient to point to a “lively dispute”. There is no obvious reason why this should be different due to the mere fact that it is the defendant who denies the contract; the standard of proof (or the “subject to be proved”) should not depend on the procedural roles of the parties.<sup>101</sup>

Secondly, although such a proposal would at first sight considerably favour the claimant, it is hard to see what he would gain by it; if he is not able to show a good arguable case, he will be bound to lose on the merits.<sup>102</sup> Moreover, such a decision would even have *res judicata* effect, preventing the unsuccessful claimant from suing all over again in another court, which is obviously in the interests of the defendant. Admittedly, there is some danger for the latter if he remains passively in the procedure (but has somehow disputed the contract) and risks a default-judgment. Furthermore, there is some potential for nuisance or vexation by the claimant. Although the latter problem might be resolved by the doctrine of abuse of process,<sup>103</sup> this solution is obviously not without disadvantages either; however, it still seems to be the most sensible one.

Obviously, such an approach requires some limitation of the court’s jurisdiction under Article 5(1) to prevent abuse. In particular, the claimant cannot be allowed simply to invoke a contract (or apply for declaration of its non-existence) and obtain jurisdiction over related tort claims.<sup>104</sup> Rather, the contractual forum taking jurisdiction to decide a “lively dispute over a contract’s existence” (on the basis that *this dispute* is a “matter relating to contract”) should prima facie be limited to decide that dispute. As Lord Clyde put it in *Kleinwort Benson*,<sup>105</sup> “[i]n such a case if the court holds that there never has been

<sup>98</sup> *Supra* n 73, [7].

<sup>99</sup> *Supra* n 73.

<sup>100</sup> *Supra* n 75.

<sup>101</sup> *Kleinwort Benson*, *supra* n 11, [182]–[184] (Lord Clyde).

<sup>102</sup> Hartley, *supra* n 92, 236.

<sup>103</sup> *Ibid.*

<sup>104</sup> Accessory jurisdiction is inappropriate for several other grounds, too; see *infra*, Section B.3.

<sup>105</sup> *Supra* n 11, [182]–[184].

a contract its jurisdiction will not extend beyond the decision on that point”; however, there *is* jurisdiction to decide with finality on the contract’s existence. Although it would certainly be convenient to give one court the power to decide the entire dispute, such apparent convenience “cannot be allowed to overcome the jurisdictional rules set out in the [Regulation]”. On the other hand, if it holds that a contract exists, its jurisdiction “extends” to adjudicate upon the contractual consequences for which remedy was sought (but still not to a further-reaching accessory jurisdiction for related tortious claims).<sup>106</sup>

(ii) *Common Ground about a Contract’s (Non-)Existence*

By contrast, where it is common ground between the parties that a contract exists, it is clear that the court has jurisdiction to decide all contractual issues.<sup>107</sup> More difficult are cases where it is common ground that no contract has ever existed. *Boss v Boss*<sup>108</sup> does not apply in such a situation since there is “no lively dispute concerning a contract’s existence”. However, whether and in what circumstances such a matter comes within Article 5(1) is beyond the scope of this article.<sup>109</sup>

(iii) *Extension to Matters Relating to Tort*

The principles of *Effer*<sup>110</sup> and *Boss v Boss*,<sup>111</sup> as set out above, have been generally extended to “matters relating to tort” by Clarke J in *Equitas*.<sup>112</sup> A claim for declaration that no tort has been committed falls within Article 5(3); the claimant does not have to establish a good arguable case that such tort was committed (which is exactly what he denies) but only to point to the defendant’s contentions. Just as under Article 5(1), it is difficult to see why this should be different only because the procedural roles are reversed.<sup>113</sup>

This approach was recently confirmed by the ECJ in *Folien Fischer*<sup>114</sup> where it held that an action for a negative declaration, in which the natural defendant (alleged tortfeasor) seeks to establish that the natural claimant (alleged victim) has no claim in tort, still falls within Article 5(3); the procedural roles of the parties are irrelevant for the application of that provision. Furthermore, the ECJ,<sup>115</sup> just as A-G Jääskinen,<sup>116</sup> appears to have indicated that the admissibility of a negative declaration, particularly the required legal interest of the claim-

<sup>106</sup> See *infra*, Section B.3.

<sup>107</sup> *Kleinwort Benson*, *supra* n 11, [182]–[184] (Lord Clyde).

<sup>108</sup> *Supra* n 75.

<sup>109</sup> See the controversial decision of *Kleinwort Benson*, *supra* n 11.

<sup>110</sup> *Supra* n 73.

<sup>111</sup> *Supra* n 75.

<sup>112</sup> *Supra* n 76.

<sup>113</sup> *Ibid*, [11].

<sup>114</sup> *Supra* n 77, [36]–[55]; *contra*: A-G Jääskinen [2012] ECR I-0000 [29]–[30].

<sup>115</sup> *Folien Fischer*, *supra* n 77, [24], [50].

<sup>116</sup> *Supra* n 114, [35].

ant to pursue such an action, is a question of national procedural law.<sup>117</sup> This might mean that requirements such as a “lively dispute about a contract’s or tort’s existence” or whether the defendant has “withdrawn his contentions”<sup>118</sup> are part of the national procedural law (and not Article 5).

### (c) Conclusion

The case law referred to above seems to indicate that Article 5(1) and 5(3) (and, if relevant, national procedural law) do not, in fact, presuppose the *existence* of a contract/tort (namely the showing of a good arguable case to that effect) but only, if such is not common ground, a “genuine and lively dispute” between the parties as to the existence. If that is correct, read together with the *Kalfelis* definition as reformulated above,<sup>119</sup> it is sufficient for the claimant (to come within Article 5(3)) simply to *allege* a rule of law providing for “contract-independent liability” and that the defendant is liable under it; then, the court must render a binding judgment on the merits.<sup>120</sup> Consequently, the claimant may well “avoid the consequences of the existence of [a] contract by seeking his remedy solely in tort”;<sup>121</sup> rather, there is nothing the defendant can do to avoid jurisdiction under Article 5(3) (as well as under Article 5(1)). This coincides with the conclusion that the defendant’s invocation of a contract cannot oust Article 5(3) jurisdiction.<sup>122</sup> Evidently, such jurisdiction must be limited to the issue whether or not a contract/tort exists (if it is found that it does not) in order to protect the interests of the defendant.

## 3. Accessory Jurisdiction for Related Claims?

### (a) Overview

Eventually, the question must be answered whether a court having jurisdiction under Article 5(1) or 5(3) can also adjudicate upon related tortious or contractual claims, respectively (*accessory jurisdiction*).<sup>123</sup> It is established that the Judgments Regulation does not contain a general jurisdictional basis for

<sup>117</sup> However, the last word might not have been spoken by the ECJ concerning that question; particularly in relation to Art 27, there is conflicting case law: cf eg BGE 136 III 523 [6] (holding that Art 27 [of the LugC] allows national procedural law to require a specific legal interest for an action for negative declaration); BGH 11.12.1996 [1997] IPRax 350 (basically providing for a duty based on European law to hear an application for negative declaration in a *lis pendens* situation).

<sup>118</sup> These requirements are implied in *Boss*, *supra* n 75 and *Equitas*, *supra* n 76.

<sup>119</sup> See *supra*, Section B.1(d)(iii) – *Kalfelis* formula.

<sup>120</sup> To that effect: HGer Zürich 11.7.1994 [1996] SZIER 75–76.

<sup>121</sup> *Contra: Burke v Uvex*, *supra* n 42, [354].

<sup>122</sup> See *supra*, Section B.1(d)(iii).

<sup>123</sup> This question does not arise as far as the claim “originally” falls under the respective provision; see *supra* n 63.

“related actions”; such can neither be derived from Article 28<sup>124</sup> nor from Article 6. In *Kalfelis*<sup>125</sup> the ECJ rejected accessory jurisdiction under Article 5(3); it held that a court having jurisdiction under that provision has no jurisdiction in so far as the “action” (ie the “action as a whole”) is not based on tort, in particular as regards contractual claims. Whether accessory jurisdiction exists for the opposite case, namely for related tortious claims under Article 5(1), is an open question. It is more than likely that the ECJ would decide likewise.<sup>126</sup> The prevailing doctrine,<sup>127</sup> however, advocates accessory jurisdiction under Article 5(1) for related tort claims but not for the opposite case under Article 5(3) (the isolated tort claim still being pursuable in the delictual forum). It is argued that the contractual claim is the “superior” claim and constitutes the “main body” of the dispute, whereas the tort claim is considered ancillary. Another school of thought<sup>128</sup> supports the view that, notwithstanding *Kalfelis*,<sup>129</sup> there is accessory jurisdiction under both provisions, even Article 5(3) attracting jurisdiction for related contractual claims.

*(b) Procedural Economy: Split and Consolidation of Proceedings*

The main argument favouring accessory jurisdiction is based on the desire to save time and costs in the proceedings (“procedural economy”). This requires not splitting up what is in fact a “single dispute” and not limiting the “legal

<sup>124</sup> *Elefanten Schuh v Jacqmain*, Case 150/80 [1981] ECR 1671 [19]; *Réunion Européenne v Spliethoff's Bevrachtungskantoor*, Case C-51/97 [1998] ECR I-6511 [39]–[40]; *Leathertex Divisione Sintetici v Bodetex*, Case C-420/97 [1999] ECR I-6747 [38].

<sup>125</sup> *Supra* n 6, [19]–[21]; affirmed in *Réunion Européenne*, *supra* n 124, [49] (see for the confusion with Art 6(1) *infra*, Section C.2) and *Freeport v Arnoldsson*, Case C-98/06 [2007] ECR I-8319 [43]–[46]; see also BGH 28.2.1996 [1996] NJW 1413; BGH 7.12.2004 [2006] IPRax 41–44; HGer Zürich 11.7.1994, *supra* n 120, 75–76.

<sup>126</sup> Denying accessory jurisdiction (also) under Art 5(1): *Watson v First Choice Holidays* [2002] ILPr 1 (CA) [38] (Lloyd J); Mankowski, *supra* n 15, 117–19; G Walter and T Domej, *Internationales Zivilprozessrecht der Schweiz* (Haupt Verlag, 5th edn, 2012), 212; D Looschelders, “Internationale Zuständigkeit für Ansprüche aus Darlehen nach dem EuGVÜ” [2006] IPRax 15–16; left open: OLG Köln 5.4.2005, *supra* n 24, 125; BGE 133 III 282 [3.5.2].

<sup>127</sup> Briggs and Rees, *supra* n 12, 247–49; 280 (but *cf* 219–20); Kropholler and von Hein, *supra* n 24, 210–12; Leible, *supra* n 31, 248–49; Spickhoff, *supra* n 24, 131–33; M Lohse, *Das Verhältnis von Vertrag und Delikt* (VVE, 1991), 25–32; DA Hofmann and OM Kunz, in C Oetiker and T Weibel (eds), *Basler Kommentar: Lugano-Übereinkommen* (Helbing Lichtenhahn Verlag, 2011), 189; P Oberhammer, “Art 5” in P Oberhammer and F Dasser (eds), *Lugano-Übereinkommen: Kommentar* (Stämpfli, 2nd edn, 2011), 159; D Acocella, in AK Schnyder (ed), *Lugano-Übereinkommen zum internationalen Zivilverfahrensrecht: Kommentar* (Dike, 2011), 195–96.

<sup>128</sup> Most prominently: Geimer, “Zivilverfahrensrecht”, *supra* n 24, 200, 233–34; R Geimer, “Streitgenossenzuständigkeit und forum delicti commissi” [1988] NJW 3090; P Gottwald, “Europäische Gerichtspflichtigkeit kraft Sachzusammenhangs” [1989] IPRax 273–74; Wolf, *supra* n 24, 87; see also H Roth, “Gespaltenen Gerichtsstand”, in P Gottwald and H Roth (eds), *Festschrift für Ekkehard Schumann zum 70 Geburtstag* (Mohr Siebeck, 2001), 359–71, erroneously deriving such a conclusion from considerations of (irrelevant) German procedural law.

<sup>129</sup> *Supra* n 6.



cognition”<sup>130</sup> of courts since this would cause expensive and burdensome parallel proceedings and also heighten the risk of irreconcilable judgments. However, it can be objected that even if accessory jurisdiction was allowed, it is still subject to the claimant’s will to make use of this attraction (being an “additional jurisdictional basis”) or to pursue the claims under Article 5(1) and 5(3) separately.<sup>131</sup> Accordingly, a split of proceedings cannot necessarily be avoided at the outset.

Nonetheless, the claimant is still free to pursue all claims together under Article 2. In this context, it is often stated that Article 28 might also provide for an appropriate instrument.<sup>132</sup> An application for subsequent consolidation under Article 28(2) (whether by the claimant or the defendant) requires that the court first seised has original jurisdiction over the related claim (under a provision other than Article 28<sup>133</sup>). However, if the claimant sues separately under Article 5(1) and 5(3), denying accessory jurisdiction under these provisions precisely means that the court first seised lacks jurisdiction over the related claim. Evidently, an application for consolidation may in this context only be successful if the court first seised has jurisdiction under Article 2 (the claimant confining the action to the contractual or the tortious claim).

Generally, only disadvantages of the claimant are pointed out in this context;<sup>134</sup> however, the defendant may also be adversely affected if the claimant chooses to pursue his claims separately as he has to face two sets of proceedings and might be induced to settlement. The defendant might effect “consolidation” of related claims by entering an appearance (Article 24) if the related claim (for which the court would otherwise not have jurisdiction) has been pleaded by the claimant and is not pending in another forum yet. That might also be possible by filing a counter-claim for declaration of non-existence of the related claim (Article 6(3)), but again only if that is not yet pending in another court. On the other hand, if the claimant has already brought both claims in different fora, there is nothing the defendant can do to consolidate the two proceedings if accessory jurisdiction is not allowed (Article 28(2) accordingly not being applicable).

It follows that the concept of accessory jurisdiction would indeed gain something (although little) in terms of procedural economy since only then might Article 28(2) apply, being the only instrument for consolidation available con-

<sup>130</sup> This expression is mainly used in the civil law tradition to express the extent of the court’s power to determine and to apply the applicable law to a given set of facts in order to examine whether a remedy sought is to be granted; an “all-embracing legal cognition” follows from the principle that the court applies the (entire) law *ex officio* (*iura novit curia*).

<sup>131</sup> A split would be prevented by a “channelling to Article 5(1)” at the characterisation stage (see *supra*, Section B.1(c)(iv), subsection (b)); however, there are (at least *de lege lata*) good arguments against such exclusive effects of a contract; see *supra*, Section B.1(d).

<sup>132</sup> See eg *Kalfelis*, *supra* n 6, [20].

<sup>133</sup> See *supra* n 124.

<sup>134</sup> See eg *Kalfelis*, *supra* n 6, [20].

trary to the will of the claimant. However, to express it in the words of Lord Clyde in a related context, such apparent procedural convenience “cannot be allowed to overcome the jurisdictional rules set out in the [Regulation]”.<sup>135</sup>

*(c) Affected Parties’ Interests and Potential Abuse*

It is argued that the claimant would be unreasonably disfavoured if he had to sue in different fora and that the defendant’s additional burden would be minimal since he has to face proceedings in that forum anyway and that it would rather be in the latter’s interests (too) to have only one set of proceedings. However, it can be objected that the claimant can still pursue all claims together under Article 2; his interests are not significantly affected since he is not at all forced to maintain multiple proceedings. On the other hand, accessory jurisdiction would provide him an additional jurisdictional basis that he would otherwise not have and give rise to unwelcome forum shopping. Although it is true that it is usually in the defendant’s interests to have only one set of proceedings, it is likewise in his interests to be sued at his domicile as far as possible.

More importantly, accessory jurisdiction would enable the claimant to (abusively) obtain unjustified jurisdictional bases: taking the view that a good arguable case for the contract/tort’s *existence* must be established by the claimant to come within Article 5(1) or 5(3),<sup>136</sup> he might obtain jurisdiction for a related claim by merely showing a good arguable case for the principal claim, although exactly knowing that, on the merits, he will not be able to prove the latter. Taking the view that, as argued here, the claimant may obtain jurisdiction by mere *allegation* (whereupon the court renders a binding judgment at least on the existence of a contract/tort),<sup>137</sup> the potential for abuse is even more evident.

*(d) Restrictive Interpretation of Article 5*

Other convincing arguments can be derived from the scheme and objectives of the Judgments Regulation: the ECJ is keen to emphasise the exceptional character of Article 5 which is interpreted restrictively, not undermining the principle of *actor sequitur forum rei*.<sup>138</sup> Evidently, any accessory jurisdiction would unduly broaden the wording of Article 5(1) and 5(3) and pierce the bounds between these provisions which are clearly distinguished in the Regulation. It would in many cases effectively lead to another (or two other) jurisdictional

<sup>135</sup> *Kleinwort Benson*, *supra* n 11, [183].

<sup>136</sup> See *supra* n 92.

<sup>137</sup> See *supra*, Section B.2(b).

<sup>138</sup> *Kalfelis*, *supra* n 6, [19]; *Handte*, *supra* n 10, [14]; but cf *Engler v Janus Versand*, Case C-27/02 [2005] ECR I-481 [48], held that “matters relating to contract” are “not interpreted narrowly”.

basis with unlimited legal cognition and reduce the importance of Article 2. Furthermore, the *raison d'être* of Article 5(1) and 5(3) is the existence of a “particularly close connecting factor between a dispute and the court”.<sup>139</sup> However, such a close connecting factor would not exist in relation to the accessory claim. An *argumentum e contrario* can, moreover, be derived from Article 6 which exhaustively provides for *fora connexitatis*.

Sometimes, arguments are based on a strand of ECJ case law directing towards a “centralization of jurisdiction”.<sup>140</sup> However, such an approach was clearly rejected in *Kalfelis*.<sup>141</sup> Furthermore, the ECJ held in *Leathertex*<sup>142</sup> that the contractual forum does not even have jurisdiction to adjudicate upon related contractual claims; it must follow *a fortiori* that it certainly does not have so for related tortious claims.

(e) *Consequence: Limited Legal Cognition*

It is submitted that, overall, the better view is (at least *de lege lata*) that neither Article 5(1) nor 5(3) provide for accessory jurisdiction. In other words, the contractual forum can adjudicate only upon contractual claims, the tortious forum only upon tortious claims. As a logical consequence of this conclusion, a court assuming jurisdiction under Article 5(1) or 5(3) has, in civil law terminology,<sup>143</sup> only a limited legal cognition.<sup>144,145</sup> Considering whether or not to grant the relief sought, the court's power to determine and apply the applicable law is limited to the “law of contracts” or the “law of torts”, respectively.<sup>146</sup>

Many legal systems know the principles of *iura novit curia* and *da mihi facta, dabo tibi ius*, namely that the court knows and applies the (entire) law *ex officio* and that the parties do not have to plead and prove the law (at least the *lex*

<sup>139</sup> See eg *Handelskvekerij Gf Bier v Mines de Potasse d'Alsace*, Case 21/76 [1976] ECR 1735 [11]; *Martin Peters Bauunternehmung v Zuid Nederlandse Aannemers Vereniging*, Case 34/82 [1983] ECR 987 [11].

<sup>140</sup> Concerning the maxim *accessorium sequitur principale*: *Shenavai v Kreischer*, Case 266/85 [1987] ECR 239; see also *Peters*, *supra* n 139, [12], [17]; *Besix v Wasserreinigungsbau Alfred Kretzschmar*, Case C-256/00 [2002] ECR I-1699 [27]; *Gabriel*, Case C-96/00 [2002] ECR I-6367 [55]–[58].

<sup>141</sup> *Supra* n 6; see also AG Geelhoed [2002] ECR I-7357 [27]–[29].

<sup>142</sup> *Supra* n 124, [38]–[42]; see also *De Bloos v Société en commandite par actions Bouyer*, Case 14/76 [1976] ECR 1497 [11]–[13] as regards the “obligation in question”.

<sup>143</sup> See *supra* n 130.

<sup>144</sup> Accurately: Hofmann and Kunz, *supra* n 127, 189; Walter and Domej, *supra* n 126, 212; using the German word “Kognitionsbefugnis” (but favouring accessory jurisdiction): Geimer, “Zivilverfahrensrecht”, *supra* n 24, 233–34; Geimer, “Streitgenossenzuständigkeit”, *supra* n 128, 3090; Gottwald, *supra* n 128, 273; Wolf, *supra* n 24, 87.

<sup>145</sup> The legal cognition is, however, *unlimited* if Art 5(1) and 5(3) *coincidentally* allocate jurisdiction to the same judicial district.

<sup>146</sup> More precisely, the “scope of the legal cognition” correlates with the demarcation of “matters relating to contract/tort” and is thus to be interpreted autonomously. It may be said that the court can take into account all rules of law governing causes of action which are autonomously qualified as “matters relating to contract/tort”.

*fori*).<sup>147</sup> As a matter of European law, the Judgments Regulation limits these procedural principles as far as Article 5 is concerned and has, accordingly, an impact on national procedural law. Although it is perfectly possible that, under national law, the parties only have to declare the remedy sought and plead and prove the facts relied upon (but not the law), the Judgments Regulation prevents the court from considering legal bases which possibly provide for such a remedy but for which it does not have jurisdiction. In other words, even if the parties “give the facts”, the judge is only entitled to “give part of the law”.

### C. CONCURRENT LIABILITY: MULTIPLE PROCEEDINGS

It is concluded that the contractual forum has only (but still) jurisdiction to adjudicate upon contractual claims and the delictual forum only (but still) to do so upon tortious claims. If these causes of action arise from the same facts and the claimant brings separate parallel proceedings,<sup>148</sup> the question arises whether these involve the “same cause of action” for purposes of Article 27 (to the effect that the court seised second has to stay or decline its proceedings) or, if not, they fall under Article 28 (related actions).

#### 1. Article 27: Same Cause of Action?

##### (a) Applying the Autonomous Interpretation of the ECJ

The ECJ has defined the term “same cause of action” in Article 27 as comprising “the facts and the rule of law relied on as the basis of the action”<sup>149</sup> and added the concept of the “same object”, which is not expressly referred to in the English version, and defined it as “the end the action has in view”.<sup>150</sup> Following that case law, it is rather evident that contractual and tortious claims, arising from the same facts, are based on different rules of law:<sup>151,152</sup> the former is based on the “law of contracts” (contractual basis), the latter on the “law of torts” (tortious basis). Consequently, separate proceedings for such claims must

<sup>147</sup> In some legal systems (as opposed to England) this principle is, to some extent, even extended to foreign law.

<sup>148</sup> Either under Art 5(1) and 5(3) or under Art 2 (limited to either claim) and Art 5.

<sup>149</sup> *The Tatry*, *supra* n 71, [38].

<sup>150</sup> *Gubisch*, *supra* n 84, [14]; *The Tatry*, *supra* n 71, [37], [40].

<sup>151</sup> “Rule of law” does not refer to any particular provision but to a more functional or teleological concept; F Dasser, “Art 27” in Oberhammer and Dasser, *supra* n 127, 574; Leible, *supra* n 31, 649–50.

<sup>152</sup> In *Maersk*, *supra* n 71, the ECJ considered an action for damages as a different cause of action than an application for the establishment of a liability limitation fund since, even if the facts were the same, “the legal rule which forms the basis of each of those applications is different. ... The [former] is based on the law governing non-contractual liability, whereas the [latter] is based on the 1957 Convention.”

involve different causes of action for the purposes of Article 27.<sup>153</sup> Furthermore, it seems reasonably clear that such proceedings cannot have the same end in view as they seek to establish different liabilities.<sup>154</sup>

Even if the rule of law was considered irrelevant, contractual and tortious claims may be said, strictly speaking, to be based on slightly “different facts”: although both might well arise from the very same incident, only the former requires pleading and proof of a contract concluded between the parties; this preceding “factual complex of reaching an agreement” is by definition not pre-supposed by the tort claim.

Consequently, although the ECJ has interpreted Article 27 “broadly”,<sup>155</sup> it is difficult to see how one might consider contractual and tortious claims as the same cause of action without substantially changing the corresponding definition under Article 27.

*(b) Limited Legal Cognition: No Lis Pendens and No Res Judicata*

It is submitted that Article 5(1) and 5(3) do not allow contractual and tortious claims to be brought together, both heads providing for a limited legal cognition of the court.<sup>156</sup> Firstly, if the court seised second were obliged to decline jurisdiction as regards a claim which is not and cannot be heard and tried in the court seised first, Article 27 would lead to a denial of justice.<sup>157</sup> Secondly, it will be argued in Section D that a judgment on one claim does not have preclusive *res judicata* effects on the other claim; *inter alia* because that would infringe the right to be heard.<sup>158</sup> Assuming that this is correct, it would be

<sup>153</sup> *Bank of Tokyo-Mitsubishi v Baskan Gida Sanayi Ve Pazarlama* [2004] EWHC 945 (Ch), [2004] ILPr 427 [210] (Lawrence Collins J; proceedings for declaration of non-liability in contract held to involve a different cause of action than proceedings for, *inter alia*, a tortious claim based on fraud); BGer 28.2.2006, 4C.351/2005 [4.4]; Hill and Chong, *supra* n 12, 277; Dasser, *supra* n 151, 574–75; M Liatowitsch and A Meier, “Art 27” in AK Schnyder (ed), *Lugano-Übereinkommen zum internationalen Zivilverfahrensrecht* (Dike, 2011), 652–53; Leible, *supra* n 31, 649–50; *contra*: D Tsirikas, “Einige Gedanken über die ‘autonome’ Bestimmung des Streit- und Urteilsgegenstandes im europäischen Zivilprozessrecht”, in R Stürner *et al* (eds), *Festschrift für Dieter Leipold zum 70 Geburtstag* (Mohr Siebeck, 2009), 354–55; Roth, *supra* n 128, 359–71, erroneously trying to export a concept derived from (German) national procedural law according to which the relevant cause of action is exclusively defined by reference to the set of facts and the relief sought but *not* the rule of law (thereby speculating that the ECJ “self-evidently” did not mean what it said in *The Tatry*, *supra* n 71); he also supports the view that the contractual forum has jurisdiction to adjudicate upon tortious claims and vice versa (see *supra* n 128) thereby denying any limitation of the court’s legal cognition; however, both suggestions are bound to fail since the corresponding argumentation is entirely based on (irrelevant) German procedural law.

<sup>154</sup> See R Fentiman, “Art 27” in Magnus and Mankowski, *supra* n 15, 587–88, generally suggesting that a common object is both, necessary and sufficient.

<sup>155</sup> See, eg *Maersk*, *supra* n 71, [32]; nevertheless, the ECJ adopted in fact a rather narrow interpretation in that case as well as in *Gantner*, *supra* n 70.

<sup>156</sup> See *supra*, Section B.3(e).

<sup>157</sup> See AG Tesouro [1994] ECR I-5439 [17]–[18] on a similar situation.

<sup>158</sup> See *infra*, Section D.4.

pointless to oblige a court to decline jurisdiction if it is clear from the outset that it will have to resume<sup>159</sup> proceedings as soon as the first court has rendered its judgment.<sup>160</sup>

(c) *Contract and Tort Claim: One Cause of Action or Several?*

So far, it has been implied that both the contractual and the tortious claim are to be qualified separately, each being a “cause of action” for the purposes of Article 27; this is self-evidently a prerequisite for considering them as “different” causes of action. However, there is no clarity as to the exact “object of qualification” and the extent to which Article 27 applies.

In *Kloeckner v Gatoil Overseas*,<sup>161</sup> a case concerning several invoices and contracts of sale, Hirst J held that Article 27 only applies as far as the same contracts and invoices are concerned: “every claim on each contract of sale ... is itself technically a separate cause of action, and these cannot ... all be bundled together into one composite cause of action”. In *Bank of Tokyo-Mitsubishi*<sup>162</sup> it was held that, although a contractual claim was barred by Article 27, a tortious claim was not, implying that these are to be qualified separately, each being a “separate cause of action”. Lawrence Collins J nonetheless acknowledged that “[t]o split the actions in this way is by no means satisfactory” but he felt that the decisions of the ECJ dictate this result. Indeed, authority for such a “claim-by-claim approach” might probably be found in *The Tatry*<sup>163</sup> where the ECJ established a corresponding “party-by-party approach”. Accordingly, the prevailing school of thought counsels a view that Article 27 shall apply *as far as* there is identity between the causes of actions underlying the actions in the two proceedings.<sup>164</sup>

In contrast, Andrew Smith J in *Evialis v SIAT*<sup>165</sup> and Beatson J in *Underwriting Members of Lloyd’s Syndicate v Sinco*<sup>166</sup> rejected looking at “separate causes of action within the proceedings” but, instead, took the approach of looking at the “proceedings as a whole” and “ask[ing] what is the central or essential issue”. *Inter alia*, they relied on the fact that “[A]rticles 27 and 28 refer to ‘actions’ and ‘proceedings’, and ... do not contemplate parts of actions or proceedings

<sup>159</sup> Art 27 (just as Art 28) applies only as long as the first proceedings are “pending”: *Berkeley Administration v McClelland (No1)* [1995] ILPr 201 (CA) [26] (Dillon LJ); Dicey, *supra* n 63, 498; *Cheshire*, n 12, 304 [844].

<sup>160</sup> See *infra*, Section D.3.

<sup>161</sup> *Kloeckner v Gatoil Overseas* [1990] 1 Lloyd’s Rep 177 (Comm) [206].

<sup>162</sup> *Supra* n 153, [207]–[210], [244].

<sup>163</sup> *Supra* n 71; adopted by AG Tesauero, *supra* n 157, [17]–[18].

<sup>164</sup> Briggs and Rees, *supra* n 12, 316; *Cheshire*, *supra* n 12, 306; Leible, *supra* n 31, 653; Kropholler and von Hein, *supra* n 24, 492; Dasser, *supra* n 151, 575–76; Liatowitsch and Meier, *supra* n 153, 662.

<sup>165</sup> [2003] EWHC 863 (Comm), [2003] 2 CLC 802.

<sup>166</sup> [2008] EWHC 1842 (Comm), [2008] 2 CLC 187.



being stayed”.<sup>167</sup> However, it must be noted that Article 27, in fact, also refers to “causes of action”.

In both cases, the issue was whether “jurisdictional claims” in England (such as anti-suit injunctions or claims for breach of jurisdiction clause) are barred by earlier foreign proceedings concerning the substantive claim if the jurisdictional issue is raised there. It is reasonably clear that such preliminary issues do not found separate causes of action.<sup>168</sup> However, that does not answer the present problem as the *legal bases*, upon which the remedy sought is based, are more than preliminary issues; rather, there are several main subject matters if it is based on several bases.

It is submitted that the “object of qualification” under Article 27 correlates with the one in relation to jurisdiction under Article 5.<sup>169</sup> Whenever two proceedings involve different facts and/or the remedies sought are based on different rules of law and/or they pursue different objects, we are concerned with independent causes of action capable of being qualified differently. It follows that Article 27 applies only (but at least) as far as the two proceedings are concerned with the same legal bases. If the claimant has several shots on the target, success of each leading to full satisfaction, each shot must be analysed separately as to whether the claimant is trying to shoot the same ball twice at different goals.

Likewise, if the second proceedings are broader than the first (involving more causes of action), Article 27 will operate only (but at least) in relation to the causes of action common to both proceedings.<sup>170</sup>

After all, this “claim-by-claim analysis” under Article 27 is a necessary consequence of splitting proceedings as envisaged in *Kalfelis*<sup>171</sup> and its resulting limitation of the legal cognition:<sup>172</sup> if proceedings under Article 5 (and/or a judgment) concerning one claim would bar the other, this would lead to a denial of justice and an infringement of the right to be heard.

## 2. Article 28: Related Actions?

Having concluded that Article 27 does not apply<sup>173</sup> in relation to contractual and tortious claims, the question remains whether Article 28 may apply, namely whether the claims are “related” within the meaning of the legal definition of Article 28(3). The ECJ has interpreted this autonomous requirement broadly as covering “all cases where there is a risk of conflicting decisions, even if

<sup>167</sup> *Evialis*, *supra* n 165, [127]; *Lloyd's Syndicate*, *supra* n 166, [32], [63]; *The Happy Fellow* [1997] CLC 1391 (CA) [1396].

<sup>168</sup> *The Happy Fellow*, *supra* n 167, [1396]; see also Briggs and Rees, *supra* n 12, 317.

<sup>169</sup> See *supra*, Section B.1(d)(iv).

<sup>170</sup> AG Tesauero, *supra* n 157, [17]–[18]; *Cheshire*, *supra* n 12, 306.

<sup>171</sup> *Supra* n 6.

<sup>172</sup> See *supra*, Section B.3(e).

<sup>173</sup> Art 28 is subsidiary; *The Tatry*, *supra* n 71, [49].

the judgments can be separately enforced and their legal consequences are not mutually exclusive”.<sup>174</sup> In *Sarrio v Kuwait Investment Authority*<sup>175</sup> Lord Saville favoured a “broad commonsense approach” and a “simple wide test ... refraining from an over-sophisticated analysis”.

It is still an open question whether the connection requirement in Article 28(3) is to be interpreted in the same way as the one in Article 6(1).<sup>176</sup> Although these apparently similar concepts are framed in identical words,<sup>177</sup> there are tensions in their interpretations: Article 6(1) is (still) an exception to Article 2 and to be interpreted narrowly,<sup>178</sup> whereas Article 28 is to be interpreted broadly,<sup>179</sup> however, the underlying purpose of both provisions is the same, namely to avoid conflicting judgments.<sup>180</sup> Nonetheless, it seems reasonable to treat authorities on Article 6(1) as, at least, persuasive for Article 28(3). Furthermore, it appears that if a connection is found under Article 6(1), the same must apply *a fortiori* for Article 28(3) since the latter is broader.

Concerning Article 6(1), the ECJ held *obiter* in *Réunion Européenne* that a contractual and a tortious claim “cannot be regarded as connected”.<sup>181</sup> However, paragraph 50 of that decision was strongly criticised<sup>182</sup> and Lloyd J doubted its correctness in *Watson v First Choice Holidays*.<sup>183</sup> Finally, the ECJ essentially overruled<sup>184</sup> that paragraph in *Freeport v Arnoldsson*<sup>185</sup> and held that the fact that claims have “different legal bases does not preclude application of [Article 6(1)]”.

Following that line of reasoning, it appears that contractual and tortious claims, arising from the same facts, might well be “related” also within the meaning of Article 28(3).<sup>186</sup> If so, the second court may (on its own motion)

<sup>174</sup> *The Tatry*, *supra* n 71, [52]–[56], the term “irreconcilable” having a different meaning than in Art 34(3) as interpreted in *Hoffmann v Krieg*, Case 145/86 [1988] ECR 645.

<sup>175</sup> *Sarrio v Kuwait Investment Authority* [1999] 1 AC 32 (HL) [41].

<sup>176</sup> Left open in *Roche Nederland v Primus*, Case C-539/03 [2006] ECR I-6535; see Fentiman, *supra* n 154, 598–99.

<sup>177</sup> Originally, Art 6(1) of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (Brussels Convention) did not contain a connection requirement. However, such was read into the text by the ECJ in *Kalfelis*, *supra* n 6, [8]–[13]; it thereby relied on Article 22 Brussels Convention and established a requirement in the same terms; this points towards a similar interpretation.

<sup>178</sup> *Kalfelis*, *supra* n 6, [7]–[8].

<sup>179</sup> *The Tatry*, *supra* n 71, [52].

<sup>180</sup> *Kalfelis*, *supra* n 6, [11]; *The Tatry*, *supra* n 71, [51].

<sup>181</sup> *Supra* n 124, [50].

<sup>182</sup> Briggs and Rees, *supra* n 12, 294–95.

<sup>183</sup> *Supra* n 126; reference to the ECJ was withdrawn after settlement.

<sup>184</sup> It held that *Réunion Européenne*, *supra* n 124, was actually not concerned with Art 6(1) (since none of the defendants was domiciled in the forum state) but with accessory jurisdiction under Art 5(1) and 5(3), confusing these two issues which were considered independently in *Kalfelis*, *supra* n 6.

<sup>185</sup> *Supra* n 125, [42]–[47].

<sup>186</sup> Liatowitsch and Meier, *supra* n 153, 684; *contra* (but both decided prior to *Freeport v Arnoldsson*, *supra* n 125): *Bank of Tokyo-Mitsubishi*, *supra* n 153, [241]; BGer 28.2.2006, 4C.351/2005 [5.3].

stay its proceedings (Article 28(1)) or (on an application of either party) decline jurisdiction and refer the case to the first court for consolidation (Article 28(2)). Both options require that the action in the first court is still “pending”;<sup>187</sup> they are unavailable after definite termination of the first proceedings. In addition to the requirement that a consolidation must be admissible under the *lex fori* of the first court, Article 28(2) requires that that court has original<sup>188</sup> jurisdiction over the second claim too. However, in a case where a contractual claim is pursued under Article 5(1) and, subsequently, a related tortious claim under Article 5(3), or vice versa, this latter jurisdiction requirement is usually<sup>189</sup> *not* satisfied since there is no accessory jurisdiction under these provisions.<sup>190</sup> This means that, in such a case, only Article 28(1) may apply and the second court may only “wait” for the result of the first court and potentially take into account its findings. However, as soon as the first proceedings are terminated, it is obliged to resume its own proceedings.

#### D. CONCURRENT LIABILITY: *RES JUDICATA* ISSUES

It is concluded that parallel proceedings concerning concurrent liability may perfectly occur – one concerning a contractual claim (under Article 5(1)), the other concerning a tortious claim (under Article 5(3)). As long as both proceedings are pending, Article 27 is not applicable as they concern different causes of action; Article 28 can at most lead to a stay. However, as soon as either is terminated and a judgment has been given, Article 28 is inapplicable too;<sup>191</sup> any granted stay must be lifted. Instead, the judgment might have to be recognised under Chapter III in the still pending proceedings (Article 33); if so, it has *res judicata* status and produces certain preclusive effects. The question arises whether and to what extent a Chapter III judgment on a contractual claim precludes related tortious claims (or vice versa). These rather complex and largely unsettled questions of preclusion cannot be examined in full detail in this article; however, a brief overview will be provided.<sup>192</sup>

<sup>187</sup> See for the same requirement under Art 27: *Supra* n 159; Art 28(2) additionally requires that they are pending “at first instance”.

<sup>188</sup> Art 28 does not serve as a jurisdictional basis; see *supra* n 124.

<sup>189</sup> Unless Art 5(1) and 5(3) *coincidentally* allocate jurisdiction to the same judicial district.

<sup>190</sup> See *supra*, Section B.3.

<sup>191</sup> Arts 27 and 28 require “pending” proceedings; see *supra* n 159.

<sup>192</sup> Generally: P Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press, 2001); G Spencer Bower and KR Handley, *Res Judicata* (LexisNexis, 4th edn, 2009).

## 1. English Law (Overview)

It is convenient to start with a look at English domestic law,<sup>193</sup> under which, once a foreign judgment is recognised as having *res judicata* status, it produces cause of action preclusion between the parties: on the one hand, it prevents the parties from contradicting the foreign determination of the (non)existence of a cause of action (cause of action estoppel); on the other hand, it prevents reassertion of and suing on the same (original) cause of action for which recovery has, though less than hoped, already been granted (statutory former recovery plea<sup>194</sup>). In addition, issue preclusion prevents, in certain circumstances, either party from contradicting issues which have been decided by the foreign court as a necessary basis of the judgment (issue estoppel). Alongside these classical *res judicata* pleas, the so-called *Henderson* plea, which is based on abuse of process,<sup>195</sup> precludes matters which were not decided in the earlier proceedings but which, because properly belonging to that litigation, could and should have been raised and decided there.<sup>196</sup>

In the present context, mainly cause of action preclusion is of interest; in particular, whether contractual and related tortious claims are considered as the “same causes of action”,<sup>197</sup> judgment on one precluding the other. In the absence of clear authority, that question is unsettled; furthermore, there is no satisfactory definition of the constituent parts of a “cause of action”. Sometimes it is defined by reference to the facts and (at least as regards torts) the *right infringed*,<sup>198</sup> this rather narrow definition might lead to the conclusion that contractual and tortious claims are different ones. Sometimes, emphasis is rather on the *factual situation* only, namely on the *act* of the defendant which gives the claimant his cause of complaint and entitlement to a remedy;<sup>199</sup> this broader definition would probably embrace both claims. On the other hand, distinction

<sup>193</sup> Comprehensively: Barnett, *supra* n 192, chs 4–6.

<sup>194</sup> Civil Jurisdiction and Judgments Act 1982, s 34; enacted to reverse the illogical non-merger rule at common law for unsatisfied foreign judgments which allowed a claimant to sue alternatively on the judgment (ie recognition) *or* (again) on the original cause of action (eg to obtain higher damages).

<sup>195</sup> The exact basis of this doctrine is still disputed; see Barnett, *supra* n 192, 191–95; KR Handley, “A Closer Look at *Henderson v Henderson*” (2002) 118 *Law Quarterly Review* 397; originally, Wigram V-C expressed it in terms of *res judicata*, *infra* n 196.

<sup>196</sup> *Henderson v Henderson* [1843] 3 Hare 100 (Ct of Chancery) [114]–[116] (Wigram V-C); see generally Barnett, *supra* n 192, ch 6.

<sup>197</sup> It is submitted that the answer is the same for both cause of action estoppel and Civil Jurisdiction and Judgments Act 1982, s 34; Barnett, *supra* n 192, 120.

<sup>198</sup> *Brunsdon v Humphrey* [1884] 14 QBD 141 (CA; Brett MR, Bowen LJ; Lord Coleridge CJ dissenting); Barnett, *supra* n 192, 121–25; not followed by the CA in a similar case in *Talbot v Berkshire County Council* [1994] QB 290 where the *Henderson* rule was applied.

<sup>199</sup> *Republic of India v India Steamship (The Indian Grace) (No 1)* [1993] AC 410 (HL) [420]–[421] (Lord Goff); *Letang v Cooper* [1965] 1 QB 232 (CA) [242]–[243] (Diplock LJ); Hill and Chong, *supra* n 12, 423–424; A Samuels, “Suing Twice on the Same Accident” [1968] *Modern Law Review* 455.

is drawn between alternative<sup>200</sup> and cumulative<sup>201</sup> remedies or causes of action, only the former leading to preclusion;<sup>202</sup> this obviously leads to difficult choice-of-law questions as to which law determines whether remedies are cumulative or alternative.

No clear answer can be given whether contractual and related tortious claims are the same<sup>203</sup> or distinct<sup>204</sup> causes of action under English law. However, even if we are concerned with “different causes of action”, it is still arguable that at least the *Henderson* rule applies: if only one claim was pursued in the foreign proceedings, an English court might strike out the other as an abuse of process if and because it could and should have been raised in the earlier litigation as properly belonging to it.<sup>205</sup>

## 2. Preclusive Effects of a Regulation Judgment: Applicable Law

The preclusive effects attributed to judgments differ considerably from one legal system to another.<sup>206</sup> Outside the Regulation, it is clear that the law of the recognising state (as the *lex fori*) determines which is the law determining the preclusive effects of a recognised foreign judgment.<sup>207</sup>

Regarding a Regulation judgment, however, this question is not entirely settled; two basic approaches would seem possible: according to the doctrine of equalisation of effects, the preclusive laws of the recognising state (as the *lex fori*<sup>208</sup>) shall apply and the effects of a corresponding domestic judgment would

<sup>200</sup> *United Australia v Barclays Bank* [1941] AC 1 (HL) [28]–[30] (Lord Atkin) held that in cases of alternative remedies, election is needed at the time of judgment; thus, the claimant “can take judgment only for the one, and his cause of action on both will then be merged in the one”; applied in *Mahesan S/O Thambiah v Malaysia Government Officers’ Co-Operative Housing Society* [1979] AC 374 (PC) [382]–[383] (Lord Diplock, concerned with two distinct, alternative remedies at common law).

<sup>201</sup> *Tang Man Sit*, *supra* n 8, [521]–[523] (Lord Nicholls); having affirmed *United Australia*, *supra* n 200, on alternative remedies, he held that in cases of cumulative remedies, the claimant is not required to choose and “may obtain judgment for both remedies and enforce both judgments” (limits being the *Henderson* rule and prevention of double satisfaction).

<sup>202</sup> Barnett, *supra* n 192, 119; Spencer Bower and Handley, *supra* n 192, 275–76, 284.

<sup>203</sup> (Apparently) for preclusion: Spencer Bower and Handley, *supra* n 192, 95.

<sup>204</sup> (Apparently) against preclusion: Barnett, *supra* n 192, 123 [186]; see also Briggs and Rees, *supra* n 12, 778.

<sup>205</sup> See *Talbot v Berkshire*, *supra* n 198.

<sup>206</sup> For example, issue preclusion is generally unknown outside the common law world. Nevertheless, even as regards cause of action preclusion, the definition of what are “same causes of action” may differ.

<sup>207</sup> An English court, having recognised a foreign judgment outside the Regulation, will treat it as if it were an English judgment (doctrine of equalisation) and apply the English preclusive rules: *The Indian Grace (No 1)* [1994] ILPr 481 (CA) [36] (Leggatt LJ); reversed by the HL on other grounds, *supra* n 199; Barnett, *supra* n 192, 249, 251; Hill and Chong, *supra* n 12, 423.

<sup>208</sup> From an English perspective, it could be argued that *res judicata* preclusion is a rule of evidence and thus subject to the procedural law of the forum.

be accorded.<sup>209</sup> In contrast, the doctrine of extension of effects obliges the recognising court to apply the preclusive laws of the state of origin, extending the original effects throughout the EU.<sup>210</sup> Whereas the Regulation itself is completely silent on that point, the *Jenard Report* favours the latter approach.<sup>211</sup> This appears to have been confirmed by the ECJ in *Hoffmann v Krieg*.<sup>212</sup> “[A] foreign judgment which has been recognized by virtue of Article [33] must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given”. However, in *Apostolides v Orams*<sup>213</sup> it qualified that statement and appears to have adopted a combination of the two approaches, namely that, although the law of the state of origin is still relevant in principle, there is “no reason for granting to a judgment, when it is enforced, ... effects that a similar judgment given directly in the [enforcing state] would not have”.

In contrast, Barnett<sup>214</sup> and Briggs and Rees<sup>215</sup> suggest that the answer differs in relation to each preclusive plea. The *Schlosser Report* appears to suggest that this is a question of national law.<sup>216</sup>

### 3. Cause of Action Preclusion: Relevance of Article 27?

Under all approaches outlined above, national law<sup>217</sup> would apply (whichever it may be), there being no uniform solution. However, a more modern school of thought counsels relevance, to whatever extent, of Article 27 on the question whether the “same causes of action” and the “same parties” are involved,

<sup>209</sup> See Barnett, *supra* n 192, 251; there does not seem to be much support of this approach under the Regulation.

<sup>210</sup> Dicey, *supra* n 63, 671–72; Cheshire, *supra* n 12, 604; P Stone, *The Conflict of Laws* (Longman, 1995), 307; P Stone, *Civil Jurisdiction and Judgments in Europe* (Longman, 1998), 152; D Lasok and P Stone, *Conflict of Laws in the European Community* (Professional Books Ltd, 1987), 289–90; this resembles the US full faith and credit clause, applying to sister states; see Barnett, *supra* n 192, 259–64.

<sup>211</sup> [1979] OJ C59/43.

<sup>212</sup> *Supra* n 174, [11]; however, the ECJ was rather concerned with enforcement than preclusive effects; similarly, considering foreign law to determine the preclusive effects of a foreign judgment in England: *The Tjaskemolen (No 2)* [1997] CLC 521 (Admlty; Clarke J); *Boss v Boss*, *supra* n 75, [359] (Saville LJ).

<sup>213</sup> *Apostolides v Orams*, Case C-420/07 [2009] ECR I-3571 [66]; again, the ECJ was concerned with enforcement.

<sup>214</sup> *Supra* n 192, ch 7, basically applying the doctrine of extension for cause of action preclusion and the doctrine of equalisation for issue and abuse of process preclusion; see also *Berkeley Administration (No 1)*, *supra* n 159, [77], where Hobhouse LJ tacitly applied English law as regards issue estoppel though apparently agreeing with Dillon LJ [26]–[28] who applied Art 27 as regards cause of action preclusion; see *infra*, Section D.3.

<sup>215</sup> *Supra* n 12, 702–05.

<sup>216</sup> [1979] OJ C59/127–128 [191]; P Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (Professional Books Ltd 1987), 1365–66 even suggests that it is beyond the scope of the Regulation and beyond jurisdiction of the ECJ to decide questions of effects of foreign judgments.

<sup>217</sup> As far as English law would apply, the question whether contractual and related tortious causes of action are the “same” is far from clear; see *supra*, Section D.1.



not only for purposes of *lis pendens* but also (at least) for cause of action preclusion.<sup>218</sup> In *De Wolf v Cox*<sup>219</sup> the ECJ held that, after a judgment (in favour of the claimant) has been given in one Member State, no proceedings may be brought in another on the same (original) cause of action between the same parties. This establishes a mandatory, uniform former recovery plea, *based on European law*.<sup>220,221</sup> As the ECJ particularly based its reasoning on Article 27,<sup>222</sup> one might infer that the *requirements* of this plea (particularly what are “same causes of action”) follow likewise from Article 27. In *Drouot Assurances v CMI*,<sup>223</sup> the ECJ was concerned with the requirement of the “same parties” under Article 27. It held that, in a case concerning formally different parties, there can still be “such a degree of identity between the interests of [the parties] that a judgment delivered against one of them would have the force of *res judicata* as against the other” and that therefore they “must be considered to be one and the same party for the purposes of [Article 27]”. This can probably be understood as also meaning, the other way round, that if the parties are considered the same under Article 27, they will both be bound by the effects of *res judicata*.<sup>224</sup>

The same approach was adopted by the Court of Appeal in *Berkeley Administration (No 1)*,<sup>225</sup> Dillon LJ held that “where under Article [27] the proceedings are between the same parties and involve the same cause of action and the

<sup>218</sup> Arguing that jurisprudence on Art 27 is somehow “persuasive authority”: Barnett, *supra* n 192, 271 [101], 277; Fawcett *et al*, *supra* n 4, 620; KR Handley, “Res Judicata in the European Court” (2000) 116 *Law Quarterly Review* 191, 194; apparently favouring *direct application* of Article 27; Cheshire, *supra* n 12, 635.

<sup>219</sup> *De Wolf v Cox*, Case 42/76 [1976] ECR 1759 [10]–[12]; cited and confirmed in *Gubisch*, *supra* n 84, [9].

<sup>220</sup> Barnett, *supra* n 192, 279–80 [137]; Cheshire, *supra* n 12, 634–35; *contra*: Kaye, *supra* n 216, 1365–66 who denies such a ratio as being beyond the jurisdiction of the ECJ and claims exclusive application of the Civil Jurisdiction and Judgments Act 1982, s 34.

<sup>221</sup> Such an autonomous European concept of *res judicata* appears to be supported by the recent decision of *Gothaer Allgemeine Versicherung v Samskip*, Case C-456/11 [2012] ECR I-0000 [33]–[43] (concerning the Lugano Convention), where the ECJ held (i) that “procedural judgments” are covered by Article 32 and (ii) that a decision declining jurisdiction has binding effects, irrespective of national law, as regards both, the operative part (declining jurisdiction) and the grounds (validity of a jurisdiction clause for another Convention State); the ECJ based its reasoning on a “concept of *res judicata* under European Union law”. Although this case is only concerned with the effects of jurisdictional judgments (and paras [39]–[42] appear to imply that such judgments are subject to a special *res judicata* regime), it is quite conceivable that the ECJ would nonetheless extend the *Gothaer* ratio to judgments on the merits. Allowing courts to review the latter (to the extent that the relevant national *res judicata* statute provides so) would still, just as regards the former (*cf* [35]–[38]), violate the principles of no review as to the substance (Art 36) and mutual trust; regardless of whether the judgment is based on common rules of EU (jurisdiction) law or on national (substantive) law.

<sup>222</sup> *De Wolf v Cox*, *supra* n 219, [10]–[12].

<sup>223</sup> *Drouot Assurances v CMI*, Case C-351/96 [1998] ECR I-3075 [19].

<sup>224</sup> Handley, “Res Judicata”, *supra* n 218, 194.

<sup>225</sup> *Supra* n 159, [26]–[28]; citing *Gubisch*, *supra* n 84; this approach was accepted by Richard Scott V-C in *Berkeley Administration v McClelland (No2)* [1996] ILPr 772 (CA) [40]–[41].

same subject matter, a judgment must ... be binding under [Article 33] between all those parties". This means that whenever – *ex hypothesi* – Article 27 would have applied, had the proceedings taken place at the same time (a judgment not yet being given), or did in fact apply (but were ignored<sup>226</sup>), the earlier judgment will have cause of action preclusion and bar the proceedings coming to a judgment later.<sup>227</sup> In *Republic of India v India Steamship (The Indian Grace) (No 2)*,<sup>228</sup> the House of Lords even assumed (decisive) influence of Article 27 (and particularly of *The Tatry*<sup>229</sup>) on the interpretation of what are "same parties" for purposes of pure English domestic law (section 34 of the Civil Jurisdiction and Judgments Act 1982). However, this way of reasoning is probably historically incorrect.<sup>230</sup>

There are strong arguments that, if not applying directly, account should at least be taken of Article 27 and its corresponding jurisprudence in order to determine the scope of cause of action preclusion of a Regulation judgment. Firstly, it would rarely be sensible to oblige a court to decline jurisdiction under Article 27 in favour of other proceedings if any resulting judgment would not bar the second proceedings. Certainly, there may be good reasons for the second court to stay proceedings and await the judgment of the first court, particularly in order to benefit from issue estoppels. However, if it is clear from the outset that proceedings will have to be resumed,<sup>231</sup> Article 28 appears to be the appropriate instrument, being merely discretionary. Secondly, such a solution would enhance uniformity and legal certainty in international litigation and would, just as Article 27, help to avoid situations of Article 34(3).<sup>232</sup>

#### 4. Contractual and Tortious Claims: No Cause of Action Preclusion

It has been concluded in Section C that contractual and related tortious claims are *not* the same causes of action under Article 27. If it is correct that Article 27 predetermines cause of action preclusion, it follows that a Chapter III judgment on one claim does not preclude the other.<sup>233,234</sup>

<sup>226</sup> The doctrine of *res judicata*, if interpreted in this way, is thus another device to avoid the situation of Art 34(3) being some sort of an "extended arm" of Art 27.

<sup>227</sup> Barnett, *supra* n 192, 277.

<sup>228</sup> [1998] AC 878 (HL) [910] (Lord Steyn).

<sup>229</sup> *Supra* n 71.

<sup>230</sup> A Briggs, "Foreign Judgments and *res judicata*" [1997] *British Year Book of International Law* 355–56.

<sup>231</sup> See *supra* n 159.

<sup>232</sup> See *supra* n 226.

<sup>233</sup> To that effect: Walter and Domej, *supra* n 126, 212.

<sup>234</sup> However, issue estoppels may possibly arise – eg if a contract was held to be invalid, an alleged tortfeasor might be estopped from relying on a contractual exemption clause in relation to the tort claim.

Regarding the particular case considered here, there are other compelling arguments: it has been concluded that Article 5(1) and 5(3) do not allow bringing contractual and tortious claims together, both provisions limiting the legal cognition of the court.<sup>235</sup> Assuming cause of action preclusion for both claims would effectively lead to a substantive extinction of one or the other claim.<sup>236</sup> Although the claimant is still free to bring both claims together under Article 2 and the defendant possibly to file a counter-claim (usually for negative declaration) under Article 6(3)<sup>237</sup> (both options preventing such an extinction), the framers certainly did not intend the bringing of a claim under Article 5 to potentially amount to a waiver by the claimant of another claim.

Furthermore, it would infringe the right to be heard (Article 6(1) ECHR<sup>238</sup>) since the original forum under Article 5 did not have jurisdiction to hear the other claim (limited legal cognition). It would deny justice<sup>239</sup> if the claimant was, in the original proceedings, excluded from pleading matters which the court was not entitled to hear, and, in subsequent proceedings, precluded by the judgment on the ground that the matter has been tried and heard and cannot be *re-litigated*. It is plain that the doctrine of *res judicata* is inevitably linked to, and in fact based on, the right to be heard. It ensures that this right is granted no more than once; however, that right itself demands that it is granted at least in *one* proper trial. Consequently, the preclusive effects may reach no further than the right to be heard was effectively granted. This is another reason why it is the Regulation (and the ECHR) which, by limiting jurisdiction and the corresponding legal cognition, requires limitation of the preclusive effects as well.

It could be objected that both parties have somehow had, in fact, an opportunity to try the precluded claim in court: the claimant could have brought both claims under Article 2; the defendant could have instigated a counter-claim. One could be inclined to say that, since both parties have had the chance to be heard, they should be subjected to the preclusive effects of *res judicata* in respect of both claims. However, Article 5 certainly does not intend to force claimants to irrevocably waive claims not falling under the respective head; this would substantially lessen the attractiveness of Article 5. Moreover, claimants would, when suing under Article 5, rarely be aware of such a waiver. Be that as it may, extending preclusive effects to both claims would still infringe the right to be heard as it still precludes the claimant, in subsequent proceedings, from

<sup>235</sup> See *supra*, Section B.3(e).

<sup>236</sup> Even if the second claim can still be brought under Art 5 or (confined to that claim) under Art 2 (if regarded as different causes of action under Art 27), as soon as judgment on either claim was given, the other would be precluded and thus effectively extinguished.

<sup>237</sup> Arguably, these claims arise from the “same facts”, being sufficiently connected; see *supra*, Section C.2 (concerning the connection-requirement in Art 28).

<sup>238</sup> European Convention on Human Rights.

<sup>239</sup> See for a similar situation (as regards Art 27): AG Tesauero, *supra* n 157, [17]–[18].

pleading a claim on the ground that he could have pleaded it in a *hypothetical* earlier trial, although he could not in fact plead it throughout the *actual* trial.

It is concluded that, *qua* European law (and the ECHR), contractual and tortious claims do not concern the same cause of action, there being no cause of action preclusion. Even if there is room for the *Henderson* rule under the Regulation<sup>240</sup> and even if the related claim is considered to “properly belong to the litigation”, that rule can simply not apply if the original court has taken jurisdiction under Article 5 since the claimant could not have raised the matter in that litigation for lack of jurisdiction.<sup>241</sup> In contrast, it may be argued that *Henderson* applies if the claimant brings only one claim under Article 2.

### 5. Multiple Judgments: No Double Satisfaction

The result is that the claimant may well obtain two judgments, one on the contractual, the other on the tortious claim. Such judgments are not irreconcilable (Article 34(3)) since they rule on different liabilities which may well exist in parallel. No problem arises if one or both claims are dismissed. However, if the claimant obtains two judgments which both award full damages, it is obvious that he cannot, in the aggregate, recover an amount in excess of his loss. English law (as probably any civilised law) does not (based on equitable principles and probably as a matter of public policy) tolerate double satisfaction.<sup>242</sup> Certainly, the Regulation does not intend to alter that; it is probably a matter of national law how to deal with prevention of double satisfaction at the enforcement stage. It is clear that a creditor, having obtained two judgments in his favour, “must give credit to the extent that either judgment is satisfied”.<sup>243</sup> payment on one satisfies the other too.<sup>244</sup> If payment is made before the second judgment was given, this substantively extinguishes the second claim (and prevents a second judgment in favour of the claimant).<sup>245</sup>

<sup>240</sup> *Berkeley Administration (No 2)*, *supra* n 225, [25]–[36] (Scott V-C), [84]–[85] (Roch LJ); Barnett, *supra* n 192, 288–91.

<sup>241</sup> See *Barrow v Bankside Members Agency* [1996] 1 WLR 257 (CA) [263] (Bingham MR); held that the *Henderson* rule does not apply if the claim would not have been decided in the earlier proceedings anyway.

<sup>242</sup> *Tang Man Sit*, *supra* n 8, [522]–[523] (Lord Nicholls); *Kohnke v Karger* [1951] 2 KB 670 (KB) [675]–[678] (Lynskey J); *United Australia*, *supra* n 200, [21] (V Simon LC); Barnett, *supra* n 192, 91 [19], 119 [156]; *Cheshire*, *supra* n 12, 546; Briggs, “choice”, *supra* n 50, 14 [11]; Spencer Bower and Handley, *supra* n 192, 284; as far as a foreign judgment aims at granting damages twice, it might even be contrary to English public policy (Art 34(1)).

<sup>243</sup> Barnett, *supra* n 192, 119 [156].

<sup>244</sup> Enforcing the second is at least an abuse of rights once full satisfaction has been obtained.

<sup>245</sup> *Tang Man Sit*, *supra* n 8, [522]–[523] (Lord Nicholls).

## E. CONCLUSION

Applying the Regulation as currently in force and as interpreted by the ECJ, it is concluded that in cases where the claimant (allegedly) has, arising from one and the same incident, a contractual and a tortious cause of action, both are to be qualified separately for jurisdictional purposes. Although Article 5(1) and 5(3) are, indeed, mutually exclusive, that is so only in relation to each “single cause of action” but not as regards the “entire dispute”. It follows that the mere existence of a contract in the parties’ relationship does not as such exclude related tortious claims from Article 5(3); such may perfectly well fall within that provision if the alleged liability does not presuppose any contract, the tortious duty existing independently. It has been argued that the claimant does not need to establish a good arguable case as to the existence of a contract/tort in order to obtain jurisdiction under Article 5(1) or 5(3);<sup>246</sup> this largely allows him to choose the jurisdictional basis. However, if the court finds that no contract/tort exists, it will only (but at least) render a binding judgment to that effect.

It has also been concluded that neither Article 5(1) nor 5(3) allow accessory jurisdiction for related claims; apart from Article 2, the contractual claim can only be brought under Article 5(1), the tortious claim only under Article 5(3). Accordingly, both provisions limit the legal cognition of the court. As a necessary consequence of this splitting of the dispute, parallel proceedings must be possible; contractual and tortious claims are *not* the same causes of action under Article 27. However, they may be related under Article 28, allowing a discretionary stay.

As soon as judgment on one claim is given, the question arises whether it precludes the other claim. It has been argued that they are not the same causes of action for *res judicata* purposes, there being no cause of action preclusion. Arguably, this follows directly from *European law*, the Judgments Regulation pre-determining cause of action preclusion of Regulation judgments. Certainly, if a creditor obtains two judgments in his favour, both awarding full compensation, he must give credit for both to the extent that either is satisfied; double satisfaction cannot be tolerated.

One might legitimately question whether the solution as elaborated in this article, which allows fragmentation of proceedings and litigation of connected (or even identical) factual issues in more than one forum, is a sensible or desirable one in terms of policy and practicality. Furthermore, the solution is admittedly of considerable complexity. However, this is *de lege lata* – if properly thought to an end – the result of a jurisdictional system, as interpreted by the ECJ, which splits disputes by reference to different causes of action (and

<sup>246</sup> However, in certain circumstances he may need to establish a “lively dispute”; probably according to national law; see *supra*, Section B.2.

their legal bases), at the same time denying jurisdiction based on relatedness. Although the latter and any “centralization of jurisdiction” would certainly have practical advantages, it would require, *de lege ferenda*, a fundamental reform and, to a considerable extent, departure of the idea of *actor sequitur forum rei* being the cardinal jurisdictional principle.