

# THE BRUSSELS I-BIS REGULATION AND FUTURE PERSPECTIVES

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## ***LIS ALIBI PENDENS* AND RELATED ACTIONS IN THE RELATIONSHIPS WITH THE COURTS OF THIRD COUNTRIES IN THE RECAST OF THE BRUSSELS I REGULATION**

Fabrizio MARONGIU BUONAIUTI\*

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### **I. Regulation (EU) No. 1215/2012 (“Brussels I Recast Regulation”) and its Mild Opening to Third-Country-Related Disputes**

The Proposal submitted by the European Commission on 14 December 2010 for the recast of EC Regulation No. 44/2001 (“Brussels I Regulation”) presented, among its distinctive features, a deviation from the traditional *inter partes*

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\* Associate Professor of International Law, University of Macerata, Department of Law; LL.M. (Cantab.).

approach to jurisdiction, which is a salient feature of both the Regulation and the pre-existing Brussels Convention of 27 September 1968.<sup>1</sup>

In fact, the distribution of jurisdiction among the courts of the various Member States, as established first under the Brussels Convention and developed subsequently under the Brussels I Regulation, is based on the assumption that only the jurisdiction of Member States' courts is addressed by the rules contained in these instruments. Such an assumption appears inevitable, due to the inapplicability, to third countries, of rules contained either in treaties, such as the Brussels Convention, or acts adopted by the EU institutions, such as the Brussels I Regulation. Besides, the assumption underlying the distribution of jurisdiction among Member States' courts as embodied in both the Brussels Convention and Regulation is that the rules contained in either instrument should in principle only address disputes presenting a relevant connection with the EU legal order. The said relevant connection is identified, as a general rule, in the defendant being domiciled in a Member State, even though, by virtue of the interplay of alternative rules, jurisdiction is eventually vested in the courts of a different Member State.<sup>2</sup> The general relevance of the domicile of the defendant in a Member State as a ground for the application of the rules of jurisdiction contained in either instrument is nonetheless subject to exceptions within the framework of the Brussels I Regulation, namely in case an exclusive head of jurisdiction is applicable, since those could apply irrespective of the domicile of the defendant. The rationale of the exception lies in the assumption that the localisation of the ground for exclusive jurisdiction in a Member State constitutes by itself a sufficient connection to the sphere of the Member State in order to justify the application of the rules as contained in either the Convention or the Regulation.<sup>3</sup>

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<sup>1</sup> COM(2010) 748 final, of 14 December 2010; revised version COM(2010) 748 final/2, of 3 January 2011. See in this respect, among others, A. BORRÁS, Application of the Brussels I Regulation to External Situations: From Studies Carried Out by the European Group for Private International Law (EGPIL/GEDIP) to the Proposal for the Revision of the Regulation, *YPIL* 2010, p. 333 *et seq.*; B. HESS, The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast, *Common Market Law Review* 2012, p. 1075 *et seq.*, esp. p. 1105 *et seq.*; R. HAUSMANN, The Scope of Application of the Brussels I Regulation, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 3 *et seq.*, esp. p. 21 *et seq.*; R. LUZZATTO, On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants, *ibidem*, p. 111 *et seq.*; F. POCAR, Révision de Bruxelles I et ordre juridique international: quelle approche uniforme?, *Riv. dir. int. priv. proc.* 2011, p. 591 *et seq.*; J. WEBER, Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation, *RebelsZ* 2011, p. 619 *et seq.*

<sup>2</sup> The general relevance of the domicile of the defendant as a ground triggering the application of the jurisdiction rules as contained in the Regulation can be desumed from the interplay of Articles 2 and 4 of the Brussels I Regulation, as from the corresponding provisions of the Brussels Convention of 1968: see, among others, L. MARI, *Il diritto processuale civile della Convenzione di Bruxelles I, Il Sistema della competenza*, Padua 1999, p. 129 *et seq.*; Th. KRUGER, *Civil Jurisdiction Rules of the EU and Their Impact on Third States*, Oxford 2008, p. 59 *et seq.*

<sup>3</sup> See, e.g., on the capability of the exclusive grounds of jurisdiction to establish by themselves a sufficient connection between the dispute and the legal order of the Member

The system is nonetheless awkward in its application since it compels the courts in the Member States to apply two parallel sets of rules with respect to jurisdiction over actions falling within the material scope of application of the Brussels Convention first and then the Brussels I Regulation, subject to whether or not the defendant was domiciled in a Member State. Therefore, since the presentation of a proposal in 2006 for the amendment of the parallel Brussels II-bis Regulation concerning jurisdiction in matrimonial matters,<sup>4</sup> the European Commission has studied solutions to overcome the said difficulty, by providing for residual jurisdictional rules intended to regulate, uniformly and without reference to domestic rules, jurisdiction in those cases where the defendant is not domiciled in a Member State.<sup>5</sup> This solution has been incorporated namely in Regulation No. 4/2009 in matters of maintenance obligations<sup>6</sup> as well as in Regulation No. 650/2012 in matters of succession.<sup>7</sup> The two Regulations, in fact, provide in very similar terms for residual jurisdiction rules, introducing supplementary grounds of jurisdiction to be applied in order to establish the jurisdiction of a Member State court whenever the defendant is not domiciled in the EU, coupled, as a last resort, with a provision for a *forum necessitatis*. The latter provides for the jurisdiction of the courts of a Member State having a sufficient connection with the dispute whenever the parties are unable to bring their case before the courts of a third country with which the case would otherwise be connected.<sup>8</sup>

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States concerned, D.P. FERNANDEZ ARROYO, Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will They Ever Survive?, in *Festschrift für Erik Jayme*, Vol. I, München 2004, p. 169 *et seq.*

<sup>4</sup> COM(2006) 399 final, of 17 July 2006, Article 7. The proposal was subsequently set aside and replaced by the establishment of an enhanced cooperation in order to complete the rules as contained in the said regulation with provisions concerning applicable law, as contained in Regulation (EU) No. 1259/2010 (“Rome III Regulation”). See A. FIORINI, Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?, *I.C.L.Q.* 2010, p. 1143 *et seq.*

<sup>5</sup> See, for a discussion of the solution advanced in the said proposal by the European Commission, A. BONOMI, Sull’opportunità e le possibili modalità di una regolamentazione comunitaria della competenza giurisdizionale applicabile *erga omnes*, *Riv. dir. int. priv. proc.* 2007, p. 313 *et seq.*

<sup>6</sup> See Articles 6-7 of Regulation (EC) No. 4/2009, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations.

<sup>7</sup> See Articles 10-11 of Regulation (EU) No. 650/2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the establishment of a European Certificate of Succession.

<sup>8</sup> See with regard to the introduction of a provision on *forum necessitatis* in Regulation (EC) No. 4/2009 on maintenance obligations, among others, P. FRANZINA, Sul *forum necessitatis* nello spazio giudiziario europeo, *Riv. dir. int.* 2009, p. 1121 *et seq.*; G. ROSSOLILLO, *Forum necessitatis* e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell’Unione europea, *Cuadernos de derecho transnacional* 2010, No. 1, p. 403 *et seq.*, esp. p. 413 *et seq.*; concerning the corresponding provision introduced in Regulation (EU) No. 650/2012 in matters of succession, A. DAVI/A. ZANOBETTI, Il nuovo diritto internazionale privato delle successioni nell’Unione europea,

The proposal for a recast of the Brussels I Regulation submitted by the European Commission in December 2010 advanced a solution following the same pattern,<sup>9</sup> but no consensus was reached within the Council and the European Parliament regarding the solution proposed, since a more conservative position prevailed in both instances.<sup>10</sup> Substantively, the distribution of jurisdiction of the Brussels I Recast is very much on the same lines as that contained in the existing Brussels I Regulation, thus maintaining in principle the distinction between cases in which the defendant is domiciled in the EU and cases in which the defendant is domiciled in a third country. The latter cases continue to be governed by domestic rules of jurisdiction. The only mild opening to the *erga omnes* approach advocated by the Commission in its proposal which has been retained in the rules of jurisdiction as contained in the Recast Regulation consists of the availability of protective rules of jurisdiction. These protective rules are available to consumers and employed workers as against non-EU domiciled counter-parties. Furthermore, the Recast Regulation provides for the applicability of the rules concerning choice-of-court agreements to those designating Member States courts irrespective of the domicile of either party. By contrast, the corresponding rules as contained in Brussels I required at least one of the parties to be domiciled in a Member State.<sup>11</sup>

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*Cuadernos de derecho transnacional* 2013, No. 2, p. 5 *et seq.*, esp. p. 119 *et seq.*; the rules on *forum necessitatis* as contained in both Regulations appear inspired by the model offered by domestic provisions, such as Article 3 of the Swiss Federal Private International Law Act (LDIP). See S. OTHENIN-GIRARD, Quelques observations sur le for de nécessité en droit international privé suisse, *RSDIE* 1999, p. 251 *et seq.* See also Article 11 of the Belgian Code of Private International Law and J.-Y. CARLIER, Le Code belge de droit international privé, *Rev. crit. dr. int. pr.* 2005, p. 11 *et seq.*; esp. p. 22 *et seq.* For a broader comparative overview, see V. RÉTORNAZ/ B. VOLDERS, Le for de nécessité: tableau comparative et évolutif, *Rev. crit. dr. int. pr.* 2008, p. 225 *et seq.*

<sup>9</sup> See Articles 25-26 of the Commission Proposal, COM(2010) 748 final, on which we may refer to F. MARONGIU BUONAIUTI, La tutela del diritto di accesso alla giustizia e della parità delle armi tra i litiganti nella proposta di revisione del regolamento n. 44/2001, in A. DI STEFANO/ R. SAPIENZA, *La tutela dei diritti umani e il diritto internazionale* (XVI Convegno SIDI, Catania, 23-24 giugno 2011), Naples 2012, p. 345 *et seq.*, esp. p. 355 *et seq.*

<sup>10</sup> See the General Approach adopted by the Ministers of Justice sitting in the Council on 1 June 2012, doc. No. 10609/12, JUSTCIV 209, CODEC 1495, Article 4-*bis* and the Opinion Delivered by the European Parliament on 20 November 2012, doc. Pt\_TA-PROV(2012)11-20, PE 495.880, Article 6.

<sup>11</sup> See, among others, on the solutions finally retained in Regulation (EU) No. 1215/2012 (“Brussels I-*bis* Regulation” or “Brussels I Recast Regulation”) in respect of jurisdiction in situations connected to third countries, among others, J.-P. BERAUDO, Regards sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale, *Clunet* 2013, p. 741 *et seq.*, esp. p. 746 *et seq.*; F. CADET, Le nouveau règlement Bruxelles I ou l’itinéraire d’un enfant gâté, *ibidem*, p. 765 *et seq.*, esp. p. 772 *et seq.*; H. GAUDEMET-TALLON/ C. KESSEDJIAN, La refonte du règlement Bruxelles I, *Rev. trim. droit eur.* 2013, p. 435 *et seq.*, esp. p. 439 *et seq.*; A. LEANDRO, Prime osservazioni sul regolamento (UE) n. 1215/2012 (“Bruxelles I bis”), *Il giusto processo civile* 2013, p. 583 *et seq.*, esp. p. 594 *et seq.*; P.A. NIELSEN, The New Brussels I Regulation, *Common Market Law Review* 2013, p. 503 *et seq.*, esp. p. 512 *et seq.*

## **II. Taking into Account Parallel Proceedings Pending before Third Country Courts: Justification for the Innovation Introduced by the Recast Regulation**

With respect to the rules on *lis alibi pendens* and related actions, the attitude regarding their subjective scope of application has been different from the start, that is, already within the text of the 1968 Brussels Convention. In fact, these rules were conceived within the original architecture of the Brussels Convention to complement the rules regarding mutual recognition and enforcement of judgments as among the Member States of the then European (Economic) Community. They were clearly conceived to prevent the risk of conflicting decisions being handed down by courts in different Member States, a circumstance which could easily be identified as an obstacle to the achievement of the objective of mutual recognition. Accordingly, since the objective of mutual recognition of judgments as among the Member States was to be achieved irrespective of the domicile of either of the parties to the dispute, the aim of preventing the occurrence of conflicting or irreconcilable judgments was clearly pursued to the same extent. Therefore, the rules on *lis alibi pendens* and related actions, as contained in the Brussels Convention first and then in the Brussels Regulation, are meant to apply irrespective of any subjective requirement of connection of the parties to the Member States, since the circumstance of the proceedings being actually pending before the courts of different Member States is the sole decisive element in this respect.<sup>12</sup>

Nonetheless, the possible involvement of third country courts alongside Member States' courts with respect to the same dispute or related disputes cannot be disregarded if we accept the applicability of the said rules of coordination among proceedings pending before courts of different Member States to actions allegedly implying also third-country related parties or material elements of the case. This possibility was envisaged from the start by the Brussels Convention of 1968 which, in a provision that appears in the same terms in Regulation Brussels I, as well as in the Recast Regulation, provides for the refusal of recognition of a judgment delivered by the courts of another Member State in case of conflict with a judgment previously delivered in a third country on the same dispute and between the same parties, provided the said third-country judgment can be recognised in the Member State concerned.<sup>13</sup>

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A. NUYTS, *La refonte du règlement Bruxelles I*, *Rev. crit. dr. int. pr.* 2013, p. 1 *et seq.*, esp. p. 4 *et seq.*

<sup>12</sup> The point has been stressed already with regard to the rules on *lis alibi pendens* as contained in the Brussels Convention of 1968 by the ECJ, 27 June 1991, C-351/89, *Overseas Union Insurance Ltd. et al. v. New Hampshire Insurance Co.*, *ECR* [1991] I-3317 *et seq.*, paras 13 *et seq.* For further references, see F. MARONGIU BUONAIUTI, *Lis Alibi Pendens and Related Actions in Civil and Commercial Matters Within the European Judicial Area*, *YPIL* 2009, p. 511 *et seq.*, esp. p. 519 *et seq.*

<sup>13</sup> See the rules as contained, respectively, in Article 27 No. 5 of the Brussels Convention of 1968, as introduced by the Accession Convention of 1978; in Article 34 No. 4 of Regulation (EC) No. 44/2001 ("Brussels I Regulation") and in Article 45 (1)(d) of Regulation (EU) No. 1215/2012 ("Brussels I Recast Regulation").

Accordingly, just as the occurrence of the delivery of conflicting judgments by the courts of different Member States is to be prevented by means of the rules on *lis alibi pendens* and related actions, a corresponding need exists with respect to third country courts, which may be concurrently seized of actions regarding either the same dispute pending before the courts of a Member State or a related dispute. This is precisely the aim of the innovation introduced by the Recast Regulation, which purports to remedy the lack of coordination with the recognition rules in the Brussels I Regulation by expressly regulating, under Articles 33 and 34 respectively, the occurrence of the presence of actions on the same dispute or related actions pending before the courts of third countries.<sup>14</sup> The Recast Regulation does not, however, regulate the recognition in the Member States of judgments delivered by third country courts which, following the same lines of the existing Brussels I Regulation, remain subject to individual Member States' rules on the recognition of foreign judgments or, eventually, to any applicable international convention. In this respect, it might be considered that the Recast Regulation has given rise to a situation of asymmetry between the territorial reach of its rules concerning coordination among competing jurisdictions, which now extend to situations where third country courts are involved, and its rules concerning the recognition and enforcement of judgments, which remain confined to the *intra*-EU domain. A corresponding asymmetry is, accordingly, to be noted with respect to the impact of the rules contained in the Recast Regulation on domestic rules regarding either aspect. In fact, whereas the application of domestic rules on the recognition and enforcement of foreign judgments remains unprejudiced in respect of judgments delivered by third country courts, the new rules contained in Articles 33 and 34 of the Regulation will have a destructive effect on domestic rules concerning *lis alibi pendens* and related actions pending before foreign courts, a consequence which could be considered as unwarranted since in most cases those rules are already capable of ensuring comparable effects in terms of coordination with the jurisdiction of third country courts and prevention of conflicting judgments.<sup>15</sup>

Before addressing the manner in which the rules as introduced in the Recast Regulation purport to achieve the desired aim of coordination with the courts of third countries, it is to be observed that the said aim is not pursued in respect of any

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<sup>14</sup> The innovation was already present within the proposal for a recast of the Brussels I Regulation submitted by the European Commission in December 2010. The proposal, nonetheless, provided only for a rule in respect of *lis alibi pendens* before third country courts, without taking into consideration related actions pending before such courts: see COM(2010) 748 final, Article 34. We commented on the solution advanced by the proposal in this respect in F. MARONGIU BUONAIUTI, *La disciplina della litispendenza nei rapporti tra giudici di paesi membri e giudici di paesi terzi nella proposta di revisione del regolamento n. 44/2001*, *Riv. dir. int.* 2011, p. 496 *et seq.* See also L. FUMAGALLI, *Lis Alibi Pendens. The Rules on Parallel Proceedings in the Reform of the Brussels I Regulation*, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 237 *et seq.*, esp. p. 249 *et seq.*

<sup>15</sup> This aspect of the introduction of the new rules will be examined *infra*, par. VI, discussing the residual role of domestic rules on *lis alibi pendens* and related actions pending before foreign courts.

action falling within the material scope of application of the Regulation itself. Instead, the application of both provisions is limited to those cases in which the court seized in a Member State is neither vested with exclusive jurisdiction (on a ground directly established by the Regulation or pursuant to a choice of court agreement), nor with jurisdiction pursuant to the special rules of jurisdiction established by the Regulation for matters presenting the need to protect weaker parties. The said limitation marks a difference from the ordinary rules on *lis alibi pendens* and related actions as among courts of different Member States. These rules apply irrespective of the ground on which the jurisdiction of the seized courts is based, with the sole exception, introduced by the Recast Regulation, of the second seized court being vested with exclusive jurisdiction pursuant to a choice of court agreement. In that case, nonetheless, the application of the rule on *lis alibi pendens* is not excluded altogether, though it differs substantially in terms of its mode of operation.<sup>16</sup> The exclusion of the application of the rules on *lis alibi pendens* and related actions *vis-à-vis* the courts of third countries in the said cases is to be considered as due to the need to ensure respect for the exclusive jurisdiction of Member States courts granted by the Regulation directly or by the will of the parties. It also complies with the allocation of jurisdiction specifically devised by the Regulation for weak-party relationships, in respect of which third country courts are not subject to comparable rules of jurisdiction nor to any duty to accept the jurisdiction of Member States courts as exclusive or the relevant allocation as mandatory.<sup>17</sup>

Nonetheless, a problem of coordination arises with respect to the above-mentioned provision, which still appears under Article 45(1)(d) of the Recast Regulation, whereby recognition of a judgment delivered by a Member State court

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<sup>16</sup> See Article 31(2) of Regulation (EU) No. 1215/2012, which provides for a substantial reversal of the rule on *lis alibi pendens* in such a case, so that any other court sitting in another Member State shall stay its proceedings until the designated court has declared whether it will exercise jurisdiction pursuant to the choice of court agreement. The said exception to the rule on *lis alibi pendens* has been introduced in order to overcome the apparent obstacle to the effectiveness of a choice of court agreement inherent in the functioning of the rules on *lis alibi pendens*, whereby the court designated in the agreement would have been compelled to stay its proceedings if a court sitting in another Member State had been seized first, until that court – which would have been vested with the competence to assess the validity and applicability of the choice of court agreement – had declined jurisdiction, as stressed by the ECJ, 9 December 2003, C-116/02, *Erich Gasser GmbH v. MISAT Srl*, ECR [2003] I-14693 *et seq.* The solution maintained by the ECJ in that case has been criticised especially by jurists from common law jurisdictions: see in particular T.C. HARTLEY, Choice-of-court Agreements, *Lis Pendens*, Human Rights and the Realities of International Business: Reflections on the Gasser Case, in *Le droit international privé: esprit et methods, Mélanges en l'honneur de Paul Lagarde*, Paris 2005, p. 383 *et seq.*; L. MERRETT, The Enforcement of Jurisdiction Agreements Within the Brussels Regime, *I.C.L.Q.* 2006, p. 315 *et seq.*; R. FENTIMAN, Parallel Proceedings and Jurisdiction Agreements in Europe, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland/Oregon 2007, p. 27 *et seq.*

<sup>17</sup> This is probably a shortcoming which is inherent in the unilateral mode of operating of the coordination with the jurisdiction exercised by third country courts introduced by the provisions under consideration, which are deemed to operate beyond any reciprocity, as correctly observed by L. FUMAGALLI (note 14), at 249.

in another Member State may be refused if the judgment is in conflict with an earlier judgment delivered by a third country court between the same parties and concerning the same cause of action, which is eligible for recognition in the Member State concerned. In fact, the said rule, which the Recast Regulation has maintained unchanged from the text of the existing Brussels I Regulation, applies regardless of the basis for jurisdiction of the Member State court that handed down the judgment to be recognised. Consequently, whereas the exercise of jurisdiction by a Member State court under one of the heads concerned may not be precluded by the existence of a parallel action pending before the courts of a third country, the recognition of a judgment delivered by that court under such a head of jurisdiction in the other Member States could be precluded by a judgment delivered in the meantime by a court sitting in a third country even if, hypothetically, the latter had been seized later than the Member State court.

### **III. Discretion as a Distinctive Feature of the Rules Concerning *lis alibi pendens* and Related Actions before Third Country Courts**

We move now to an analysis of the mode of operation of the rules regarding *lis alibi pendens* and related actions in the relationships with third country courts. The most salient feature of these rules as compared to the rigid approach which inspires the corresponding rules regarding the same relationships among the courts of different Member States is the broad discretion which they confer on Member States' courts in respect of the appropriateness of applying them in the individual case.<sup>18</sup>

Particularly striking in this respect is the difference in approach between the rules addressing the two situations of *lis alibi pendens*. In fact, the application of the rules of *lis pendens* as among the courts of different Member States is mandatory. This implies, first, that the Member States' courts have a duty to apply those rules *ex officio*. Secondly, they are obliged to stay the proceedings pending before them and dismiss the case once the relevant grounds are met. Conversely, the application of the rules of *lis pendens* with respect to proceedings pending before third country courts is left to the discretion of the Member State court seized. Articles 33 and 34 of the Recast Regulation firstly leave it to the domestic law of the Member State of the court seized to determine whether the courts are to apply the rule *ex officio*, failing which both rules are to be intended as applicable only *ex*

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<sup>18</sup> This is probably the most striking feature of the innovation introduced by the Recast Regulation, which has been frequently underlined in the first commentaries: cf., particularly, L. FUMAGALLI (note 14), at 249 *et seq.*, and, among general comments on the Recast Regulation as a whole, J.-P. BERAUDO (note 11), at 753 *et seq.*; F. CADET (note 11), at 775 *et seq.*; H. GAUDEMET-TALLON/C. KESSEDJIAN (note 11), at 442 *et seq.*; A. LEANDRO (note 11), at 603 *et seq.*; P.A. NIELSEN (note 11), at 513 *et seq.*; A. NUYTS (note 11), at 7 *et seq.* The inherently flexible nature of the instrument of coordination with the jurisdiction of third country courts is underlined also in the Preamble to the Recast Regulation, Recital No. 23.



parte.<sup>19</sup> Secondly, the courts seized in the Member States are under no duty to stay proceedings in favour of a third country court, even when the requirements established by the rule are met. Inevitably, this difference is less sensible with respect to related actions, where also the rules regarding the relationships among Member States' courts provide for a discretionary evaluation by the court second seized. This is justified in light of the different contexts and the different perspectives in which the two sets of rules operate.

In fact, whereas among the Member States the relevant context is that of the European Judicial Area within which the automatic recognition of judgments is the general rule and where, due to the significant innovations introduced in this respect by the Recast Regulation itself, judgments delivered in a Member State are, subject to certain conditions, directly enforceable in the other Member States without need for any declaration of enforceability (*exequatur*),<sup>20</sup> the context is not the same with respect to actions pending before third country courts.<sup>21</sup> Accordingly, the perspective from which the Regulation operates, consisting of a distribution of jurisdiction within a closely integrated system sharing common values and traditions and, crucially, common standards of procedural fairness, cannot be extended to the relationships with third countries. In terms of the latter, the perspective from which the innovation introduced by the Recast Regulation moves is that of a unilateral effort

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<sup>19</sup> See, respectively, Article 33(4) of the Recast Regulation in respect of *lis alibi pendens* and Article 34(4) concerning related actions. See *infra*, VI, concerning the residual role of the domestic rules on *lis alibi pendens* and related actions in the relationships with third countries.

<sup>20</sup> This is probably the most significant innovation introduced by the Recast Regulation since it extends to all judgments in civil and commercial matters, falling within the material scope of application of the Regulation, a solution strictly inspired, albeit with some modifications, to that previously introduced, in respect of judgments on non-contested claims, in Regulation (EC) No. 805/2004 on the establishment of a European enforcement order. See for an analysis of the new regime introduced by the Recast Regulation in this respect, among others, J.-P. BERAUDO (note 11), at 756 *et seq.*; F. CADET (note 11), at 770 *et seq.*; H. GAUDEMET-TALLON/ C. KESSEDJIAN (note 11), at 451 *et seq.*; A. LEANDRO (note 11), at 610 *et seq.*; P.A. NIELSEN (note 11), at 524 *et seq.*; A. NUYTS (note 11), at 22 *et seq.*; with regard to the solutions, from which the final text of the Regulation slightly departed, advanced in the proposal submitted by the European Commission, Th. PFEIFFER, Recast of the Brussels I Regulation: The Abolition of *Exequatur*, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 311 *et seq.*; M. DE CRISTOFARO, The Abolition of *Exequatur* Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense, *ibidem*, p. 353 *et seq.* See also, concerning the latter aspect, F. MARONGIU BUONAIUTI (note 9), at 361 *et seq.*

<sup>21</sup> As noted already (*supra* II.), the Recast Regulation, following the same approach as the current Brussels I Regulation, regulates only the recognition and enforcement of judgments delivered by Member States' courts, whereas the recognition of judgments delivered by third country courts is left to the domestic law of the Member States or to international conventions as may be applicable to the relationships between the individual Member State and the third country concerned. See, on the opportunity to provide for common rules regarding the recognition in the Member States of judgments delivered by third country courts, S.M. CARBONE, What About the Recognition of Third States' Foreign Judgments?, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 299 *et seq.*, esp. p. 301 *et seq.*

of coordination with the jurisdiction of third country courts, which is attempted independently from any condition of reciprocity and towards third countries belonging to various legal traditions. Within the much broader context in which the rules attempting the said unilateral effort of coordination are deemed to operate, it is clearly impossible to place a comparable degree of reliance on the likelihood of the proceedings pending before a third country court to end up with a judgment capable of recognition in the Member State of the court seized as would apply in *intra*-EU cases.<sup>22</sup>

This justifies the express provision in both Articles 33 and 34 of the Recast Regulation of a requirement for granting a stay of the proceedings pending before a Member State court which is frequently present within domestic rules concerning *lis alibi pendens* or related actions before foreign courts, whereby the court is to establish that the judgment to be delivered by the third country court concurrently seized of the same or of a related action is capable of being recognised in the Member State of the court seized.<sup>23</sup> Such an assessment, which substantially

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<sup>22</sup> In substance, in the relationships with the courts of third countries it proves difficult to establish a principle of reciprocal faith, which is distinctive of the European judicial area as a space where judges of a Member State may entrust those sitting in the other Member States to deliver judgments capable of being recognised and enforced in the other Member States and to correctly apply the same set of rules concerning jurisdiction. The principle of reciprocal faith has been used on various occasions by the ECJ to stress the need for Member States' courts to respect the determinations made by other Member States' courts regarding jurisdiction: in particular, ECJ, 9 December 2003, C-116/02, *Erich Gasser GmbH v. MISAT Srl* (note 16), concerning the competence to decide on the validity of a jurisdiction agreement designating a court of another Member State; ECJ, 27 April 2004, case C-159/02, *Turner v. Grovit*, ECR [2004] I-3565 *et seq.*, concerning the exclusion of the power to issue *anti-suit injunctions* which could have the effect of preventing a judge sitting in another Member State from exercising his jurisdiction; ECJ, 10 February 2009, *Allianz S.p.a. c. West Tankers Inc.*, ECR [2009] I-663 *et seq.*, extending the same solution to a case where the injunction had been issued to enforce an arbitration clause.

<sup>23</sup> Such a requirement is present, among others, under Italian law, under Article 7 of law No. 218/1995 providing for the reform of the Italian system of private international law: see, among others, C. CONSOLO, *Profili della litispendenza internazionale*, Riv. dir. int. 1997, p. 5 *et seq.*, esp. p. 38 *et seq.*; R. MARENGO, *La litispendenza internazionale*, Turin, 2000, p. 98 *et seq.*; F. MARONGIU BUONAIUTI, *Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile*, Naples 2008, p. 34 *et seq.*, p. 399 *et seq.* In French Law, see the judgment of the French Cour de cassation, 1<sup>re</sup> Ch. Civ., 26 November 1974, *Soc. Miniera di Fragne*; annotated by A. PONSARD, *Clunet* 1975, p. 108 *et seq.*; annotated by D. HOLLEAUX, *Rev. crit. dr. int. pr.* 1975, p. 491 *et seq.* In German law, see judgment of the Bundesgerichtshof, 2 October 1957, *Neue Juristische Wochenschrift* (NJW) 1958, p. 103 *et seq.* and R.A. SCHÜTZE, *Die Berücksichtigung der Rechtshängigkeit eines ausländischen Verfahrens*, NJW 1963, p. 1486 *et seq.* In Austrian law, see the case law of the *Oberster Gerichtshof* (OGH), among which OGH, 23 February 1982, *Zeitschrift für Rechtsvergleichung* (ZfRV) 1984, p. 145 *et seq.*; annotated by A. KONECNY, *Zur Einrede der Streitanhängigkeit*, *ibidem*; OGH, 12 February 1997, *IPRax* 1999, p. 385 *et seq.*; annotated by B. HEIDERHOFF, *Widerklage und ausländische Streitanhängigkeit*, *IPRax* 1999, p. 392 *et seq.* In Swiss Law, see Article 9 of the Swiss federal law on private international law (LDIP) and I. SCHWANDER, *Ausländische Rechtshängigkeit nach IPR-Gesetz und Lugano-Übereinkommen*, in *Beiträge zum schweizerischen und internationalen Zivilprozessrecht. Festschrift für Oscar Vogel*, Freiburg (CH) 1991, p. 395

consists of a forecast, a prognostic evaluation as significantly conveyed by the German expression *Anerkennungsprognose*, is to be performed on the basis of the domestic rules on recognition of foreign judgments, due to the inapplicability to third-country judgments of the rules contained in the Regulation. Due to its prognostic nature, the said assessment inevitably implies a certain degree of discretion, alongside an inevitable margin of uncertainty, by the judge. In fact, subject to the peculiarities of the relevant domestic rules, such an evaluation is inherently incomplete. Actually, some of the elements to be taken into consideration are present already at the moment when the assessment takes place, such as those regarding the jurisdiction of the foreign court and the regularity of the introductory phase of the proceedings. Others are inevitably to be appreciated by inference from the circumstances of the case as they appear at the moment when the evaluation is performed. Accordingly, the assessment regarding the latter may eventually be rebutted based on subsequent developments and by the judgment to be delivered by the foreign court. Among these, feature the compatibility of the judgment to be delivered by the third country court with the public policy of the Member State of the court seized; the capacity of the judgment to become final and, where applicable, to acquire the force of *res iudicata* in the country of origin; and finally, reflecting the most commonly contemplated grounds of recognition, the absence of any conflict with judgments to be delivered in the Member State of the court seized – excluding the judgment to be delivered by the court seized in the proceedings concerned, which, due to the stay granted, will certainly not be delivered earlier than the foreign judgment – or with judgments enforceable in the same country.<sup>24</sup>

If the requirement just mentioned is not novel to the regulation of *lis alibi pendens* before foreign courts at a domestic level, as it finds its justification from a systematic perspective in the attitude of *lis pendens* to promote a coordination among competing jurisdictions, paving the way for the recognition of the judgment to be delivered by the foreign court seized of the concurrent action, more peculiar is the second requirement of Articles 33 and 34 of the Recast Regulation. In fact, the requirement that the granting of a stay is necessary for the proper administration of justice appears more strictly inspired, in its broadly discretionary nature, to a different technique of coordination among competing jurisdictions, which is inherent in the doctrine of *forum non conveniens*. Such a doctrine, which is familiar uniquely to common law countries, is based on an exercise of self-restraint by the court seized of an action. Such self-restraint presupposes that the action, though

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*et seq.* In Belgian law, see Article 14 of the Belgian code of private international law and J.-Y. CARLIER (note 8), at 25.

<sup>24</sup> The inevitable prognostic and incomplete nature of the assessment to be performed by the judge regarding the likelihood of the proceedings pending abroad to result in a judgment capable of recognition in the *forum* at the stage when the judge is expected to decide on the granting of a stay due to *lis alibi pendens* has been historically a ground for resistance from a systematic perspective to the attribution of effects to the mere fact of proceedings pending abroad, since this would have caused a significant element of uncertainty: see, in particular, G. MORELLI, *Diritto processuale civile internazionale*, II ed., Padua 1954, p. 169 *et seq.*, who pointed to this shortcoming in order to justify the negative attitude towards *lis alibi pendens* in respect of proceedings pending abroad adopted at that time under Italian law, pursuant to Article 3, Code of civil procedure.

falling within the limits of the court's jurisdiction, nonetheless appears weakly linked to the *forum*. At the same time, the application of the doctrine presupposes that the action presents stronger connections with another country, in whose courts, on an overall assessment of the relevant circumstances, it would be likely to be entertained more appropriately than in the *forum*. The decision to grant a stay of an action on the grounds of *forum non conveniens* is generally made subject to a further condition, which is the same as that contemplated by the Recast Regulation for the purposes of granting a stay of an action on grounds of *lis alibi pendens* or of a related action pending before a third country court. The court is to be satisfied that the granting of a stay is necessary for the correct administration of justice.<sup>25</sup>

Such a requirement, which is inevitably discretionary in nature, is strictly due to the need to ensure that the decision to grant a stay of an action pending before the court of a Member State based on the presence of a parallel action pending before the court of a third country does not endanger the right of the applicant to obtain a fair trial. Such a right could be jeopardized not only by the wait until the end of proceedings pending before the third country court concurrently seized, but also, particularly in case of *lis alibi pendens* where the same action is pending abroad, by a lack of familiarity by the defendant of procedure in the third country court, which may provide less satisfactory standards of procedural fairness than those generally available in a Member State court. The requirement under examination is to be evaluated carefully by the Member State courts, since a decision to stay proceedings pending before them in order to give way to a concurrent action pending before a third country court could entail a responsibility for the Member State whose courts exercised their discretion recklessly. In such a situation, in fact, a Member State could face the risk of being held liable for having violated the provisions under Article 6 of the European Convention on Human Rights as well as under Article 47 of the Charter of Fundamental Rights of the EU, which applies to action taken by a Member State court pursuant to a provision contained in a EU Regulation,<sup>26</sup> in case the third country court appears unable to

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<sup>25</sup> The requirements to which the granting of a stay on *forum non conveniens* grounds is subject have been clearly specified, under English law, by the well-known House of Lords judgment in the case of *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1987] A.C. 460 *et seq.*, esp. p. 475. Literature on the said doctrine is particularly extensive: we may refer, among others, to Ch. CHALAS, *L'exercice discrétionnaire de la compétence juridictionnelle en droit international privé*, Aix-Marseille 2000, p. 220 *et seq.*; M.A. LUPOI, *Conflitti transnazionali di giurisdizioni*, Milano 2002, p. 145 *et seq.*, esp. p. 167 *et seq.*; A. NUYS, *L'exception de forum non conveniens (Etude de droit international privé comparé)*, Bruxelles 2003, p. 183 *et seq.* The doctrine has also formed the subject of a resolution adopted by the INSTITUT DE DROIT INTERNATIONAL, *Le recours à la doctrine du forum non conveniens et aux « anti-suit injunctions »: principes directeurs/ The Principles for Determining When the Use of the Doctrine of forum non conveniens and Anti-Suit Injunctions is Appropriate*, *Annuaire de l'Institut de droit international* vol. 70-I (2003), p. 1 *et seq.*; A. NUYS, *Les principes directeurs de l'Institut de droit international sur le recours à la doctrine du forum non conveniens et aux antisuit injunctions*, *Revue belge de droit international* 2003, p. 536 *et seq.*

<sup>26</sup> Pursuant to Article 51 of the Charter of Fundamental Rights of the European Union, the latter applies to the institutions of the EU and to Member States only insofar as they are implementing provisions of EU law: see, among others, A. ROSAS/ H. KAILA,

secure satisfactory standards of fair trial as established pursuant to those provisions according to their interpretation by the European Court of Human Rights.<sup>27</sup>

#### **IV. Grounds for Resuming Proceedings as a Safeguard for the Procedural Rights of the Parties**

It is in light of the risk inherent in the exercise of such a discretion that both provisions under Articles 33 and 34 of the Recast Regulation provide for exceptional circumstances under which a Member State court having stayed proceedings due to *lis alibi pendens* or to a related action pending before a third country court may decide to resume proceedings without waiting for the proceedings pending before that court to have come to an end. The said exceptional grounds for resuming proceedings broadly correspond, in negative and alternative terms, to the requirements allowing, cumulatively, for the granting of a stay, and, inherently, they imply in turn the exercise of a certain degree of discretion on the part of the Member State court seized. The Member State court having stayed proceedings may, in fact, discretionally decide to resume proceedings in a series of circumstances in which, on different grounds, the third country court seized of the concurrent action no longer appears to be in a position to grant an effective, timely and fair handling of the case pending before it. This may in turn occur either due to the fact that the third country court stayed or discontinued the proceedings pending before it, or

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L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan, *Il diritto dell'Unione europea* 2011, p. 1 *et seq.*; J. ZILLER, I diritti fondamentali tra tradizioni costituzionali e "costituzionalizzazione" della Carta dei diritti fondamentali dell'Unione europea, *ibidem*, p. 539 *et seq.*

<sup>27</sup> We discussed this issue in F. MARONGIU BUONAIUTI, *Forum non conveniens* e art. 6 della convenzione europea dei diritti dell'uomo, *Riv. dir. int.* 2001, p. 420 *et seq.*, commenting on the House of Lords judgment in the case of *Lubbe and ors. v. Cape Plc.*, [2000] UKHL 41, where the House of Lords excluded the possibility of granting a stay on *forum non conveniens* grounds when, due to the absence of measures of legal aid comparable to those available before the English courts, the applicants would not be in a position to entertain proceedings before the allegedly more appropriate court. More broadly, on the relevance of a correct establishment of jurisdiction for the right of the parties to obtain a fair trial, among others, J.J. FAWCETT, The Impact of Article 6(1) of the ECHR on Private International Law", *I.C.L.Q.* 2007, p. 1 *et seq.*; A. HALFMEIER, Menschenrechte und internationales Privatrecht im Kontext der Globalisierung, *RabelsZ* 2004, p. 653 *et seq.*; P. KINSCH, Droits de l'homme, droits fondamentaux et droit international privé, *Recueil des Cours* vol. 318 (2005), p. 9 *et seq.*, esp. p. 65 *et seq.*; F. MARCHADIER, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Bruxelles 2007, p. 183 *et seq.*; P. SCHLOSSER, Jurisdiction in International Litigation: The Issue of Human Rights in Relation to National Law and to the Brussels Convention, *Riv. dir. int.* 1991, p. 5 *et seq.*

that the third court appeared unable to deliver a timely judgment on the merits, or, more generally, due to the need to ensure the correct administration of justice.<sup>28</sup>

Again, whereas the first ground contemplated for a resumption of proceedings by the Member State court, albeit subject to its discretionary evaluation, is linked to objective circumstances of fact, such as the proceedings before the third country court having materially been stayed or discontinued, the others imply a much broader degree of discretion. In particular, the appearance of the third country court being unable to conclude its proceedings in a timely manner introduces an element which, though relevant within the context of the guarantee of a fair trial pursuant to both Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the EU, has been considered by the European Court of Justice as alien to the logic of the rules on *lis alibi pendens* as contained formerly in the Brussels Convention of 1968 and then in the Brussels I Regulation.<sup>29</sup> Although the principle of mutual faith among the judicial systems of the Member States has precluded the attribution of relevance to that factor, the difference in treatment between proceedings pending before Member State courts and third country courts appears unwarranted. As it is well known, from case law of the European Court of Human Rights and domestic legislation passed to remedy the situation, lengthy proceedings are certainly not an exclusive prerogative of third country courts.<sup>30</sup>

Oddly, whereas one of the requirements for granting a stay of proceedings is the appearance that the third country court is likely to deliver a judgment capable of recognition in the Member State of the court seized, the subsequent appearance to the contrary due to the emergence of new elements is not contemplated as a ground for resuming proceedings. Such a situation may, nonetheless, be considered as likely to fall under the catch-all provision allowing for the resumption of proceedings in order to ensure the correct administration of justice.

Symmetry is instead to be found with respect to the additional requirements for granting a stay and resuming proceedings in case of a related action pending

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<sup>28</sup> See, respectively, Art. 33(2) of the Recast Regulation in respect of *lis alibi pendens* before a third country court and Art. 34, par. 2 of the same Regulation in respect of related actions pending before such a court.

<sup>29</sup> ECJ, *Gasser* (note 16), at paras 70 *et seq.* See, among others, J.J. FAWCETT (note 27), at 13 *et seq.*; R. FENTIMAN, Access to Justice and Parallel Proceedings in Europe, *Cambridge Law Journal* 2005, p. 312 *et seq.*; T.C. HARTLEY (note 16), at 389 *et seq.*; Th. SCHILLING, Internationale Rechtshängigkeit vs. Entscheidung binnen angemessener Frist. Zum Zusammenspiel von Art. 6 I EMRK, Art. 307 EGV und Art. 27 EuGVV, *IPRax* 2004, p. 294 *et seq.*

<sup>30</sup> Most notably, in Italy such a problem has become so significant, after a long series of judgments delivered by the European Court of Human Rights affirming the violation of the rule under Article 6(1) of the ECHR due to the excessive length of proceedings before the Italian courts, to cause the passing of a law providing for compensation to the parties aggrieved by such violations: law No. 89 of 24 March 2001, so called “legge Pinto” from the name of its promoter. See, concerning its interpretation by the Italian Court of Cassation, M.L. PADELLETTI, Le sezioni unite correggono la rotta: verso un’interpretazione della legge Pinto conforme alle decisioni della Corte europea dei diritti dell’uomo, *Riv. dir. int.* 2004, p. 452 *et seq.*

before a third country court under Article 34 of the Recast Regulation. In this case, in fact, since the appropriateness of a joint hearing and decision of the related causes in order to prevent the risk of irreconcilable decisions figures among the requirements for the granting of a stay of proceedings pending before a Member State court, the subsequent appearance that such a risk is not material any longer is contemplated among the alternative grounds for the resumption of proceedings. Nonetheless, it seems that this requirement, which appears in precisely the same terms for related actions pending before other Member States' courts under Article 30(3) of the Recast Regulation<sup>31</sup> pertains to the mere existence of the requirements for the concurrent actions to be considered as related for the purposes of the rule under consideration, and not to the distinct level of the appropriateness of a stay to be granted when a related action is pending before a third country court. Furthermore, whereas, in the context of intra-EU relationships, the granting of a stay of an action due to a related action pending before another Member State's courts is a prelude to a consolidation of the actions before the court first seized, provided the further requirements established in this respect are met, such a perspective is more difficult to achieve with regard to related actions pending before third country courts. A provision in this sense could hardly be unilaterally adopted in an EU act, which by definition cannot be binding on third countries. Therefore, the stay of proceedings due to a related action pending before a third country court as conceived under Article 34 of the Recast Regulation can hardly be considered as likely to ensure a joint hearing and decision of the related causes, whereas it could more modestly be held to allow the Member State court seized to wait for the third country court to decide on the related cause in order to take account of the judgment delivered in its respect for the purpose of deciding on the action pending in the *forum*.<sup>32</sup>

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<sup>31</sup> The same terms appeared in the corresponding provisions of Article 28(3) of the Brussels I Regulation as well as, earlier, in Article 22(3) the 1968 Brussels Convention.

<sup>32</sup> In fact, the consequences likely to derive from the granting of a stay of proceedings pending before a Member State court due to a related action pending before a third country court are to be considered as quite similar to those deriving from the application of analogous provisions contained in Member States' laws, such as Article 7(3) of Law No. 218/1995 providing for the reform of the Italian system of private international law, which provides for a discretionary power of the seized court to suspend proceedings in case of an action concerning a preliminary issue pending before a foreign court. The purpose of the rule is clearly that of waiting for the preliminary issue to be decided by the foreign court in order to take account of the decision delivered, provided the latter meets the requirements for recognition, for the adjudication of the action pending in the *forum*. See, among others, C. CONSOLO (note 23), at 67 *et seq.*; R. MARENGO, (note 23), at 132; F. MARONGIU BUONAIUTI (note 23), at 481 *et seq.*

## V. Effects of the Judgment Delivered by the Third Country Court in the Same or in a Related Action on the Proceedings Pending before the Member State Court

The last point addressed brings us to the discussion of a critical element of the new rules concerning *lis alibi pendens* and related actions in the relationships with third country courts. This consists of the effects produced by the judgment delivered by the court seized in a third country on the action pending before the Member State court having stayed proceedings.<sup>33</sup>

In this respect, the difference in approach as compared to the solutions adopted for *intra*-EU cases under Articles 29 and 30 of the Recast Regulation is significant, and cannot but reflect the difference between the contexts in which the two sets of rules are intended to operate. In fact, whereas in the *intra*-EU context, sufficient reliance may be placed on the assumption that the proceedings pending before the court of another Member State which has affirmed its jurisdiction will end up with a judgment entitled to recognition and enforceable in the Member State of the second seized court, the same is not true in respect of the relationships with third country courts. With respect to proceedings pending before such courts, no reliance can be placed on the possibility of the judgment to be delivered by the court seized in a third country to be recognised or enforced in the Member State of the concurrently seized court, nor, as mentioned already, on the possibility for the applicant in the proceedings before the Member State court to have his cause consolidated with that pending on a related action before a third country court. This different state of affairs, which was underlined since the very beginning by subjecting the granting of a stay due to proceedings pending before a third country court to the requirement of a positive *Anerkennungsprognose*, turns into a radically more restrictive regulation of the effects ensuing from the granting of a stay of the proceedings. In fact, under both Articles 33 and 34 of the Recast Regulation, the proceedings in respect of which a stay has been granted shall remain suspended – unless they are resumed under one of the grounds examined above – for the entire duration of the proceedings pending before the third country court.<sup>34</sup> The Member

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<sup>33</sup> See, respectively, Article 33(3) of the Recast Regulation in respect of *lis alibi pendens* before a third country court and Article 34(3), in respect of related actions pending before such a court.

<sup>34</sup> The solution retained by the Recast Regulation in this respect is similar to that adopted in some domestic rules concerning *lis pendens* before a foreign court, where, accordingly, no reliance may be placed on the proceedings pending abroad to end up with a judgment amenable to recognition in the *forum*. See, with regard to Art. 7 of law No. 218/1995, providing for the reform of the Italian system of private international law, A. DI BLASE, *Influenza della Convenzione di Bruxelles sulla disciplina della litispendenza nella legge di riforma del diritto internazionale privato italiano*, in F. SALERNO (ed.), *Convenzioni internazionali e legge di riforma del diritto internazionale privato*, Padua 1997, p. 195 *et seq.*, esp. p. 196 *et seq.*; F. MARONGIU BUONAIUTI (note 23), at 504 *et seq.*; concerning Art. 9(3) of the Swiss Federal Act on Private International Law, among others, B. DUTOIT, *Commentaire de la loi fédérale du 18 décembre 1987*, 2<sup>nd</sup> edn, Bâle 1997, p. 19



State court having stayed the proceedings pending before it is allowed, or rather, in case of *lis pendens*, obliged to decline jurisdiction only once the proceedings before the third country court have been concluded with a judgment which can be recognised and, eventually, enforced in the Member State of the court seized. The particularly cautious approach adopted in this respect by the Recast Regulation inevitably confirms, if need be, the scarce reliance which may be placed on the prognostic evaluation performed by the Member State court upon deciding on the granting of a stay in respect of the likelihood of the proceedings pending before the third country court to end up with an enforceable judgment.

As for the difference between the regime respectively applicable to situations of *lis alibi pendens* and of related actions pending before a third country court, the solution adopted by the Recast Regulation appears reasonable in providing for a duty of the Member State court to decline jurisdiction in the former case and for a mere discretion in the latter. In fact, in case of *lis pendens* the two actions pending respectively before a Member State court and before a court sitting in a third country are assumed to be identical, albeit with the flexibility which the ECJ has adopted in interpreting the relevant requirements in respect of *intra-EU* cases.<sup>35</sup> Accordingly, the judgment delivered by the third country court, once recognised in the Member State of the concurrently seized court, is likely to fully absorb the object of the action which has been introduced before that court. Instead, in case of related actions, the objects of the concurrent actions are by definition not the same, except, of course, in case the applicant in the action pending before the Member State court seized has succeeded in having his action consolidated with that pending before the third country court. Therefore, the Member State court must be left with the necessary discretion in order to be able to assess the extent to which the judgment delivered by the third country court is capable, once recognised, to absorb the subject-matter of the action introduced before the Member State court or whether, conversely, an interest persists in the resumption of proceedings before that court in order to proceed with the case on the basis of the judgment delivered by the third country court on the related action.<sup>36</sup>

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*et seq.*; P. VOLKEN, Kommentierung zu Art. 9, in *Zürcher Kommentar zum IPRG*, 2<sup>nd</sup> edn, Zürich 2004, p. 111 *et seq.*, esp. p. 127 *et seq.*

<sup>35</sup> See, particularly, in respect of the requirement of the identity of the causes of action of the concurring proceedings, ECJ, 8 December 1987, case 144/86, *Gubisch Maschinenfabrik v. Palumbo*, ECR [1987], 4861 *et seq.*; ECJ, 6 December 1994, C-406/02, *Tatry (Owners of the cargo lately laden on board the ship) v. Maciej Rataj (Owners of the ship)*, ECR [1994] I-5439 *et seq.*, both concerning cases of actions for negative declarations as opposed to actions seeking the enforcement of a contract or the establishment of liability for damages; ECJ, 19 May 1998, C-351/96, *Druot assurances S.A. v. Consolidated Metallurgical Industries*, ECR [1998] I-3075 *et seq.*, concerning the requirement of the identity of the parties. We may refer, among others, to A. DI BLASE, *Connessione e litispendenza nella Convenzione di Bruxelles*, Padua 1993, p. 83 *et seq.*; F. MARONGIU BUONAIUTI (note 23), at 291 *et seq.*; *idem* (note 12), at 528 *et seq.*; C. MCLACHLAN, *Lis pendens in International Litigation*, Leiden/ Boston 2009, p. 117 *et seq.*

<sup>36</sup> An interest in the resumption of the proceedings stayed by the Member State court will subsist whenever the action pending before that court is dependent from the result of the action which has formed the subject of the proceedings pending before the third country court, in case the latter concerned a preliminary issue to be decided beforehand, as

## VI. Residual Role of Domestic Rules on *lis alibi pendens* and Related Actions before Foreign Courts

The introduction within the Recast Regulation of uniform rules addressing the situation where the same or related actions are pending before the courts of third countries provides an answer to a question which has been left open by the Brussels I Regulation and which has never been addressed expressly by the ECJ, that is, the applicability by Member State courts of domestic rules on *lis alibi pendens* or related actions pending before foreign courts to cases where the parallel proceedings are pending before third country courts.

This issue could apparently be easily disposed of by observing that since the rules on *lis pendens* and related actions as contained in the Brussels I Regulation applied only in respect of actions pending before other Member States' courts, no apparent obstacle existed to the applicability of domestic rules to a situation which the Regulation, just as previously the Brussels Convention of 1968, did not intend to regulate.<sup>37</sup> Nonetheless, the point proved controversial as a consequence of the position adopted by the ECJ in its case law related to both the Convention and the Regulation. In the said case law, in fact, the ECJ has developed the assumption that jurisdiction conferred upon the courts of a Member State by the provisions of the Brussels I Regulation or the Brussels Convention alike is to be considered as mandatory, so that the courts of a Member State vested with such a jurisdiction are not allowed to decline it in favour of third country courts applying their domestic rules.<sup>38</sup>

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contemplated under Italian law by Article 7(3) of Law No. 218/1995: see, among others, C. CONSOLO (note 23), at 67 *et seq.*; R. MARENGO (note 23), at 132; F. MARONGIU BUONAIUTI (note 23), at 481 *et seq.*

<sup>37</sup> Such has been the solution defended by the English Court of Appeal in the well-known judgment in the case of *In Re Harrods (Buenos Aires) Ltd.*, [1992] Ch. 72, and finds support also in the opinion of one of the first scholars addressing comprehensively the system established by the Brussels Convention of 1968: G.A.L. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris 1972, p. 198 *et seq.*, who admitted that courts sitting in Member States whose laws contemplated a *lis alibi pendens* rule in respect of proceedings pending before a foreign court could apply those rules in the relationships with third countries, so as to achieve the same objective of sound administration of justice which the Convention pursued as among the Member States. Perplexities were nonetheless raised by the cited judgment of the English Court of Appeal, insofar as it admitted the possibility of granting a stay on *forum non conveniens* grounds, due to the element of discretion which this would have introduced in a system based on rigid rules, whose application was aimed to ensure certainty and predictability: see, in particular, H. DUINTJER TEBBENS, The English Court of Appeal in *Re Harrods*: An Unwelcome Interpretation of the Brussels Convention, in M. SUMAMPOUW (ed.), *Law and Reality, Essays on National and International Procedural Law in Honour of C.C.A. Voskuil*, The Hague 1992, p. 47 *et seq.*; H. GAUDEMET-TALLON, Le “*forum non conveniens*”, une menace pour la convention de Bruxelles?, *Rev. crit. dr. int. pr.* 1991, p. 491 *et seq.*

<sup>38</sup> The applicability of the rules of jurisdiction as contained, at the relevant time, in the Brussels Convention of 1968 on the sole ground of the domicile of the defendant in a

Such a position, which can be considered as dictated by the logic of *effet utile*, whereby in having recourse to domestic rules to settle matters not expressly regulated by provisions of EU law, the Member States may not prejudice the attainment of the objective of EU rules applicable in the field concerned,<sup>39</sup> has been clearly maintained in the well-known *Owusu* case. The said case dealt with the application of a mechanism inherent in the doctrine of *forum non conveniens*, which does not find a direct parallel within the system of the Brussels I Regulation.<sup>40</sup> Nonetheless, it has been questioned whether the negative solution adopted by the Court could also extend to the applicability of other instruments, more homogeneous to those contemplated at an *intra*-EU level within the Regulation itself, by means of which Member States' courts could be brought to decline jurisdiction in favour of third country courts.<sup>41</sup> In this sense, the English Court of Appeal, not long after the ECJ judgment in the *Owusu* case, has maintained that the latter was of no prejudice to the power of the English courts to decline jurisdiction in a case subject to the Brussels I Regulation due to a choice of court clause designating a third country court, with due account taken of the weight attached to the will of the parties in the allocation of jurisdiction within the system of the

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Member State has been stressed by the ECJ particularly in its judgment of 13 July 2000, C-412/98, *Group Josi Reinsurance Co. v. UGIC*, ECR [2000] I-5925 *et seq.*, and the mandatory nature of the jurisdiction conferred by the Convention has been stressed by its well-known judgment of 1<sup>st</sup> March 2005, C-281/02, *Andrew Owusu v. N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, ECR [2005] I-1383 *et seq.*, where the ECJ notably excluded the applicability by a Member State court, namely an English court, of domestic rules, materially consisting of the doctrine of *forum non conveniens*, in order to grant a stay of proceedings based on a ground of jurisdiction provided by the Brussels Convention in favour of a third country court. See, among others, B. AUDIT/G.A. BERMANN, *The Application of Private International Norms to "Third Countries": The Jurisdiction and Judgments Example*, in A. NUYTS/N. WATTÉ (eds), *International Civil Litigation in Europe and Relations With Third States*, Brussels 2005, p. 55 *et seq.*, esp. p. 78 *et seq.*; R. FENTIMAN, *National Law and the European Jurisdiction Regime*, *ibidem*, p. 83 *et seq.*, esp. p. 101 *et seq.*; Th. KRUGER (note 2), at 265 *et seq.*; P. DE VAREILLES-SOMMIÈRES, *The Mandatory Nature of Article 2 of the Brussels Convention and Derogation from the Rule It Lays Down*, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland/Oregon 2007, p. 101 *et seq.*

<sup>39</sup> Regarding the *effet utile* of the rules on jurisdiction as contained in the 1968 Brussels Convention, the ECJ has held in its judgment of 15 May 1990, case 365/88, *Kongress Agentur Hagen GmbH v. Zeehage BV*, ECR [1990] I-1845 *et seq.*, paras 17 *et seq.*, that the application of domestic rules concerning admissibility of actions, an issue which is not governed by the Convention, though remaining in principle unaffected, may not prejudice the *effet utile* of the Convention, as would be likely to occur in case the application of such rules would preclude the application of the rules of jurisdiction contained in the Convention. The same *rationale* applies currently to the Regulation and prospectively to the Recast Regulation.

<sup>40</sup> ECJ, *Owusu* (note 38), esp. at paras 41 *et seq.*

<sup>41</sup> See, particularly, R. FENTIMAN, *Civil Jurisdiction and Third States: Owusu and After?*, *Common Market Law Review* 2006, p. 705 *et seq.*; Th. KRUGER (note 2), at 234 *et seq.*

Regulation itself.<sup>42</sup> Following the same line of reasoning, we have proposed elsewhere that the power of Member States' courts vested with jurisdiction under the Regulation to stay proceedings and, eventually, to decline jurisdiction due to proceedings pending before third country courts on the same or related actions pursuant to the domestic rules on *lis alibi pendens* or related actions before foreign courts could not be considered as barred by the position adopted by the ECJ in *Owusu*.<sup>43</sup> To reach that conclusion we argued that the rather inflexible solution adopted in that case was to be considered as due to the reluctance to accommodate the broad degree of flexibility and discretion inherent in the doctrine of *forum non conveniens* within the framework of the Brussels system, strictly inspired as it then appeared to certainty and predictability as concerns the establishment of jurisdiction.<sup>44</sup>

Inevitably, the solution adopted in the Recast Regulation represents a radical change in the perspective from which the issue had been considered, both because it expressly regulates the matter, thus absorbing any residual role which domestic rules could have maintained in this respect within the scope of application of the Brussels I Regulation, and because it addresses it by resorting to discretionary mechanisms which, as noted already, are in reality very similar to those inherent in the doctrine of *forum non conveniens* which the ECJ had not too many years earlier declared at odds with the rationale of the Brussels system of allocation of jurisdiction.<sup>45</sup> Leaving this second limb of the issue to some further remarks,

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<sup>42</sup> Court of Appeal (Civil Division), *Konkola Copper Mines v. Coromin*, [2006] 1 Lloyd's Rep. 410, confirming High Court of Justice (Queen's Bench Division), *Konkola Copper Mines v. Coromin*, [2005] EWHC 898 (Comm), summary in *Rev. crit. dr. int. pr.* 2006, p. 722 *et seq.*, note H. MUIR-WATT. Such a solution was expressly endorsed by the ECJ, prior to the *Owusu* judgment – in which the Court refrained from returning to the point, deeming it irrelevant for the disposal of the case pending before the referring court, where no choice of court agreement nor *lis alibi pendens* was at stake (see paras 47 *et seq.*) – in its earlier judgment of 9 November 2000, C-387/98, *Coreck Maritime GmbH v. Handelsveem BV*, ECR [2000] I-9337 *et seq.*, paras 19 *et seq.*

<sup>43</sup> See F. MARONGIU BUONAIUTI (note 14), at 496 *et seq.*, esp. p. 503 *et seq.*, and previously, *idem* (note 23), at 150 *et seq.*

<sup>44</sup> *Ibidem*. See, similarly, G. CUNIBERTI/ M. WINKLER, Note on Cour de justice des Communautés européennes, 1<sup>er</sup> mars 2005, *Clunet* 2005, p. 1183 *et seq.*, esp. p. 1188 *et seq.*; *idem*, *Forum non conveniens* e convenzione di Bruxelles: il caso *Owusu* dinanzi alla Corte di giustizia, *Diritto del commercio internazionale* 2006, p. 3 *et seq.*, esp. p. 19 *et seq.*; P. FRANZINA, Le condizioni di applicabilità del regolamento (CE) n. 44/2001 alla luce del parere 1/03 della Corte di giustizia, *Riv. dir. int.* 2006, p. 948 *et seq.*, esp. p. 975 *et seq.*; a more prudent approach was adopted by P. DE VAREILLES-SOMMIÈRES (note 38), at 113 *et seq.*, who proposed a discretionary evaluation of the opportunity of staying an action due to proceedings pending before a third country court in order to prevent an incentive to *forum shopping*; to the contrary, Th. KRUGER (note 2), at 266 *et seq.*, who prospected the introduction of an amendment to the Brussels I Regulation in order to expressly provide for the applicability of domestic provisions on *lis pendens* abroad in such cases.

<sup>45</sup> The rationale of the system embodied in the Brussels Convention and subsequently in the Brussels I Regulation being indeed that of ensuring certainty and predictability as concerns the establishment of jurisdiction, as clearly stressed by the ECJ in its judgment in the *Owusu* case (note 38), esp. at paras 38 *et seq.* See on this point, among others,

which we shall make later on, it is to be observed that domestic rules concerning *lis alibi pendens* or related actions pending before foreign courts will see their scope of application inevitably narrowed down to those sole cases which are not subject to the Recast Regulation since, within the scope of application of the latter, the matter will be entirely dealt with by either Article 33 or 34 of the Regulation.<sup>46</sup>

As noted already,<sup>47</sup> the rules as introduced by the Recast Regulation in respect of *lis alibi pendens* and related actions pending before third country courts leave one aspect of the application of the new rules for the Member States to regulate: the relevant regime of applicability. In fact, both rules, though providing for a default regime applicable in the absence of any domestic rule in the sense of allowing the applicability of either rule *ex parte* only, leave it open for the Member States to provide in their domestic law for the same rules to be applicable *ex officio*. The rule as formulated in the same terms under Articles 33(4) and 34(4) of the Recast Regulation actually leaves open the question of whether Member States are considered as expected to adopt, in case they wish to provide for the said rules to be applicable *ex officio*, specific implementing provisions or whether reference may be made, by analogy, to the regime of applicability of the corresponding rules existing in the domestic law of the Member States on *lis alibi pendens* or related actions pending before a foreign court. In this respect, the Recast Regulation contains no provision vesting the Member States with the responsibility to adopt specific provisions implementing the Recast Regulation for this specific purpose.

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A. DICKINSON, Legal certainty and the Brussels Convention: Too Much of a Good Thing?, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland/ Oregon 2007, p. 115 *et seq.*; P. MAYER, *Forum non conveniens* et application uniforme des règles de compétence, *ibidem*, p. 137 *et seq.*; G.P. ROMANO, Principe de sécurité juridique, système de Bruxelles I/Lugano et quelques arrêts récents de la CJCE, in A. BONOMI/ E. CASHIN RITAINE/ G.P. ROMANO (eds), *La Convention de Lugano. Passé, présent et devenir*, Zürich 2007, p. 165 *et seq.*, esp. p. 182 *et seq.*; *idem*, Le principe de sécurité juridique, à l'épreuve des arrêts *Gasser* et *Owusu*, *Cahiers de droit européen* 2008, p. 175 *et seq.*, esp. p. 185 *et seq.*; lastly, C.M. MARIOTTINI, The Proposed Recast of the Brussels I Regulation and *Forum non conveniens* in the European Union Judicial Area, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 285 *et seq.*, esp. p. 287 *et seq.*

<sup>46</sup> Indeed, with regard to actions not falling within the scope of application *ratione materiae* of the Recast Regulation, the issue of compatibility of the recourse to the domestic rules concerning *lis alibi pendens* or related actions pending abroad will not even come for consideration, since those actions are entirely subject to the domestic rules of jurisdiction. The problem addressed above (note 37 *et seq.*) could still be posed as concerns the applicability of domestic provisions on *lis pendens* and related actions pending abroad with respect to an action pending before a third country court whenever the action falls within the scope of application of other regulations bearing uniform rules on jurisdiction without expressly regulating the issue of *lis pendens* or related actions pending before a third country court, as in cases falling within the scope of application of the Brussels II-*bis* Regulation, No. 2201/2003, or the Maintenance Regulation, No. 4/2009, or, lastly, of the Succession Regulation, No. 650/2012, unless provisions comparable to Arts 33 and 34 of the Recast Regulation are introduced in those regulations as well, as might be advisable in order to ensure uniformity within the European jurisdiction regime.

<sup>47</sup> *Supra* III., note 19.

Therefore, an interpretation of the rule as referring to the solutions ordinarily contemplated in respect of the corresponding domestic rules would present the advantage of simplicity and of uniformity as concerns the attitude adopted within the same Member State regarding actions pending before a third country court. This would imply a corresponding treatment in this regard for situations falling under the new rules contained in the Recast Regulation and cases subject to the residually applicable domestic rules. Furthermore, such a solution would preserve an albeit limited scope of application for the relevant domestic rules within the scope of application of the Regulation, which would otherwise be excluded altogether. Such a consequence would likely appear disproportionate with respect to the fact that domestic rules continue to regulate, instead, the recognition of the judgments to be delivered by the third country courts seized of the concurrent actions. It is nonetheless to be conceded that, within the currently broad and diversified context of the Member States, it may not always prove easy for subjects located in a third country to identify the relevant domestic rules to be applied by analogy, and these, furthermore, may not expressly regulate the matter, leaving it to case law which may not always appear consistent.<sup>48</sup>

## VII. Final Remarks: The New Rules as a Revival of the Long-Standing Opposition between Certainty and Flexibility in the Allocation of Jurisdiction

The solution as embodied in Articles 33 and 34 of the Recast Regulation, although not devoid of difficulties and uncertainties regarding its prospective application, is to be considered as a significant innovation within the Brussels system of allocation of jurisdiction, in a twofold perspective.

From the one side, it represents a welcome, though incomplete, overcoming of the traditional, rigid *inter partes* approach which had inspired that system from the very moment when the Brussels Convention of 1968 had been conceived, and when the limits of a system artificially tending to isolate the relationships between the Member States from those with the rest of the world were probably less

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<sup>48</sup> For example, under Italian law, Art. 7(1) of law No. 218/1995, providing for the reform of the Italian system of private international law, apparently provides for the rule on *lis alibi pendens* in respect of proceedings pending before a foreign court to be applied *ex parte*, as should be clear from the wording of the provision (“Quando, (...), sia eccepita...”) and as was confirmed by the earlier case law: see C. CONSOLO (note 23), esp. at 51 *et seq.*; R. MARENGO (note 23), at 165 *et seq.*; F. MARONGIU BUONAIUTI (note 23), at 222 *et seq.* Recently, however, the Italian Court of Cassation (sez. un. civ.), 28 November 2012, No. 21108, *Riv. dir. int. priv. proc.* 2013, p. 762 *et seq.*, critically commented by S.A. VILLATA, Sulla nozione e sulla rilevanza d’ufficio della litispendenza internazionale nella l. 218/1995, *Rivista di diritto processuale* 2013, p. 1574 *et seq.*, esp. p. 1583 *et seq.*, has unpersuasively changed its initial position, admitting the application of the rule *ex officio*, though posing on the interested party, pursuant to a general rule, the burden of allegation of the relevant circumstances of fact.

resented. As noted already, the fact of taking into account the event of proceedings pending before a third country court on either the same or on related actions overcomes to a certain extent such a limit and reflects realistically the perspective of judgments to be delivered by third country courts in such actions to be recognised and enforced in the Member States, albeit still pursuant to their respective domestic rules.<sup>49</sup>

From the other side, the solution adopted, in providing a different and less automatic treatment of the situation of parallel actions pending before third country courts than that provided for in respect of actions pending before other Member States' courts, inevitably reflects the underlined differences in the relevant contexts and perspectives from which the two sets of rules are deemed to operate. What inevitably appears striking in the solution adopted by the Recast Regulation is that, in addressing the said difference, the Regulation has not simply chosen to provide for additional requirements for the granting of a stay of proceedings and eventually for declining jurisdiction in presence of parallel proceedings on either the same or related actions pending before a third country court. In reality, the Recast Regulation conveys the impression of having adopted a different technique in addressing such situations, based to a large extent on the exercise by the Member States' courts of the same sort of discretion which the ECJ had expressly declared to be alien to the Brussels system of allocation of jurisdiction.<sup>50</sup>

Ultimately, it is just as if the EU legislator had overcome the position adopted by the ECJ in its case law. The Court, in fact, had found in *Owusu* the discretion inherent in the doctrine of *forum non conveniens* incompatible with the basic principles of legal certainty and predictability in the exercise of jurisdiction by the courts of the Member States, as distinctive of the system enshrined in the Brussels Convention first and then in the Brussels I Regulation. In substance, discretion appears to have been officially accepted, after some breakthroughs in other EU acts adopted in the field of judicial cooperation in civil matters, among the tools of which the Member States' courts may avail themselves in applying the rules embodied in the system. This, nonetheless, happens so far only in respect of situations connected with third countries.<sup>51</sup> Inevitably, although the conceptual

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<sup>49</sup> As expressly admitted by Article 34(4) Brussels I Regulation, and, accordingly, by Article 45(1)(d), of the Recast Regulation, which provide that an earlier judgment on the same cause of action and between the same parties delivered in a third country and enforceable in the Member State requested constitutes a ground for refusal of recognition of a judgment delivered by another Member State's courts: *supra* II. See on the desirability of introducing uniform rules concerning the recognition of third country judgments in the Member States in order to prevent the risk of diverging outcomes and the incentive to *forum shopping* inherent in the coexistence of different national standards, S.M. CARBONE, (note 21), p. 301 *et seq.*

<sup>50</sup> ECJ, *Owusu* (note 38), at paras 41 *et seq.* See also *supra* VI., note 38 *et seq.*

<sup>51</sup> Actually, some earlier examples of a reception of a discretionary method of regulating the relationships among competing jurisdictions which could be considered as inspired by the *forum non conveniens* model are to be found, even though in the distinct sphere of the relationships among courts sitting in different Member States only, in Article 15 of EC Regulation No. 2201/2003, s. c. Brussels II-*bis*, providing for the referral of actions in matters of parental responsibility to the courts of another Member State presenting a close connection with the minor, provided such a transfer is suitable for the superior

obstacles which have made difficult the reception of legal institutions deriving from the common law world in a system strictly inspired to the civil law tradition are apparently removed, the practical difficulties remain. In fact, one thing is to allow courts belonging to the common law tradition to apply the instruments to which they are familiar, another matter is to provide that also other Member States' courts are to embark in exercises to which they are not acquainted. Even if reasonable preoccupations may lie behind the requirements concerning proceedings pending before third country courts, uncertainty and vagueness remains in the wording of some of the requirements for the granting of a stay due to *lis alibi pendens* or a related action pending before a third country court. In particular, it may prove difficult to identify the grounds on which the Member State court seized is to decide that the granting of stay is necessary for the correct administration of justice. One may wonder whether merely procedural considerations may come into account in that respect, or whether substantial ones, pertaining for example to the material result which is likely to be achieved in the proceedings pending before the third country court may also come into account in the balance which the court seized is expected to strike among the relevant circumstances of the case. In this respect, it is inevitable to observe that the taking into consideration of aspects pertaining to the substance of the case would imply attributing relevance also to the law to be applied by the third country court in the adjudication of the case. Such law will inevitably be determined pursuant to the private international law rules applicable in the third country concerned, which, as such, is not involved in the process of unification of such rules ongoing at EU level. In these terms, the application of the rules on *lis pendens* and related actions in respect of proceedings pending before third country courts as introduced by the Recast Regulation might operate as an instrument of coordination, albeit unilateral, between the evolving European system of private international law and third countries' conflict of laws systems.<sup>52</sup>

Nonetheless, the Recast Regulation, no different from a practice which appears frequently followed by recent EU legislation in the field concerned,<sup>53</sup> pro-

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interest of the latter; as well as, more recently, in Article 6 of Regulation (EU) No. 650/2012 in matters of succession, which, in case of choice of law, allows the court seized pursuant to the rules of jurisdiction contained in the Regulation to decline jurisdiction in favour of the courts of the Member State of the chosen law, if it deems that those courts are in a better position to rule on the succession taking account of the circumstances of the case. Cf., with regard to the former, F. MARONGIU BUONAIUTI (note 23), at 476 *et seq.*; *idem* (note 9), at 359, in note; J. WEBER (note 1), at 636 *et seq.*; C.M. MARIOTTINI (note 45), at 294 *et seq.*; concerning the latter, A. DAVÌ/A. ZANOBETTI (note 8), at 118 *et seq.*; C.M. MARIOTTINI, *ibidem*.

<sup>52</sup> For some considerations regarding *lis alibi pendens*, conceived as a means of opening to a coordination among different systems of private international law, see F. MARONGIU BUONAIUTI (note 23), at 44 *et seq.*; *idem* (note 14), at 500; previously, among others, P. PICONE, *Les méthodes de coordination entre ordres juridiques en droit international privé*, *Recueil des Cours* vol. 276 (1999), p. 9 *et seq.*, esp. p. 259 *et seq.*; A. NUYTS, *L'exception de forum non conveniens* (note 25), at 850 *et seq.*

<sup>53</sup> See, for some remarks concerning the massive and probably inappropriate recourse to statements contained in the recitals of the preambles to supplement the provi-



vides some indications in this respect within a recital in the Preamble, by itself devoid of any binding effect. In the said recital, the Preamble states that the Member State court should consider all the circumstances of the case pending before it. Such a statement, suggesting an inclusive rather than an exclusive approach, is followed by some indications, all of which are actually pertaining to the procedural sphere, such as the connections existing between the facts of the case and the parties and the third country concerned, the state of progress of the proceedings in the third country court when the issue comes for consideration, and the likelihood of the proceedings before the latter court to be concluded in a timely manner.<sup>54</sup>

Inevitably, there is a risk that such broad discretion conferred upon the Member States courts by the Recast Regulation is actually exercised differently by courts sitting in different Member States belonging to heterogeneous legal traditions, and therefore threatens the Regulation's objective of uniformity. The debate which the ECJ in *Owusu* seemed to have closed is thus revived by the Recast Regulation. Certainty vs. flexibility as the prevailing aim of a system of allocation of jurisdiction was the crucial issue raised by the earlier works commenting on the effects which the application of traditional institutions of the common law, such as the doctrine of *forum non conveniens*, could have on the system of distribution of jurisdiction among the courts of different Member States contained in the Brussels Convention.<sup>55</sup> The same issue is indeed still present behind the competing needs to preserve the integrity and continuity of the Brussels system of jurisdiction and to provide for its prudent opening to the outer world.<sup>56</sup>

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sions contained in the text of EU Regulations adopted in the field of private international law, A. DAVÌ/ A. ZANOBETTI (note 8), at 17, in note.

<sup>54</sup> Preamble, Recital No. 24.

<sup>55</sup> See comments by H. DUINTJER TEBBENS (note 37), at 47 *et seq.* and H. GAUDEMET-TALLON (note 37), at 491 *et seq.* on the English Court of Appeal judgment in the case of *In Re Harrods (Buenos Aires) Ltd*, cit. (*supra*, note 37) which had admitted the possibility of the English courts vested with jurisdiction under the Brussels Convention to decline jurisdiction in favour of a third country court on *forum non conveniens* grounds.

<sup>56</sup> See, among other more recent comments on the said issue following the ECJ judgment in the *Owusu* case, from different perspectives, A. DICKINSON (note 45), at 115 *et seq.*; P. MAYER (note 45), at 137 *et seq.*; G.P. ROMANO (note 45), at 182 *et seq.*; *idem* (note 45), at 185 *et seq.*; C.M. MARIOTTINI (note 45), at 287 *et seq.*